This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. However, it is provided with the understanding that the publisher is not engaged in rendering legal, accounting or other professional service and that the authors are not offering such advice in this publication. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.
This Guidebook provides a general picture of the taxes imposed by the State of West Virginia and the taxes levied by the local governments. All 2012 amendments to the West Virginia law that are currently in effect are reflected and references to federal laws are to the law as enacted and/or amended before January 1, 2012.¹

This Guidebook is designed as a quick reference work describing the general provisions of the respective tax laws, regulations and administrative practice, useful to tax practitioners, businessmen and others who prepare or file West Virginia state and local returns or who are required to deal with West Virginia state and local taxes.

State taxes of major interest—the corporation net income tax, the business franchise tax, the consumer sales and service and use tax, the property tax and the severance tax are treated in detail. Incentives for business development and tax procedure also are detailed. Other West Virginia state and local taxes are summarized with particular emphasis on persons or transactions subject to tax, exemptions, basis and rates of tax, and returns and payment.

In determining the personal income tax and the corporation net income tax, West Virginia uses federal figures as a starting point in the determination of the West Virginia tax base. Consequently, the Guidebook makes references to the comparable and relevant provisions of the Federal Internal Revenue Code. Changes in federal income tax law made after December 31, 2011, that affect the federal adjusted gross income of individuals and the federal taxable income of corporations are not automatically incorporated into the West Virginia personal and corporation net income tax laws. Historically, the West Virginia Legislature annually updates the meanings of “federal adjusted gross income” and “federal taxable income” for West Virginia income tax purposes. Any federal change the Legislature does not wish to adopt is then enacted as an increasing or decreasing modification to “federal adjusted gross income” or “federal taxable income,” as appropriate.

This Guidebook is not designed to eliminate the necessity of referring to the law and regulations for answers to specific problems nor is it intended to take the place of the more detailed information available from other publishers. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

¹ West Virginia income tax laws do not automatically conform to changes in federal income tax law affecting the definitions of federal adjusted gross income for individuals and federal taxable income in the case of corporations, estates and trust. Historically, the West Virginia Legislature has enacted conformity legislation and made the enactments retroactive.
PREFACE

Each tax of major interest is covered in a separate chapter and there is a chapter covering a number of miscellaneous taxes in a general way. Additionally, there are chapters on tax procedure and incentives for business development. Where there is a special procedure applicable to a particular tax, the procedure is discussed in the chapter pertaining to that tax.

This Guidebook was written by a number of authors each of whom contributed a chapter. The authors are well-known tax authorities in West Virginia and have particular knowledge of the subject of their chapter. Each chapter discusses the statutory scheme, regulations and briefly reviews the major cases pertaining to the tax covered. A detailed example of each State tax incentive for business development is provided in the chapter discussing those incentives. Discussion of the major taxes includes reference to relevant forms. However, because forms for all taxes collected by the West Virginia Tax Department are available at the Department’s webpage, http://www.state.wv.us/taxdiv/, under the forms icon, we have not included the various forms in this publication. Each chapter lists the sections of the West Virginia Code applicable to the particular tax being discussed. The West Virginia Code is available at the West Virginia Legislature’s webpage: http://www.legis.state.wv.us/. Frequently, this Guidebook cites applicable regulations. The Tax Commissioner is authorized to promulgate interpretive, legislative and procedural administrative rules following the procedure set forth in article three of the State Administrative Procedures Act. (W. Va. Code § 29A-3-1 et seq.) These rules are available in hard copy from the West Virginia Secretary of State. They are also available in electronic format at the Secretary of State’s website: www.sos.wv.gov by clicking on the words “Search for Regulations” under the Administrative Law icon.

Because West Virginia adopts federal figures as the starting point for the corporate and non-corporate income taxes, this Guidebook makes references to the comparable federal law provisions where relevant.

Dale W. Steager, Editor

December 1, 2012
ACKNOWLEDGMENT

The editor would like to acknowledge the assistance of Commerce Clearinghouse (CCH) in allowing the West Virginia Society of Certified Public Accountants to use the 1993 West Virginia Tax Guide published by them as a starting point for this publication. We are also grateful to Kevin R. Waldo, Esq. who was instrumental in obtaining the assistance of Commerce Clearing House. The 1993 publication was edited by Harry P. Henshaw III with the assistance of West Virginia University, College of Law, and a number of other persons including the writers who participated in that undertaking. While there have been many changes in West Virginia’s tax laws since 1993, being able to use the 1993 CCH publication as a starting point is very much appreciated by writers who prepared this 2012 Guidebook to West Virginia Taxes.

The West Virginia Society of Certified Public Accountants would like to acknowledge the assistance of James M. Sturgeon, Jr., in making this Guidebook available on the Society’s website.
# TABLE OF CONTENTS

_The text of each Chapter is preceded by a detailed listing of the contents therein._

## Introductory Materials
- Table of Contents: 1
- Table of State Tax Department Publications: 6
- Administration and Personnel: 9
- Tax Tables: 11

## Chapter 1 – Corporation Net Income Tax: 1-1
- ¶ 101 Introduction: 1-2
- ¶ 102 Taxable Corporations: 1-6
- ¶ 103 Exempt Corporations: 1-9
- ¶ 104 Definition of "Taxable Income": 1-10
- ¶ 105 Increasing Adjustments to Federal Taxable Income: 1-11
- ¶ 106 Decreasing Adjustments to Federal Taxable Income: 1-13
- ¶ 107 Direct Allocation of Certain Items of Nonbusiness Income: 1-17
- ¶ 108 Apportionment by Three-Factor Formula (With Double-Weighted Sales): 1-19
- ¶ 109 Special Apportionments for Motor Carriers: 1-24
- ¶ 110 Special Apportionment for Financial Organizations: 1-24
- ¶ 111 Accounting Periods and Methods: 1-28
- ¶ 112 Credits Against Tax: 1-29
- ¶ 113 Returns and Payment of Tax: 1-31
- ¶ 114 Business Activities Report: 1-33
- ¶ 115 Estimated Tax: 1-34
- ¶ 116 Consolidated Returns: 1-35
- ¶ 117 Nonresident Shareholder Withholding: 1-36
- ¶ 118 Composite Nonresident Personal Income Tax Return: 1-37
- ¶ 119 Recordkeeping Requirements: 1-38
- ¶ 120 Procedure and Administration: 1-38
- ¶ 121 Corporation Net Income Tax Return Forms and Schedules: 1-39

## Chapter 2 – Business Franchise Tax: 2-1
- ¶ 201 Introduction: 2-1
- ¶ 202 Taxpayers Subject to Tax: 2-2
- ¶ 203 Exemptions from Tax: 2-3
- ¶ 204 Tax Levied on Capital: 2-4
- ¶ 205 Apportionment by Three-Factor Formula: 2-7
- ¶ 206 Special Apportionment for Financial Organizations: 2-11
- ¶ 207 Rate of Tax: 2-13
- ¶ 208 Credits Against Tax: 2-14
- ¶ 209 Accounting Periods and Methods: 2-17
| ¶ 210 Annual Returns | 2-17 |
| ¶ 211 Declaration and Payment of Estimated Tax | 2-18 |
| ¶ 212 Return Requirements | 2-19 |
| ¶ 213 Records | 2-19 |
| ¶ 214 Business Activities Report | 2-19 |
| ¶ 215 General Procedure and Administration | 2-20 |
| ¶ 216 Specimen Return - Combined Corporation Net Income/Business Franchise Tax Return - Form WV/CNF-120 | 2-21 |

Index -- Chapter 2 -- Business Franchise Tax 2-22

### Chapter 3 – Tax Credits for Business and Individuals 3-1

- ¶ 301 Economic Opportunity Tax Credit 3-5
- ¶ 301.15 Economic Opportunity Tax Credit – Small Business 3-13
- ¶ 301.16 Economic Opportunity Tax Credit – Corporate Headquarters 3-13
- ¶ 301.17 Economic Opportunity Tax Credit – High Tech Manufacturers 3-13
- ¶ 301.18 Economic Opportunity Credit For Jobs Creation 3-16
- ¶ 302 Manufacturing Investment Tax Credit 3-17
- ¶ 303 Manufacturing Property Tax Credit Adjustment 3-20
- ¶ 304 Industrial Expansion and Revitalization Tax Credit – Electric Power 3-21
- ¶ 305 Coal Loading Facility Credit 3-24
- ¶ 306 Strategic Research and Development Tax Credit 3-26
- ¶ 307 High Growth Business Investment Tax Credit 3-30
- ¶ 308 Tourism Development Tax Credit 3-32
- ¶ 309 Environmental Agricultural Equipment Credit 3-36
- ¶ 310 Historic Rehabilitated Commercial Buildings Tax Credit 3-37
- ¶ 311 Historic Rehabilitated Residential Building Tax Credit 3-38
- ¶ 312 Neighborhood Investment Tax Credit 3-39
- ¶ 313 Apprentice Training Tax Credit 3-41
- ¶ 314 Film Industry Tax Credit 3-42
- ¶ 315 Residential Solar Energy Tax Credit 3-45
- ¶ 316 Nonfamily Adoption Tax Credit 3-46
- ¶ 317 Commercial Patent Incentives Credit 3-46
- ¶ 318 Innovative Mine Safety Technology Tax Credit 3-52
- ¶ 319 Alternative-fuel Motor Vehicle Tax Credit 3-56
- ¶ 320 Energy Intensive Industrial Consumers Revitalization Tax Credit 3-59

Index – Chapter 3 – Tax Incentives For Businesses and Individuals 3-62

### Chapter 4 – Noncorporate Income Taxes 4-1

- ¶ 401 INDIVIDUAL INCOME TAXES 4-3
- ¶ 401.1 Introduction 4-3
- ¶ 401.2 Basis of Tax 4-4
- ¶ 401.3 Tax year, Accounting Periods and Methods. 4-4
- ¶ 401.4 Modifications Increasing Federal Adjusted Gross Income 4-5
- ¶ 401.5 Modifications Decreasing Federal Adjusted Gross Income 4-7
- ¶ 401.6 Low income earned income exclusion 4-12
- ¶ 401.7 Other Modifications to Federal Adjusted Gross Income 4-13
401.8 West Virginia Adjusted Gross Income of Nonresident Individual
401.9 West Virginia Adjusted Gross Income -- Part-Year Resident
401.10 West Virginia Taxable Income
401.11 Personal Exemptions of Resident and Nonresident Individuals
401.12 "Resident" and "Nonresident" Defined
401.13 Rate of Tax
401.14 Resident Partners
401.15 Nonresident Partners
401.16 Resident Shareholders of S Corporations
401.17 Nonresident Shareholders of S Corporations
401.18 Share of resident estate or trust beneficiary fiduciary adjustment
401.19 Nonresident Beneficiary Share of West Virginia Source Income of Estate or Trust
401.20 Computation of Tax on West Virginia Income of Nonresidents
401.21 Computation of Tax of Part-Year Resident
401.22 Declarations of Estimated Tax
401.23 Payment of Estimated Tax
401.24 Amount of Estimated Tax Payments
401.25 Additions to Tax for Underpayment of Estimated Tax
401.26 Returns and Liabilities
401.27 Income Taxes of Members of Armed Forces on Death
401.28 Composite Returns
401.29 Signing of Returns and Other Documents
401.30 When Amended Return Required
401.31 Report of Change in Federal Taxable Income
401.32 Change of Election
401.33 Payment of Tax
401.34 Method of Paying Tax Due
401.35 Extension of Time to File Declaration of or Annual Return
401.36 Extension of Time to Pay Tax
401.37 Minimum Tax
401.38 Credit for Taxes Paid to Other States
401.39 Senior Citizens' and Disabled Persons Credit for Property Taxes
401.40 Low Income Refundable Credit for Taxes Paid on Homestead
401.41 Senior Citizen Property Tax Relief (Tax Years Before 2012)
401.42 Low-income Family Tax Credit
401.43 Other Credits against Tax
402 WITHHOLDING TAXES
402.1 Withholding of Income Tax by Employers
402.2 Duties of Employers With Respect to Withholding Taxes
402.3 Information Statement for Employee (Form W-2)
402.4 Employer's Liability for Withheld Taxes
402.5 Employer's Failure to Withhold
402.6 Withholding Tax on West Virginia Source Income Distributable to Nonresident Partners, S Corporation Shareholders,
Chapter 5 – Consumer Sales and Service Tax and Use Tax

¶ 501 History of the Sales Tax and the Use Tax
¶ 502 Overview of the Sales Tax
¶ 503 Overview of the Use Tax
¶ 504 "Sale" Defined
¶ 505 "Use" Defined
¶ 506 "Gross Proceeds," "Purchase Price" and "Sales Price" Defined
¶ 507 Sales to Related Parties
¶ 508 Rates of the Sales Tax
¶ 509 Rates of the Use Tax
¶ 510 Tax on Motor Vehicles
¶ 511 Per Se Exemptions
¶ 512 Exemptions for Which Exemption Certificate is Required
¶ 513 Records of Using Exemption Certificates
¶ 514 Refundable Exemptions
¶ 515 Agents and Contractors Assertion of Principal's Exemption
¶ 516 Methods for Claiming Refundable Exemptions (Refund or Credit)
¶ 517 Direct Pay Permits
¶ 518 Materials Produced or Manufactured By a Contractor
¶ 519 Apportionment
¶ 520 Use Tax Exemptions
¶ 521 Credit Against the Use Tax for Sales Tax Paid to Another State
¶ 522 Collection of the Sales Tax
¶ 523 Collection of the Use Tax
¶ 524 Bond Required of Nonresident Contractors for Payment of Use Tax
¶ 525 Collection of Use Tax from Certain Out-of-State Volume Retailers
¶ 526 Vendor Liability for the Sales Tax
¶ 527 Consumer Liability for the Sales Tax
¶ 528 Liability for the Use Tax
¶ 529 General Transaction Sourcing Rules
¶ 530 Sale of Entire Business
¶ 531 Sales Tax or Use Tax Cannot Be Assumed by Vendor
¶ 532 Gasoline and Special Fuel
¶ 533 Sales Tax Returns
¶ 534 Use Tax Returns
¶ 535 Maintenance of Records
¶ 536 Officer's Liability and Penalties
¶ 537 Procedure and Administration
¶ 538 Miscellaneous Examples of the Sales Tax and the Use Tax
¶ 539 Local Sales and Use Taxes
¶ 540 Sales Tax And Use Tax Forms

Index - Chapter 5 - Consumers Sales and Use Taxes
¶ 713 Special Tax on Coal Production for  
Mines and Minerals Operations Fund 7-10
¶ 714 Accounting Periods and Methods  7-11
¶ 715 Records 7-11
¶ 716 Returns and Payments of Tax 7-11
¶ 717 Bond 7-12
¶ 718 Agreement for Processor to Pay Tax 7-12
¶ 719 Procedure and Administration 7-12
¶ 720 Collection of Tax by Purchaser of Natural Gas 7-12
¶ 721 Reports by Persons Severing Natural Gas 7-13
¶ 722 Nonresidents Severing Timber 7-13
¶ 723 Example - Taxes on privilege of producing coal 7-13
¶ 724 Severance Tax Returns 7-15
Index - Chapter 7 -- Severance Tax 7-16

Chapter 8 – Estate Tax 8-1

Chapter 9 – Procedure and Administration 9-1
¶ 901 Introduction 9-1
¶ 902 Overview of Tax Procedure Act 9-2
¶ 903 Statements of Administrative Positions 9-2
¶ 904 Filing Returns and Paying Taxes 9-4
¶ 905 Confidentiality and Disclosure of Information 9-6
¶ 906 Audit Selection and Procedure 9-7
¶ 907 Assessments 9-8
¶ 908 Administrative Protest and Hearings 9-10
¶ 909 Appeals 9-13
¶ 910 Refunds and Credits of Overpayments 9-18
¶ 911 Time Limitations 9-19
¶ 912 Collection of Tax—In General 9-20
¶ 913 Collection of Tax—Liens 9-21
¶ 914 Collection of Tax—Levy 9-22
¶ 915 Interest, Additions to Tax and Penalties 9-24
¶ 916 Criminal Penalties 9-27
¶ 917 Specimen Documents 9-29
Index - Chapter 9 - Tax Procedure and Administration 9-30

Chapter 10 – Miscellaneous Taxes 10-1
¶ 1001 Business Registration Tax 10-1
¶ 1002 Corporate Tax On Excess Acreage 10-4
¶ 1003 Corporate License Tax 10-4
¶ 1004 Motor Carrier Road Tax 10-4
¶ 1005 Motor Fuel Excise Tax 10-5
¶ 1006 Telecommunications Tax 10-6
¶ 1007 Business And Occupation Tax - Tax On Utilities 10-8
1008 Business And Occupation Tax - Tax On Natural Gas Storage 10-9
1009 Business And Occupation Tax - Electricity 10-9
1010 Tobacco Excise Taxes 10-10
1011 Soft Drinks Excise Tax 10-11
1012 Excise Tax On Transfer Of Real Property 10-13
1013 Health Care Provider Taxes 10-15
1014 Severance and Business Privilege Tax 10-17
1015 Unemployment Compensation Tax 10-18
1016 Municipal Taxes 10-19

Index - Chapter 10 -- Miscellaneous Taxes 10-27

Chapter 11 – Unclaimed Property 11-1

1101 Introduction 11-2
1102 Presumptions of Abandonment 11-4
1103 Contents of safe deposit box or other safekeeping depository 11-7
1104 Rules for taking custody of unclaimed property 11-7
1105 Dormancy charge 11-8
1106 Burden of proof as to property evidenced by record of check or draft 11-9
1107 Report of abandoned property 11-9
1108 Payment or delivery of abandoned property 11-10
1109 Notice and publication of lists of abandoned property 11-11
1110 Custody by State Treasurer; recovery by holder; defense of holder 11-12
1111 Crediting of dividends, interest and increments to owner's account 11-13
1112 Public sale of abandoned property 11-13
1113 Deposit of funds 11-14
1115 Filing claim with State Treasurer; handling of claims by Treasurer 11-16
1116 Action to establish claim 11-16
1117 Election to take payment or delivery 11-16
1118 Destruction or disposition of property having no substantial commercial value; immunity from liability 11-17
1119 Periods of limitation 11-17
1120 Requests for reports and examination of records 11-17
1121 Retention of records 11-19
1122 Enforcement 11-19
1123 Interstate agreements and cooperation; joint and reciprocal actions with other states 11-19
1124 Interest and penalties 11-20
1125 Records of abandoned property 11-21
1126 Foreign transactions 11-21
1127 Uniformity of application and construction 11-21

Index - Chapter 11 - Unclaimed Property 11-22
The State Tax Department publishes the following Taxpayer Services Division publications (TSD) at its website, [http://www.state.wv.us/taxdiv](http://www.state.wv.us/taxdiv), which provide general tax information on the following subjects:

<table>
<thead>
<tr>
<th>Publication</th>
<th>Date</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>TSD-1</td>
<td>Rev. December, 2012</td>
<td>Publications Available</td>
</tr>
<tr>
<td>TSD-2</td>
<td>Rev. December, 2012</td>
<td>Tax Division Telephone Listing</td>
</tr>
<tr>
<td>TSD-3</td>
<td>Rev. January, 2011</td>
<td>Current Mailing Addresses</td>
</tr>
<tr>
<td>TSD-100</td>
<td>Rev. November, 2012</td>
<td>West Virginia Business Taxes</td>
</tr>
<tr>
<td>TSD-110</td>
<td>Rev. August, 2011</td>
<td>West Virginia Tax Credits</td>
</tr>
<tr>
<td>TSD-200</td>
<td>Rev. November, 2011</td>
<td>West Virginia Business Franchise Tax</td>
</tr>
<tr>
<td>TSD-210</td>
<td>Rev. November, 2011</td>
<td>Coal Processing And Severance Tax</td>
</tr>
<tr>
<td>TSD-211</td>
<td>Rev. November, 2012</td>
<td>Timber Severance Tax</td>
</tr>
<tr>
<td>TSD-300</td>
<td>Rev. September, 2012</td>
<td>Sales And Use Tax Exemptions Of Local Governments</td>
</tr>
<tr>
<td>TSD-301</td>
<td>Rev. January, 2005</td>
<td>Sales And Use Tax Responsibilities Of Local Governments</td>
</tr>
<tr>
<td>TSD-310</td>
<td>Rev. September, 2010</td>
<td>Capital Improvement Rule: Sales And Use Tax Changes</td>
</tr>
<tr>
<td>TSD-312</td>
<td>Rev. February, 2008</td>
<td>ABCs Of Sales and Use Tax for Public Schools</td>
</tr>
<tr>
<td>TSD-312A</td>
<td>Rev. February, 2008</td>
<td>ABCs Of Sales and Use Tax For Private Elementary and Secondary Schools</td>
</tr>
<tr>
<td>TSD-315</td>
<td>Rev. August, 2009</td>
<td>Changes Affecting Factory-Built Home Dealers</td>
</tr>
<tr>
<td>TSD-316</td>
<td>Rev. February, 2006</td>
<td>Sales Tax On Homeowners Association Fees &amp; Lodging Rentals</td>
</tr>
<tr>
<td>TSD-317</td>
<td>Rev. April, 1993</td>
<td>Transient Vendors</td>
</tr>
<tr>
<td>TSD-320</td>
<td>Rev. November, 2011</td>
<td>Special Sales and Use Tax Rules For Nonprofit Organizations</td>
</tr>
<tr>
<td>TSD-321</td>
<td>Rev. November, 2011</td>
<td>Consumers Sales And Service Tax-Hotel And Motel Bills</td>
</tr>
<tr>
<td>TSD-325</td>
<td>Rev. November, 2011</td>
<td>The Incidental Installation Rule: Sales and Use Tax Changes</td>
</tr>
<tr>
<td>TSD-355</td>
<td>Rev. April, 1993</td>
<td>The Integrated Manufacturer/Contractor Rule</td>
</tr>
<tr>
<td>TSD-356</td>
<td>Rev. April, 1993</td>
<td>Motion Picture Theaters: Sales and Use Tax Rules</td>
</tr>
<tr>
<td>TSD-358</td>
<td>Rev. July, 2008</td>
<td>Direct Use Concept</td>
</tr>
<tr>
<td>TSD-360</td>
<td>Rev. October, 2012</td>
<td>Registration Procedures For Business</td>
</tr>
<tr>
<td>TSD-364</td>
<td>Rev. December, 2007</td>
<td>Auctioneers And Sales Tax</td>
</tr>
<tr>
<td>TSD-365</td>
<td>Rev. July, 2012</td>
<td>How Interest and Additions To Tax Are Assessed</td>
</tr>
<tr>
<td>TSD-366</td>
<td>Rev. November, 2011</td>
<td>Sales Tax Responsibilities: Operators Of Night Clubs, Bars,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Restaurants &amp; Similar Businesses</td>
</tr>
<tr>
<td>TSD-368</td>
<td>Rev. January, 2012</td>
<td>Sales And Use Tax And Veterinarians</td>
</tr>
<tr>
<td>TSD-370</td>
<td>Rev. January, 2012</td>
<td>Manufacturer/Retailer-Sales And Use Tax On Samples</td>
</tr>
<tr>
<td>TSD-372</td>
<td>Rev. April, 1993</td>
<td>Radio And Television Broadcasters And Sales And Use Tax</td>
</tr>
<tr>
<td>TSD-373</td>
<td>Rev. November, 2011</td>
<td>Sales And Use Tax And Attorneys</td>
</tr>
<tr>
<td>TSD-374</td>
<td>Rev. November, 2011</td>
<td>Sales And Use Tax And Dentists</td>
</tr>
<tr>
<td>TSD-375</td>
<td>Rev. November, 2011</td>
<td>Summer Camps and Sales Tax</td>
</tr>
<tr>
<td>Publication</td>
<td>Issue Date</td>
<td>Description</td>
</tr>
<tr>
<td>------------</td>
<td>---------------</td>
<td>------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>TSD-427</td>
<td>Rev. November, 2011</td>
<td>Dispensed Upon Prescription Prepaid Wireless Calling Services Now Subject to Sales and Use Tax</td>
</tr>
<tr>
<td>TSD-428</td>
<td>Rev. August, 2011</td>
<td>Filing And Remitting Of Income Tax Withheld</td>
</tr>
<tr>
<td>TSD-429</td>
<td>Rev. November, 2011</td>
<td>Notice to West Virginia Timber Producers of Elimination of Severance Tax on Timber For A Three Year Period</td>
</tr>
<tr>
<td>TSD-431</td>
<td>Rev. September, 2011</td>
<td>My Taxes ACH Debit Payments</td>
</tr>
<tr>
<td>TSD-432</td>
<td>July, 2012</td>
<td>Backup Withholding From Gambling Winnings</td>
</tr>
</tbody>
</table>

To order publications call State Tax Department’s automated information system at (304) 344-2068 or 1-800-422-2075 toll free
TDD service for the hearing impaired: 1-800-2TAXTDD (1-800-282-9833)
Internet address: [http://www.wvtax.gov/](http://www.wvtax.gov/)

*List is current through December 1, 2012.*
ADMINISTRATION AND PERSONNEL

DEPARTMENT OF REVENUE
Secretary of Revenue: Charles O. Lorensen
Deputy Secretary: Jason C. Pizatella
Deputy Secretary: Mark Muchow
General Counsel: Mark Matkovich
Public Information Specialist: Heather A. Raines

The Department of Revenue provides administrative support services and liaison with the Governor’s Office for 10 agencies, boards, commissions and offices, one of which is the State Tax Division, hereinafter called the State Tax Department. Also included in the Department of Revenue is the Office of Tax Appeals, the Alcohol Beverage Control Administration, the Division of Banking, the Insurance Commission, the Lottery Commission, the Municipal Bond Commission, the Racing Commission, the State Athletic Commission, and the State Budget Office.

STATE TAX DEPARTMENT
State Tax Commissioner: Craig A. Griffith
Deputy Tax Commissioner: Jeffrey T. Oakes (Acting)
General Counsel: Mark S. Morton
Director - Auditing Division: Dana K. Angell
Director - Compliance and Taxpayer Services Division: Michael E. Coutz (Acting)
Director - Criminal Investigation Division: Thomas A. Moore (Acting)
Director - Information Technology Division: Stephanie Tichenor
Director - Legal Division: Mark S. Morton
Director - Operations Division: Patricia J. Haddy
Director - Property Tax Division: Jeffrey A. Amburgey
Director - Research and Development: Roger D. Cox
Director - Revenue Division: Jill A. Whited
Director - Tax Account Administration: Tonja J. Oakes
Tax Clearances, Certificates of Good Standing: Darlena Lilly
Disclosure Officer: Karen Villaneueva-Matkovich
Public Information Officer: Daniel W. Forinash

The State Tax Department administers, collects and enforces all of the State taxes discussed in this book except for the ad valorem property tax, the unemployment tax and the taxes imposed, administered, collected and enforced by counties and municipalities. The State Tax Department determines the appraised values of industrial and natural resource properties, determines the tentative assessed value of operating public utility properties and supervises the work of locally elected county assessors who are responsible for determining the appraised value of all other property and for determining the assessed value of real and tangible personal property in their
respective counties on the July 1st assessment day, except for operating public utility property. The Department administers a number of business incentive and other tax credit programs, licenses the conduct of charitable bingo games and charitable raffles held in the State and performs a number of other statutory duties.

**OFFICE OF TAX APPEALS**

Chief Administrative Law Judge: A. M. “Fenway” Pollack  
Administrative Law Judge: George V. Piper  
Administrative Law Judge: Christopher B. Amos  
Executive Director and “Clerk of Court” Vacant

The Office of Tax Appeals was created by the Legislature in 2002 to hear petitions for reassessment and petitions for refund of taxes and fees administered under the West Virginia Tax Procedure and Administration Act and to hear other appeals from actions of the Tax Commissioner as authorized in the West Virginia Code. The Office has no jurisdiction in property tax matters.

**BOARD OF PUBLIC WORKS**

Governor: Earl Ray Tomblin  
Secretary of State: Natalie Tennant  
State Attorney General: Patrick Morrisey  
State Auditor: Glen B. Gainer, III  
State Commissioner of Agriculture: Walt Helmick  
State Superintendent of Schools: Vacant  
State Treasurer: John Perdue

The Board of Public Works, a board composed of the above officials, ex-officio, levies the State property tax, determines the assessed value of operating property of public service companies and hears appeals from tentative assessments of public utility property.

**SECRETARY OF STATE**

Natalie E. Tennant, Secretary of State

The Secretary of State Office’s office includes the administrative law division, which publishes the State Register and is the repository for administrative regulations promulgated by state agencies; the business division, which maintains the official state records of formation, change and termination of legal entities such as, corporations, limited liability companies, limited partnerships, limited liability partnerships, voluntary associations and business trusts, and authorizations of foreign entities to do business in the State; and the elections division.
STATE AUDITOR
Glen B. Gainer, III, State Auditor

The State Auditor’s duties include annually apportioning the statewide assessed values of public utility properties determined by the Board of Public Works; and collecting the property taxes annually levied on public utilities.
## TAX RATES

### BUSINESS FRANCHISE TAX

**Tax rates**

<table>
<thead>
<tr>
<th>Period</th>
<th>Tax Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>For taxable years beginning after June 30, 1997</td>
<td>0.70% of taxable capital</td>
</tr>
<tr>
<td>For taxable years beginning after December 31, 2006</td>
<td>0.55% of taxable capital</td>
</tr>
<tr>
<td>For taxable years beginning after December 31, 2008</td>
<td>0.48% of taxable capital</td>
</tr>
<tr>
<td>For taxable years beginning after December 31, 2009</td>
<td>0.41% of taxable capital</td>
</tr>
<tr>
<td>For taxable years beginning after December 31, 2010</td>
<td>0.34% of taxable capital</td>
</tr>
<tr>
<td>For taxable years beginning after December 31, 2011</td>
<td>0.27% of taxable capital</td>
</tr>
<tr>
<td><strong>For taxable years beginning after December 31, 2012</strong></td>
<td><strong>0.21% of taxable capital</strong></td>
</tr>
<tr>
<td>For taxable years beginning after December 31, 2013</td>
<td>0.10% of taxable capital</td>
</tr>
<tr>
<td>For taxable years beginning after December 31, 2014</td>
<td>No Tax</td>
</tr>
</tbody>
</table>

*Minimum tax:* The minimum tax is $50 per year.

For additional information about the business franchise tax, see chapter 2 of this Guidebook.

### CORPORATION NET INCOME TAX

**Tax Rates**

<table>
<thead>
<tr>
<th>Period</th>
<th>Tax Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>For taxable periods beginning before January 1, 2007</td>
<td>9.0%</td>
</tr>
<tr>
<td>For taxable periods beginning after December 31, 2006</td>
<td>8.75%</td>
</tr>
<tr>
<td>For taxable periods beginning after December 31, 2008</td>
<td>8.50%</td>
</tr>
<tr>
<td>For taxable periods beginning after December 31, 2011</td>
<td>7.75%*</td>
</tr>
<tr>
<td><strong>For taxable periods beginning after December 31, 2012</strong></td>
<td><strong>7.0%</strong></td>
</tr>
<tr>
<td>For taxable periods beginning after December 31, 2013</td>
<td>6.5%*</td>
</tr>
</tbody>
</table>

*These rate reductions are suspended if the State Rainy Day Fund as of the preceding June 30th drops below 10% of the general revenue budget for the then current fiscal year of the State. Suspension and any subsequent suspension continue until the Rainy Day Fund exceeds 10% of the general revenue budget, at which time all suspended reductions take effect on the next January 1st.*

For additional information about the corporation net income tax, see chapter 1 of this Guidebook.

### NON-CORPORATE INCOME TAX

**Tax Rates**

Single individuals, estates and trusts, married individuals filing joint returns:
If W. Va. taxable income is:  
The tax is:
- Not over $10,000: 3% of the taxable income
- Over $10,000 but not over $25,000: $300 plus 4.0% of excess over $10,000
- Over $25,000 but not over $40,000: $900 plus 4.5% of excess over $25,000
- Over $40,000 but not over $60,000: $1,575.00 plus 6.0% of excess over $60,000
- Over $60,000: $2,775.00 plus 6.5% of excess over $60,000

Married individuals filing separate returns:

If W. Va. taxable income is:  
The tax is:
- Not over $5,000: 3% of the taxable income
- Over $5,000 but not over $12,500: $150.00 plus 4.0% of excess over $10,000
- Over $12,500 but not over $20,000: $450.00 plus 4.5% of excess over $20,000
- Over $20,000 but not over $30,000: $787.50 plus 6.0% of excess over $30,000
- Over $30,000: $1,387.50 plus 6.5% of excess over $30,000

Minimum tax: None

Withholding on employee compensation is required. Withholding is also required, at a 6.5% rate:

- When a pass-through entity distributes West Virginia source income to nonresident individuals or corporations (distributions include actual or deemed);
- When a nonresident individual or business sells real property located in this State unless an exemption applies; and
- On gambling winnings when withholding is required for federal income tax purposes.

For additional information about the noncorporate income taxes, see chapter 4 of this Guidebook.

CONSUMER SALES AND SERVICE TAX AND USE TAX

Tax Rates

General: The rate of tax due under the consumers sales and service tax and under the use tax is 6% of the purchase price of the tangible personal property or taxable service. However, sales of mobile homes used by the purchasers as a principal year-round residence are taxed at a rate of 6% on 50% of the purchase price. A compensating use tax is also imposed which generally applies when tangible personal property or a taxable service is purchased outside West Virginia. Credit is allowed against the use tax for sales taxes lawfully paid to another state.
Groceries: Food intended for human consumption sold in grocery and similar stores is subject to a 1% tax beginning July 1, 2012\(^2\) and becomes zero on July 1, 2013. The reduced rate does not apply to vitamins, dietary supplements, heated foods, soft drinks, prepared foods, or food sold through vending machines, which remain taxable at the 6% rate of tax.

Motor vehicles: Motor vehicles are subject to the 5% sales tax. Individuals who move to West Virginia are exempt from paying the tax when they re-title their motor vehicle in West Virginia.

For additional information about sales and use taxes, see chapter 5 of this Guidebook.

PROPERTY TAX

Tax Rates

The maximum property tax rates allowed by the West Virginia Constitution per $100 of assessed valuation are:

- $0.50 for Class I property (intangible personal property and farm personal),
- $1.00 for Class II property (owner occupied residential property and farmland),
- $1.50 for Class III property (other property located outside a municipality),
- $2.00 for Class IV property (other property located inside a municipality).

These rates can, however, be increased by referendum to impose excess levies proposed by county boards of education, county commissions and municipalities and to pay bonded indebtedness approved by the voters. Excess levies are generally in effect for a period of 5 years before resubmission to the voters. Education excess levy are approved by a simple majority vote. Other excess levies require at least 60% voter approval. The voters can also approve general obligation bond levies by a simple majority vote.

For additional information about ad valorem property taxes, see chapter 6 of this Guidebook.

Property Transfer Tax

In most counties, the county real property transfer tax is $2.20 per $500 of value (or fraction thereof) and is payable to the county clerk when the deed is recorded. The county tax is in addition to the state transfer tax which is $2.20 per $500 of value (or

\(^2\) Before January 1, 2012, the rate of tax on groceries was 3%. On January 1, 2012, the rate of tax reduced to 2%. On July 1, 2012, the rate of tax reduced to 1%. Elimination of the tax on groceries beginning July 1, 2013 is contingent upon the balance in the State's Rainy Day Fund exceeding 12 1/2% of the general revenue fund budget for the fiscal year that begins July 1, 2013. W. Va. Code § 11-15-3a.
fraction thereof) and is payable to the county clerk when the deed is recorded.

For additional information about the property transfer tax, see chapter 10 of this Guidebook.

**Severance Tax**

**Tax Rates**

For most natural resources the tax rate of 5% of gross value of the natural resource at the point where the severance privilege ends. However, when coal is produced by underground methods of mining from thin coal seams the rate of tax is 1%, if the seam is less than 37 inches thick, and 2%, if the seam is 37 inches but not greater than 45 inches thick. The rate of tax on the privilege of extracting coal from the waste and residue of prior mining is 2.5% of the gross value of the coal produced. The rate of tax on the privilege of severing timber is has been discontinued until the additional tax imposed on the privilege of severing timber imposed by W. Va. Code § 11-13V-4 remains in effect. After expiration of the additional tax, the severance tax imposed by W. Va. Code § 11-13A-3b resumes at the 1.22% for timber severed after the expiration date.

To fund payment of the Workers’ compensation old fund liability, additional severance taxes are imposed on the privileges of severing coal, natural gas and timber. The rates of tax are 56 cents per ton, in the case of coal, 0.7 cent per MCF, in the case of natural gas, and 2.78% of gross value in the case of timber.

Effective July 1, 2012, the special reclamation tax imposed by W. Va. Code § 22-3-11 and measure by clean coal mined is increased from 14.4 cents per ton to 27.9 cents per ton.

For additional information about severance taxes, see chapter 7 of this Guidebook.

**ESTATE TAX:** None (for persons dying after December 31, 2004)
# CHAPTER 1

## CORPORATION NET INCOME TAX

By Victor Grigoraci and Kevin A. Highlander

Victor Grigoraci, CPA/PFS, CFP® and Kevin A. Highlander, CPA, are with the Charleston, West Virginia office of Hayflich Grigoraci PLLC. They oversee the firm’s tax advisory practice and regularly consult on state and local tax issues.

Published by West Virginia Society of Certified Public Accountants

900 Lee Street, E. Suite 1201, Charleston, WV 25301

© 1993 Commerce Clearing House, Inc. © 2012 West Virginia Society of Certified Public Accountants

All Rights Reserved

## Table of Contents

| ¶ 101 Introduction .......................................................... | 1-1 |
| ¶ 102 Taxable Corporations ............................................. | 1-6 |
| ¶ 103 Exempt Corporations ............................................. | 1-9 |
| ¶ 104 Definition of “Taxable Income” ............................... | 1-10 |
| ¶ 105 Increasing Adjustments to Federal Taxable Income .... | 1-11 |
| ¶ 106 Decreasing Adjustments to Federal Taxable Income .... | 1-12 |
| ¶ 107 Direct Allocation of Certain Items of Nonbusiness Income | 1-17 |
| ¶ 108 Apportionment by Three-Factor Formula (With Double-Weighted Sales) | 1-19 |
| ¶ 109 Special Apportionments for Motor Carriers ............... | 1-24 |
| ¶ 110 Special Apportionment for Financial Organizations .... | 1-24 |
| ¶ 112 Accounting Periods and Methods ......................... | 1-28 |
| ¶ 113 Credits Against Tax ............................................. | 1-29 |
| ¶ 114 Returns and Payment of Tax ................................... | 1-31 |
| ¶ 115 Business Activities Report .................................... | 1-33 |
| ¶ 116 Estimated Tax .................................................... | 1-34 |
| ¶ 117 Consolidated Returns .......................................... | 1-35 |
| ¶ 118 Nonresident Shareholder Withholding .................... | 1-36 |
| ¶ 119 Composite Nonresident Personal Income Tax Return | 1-37 |
| ¶ 120 Recordkeeping Requirements .................................. | 1-38 |
| ¶ 121 Procedure and Administration .............................. | 1-38 |
| ¶ 122 Corporation Net Income Tax Return Forms and Schedules | 1-38 |

## ¶ 101 Introduction


*History:* The West Virginia Corporation Net Income Tax Act first became effective on
July 1, 1967. However, until 1987 the principal business tax in West Virginia was the business and occupation tax levied on various categories of gross receipts at different rates for each category. Since the corporation net income tax rates were relatively low (6% until 1983, and 6% and 7% until July 1, 1987), and a credit was allowed against the corporation net income tax for business and occupation and carrier income taxes, the corporation net income tax was not an important business tax in the State. Effective July 1, 1987, the carrier income tax was repealed, the business and occupation tax on most businesses was repealed and the corporation net income tax rate was increased to 9.75%. The rate was then reduced 0.15% each July 1 for the next five years as follows: 9.60% for 1988, 9.45% for 1989, 9.30% for 1990, and 9.15% for 1991 until July 1, 1992 when the rate became 9%. The rate next changed on January 1, 2007, when the rate was reduced to 8.75%, for taxable periods beginning after December 31, 2006. The rate was reduced to 8.5% for taxable periods beginning after December 31, 2008 through 2011 and the rates are scheduled to phase-down to 7.75% in 2012, 7.0% in 2013 and 6.5% in 2014.\(^1\) Consequently, the corporation net income tax and, to a lesser extent, the business franchise tax are now the principal business taxes on corporations doing business in West Virginia.

**Conformity with federal statute:** For simplicity and to aid in interpretation and enforcement, the West Virginia statute adopts federal definitions wherever possible. Since the corporation net income tax is a conformity statute, the meaning of “federal taxable income” has generally been amended annually in order to incorporate applicable federal changes through December 31st of the calendar year preceding the due date of the annual return. (See ¶ 104 below.)

**Many provisions are in common with the business franchise tax:** The corporation net income tax statute has many provisions essentially the same as those included in the business franchise tax statute (see Chapter 2 of this Guidebook). Specifically, the three-factor formula used by most corporations to apportion income within and without this State is the same three-factor formula it uses to apportion capital within and without this State for purposes of the business franchise tax. Banks and other financial organizations use a special receipts factor to apportion their business income for income tax purposes as well as for purposes of the business franchise tax. Therefore, a corporation doing business in West Virginia will usually apportion its income and capital to determine that which is taxable by West Virginia in the same manner. The exception is interstate motor carriers. They may apportion their trucking company income using a mileage factor but apportion their capital for purposes of the business franchise tax using the three-factor formula. Additionally, a corporation reduces its federal taxable income and its capital for certain state and local obligations and obligations secured by residential real estate in the same manner to determine capital subject to the business

\(^1\) The scheduled rate reductions for January 1, 2012, 2013 and 2014, respectively, will only take effect provided the State’s rainy day fund on the preceding June 30\(^{th}\) is at least 10% of the general revenue fund appropriation for the fiscal year of the State during which the next rate reduction is scheduled to occur. In the event the rainy day fund is less, the rate reduction is suspended. The State’s rainy day fund met the 10% threshold on both June 30, 2011 and June 30, 2012, accordingly, the 7.75% rate is effective for 2012 and the 7.0% rate is effective for 2013.
franchise tax and income subject to the corporation net income tax.

The West Virginia Corporation Net Income Tax statute was amended on March 20, 2007 (SB 749) and March 8, 2008 (SB 680) to repeal consolidated filings and require two or more corporations (including owned partnerships and limited liability companies) engaging in a unitary business to file a combined report for taxable years beginning on or after January 1, 2009. Additionally, taxable members of a unitary business may elect to file a combined return rather than separate returns.


Combined reporting is a tax reporting method where all of the members of a unitary group are required to determine their net income based on the activities of the unitary group as a whole. Unitary group members that have nexus with West Virginia apportion the total group income to West Virginia through an apportionment formula.

Combined reporting treats each filer as a part of one business – part of the unitary group. If the income reported to West Virginia is the income of all of the unitary businesses apportioned to West Virginia, then the related corporations are: less able to shift income out of West Virginia and less able to shift expenses into West Virginia. And so are less able to manipulate and decrease taxable income.

The West Virginia State Tax Department estimated that combined reporting will generate additional annual revenue of $24 to $28 million. (See Fiscal Note to SB 749 (2007) available at [http://www.legis.state.wv.us](http://www.legis.state.wv.us).)

More specifically, the regulations provide that “combined group” and “unitary group” are used interchangeably and mean the group of all taxpayers whose income and apportionment factors are required to be taken into account in determining the taxpayer’s share of the net business income or loss apportionable to West Virginia. (WVCSR § 110-24-3.2.1.)

“Combined Report” means a Schedule or Schedules UB series which are to be attached to a taxpayer’s annual corporation net income tax return and which report the income and apportionment information of all corporations that are members of the taxpayer’s “commonly owned” combined group. (WVCSR § 110-24-3.2.2.) (See ¶ 108 below.)

“Commonly Owned” or “Common Ownership” mean, in general, that more than 50% of the voting control of one or more corporations or other entities, is directly or indirectly owned by one or more common owners, whether corporate or non-corporate, subject to comprehensive specific rules and examples in the regulations. (WVCSR § 110-24-3.2.3.)

“Stapled Entities” is a new definition in the regulations “where, by reason of their form of ownership, or restrictions on transfer of ownership, or other terms or conditions,
whether existing by operation of law, by written contract, or otherwise, in the case of a transfer of one or more ownership interests, require more than 50% of the voting control of each entity to be transferred.” Thus, “two or more corporations that are stapled entities are treated as commonly owned or under common ownership, and subject to inclusion in a combined group.” (WVCSR § 110-24-3.2.3.c.)

Again, careful study of “Commonly Owned” or “Common Ownership” is necessary in order to discern its applicability. Specific rules and examples include: direct and indirect voting control, tiered ownership, and related versus unrelated owners. (WVCSR § 110-24-3.2.3.)

"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 the corporation net income and business franchise taxes, 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.” (See W. Va. Code § 11-24-3a(43).)

The statute was again amended in 2009 (SB 540). Those changes are retroactive to taxable years beginning after December 31, 2008.

The primary changes for taxable years beginning after December 31, 2008 include:

(1) Distributive share from an interest in a partnership or other entity taxed like a partnership for federal income tax purposes will no longer be treated as allocable business income. Such income will be treated like any other income of the corporation and the corporation’s property, payroll and sales factors will include the corporation’s proportionate share of the partnership’s factors. A business conducted directly or indirectly by one corporation through its direct or indirect interest in a partnership will be unitary with that portion of a business conducted by one or more other corporations 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.

2 As used in this paragraph and generally throughout this chapter, the term “partnership” includes any partnership, limited liability company or other pass-through entity treated as a partnership for federal income tax purposes for the taxable year.
and a significant flow of value to the separate parts and the corporations are members of the same commonly controlled group. (WVCSR § 110-24-13a.2.a.) A partnership interest that is not part of a unitary business will be treated as a discrete separate business;

(2) The federal deduction for interest expenses and intangible expenses paid to a related person must be added back to federal taxable income, unless an exception to add-back applies. When the expense is paid to a related person who is a member of a controlled group and the expense is a unitary business expense, both the expense and the income are disregarded when unitary business income is computed and there is no add-back. However, an interest expense or intangible expense may be paid to a related person who is not part of the controlled group engaged in a unitary business. In this situation, add-back is required unless an exception applies. Also, if the expense is not a unitary business expense, add-back is required even though the expense is paid to a member of the combined group, unless an exception applies;

(3) The dividends paid deduction allowed by federal law must be added back to federal taxable income when the dividends are paid by a captive real estate investment trust (REIT) or captive regulated investment company (RIC);

(4) Special rules apply to charitable contributions paid from unitary business income or of unitary business property;

(5) Combined reporting rules also apply to parent subsidiary groups even though no corporation is taxable outside of West Virginia, when the group is engaged in a unitary business; Combined reports must be prepared on a water’s-edge basis, unless the combined group elects to prepare the report on a world-wide combination basis, which is irrevocable for 10 tax years; and

(6) “Special Apportionment Members” continue to include motor carriers and financial organizations.

Note: SB 386 amended and reenacted W.Va. Code §11-24-13f with respect to water’s-edge corporations to exempt from taxation certain income from taxation under certain Federal tax treaties; clarifies the entities that must be included in a water’s-edge group combined report; provides the Tax Commissioner with authority to require reports or make adjustments regarding combined reports; and authorizes the Tax Commissioner to promulgate legislative, procedural or emergency rules, as necessary. This bill passed the Legislature March 8, 2012, and took effect June 6, 2012. It was signed on March 30, 2012.

**Combined report:** The members of a combined or unitary group may annually elect to designate one taxpayer member of the group to file a single annual return for the taxable members of the group in lieu of the filing of separate annual returns. Taxpayers can make the election through a letter written to the West Virginia State
A full discussion of the combined reporting requirements is beyond the scope of this chapter. In addition to the regulations and filing instructions, guidance can be requested from the West Virginia State Tax Department as follows: Mark Morton, General Counsel, Legal Division, P. O. Box 1005, Charleston, WV 25324 or Mark.S.Morton@wv.gov.

Note: The West Virginia State Tax Department’s annual returns for the 2009 and 2010 tax years were in several instances not fully consistent with the Corporation Net Income Tax Act. Nevertheless, the Department has advised that they are auditing books and records of taxpayers for compliance with the requirements of the Corporation Net Income Tax Act and the Business Franchise Tax Act. The Department responded to suggestions from tax practitioners and the 2011 forms and instructions were improved.

¶ 102 Taxable Corporations


Definition of corporation: “Corporation” means “any corporation” as defined by the laws of this State or organization of any kind treated as a corporation for tax purposes under the laws of this State, wherever located, which if it were doing business in this State would be a “taxpayer.” The business conducted by a partnership which is directly or indirectly held by a corporation shall be considered the business of the corporation to the extent of the corporation’s distributive share of the partnership income, inclusive of guaranteed payments to the extent prescribed by regulation. The term "corporation" includes a joint-stock company and any association or other organization which is taxable as a corporation under the federal income tax law.” Banks, banking associations, trust companies, building and loan associations, savings and loan associations and other financial organization are also subject to the corporation net income tax (see ¶ 110 below).

Definition of engaging in business: For purposes of the corporation net income tax, "doing business" or "engaging in business" is generally defined to mean any corporation which enjoys the benefits and protection of government and laws in the State. (W.Va. Code § 11-24-3a(11).) However, West Virginia’s jurisdiction to impose the corporation net income tax is limited by federal law (15 USC § 381(a)(1)). The federal statute provides that when a foreign corporation’s instate activities do not exceed the following activities in a state, that state may not impose its income tax on the corporation:

---

3 For simplicity purposes, the term corporation includes other entities electing to be taxed as a corporation.

4 See footnote 2, supra.
(1) Activity in the state by employees soliciting orders for the sale of tangible personal property where the employees soliciting orders have no authority to accept the orders;

(2) Activities by employees displaying or promoting goods in the state without soliciting or taking orders for the sale of tangible personal property;

(3) Solicitation activities by nonemployee representatives conducted through an office or other business location in the state not owned, leased or operated by the foreign corporation; and

(4) Mere delivery of goods in the state by company-operated vehicles.

These activities are protected regardless of how frequently they occur.

Although not set forth in the regulations, the following activities within this State will be looked at to determine whether a corporation is doing business in this State.

(1) The maintenance of an office;

(2) The maintenance of merchandise for sale;

(3) The sale or distribution of merchandise from a vehicle to purchasers within this State;

(4) The regular performance of a service for a resident of this State; or

(5) The operation of income-producing property or other business property (whether real or personal) located in this State.

Moreover, the West Virginia State Tax Department is aggressive in considering every connection to the State (that is not excluded by 15 USC § 381(a)(1) discussed above) as a basis for asserting jurisdiction to tax the foreign corporation’s net income. The State looks to even minor contacts such as bank accounts, telephone numbers, post office boxes, activities of employees, and the lease and ownership of property as evidence of doing business in this State. Of course, this is really no different than other states.

West Virginia has adopted a rebuttable economic nexus threshold for out-of-state financial organizations doing business in West Virginia. In general, there is a presumption of nexus when the bank or other financial organization during any year solicits business from 20 or more persons in this State and its gross receipts attributable to sources in this State equals or exceeds $100,000 subject to certain exceptions. (W. Va. Code § 11-24-7b(d).) This threshold was discussed and approved in the MBNA
During 2012, in *Craig A. Griffith, West Virginia State Tax Commissioner v. ConAgra Brands, Inc.*, 229 W. Va. ___, 728 S.E.2d 74, (2012), the West Virginia Supreme Court of Appeals ruled on a case involving the receipt of royalties from the licensing of intangible trademarks and trade names. Through the execution of licensing agreements, ConAgra Brands had been collecting royalty payments for the use of its trademarks and trade names by various unrelated, third party licensees and CA Foods affiliated licensees. The trademarks and trade names, to name but a few, included familiar brands, such as Armour, Butterball, Country Skillet, Healthy Choice, Kid Cuisine, Morton, Swift and Swift Premium. The royalties were collected by ConAgra Brands from the sale by the licensees of food products bearing the trademarks and trade names to clients and customers throughout the United States, including West Virginia.

ConAgra Brands did not own or rent any offices, warehouses or other facilities in West Virginia and did not maintain any inventory or sell or distribute merchandise in this State. ConAgra Brands had no employees or agents in West Virginia. Various licensees sold or distributed products bearing the trademarks and trade names to wholesalers and retailers located in West Virginia, and the licensees provided services in West Virginia to those clients and customers. ConAgra Brands provided no services in that regard and, *as stipulated*, did not direct or dictate how the licensees distributed the products bearing the trademarks and trade names. Nevertheless, ConAgra Brands paid all expenses in defending its trademarks and trade names against infringement and in overseeing national marketing by developing marketing strategies and purchasing advertisements with national media outlets.

Following a field audit, which included a Multistate Tax Commission Audit Report, the Director of the Auditing Division of the State Tax Division, in July 2006, issued a notice of assessment for the period June 1, 2000, through May 31, 2003, stating that ConAgra Brands failed to pay corporation net income tax on income apportioned to West Virginia. ConAgra Brands subsequently filed petitions for reassessment alleging that it was subject to neither corporation net income tax nor business franchise tax in West Virginia.

By decision dated January 6, 2010, the Office of Tax Appeals upheld the two assessments. ConAgra Brands filed an appeal in the Circuit Court of Berkeley County from the decision of the Office of Tax Appeals. Additional briefs were submitted, and on January 10, 2011, the circuit court entered a final order setting aside the decision of the Office of Tax Appeals. The State Tax Commissioner subsequently appealed the circuit court’s ruling to the WV Supreme Court of Appeals.

The WV Supreme Court of Appeals upheld the lower court’s ruling in favor of the

---

taxpayer. Of particular note from the opinion are syllabus points #2 and 3:6

- Syllabus point 2. “A state tax on interstate commerce will not be sustained unless it: ‘(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate; and (4) is fairly related to the services provided by the State.’ *Maryland v. Louisiana*, 451 U.S. 725, 754, 101 S.Ct. 2114, 2133, 68 L.Ed.2d 576, 600 (1981).” Syl. pt. 1, *Western Maryland Railway Co. v. Goodwin, Comm'r*, 167 W. Va. 804, 282 S.E.2d 240 (1981).

- Syllabus point 3. “Assessments against a foreign licensor for West Virginia corporation net income and business franchise tax, on royalties earned from the nation-wide licensing of food industry trademarks and trade names, satisfied neither “purposeful direction” under the Due Process Clause nor “significant economic presence” under the Commerce Clause, where the foreign licensor, with no physical presence in this State, did not sell or distribute food-related products or provide services in West Virginia and where: (1) all products bearing the trademarks and trade names were manufactured solely by unrelated or affiliated licensees of the foreign licensor outside of West Virginia, (2) the foreign licensor did not direct or dictate how its licensees distributed the products and (3) the licensees, operating no retail stores in West Virginia, sold the products only to wholesalers and retailers in this State.”

The concurring opinion of Justice Brent Benjamin in the *ConAgra* case will be of interest to those who have an interest in the MBNA case holdings.

### ¶ 103 Exempt Corporations

*Comparable Federal:* IRC §§ 501, 1362.

The following corporations are exempt from the West Virginia corporation net income tax (WVCSR § 110-24-5):  

**Corporations:** Corporations that are exempt from federal income tax are exempt from the corporation net income tax. However, certain regulated investment companies and real estate investment trusts are subject to the tax as specified in W. Va. Code § 11-24-4b.

**Exempt organizations:** A limited exemption is provided to entities that are exempt from federal income tax under the provisions of IRC § 501. If a tax-exempt entity is engaged in activities generating unrelated business income, the entity is subject to tax on this income. Thus, the filing of a Federal Form 990-T to report unrelated business income makes the entity subject to filing a West Virginia corporation income tax return. (WVCSR § 110-24-5.1.a.1.)

---

6 In West Virginia, the Supreme Court of Appeals is required by W. Va. Const. Art. VIII, § 4, to prepare syllabus points as part of its decision. Syllabus points are the law of the case.
Insurance companies: Insurance companies that pay the West Virginia tax on
premium income and insurance companies that pay the surcharge imposed by W. Va.
Code § 23-2C-3(f)(1) or (3) or that would be subject to those taxes if its business were
transacted in this state are exempt. See W. Va. Code § 11-247-3a (17). In addition,
"farmers mutual fire insurance companies" are exempt, as provided in W. Va. Code §
33-22-16, and "fraternal benefit societies" are exempt, as provided in W. Va. Code § 33-
23-29. (WVCSR § 110-24-5.1.a.2 and 3.)

Farm credit associations: Production credit associations organized under the
provisions of the federal "Farm Credit Act of 1933" are exempt. It should be noted,
however, that this exemption is not applicable if the production credit association or
credit union is a cooperative association organized under the provisions of W. Va. Code
§ 19-4-2 et seq.

Certain trusts for employees: Certain trusts established under § 186 of the Labor
Relations Act of 1947 for employees are exempt.

S corporations: Corporations which elect under IRC § 1362 to be taxed as pass-
through entities (called "S corporations") are exempt from the West Virginia corporation
net income tax and, unlike the federal income tax, there is no capital gain or built in
gains tax. However, S corporations are required to file an information return on Form
WV/CNT-112S. Nevertheless, just like a federal S corporation, the income, loss, and
specially allocated items are passed through to the S corporation shareholders for
reporting on their respective income tax returns. (W. Va. Code § 11-24-5(d).) See ¶ 118
below regarding nonresident withholding requirements.

Other exempt corporations: Racing associations (W. Va. Code § 19-23-12), credit
unions (W. Va. Code § 31C-2-8), and hospital service corporations (W. Va. Code § 33-
24-4), including Blue Cross/Blue Shield type corporations (W. Va. Code § 33-24-1) are
also exempt.

¶ 104 Definition of "Taxable Income"


"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 the corporation net income tax law, except that in the case of a corporation
having income from business activity which is taxable without this State, its "West
Virginia taxable income" is the portion of its taxable income as so defined and
adjusted as is allocated or apportioned to this State under the provisions of the
corporation net income tax law. (W. Va. Code § 11-24-3a.)

It is important to note that SB 210 amended and reenacted WV Code § 11-24-3
(definitions) by updating the meaning of "federal taxable income" and certain other
terms used in the West Virginia Corporation Net Income Tax Act to conform with their
definitions for federal income tax purposes as of January 1, 2012. SB 210 passed the
Legislature February 16, 2012 and took effect upon its passage. However, the bill is retroactive to the extent that it incorporated changes in federal law made after December 31, 2010 but before January 1, 2012, and made those changes effective for tax years beginning on or after January 1, 2011, to the extent those changes were effective for federal income tax purposes. It was signed February 22, 2012.

§ 105 Increasing Adjustments to Federal Taxable Income


Comparable Federal: IRC §§ 103, 172, 199, 312.

The following increases are made to federal taxable income to arrive at unapportioned West Virginia taxable income:

Income from state and local obligations: Interest or dividends from any state or local bonds or securities (exempt for federal income tax purposes under IRC § 103) are added to income. This includes income from securities issued by West Virginia and its political subdivisions.

Income from federal securities not exempt from state taxes but exempt from federal taxes: Interest or dividends (less related expenses to the extent not deducted in determining federal taxable income) on obligations or securities of any authority, commission or instrumentality of the United States, which the laws of the United States exempt from federal income tax, but not from state income taxes, are added to income.

Income-type taxes deducted for federal purposes: Income taxes and other taxes, including franchise and excise taxes, which are based on, measured by, or computed with reference to net income and imposed by this State or any other taxing jurisdiction, are added to income to the extent deducted in determining federal taxable income.

Federal depreciation/amortization for West Virginia water/air pollution control facilities previously expensed for West Virginia income tax purposes: Depreciation/amortization of water/air pollution control facilities is not allowed as a deduction, if such costs have previously been fully deducted for West Virginia corporate net income tax purposes, and is added to income.

Unrelated business income of exempt corporations: The amount of unrelated business taxable income, as defined by IRC § 512 of a corporation which by reason of its purposes is exempt from federal income taxes, is added to income.

Net operating losses deducted for federal income tax purposes: The amount of any net operating loss deduction taken for federal income tax purposes under IRC § 172 is added to income.

Federal deduction for charitable contributions to Neighborhood Investment Programs (NIP), if claiming the West Virginia NIP Tax Credit: If the West Virginia NIP credit is claimed for corporate net income tax purposes, the amount of the West Virginia
charitable contribution is added to income.

Net operating loss from sources outside the United States: Taxpayers with foreign source income must adjust their federal taxable income by the amount of their taxable income or loss from sources outside the United States.

Foreign taxes deducted for Federal income tax purposes: Foreign taxes are not allowed as a deduction and must be added to income.

Qualified production activity deduction taken under IRC § 199: The qualified production activity deduction is not allowed as a deduction and must be added to income.

Intangible and interest expense for related parties: Taxpayers must add back otherwise deductible intangible and interest expenses paid, accrued or incurred in connection with a related member, unless an exception applies. (W. Va. Code §§ 11-24-4b(c)(1) and 11-24-4b(d)(1).) As used here, “related member” is broadly defined in W. Va. Code § 11-24-3a(32) and includes a “related entity,” which is broadly defined in W. Va. Code § 11-24-3a(31). If the related member was subject to tax in West Virginia, another state, or a foreign nation on a tax base that included the intangible or interest expense, then the taxpayer will receive a credit against West Virginia tax. However, if the expense is a unitary business expense of the taxpayer and unitary business income of the related member, the expense and income will wash when unitary business income of the group is determined and add back is not required.

Dividends paid deduction for certain captive real estate investment trusts: A captive real estate investment trust must add back the dividend paid deduction otherwise allowed by federal law. A captive real estate investment trust is defined as shares or beneficial interest which: (1) are not regularly traded on an established securities market and (2) are more than 50 percent of the voting power or value of the beneficial interests or shares which are owned or controlled by a single entity that is (a) treated as an association taxable as a corporation under federal law and (b) not exempt from federal income tax under IRC § 501(a). (W. Va. Code § 11-24-4b(a) and § 11-24-3a(3) (defining “captive real estate investment trust”).)

Dividends paid deduction for certain regulated investment companies: Certain regulated investment companies must add back the dividend paid deduction otherwise allowed by federal law unless the company is a qualified regulated investment company. Shares that are held in a segregated asset account of a life insurance corporation are considered a qualified regulated investment company, thus not subject to the add back requirement. (W. Va. Code § 11-24-4b(b) and § 11-24-3a(28)(c) (defining “qualified real estate investment trust”).)

¶ 106 Decreasing Adjustments to Federal Taxable Income


Old Law - Adjustment to certain gains: This adjustment has been eliminated for tax years beginning on and after January 1, 2009. (See W. Va. Code § 11-24-6(d)(1).) For prior years, any gain from the sale of property which had a higher fair market value on July 1, 1967, than the adjusted basis at said date for federal income tax purposes is recomputed using a stepped-up basis equal to its fair market value at said date for purposes of computing gain taxable by this State. However, gain for State corporation net income tax purposes cannot exceed the sales price so as to create a loss. The purpose of this adjustment is to prevent the taxation of a property's appreciation prior to the implementation of the corporation net income tax. The adjustment for capital gains is made on an asset-by-asset basis. While not formally accepted by the Department, the State has been known to accept a proration of value before and after July 1, 1967, where the fair market value as of July 1, 1967, cannot be determined.

Current law provides for the following decreases to federal taxable income:

Refund or credit for taxes included in federal income: The amount of any refund or credit for overpayment of income and other taxes (including franchise and excise taxes) which are based on, measured by, or computed with reference to net income, imposed by West Virginia or any other taxing jurisdiction, is subtracted from income to the extent properly included in gross income for federal income tax purposes.

Interest to carry state and local obligations disallowed for federal income tax purposes: The full amount of interest expense actually disallowed in determining federal taxable income which was incurred to purchase or carry securities of any state or of any political subdivision thereof is subtracted from income.

Salary expenses disallowed by reason of federal jobs credit: The amount of salary expenses disallowed as a deduction for federal income tax purposes due to claiming the federal jobs credit under IRC § 51 is subtracted from income.

Federal adjustment for certain foreign dividends: The amount required to be added to federal taxable income as a dividend received from a non-United States corporation under IRC § 78 by a corporation electing to take the foreign tax credit for federal income tax purposes is subtracted from income.

Income of controlled foreign corporations: The amount of income of controlled foreign corporations included in federal adjusted gross income of United States corporations by the operation of IRC § 951 (foreign source income) is subtracted from income.

Certain foreign source income: Any amount included in federal adjusted gross income which is foreign source income under IRC §§ 861-863 is subtracted from income.

Disallowed depreciation for federal income tax purposes of pollution facilities: State law allows taxpayers an election to expense the cost of certain air and water pollution
control facilities, located in this State, in the year in which the cost of acquisition, construction or development was paid or incurred. If this election is made, the total amount of any federal deduction for depreciation or amortization of such cost is disallowed. The election is made in the return for the year in which the cost was paid or incurred. Once made, the election is irrevocable. Eligible air and water pollution control facilities are those facilities, located in this State, that are "certified pollution control facilities" as defined in IRC § 169(d) for federal income tax purposes.

Employer contributions to medical savings accounts included in federal taxable income less amounts withdrawn for non-medical purposes: The amount included in federal taxable income for employer contributions to a medical savings account under W. Va. Code § 33-16-15, less withdrawals for nonmedical expenses is subtracted from income.

Allowance for certain state and local obligations and obligations secured by residential real estate: Certain income that is exempt from the West Virginia corporation net income tax is not subtracted to arrive at unapportioned taxable income. Instead, the percentage of the total assets which are exempt from West Virginia tax is determined and the result is then multiplied by unapportioned taxable income to give the amount deducted as tax exempt income. Specifically, a corporation is allowed to reduce its unapportioned taxable income by the proportion that the value of its total assets bears to:

1. obligations and securities of the United States or any agency, authority, commission or instrumentality of the United States;
2. obligations of the State of West Virginia or any political subdivision of the State;
3. investments or loans primarily secured by mortgages or deeds of trust or liens or security agreements on residential property (including "mobile homes") located in West Virginia and occupied by non-transients.

The definition of federal obligations qualifying for a reduction to the tax base is rather broad and includes not only direct obligations of the federal government, but also direct obligations and securities of "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." (W. Va. Code § 11-24-6(f)(1)(a).) However, the Business Franchise Tax Regulations indicate that instruments issued by another taxpayer that have a federal government guarantee, as opposed to a direct obligation, will not qualify for adjustment of the tax base. (WVCSR § 110-23-3.4.6.1.a.2.) For discussion and listing of certain investment vehicles that are either exempt or taxable, see TAA 93-002.

In order to determine the proportion of income from these sources to be included in the tax base, it will be necessary for taxpayers to determine the monthly averages of the obligations noted above as well as the monthly averages of the taxpayer's total assets.
Monthly averages are determined by computing an average for each month of the taxable year and dividing the sum of the monthly averages by the number of months in the taxable year. Once monthly averages have been determined, the taxable proportion of income can be computed by the following formula:

\[
\text{Unapportioned taxable income} \times (1 - \frac{\text{Average monthly balance of excluded obligations}}{\text{Average monthly total assets after allowance}}) = \text{Taxable income}
\]

For purposes of determining average monthly balances, the Regulations state that the balances should be determined at "cost" in the same manner as the obligations, investments, and loans are reported on Schedule L of the taxpayer's federal income tax return. Presumably, "cost" can be either the book or tax basis of the obligation. According to the Business Franchise Tax Regulations, "when a taxpayer does not maintain records sufficient to clearly establish the monthly beginning and ending account balances, the average of the monthly beginning and ending account balances shall be deemed to be zero unless the taxpayer can otherwise affirmatively establish to the satisfaction of the Tax Commissioner the amount of the average monthly beginning and ending account balances." (WVCSR § 110-23-3.4.6.3.a.) An example of the foregoing computation is as follows:

Assume a corporate taxpayer has unapportioned taxable income of $200,000 for 2012. Assume further that asset balances are as follows:

United States securities owned and total assets as of:

<table>
<thead>
<tr>
<th>Date</th>
<th>U.S. Securities</th>
<th>Total Assets</th>
<th>Monthly Averages</th>
</tr>
</thead>
<tbody>
<tr>
<td>01/01/12</td>
<td>$300,000</td>
<td>$2,000,000</td>
<td>$312,500</td>
</tr>
<tr>
<td>02/01/12</td>
<td>325,000</td>
<td>2,200,000</td>
<td>337,500</td>
</tr>
<tr>
<td>03/01/12</td>
<td>350,000</td>
<td>2,300,000</td>
<td>300,000</td>
</tr>
<tr>
<td>04/01/12</td>
<td>250,000</td>
<td>2,250,000</td>
<td>175,000</td>
</tr>
<tr>
<td>05/01/12</td>
<td>100,000</td>
<td>2,300,000</td>
<td>75,000</td>
</tr>
<tr>
<td>06/01/12</td>
<td>50,000</td>
<td>2,350,000</td>
<td>25,000</td>
</tr>
<tr>
<td>07/01/12</td>
<td>0</td>
<td>2,300,000</td>
<td>0</td>
</tr>
<tr>
<td>08/01/12</td>
<td>0</td>
<td>2,300,000</td>
<td>0</td>
</tr>
<tr>
<td>09/01/12</td>
<td>0</td>
<td>2,400,000</td>
<td>0</td>
</tr>
<tr>
<td>10/01/12</td>
<td>0</td>
<td>2,450,000</td>
<td>25,000</td>
</tr>
<tr>
<td>11/01/12</td>
<td>50,000</td>
<td>2,400,000</td>
<td>55,000</td>
</tr>
<tr>
<td>12/01/12</td>
<td>60,000</td>
<td>2,450,000</td>
<td>70,000</td>
</tr>
<tr>
<td>12/31/12</td>
<td>80,000</td>
<td>2,460,000</td>
<td></td>
</tr>
</tbody>
</table>

TOTAL $1,375,000 $27,930,000

Based upon the above, the corporation’s adjusted taxable income is determined to be $190,154 as follows:

\[
$200,000 \times (1 - \left( \frac{1,375,000}{12} \right)) = \$190,154
\]

\[
\frac{27,930,000}{12}
\]
Adjusted federal taxable income: Federal taxable income plus increasing adjustments less decreasing adjustments produces adjusted Federal taxable income, which becomes West Virginia net taxable income for wholly West Virginia corporations, after deducting the West Virginia net operating loss deduction carryforward. West Virginia corporations are those that have their commercial domicile in West Virginia and are not taxable in another state.\(^7\)

Multi-state corporations are required to allocate and apportion their income. Multi-state corporations are corporations that are taxable in this State and in one or more other states. To illustrate these computations, here is the applicable portion of pages 2 and 3 from 2011 Form WV/CNF-120 (the 2012 version of this form was not available at the time of writing):

\[
\begin{align*}
10. \text{Total nonbusiness income allocated everywhere} & \quad \text{Form WV/CNF-120APT, Sch. A1, Line 8, Column 3} \\
11. \text{Total income subject to apportionment} & \quad \text{Subtract Line 10 from line 9} \\
12. \text{West Virginia apportionment factor} & \quad \text{Form WV/CNF-120APT, Sch. B, Part 1, Line 8; Part 2 or Part 3, Col. 3} \\
13. \text{West Virginia apportioned income} & \quad \text{Line 11 multiplied by Line 12} \\
14. \text{Nonbusiness income allocated to West Virginia} & \quad \text{Form WV/CNF-120APT, Sch. A2, Line 12} \\
15. \text{West Virginia taxable income} & \quad \text{Multistate corporations add lines 13 and 14, wholly West Virginia enter line 9} \\
16. \text{West Virginia net operating loss carryforward} & \quad \text{Schedule NOL, Column 6 total} \\
17. \text{WV NET TAXABLE INCOME} & \quad \text{Subtract Line 16 from Line 15}
\end{align*}
\]

West Virginia net operating loss deduction: West Virginia net operating loss carryover and carrybacks are subtracted from federal taxable income. In other words, the federal net operating loss is an increasing adjustment to federal taxable income; whereas the specifically computed West Virginia net operating loss deduction is allowed as a decreasing adjustment. Furthermore, if a corporation is required to allocate and apportion its income, the net operating loss deduction is taken after such allocation and apportionment. The loss carryback period and the loss carryforward period are just like the federal rules. However, not more than $300,000 of net operating losses from any taxable year may be carried back. In addition, since the West Virginia net operating loss deduction is determined in accordance with IRC § 172, taxpayers now have available an election to not carryback a net operating loss deduction which is not tied to the treatment of their federal net operating loss deduction. (W. Va. Code § 11-24-6(d).)

The amount of net operating loss carryforwards available to an affiliated group which elected for the first time prior to 2009 to file a consolidated West Virginia corporation income tax return for a taxable year is limited to the net operating losses incurred by those members of the affiliated group which did business in West Virginia and filed separate West Virginia Corporation Net Income Tax Returns in those prior taxable years. Thus, a West Virginia net operating loss deduction will not be allowed for the net operating loss of those members of the affiliated group which did no business in this State during prior taxable years and were not required to file a West Virginia corporation income tax return. (TAA 88-014.)

\(^7\) Financial organizations that have their commercial domicile in West Virginia were subject to tax on their unapportioned adjusted federal taxable income for taxable years that began before January 1, 2009. Today, financial organizations that have their commercial domicile in this State and are taxable in another state may apportion their income in the same manner as financial organizations taxable in this State that have their commercial domicile outside this State.
Schedule NOL is designed to support claiming of a West Virginia net operating loss carryforward deduction by providing information on the year of the loss and how the loss was/is being used.

For federal income tax purposes, IRC § 444 does not permit the carryback of fiscal year net operating losses for fiscal year personal service corporations. However, since IRC § 172 (not § 444) controls for West Virginia corporation net income tax purposes, fiscal year personal service corporations should be permitted net operating loss carrybacks even though this is not allowed for federal income tax purposes. Nevertheless, this position is being challenged by the Department on the basis that no net operating loss deduction is allowed for West Virginia carryback purposes unless there is a federal net operating loss carryback.

¶ 107 Direct Allocation of Certain Items of Nonbusiness Income

Law: W. Va. Code §§ 11-24-7(b), 11-24-7(d)
Comparable Federal: IRC § 631.

A corporation having business income which is taxable both in this State and in another state must allocate and apportion its adjusted federal taxable income. A corporation is taxable in another state if:

(1) The corporation is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporation stock tax in another state, or

(2) Another state has jurisdiction to subject the corporation to a net income tax, regardless of whether, in fact, that state does or does not subject the taxpayer to such tax. (WVCSR § 110-24-7.)

The definition of “business income” was amended and now means income arising from transactions and activity in the regular course of 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 the 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. (W. Va. Code § 11-24-3a(2) (2007).) Essentially, all income that may be apportioned without violating the U.S. Constitution is now business income. "Nonbusiness income" means all income other than business income.

If a taxpayer is taxable in another state, rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties (to the extent that they constitute nonbusiness income of the taxpayer) are allocated directly as provided below, but only to the extent they constitute nonbusiness income. (W. Va. Code § 11-24-7(d).)
Rents and royalties from real property: If net income or loss from rents and royalties from real estate located in West Virginia is nonbusiness income, it is allocated to this State. Rent from real property constitutes business income, which is subject to apportionment rather than direct allocation, when the rental of the property is the principal business or the income serves an operational rather than an investment function of the corporation.

Rents and royalties from tangible personal property: Net income or loss from rentals and royalties from tangible personal property are allocated to this State to the extent that the property is utilized in this State and the property generates nonbusiness income. The extent of utilization is determined by the number of days the property is physically located within and without this State. If the corporation was not organized or taxable in another state, all the net rentals and royalties from tangible personal property are allocated to this State. The operational versus functional test discussed above also applies here.

Capital gains: If capital gains and losses from sales of real property located in this State are nonbusiness income, they are allocable to this State. This is also true of tangible personal property if the property had a situs in this State at the time of the sale, or the taxpayer's commercial domicile is in this State and the taxpayer is not taxable in another state in which the property had situs. In addition, capital gains and losses from sales of intangible personal property are allocable to this State if the taxpayer's commercial domicile is in this State and the income is nonbusiness income. Moreover, the statute provides that gains under IRC § 631(a) and (b) from the sale of natural resources severed in the state are allocated to this State if they are nonbusiness income. The operational versus functional test discussed above also applies here.

Interest and dividends: Interest and dividend income is allocated to the state if the corporation's commercial domicile is in this State and the income is nonbusiness income. Interest income is business income which is not subject to direct allocation if it arises out of the business activity of the corporation. The operational versus functional test discussed above also applies here.

Patent and copyright royalties: If patent and copyright royalties are nonbusiness income, they are allocated to this State if the patent or copyright is used by the corporation in this State. If the patent or copyright is used by a corporation which has its commercial domicile in this State, and which is not taxable in another state, the royalties are allocated to West Virginia if they are nonbusiness income. The operational versus functional test discussed above also applies here.

Corporate partner's distributive share: For taxable years beginning before January 1, 2009, a corporate partner's distributive share of partnership income, gain, loss, deduction or credit is allocated to this State to the extent it is derived from partnership activity in this State, whether such income is business or nonbusiness income in the hands of the partnership. The partnership needs to allocate its distributive share that is
nonbusiness income. The partnership also needs to apportion its distributive share that is business income using the partnership’s apportionment factors. Nonbusiness income distributive share that is allocated to this State is then divided among the partners in the same manner as partnership income is distributed. Business income distributive share apportioned to this State is then divided among the partners in the same manner as partnership income is distributed. Each member of the partnership must report its proportionate share of nonbusiness income allocated to this State plus its proportionate share of business income apportioned to this State as income allocated to this State. (W.Va. Code § 11-24-7(d)(5).) The purpose of this methodology is to avoid having the business income of the partnership being subject to double apportionment, first using the apportionment factors of the partnership and then apportioned using the apportionment factors of the corporation.

For taxable years beginning after December 31, 2008, a corporation’s distributive share from a partnership is nonbusiness income only if the corporation’s interest in the partnership generates nonbusiness investment income. If the interest generates business income, then the items of distributive share are treated just like other similar items of the corporation when determining its adjusted West Virginia taxable income. Additionally, the corporation’s proportionate share of partnership’s property, payroll and sales factors are included when computing the corporation’s property, payroll and sales factors. If the partnership’s business is unitary with one or more members of corporate owner’s combined or unitary group, then the corporation’s portion of distributive share is included when determining the business income of the combined group and the corporation’s proportionate share of the partnership factors are included when apportioning the business income of the combined or unitary group. (W. Va. Code § 11-24-13c(c).)

¶ 108 Apportionment by Three-Factor Formula (With Double-Weighted Sales)


For taxpayers other than motor carriers and financial organizations, after the direct allocation of certain nonbusiness income, the remaining adjusted federal taxable income is apportioned by multiplying by a fraction, the numerator of which is the sum of the property factor plus the payroll factor plus two times the sales factor, and the denominator of the fraction is four. Where any fraction has a numerator of zero and a denominator of other than zero, the factor is deemed to be zero, i.e., 0/100 = 0. (WVCSR § 110-24-7.3.a.) In cases where a factor has a denominator of zero, the denominator of the apportionment formula fraction is decreased by the number of factors having zero. If the sales factor denominator is zero, then the apportionment fraction denominator is decreased by two. The following formula is applicable:

\[
\text{Taxable income subject to apportionment} \times \frac{\text{Property factor} + \text{payroll factor} + (2 \times \text{sales factor})}{4} = \text{Apportioned taxable income}
\]

**Property factor:** The property factor is a fraction, the numerator of which is the average value of the taxpayer’s real and tangible personal property owned or rented
and used by the taxpayer within West Virginia during the taxable year, and the denominator is the average value of all real and tangible personal property owned or rented and used by the taxpayer during the taxable year. The formula is as follows:

\[
\text{Property factor} = \frac{\text{Average value of real and tangible personal property in W.Va.}}{\text{Average value of all real and tangible personal property}}
\]

The average value of all real and tangible personal property is taken from the taxpayer’s federal income tax return, Schedule L. The average value of property is determined by averaging the values at the beginning and end of the taxable year. However, in cases where there are substantial fluctuations during the year, the Tax Commissioner may require the taxpayer to average monthly values. For purposes of determining the average value of property, original cost is to be used. Property that is not owned, but rented by the taxpayer, is valued at eight times the net annual rental rate. Rent includes all amounts payable under the lease arrangement in situations where a rental agreement obligates the lessee to pay for such items as interest, taxes, insurance, repairs, etc., as is typically found in a triple net lease. Leasehold improvements are considered property for purposes of apportionment, even if the improvements revert to the lessor upon termination of the lease.

For purposes of determining the property factor as it relates to moveable tangible personal property used within and without West Virginia, the value of the moveable property is determined by multiplying the original cost of such property by a fraction, the numerator of which is the number of days the moveable property has a physical presence in West Virginia and the denominator of which is the number of days of physical presence everywhere during the taxable year. Days of physical location can be determined by statistical methods or any other reasonable basis acceptable to the Tax Commissioner. The following formula is appropriate:

\[
\text{Value of moveable} = \frac{\text{Cost of moveable property in W.Va.}}{\text{W.Va. during any part of year}} \times \frac{\text{Days within W.Va.}}{\text{Days everywhere}}
\]

**Payroll factor**: The payroll factor is a fraction, the numerator of which is the total compensation paid in West Virginia during the taxable year, and the denominator of which is the total compensation paid by the taxpayer to all employees regardless of domicile as reflected on the taxpayer's federal income tax return. The formula follows:

\[
\text{Payroll Factor} = \frac{\text{Payroll in W.Va.}}{\text{Total payroll}}
\]

For purposes of the payroll factor, compensation typically means all wages and other forms of remuneration paid to employees for personal services that are reportable on federal Forms W-2. Payments made to independent contractors or to individuals who are not deemed employees for federal income tax purposes are not considered compensation for purposes of the payroll factor.

Compensation is deemed paid in West Virginia and is considered as a part of the numerator in the payroll factor if the employee's services are either:
(1) performed entirely within West Virginia; or

(2) performed both within and without this State, but the services performed without West Virginia are incidental to the employee’s services within this State; or

(3) performed both within and without West Virginia and one of the following elements is present:

(a) the employee’s base of operations is located within West Virginia; or

(b) the employee has no base of operations but the employee is directed or controlled from a location within West Virginia; or

(c) there is no base of operations in any state in which some of the employee’s services are performed and the employee’s residence is located within West Virginia.

Sales factor: The sales factor is a fraction, the numerator of which is the gross receipts of the taxpayer derived from normal business transactions and activities within West Virginia, net of any returns and allowances. The denominator of the fraction is the total gross receipts derived by the taxpayer from its normal business activities and reflected as gross income on its federal income tax return. Below is the applicable formula:

\[
\text{Sales Factor} = \frac{\text{Gross receipts from activities within W.Va.}}{\text{Total gross receipts}}
\]

The West Virginia corporation net income tax includes a throwout rule,\(^8\) with respect to the sales factor. A throwout rule eliminates from the denominator of the sales factor (i) all destination sales to those states in which the taxpayer transacts no business, (ii) sales to those states where no business is subject to a corporation income tax, franchise tax, or corporation stock tax, or (iii) where the destination state lacks jurisdiction to impose a corporation net income tax, irrespective of whether such state imposes such tax. (WVCSR § 110-24-7.7.g.)

Gross receipts typically means gross income and not gross profit or net income, and it includes all interest income, service charges, carrying charges, federal and state excise taxes (including sales taxes) passed on to the buyer. (WVCSR § 110-24-7.7.g.)

---

\(^8\) New Jersey repealed the throwout rule while litigation over the constitutionality of the throwout rule was working its way through the courts. Today, West Virginia and Maine are the only states that require taxpayers to reduce the denominator of their sales factor by the amount of sales to customers located in the states where the taxpayer is not taxable. Furthermore, the editor has noted that because West Virginia’s combined reporting rules do not disregard the separate identities of the taxpayer members of the combined group, W. Va. Code §11-24-13c(a), the combined group is not the taxpayer in West Virginia and application of West Virginia’s throwout rule is on a corporation-by-corporation basis and not on a combined group basis.
7.7.a.2.A.) Accordingly, no reduction for cost of goods sold or other expenses (except returns and allowances) shall be subtracted in arriving at gross receipts. If business income includes interest from governmental obligations exempt from taxation by West Virginia, such amounts shall be excluded from the numerator and denominator.

If a taxpayer departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, it must disclose such information by attaching a statement to the West Virginia corporation income tax return, setting forth the nature and effect of the change. (WVCSR § 110-24-7.7.b.)

**Sale of tangible personal property:** Sales of tangible personal property are deemed attributable to West Virginia under either of the following conditions:

1. The property is delivered or shipped to a purchaser other than the United States government, who is located within the State of West Virginia. The f.o.b. point, or other conditions of sale, are irrelevant for this purpose. West Virginia sales include delivery to a third party located in West Virginia, if the seller is so directed by an out-of-state purchaser.

2. The tangible property is shipped from a West Virginia location and the purchaser is the United States government.

In situations where a taxpayer sells tangible personal property to a purchaser located within a state in which the taxpayer is not taxed, then such sales shall be excluded from the denominator of the sales factor.

For taxable years beginning after December 31, 2008, all members of a unitary group engaging in business activity in West Virginia must be included in a combined report. The business income of the unitary group is then apportioned using the numerator of each group member’s property, payroll and sales factors and the unitary group’s aggregate denominators, when no member is a motor carrier or financial organization subject to a special apportionment rule.

**Sales of other than tangible property:** In cases where the taxpayer’s business activities consist of sales other than sales of tangible personal property, the sales are considered West Virginia transactions if either:

1. the income-producing activity is performed within West Virginia;

2. the income-producing activity is performed both within and without West Virginia and a greater proportion of the income-producing activity is performed within West Virginia as compared to any other state based on the cost of the performance of the service or sale (WVCSR § 110-24-7.7.h.1.); or

3. if the sale constitutes business income to the taxpayer, or the taxpayer is a financial organization subject to special apportionment rules.
Alternative apportionment methods: In situations where either the taxpayer or the Tax Commissioner believes the statutory allocation and apportionment provisions do not fairly represent the extent of a taxpayer’s business activities in West Virginia, the taxpayer may petition or the Tax Commissioner may require, with respect to all or part of the taxpayer’s business activities: (1) separate accounting; (2) the exclusion of one of the factors; (3) the inclusion of one or more additional factors; or (4) the use of any other method, including a unitary basis in order to equitable allocate or apportion the taxpayer’s income. Taxpayers (including public utilities) desiring approval to use an alternative method of allocation must file a petition with the Tax Commissioner no later than the original due date (without regard to any extension) of the annual West Virginia corporation income tax return. (W. Va. Code § 11-24-7(h)(1).)

Unitary method: For tax years beginning on or after January 1, 2009, mandatory combined reporting is required of unitary groups of corporations that have one or more members that do business in West Virginia and in one or more other states and/or nations. Thus, for purposes of determining the business income of combined or unitary group, the law disregards the fact that members of such groups are separate legal entities if they, together, engage in unitary business activity. (W. Va. Senate Bill 749, 2007 Regular Session.) Unless the unitary group elects to report on a worldwide combine basis, the combined group will include domestic corporations formed under the various state laws and certain other corporations, as provided in W. Va. Code § 11-24-13f(a).

Essentially, the federal taxable income of all members of the unitary group is adjusted as provided in West Virginia law and business income is apportioned to West Virginia using the West Virginia numerator of each taxable member and the unitary group’s denominator for each of the factors.

A corporation may have different streams of income. The streams may include, for example nonbusiness income (e.g., investment income not serving an operational function), business income from one or more different unitary groups and business income from business activity that is not unitary business income. Each stream of income may be subject to a different apportionment rule. The business income of the combined or unitary group includes only that portion of the corporation’s adjusted federal taxable income that is attributable to the group’s unitary business activity. The corporation will need to keep appropriate records to properly report these different streams of income.

Schedules UB are utilized to enable a unitary business group to determine the amount of its unitary business income that is attributable to West Virginia. For 2011, Schedule UB 4 is replaced by Schedule UB-4CR, which is a Microsoft Excel spreadsheet on which to report the unitary business income of the combined group engaged in unitary business activity. A combined report that includes all members of the combined group engaged in unitary business activity is required by W. Va. Code § 11-24-13a(j). If the taxable members of the combined group file separate returns, a copy of UB-4CR must be filed with each return. If an election is made by the taxable
members to file a combined return for the taxable members, the UB-4CR is filed with the combined return. (The 2012 forms are not available at this writing.)

Once a taxable member’s share of the unitary group’s West Virginia adjusted federal taxable income is determined, that member’s West Virginia taxable income is determined as provided in W. Va. Code § 11-24-13c.

**Prior law:** For tax years beginning before January 1, 2009, a taxpayer may have requested to file on a unitary basis (WVCSR § 110-24-7a). The State Tax Department routinely denied these requests. An affiliated group of corporations that filed a consolidated federal income tax return could elect to file a consolidated West Virginia return in which the adjusted federal taxable income of the entire federal combined group was apportioned using the group’s property, payroll and sales factors.

### ¶ 109 Special Apportionments for Motor Carriers

**Law:** W. Va. Code § 11-24-7a *et seq.*

The special rules for apportioning business income of motor carriers replaced the general apportionment formula of the corporation net income tax. A "motor carrier" is any corporation engaging in the transportation of passengers or property for compensation by motor vehicle over roads in this State, whether traveling on a scheduled route or otherwise. This definition encompasses not only trucks but also taxi cabs, and is broader than the definition of motor carrier found in the motor carrier tax.

The special apportionment formula for motor carriers is:

\[
\text{Miles traveled in state} / \text{Total miles traveled}
\]

If the total mileage of a motor carrier in this State is 5% or less of its total mileage nationwide during a year and if the motor carrier either (i) travels less than 50,000 miles in this State or (ii) makes no more than 12 trips in this State, the apportionment formula of subsection 7a(b) for motor carriers does not apply. Note that miles means gross miles, not revenue miles.

### ¶ 110 Special Apportionment for Financial Organizations

**Law:** W. Va. Code § 11-24-7b

**History:** The Legislature found during the 1991 Regular Session that the general formula set forth in W. Va. Code § 11-24-3 for apportioning the capital of corporations 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, any organization meeting the statutory definition of a financial organization must use a special apportionment formula to determine its taxable income.
**Financial Organization Defined:** The definition of a "financial organization" includes all bank holding companies, regulated financial corporations, and any other entity (credit unions are exempt) so long as more than half of the entity's gross business income is derived from loans, the extension of credit, leasing and related activities, the operation of a credit card business, estate and trust services, and the acceptance of deposits.

**In-State Financial Organization:** For taxable years beginning before January 1, 2009, if a financial organization or bank was domiciled or headquartered in West Virginia, the entity was not allowed to apportion its business income to the various states in which activities were conducted for West Virginia corporation net income tax purposes. These financial organizations were presumed to earn 100% of their income within West Virginia and 100% of their adjusted federal taxable income taxed by West Virginia. To compensate in-state organizations for income taxes paid to any other state, in-state organizations were allowed a credit on their West Virginia tax returns for taxes paid to another state or the West Virginia tax computed on the income taxed by the other state(s). This credit mechanism protects in-state organizations from being double taxed on the same income. (See ¶ 101 above.)

**Out-of-State Financial Organization:** The special apportionment rules discussed below must be used if an out-of-state financial organization is doing business in West Virginia. Generally, under the law, out-of-state financial organizations are deemed to have sufficient contact with West Virginia to be subject to the business franchise and corporation net income taxes if, during a tax year, they solicit business with 20 or more persons or entities located within West Virginia or if the out-of-state organization generates gross receipts of $100,000 or more from West Virginia customers.

For purposes of determining whether an out-of-state financial organization is taxable, gross receipts from certain types of secondary market assets are not considered. (Secondary market assets are obligations that were not originally solicited or contracted by the present owner.) Specifically, gross receipts from the following ownership interests (and certain related activities) will not be considered in determining whether a financial organization is subject to taxation:

1. An interest in a real estate mortgage investment which is a conduit, such as a real estate investment trust or a regulated investment company;

2. An interest in a security representing ownership or participation in a pool of promissory notes or certificates or 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 from which the interest is attributed to a consumer loan, a commercial loan or a secured commercial loan in which the payment obligations were solicited and entered into by a person that was
independent and was not acting on behalf of the owner; or an interest in the 
right to service or collect income from such a loan; or

(4) An amount held in an escrow or trust account with respect to the above 
interests.

If a financial organization is subject to taxation when gross receipts from the 
foregoing interests are not considered, such receipts must, however, be included 
when apportioning its income.

Financial organizations that are taxable in West Virginia and in one or more other 
states are required to use a special one factor formula to apportion their income to 
West Virginia for corporation net income tax purposes. This single factor is based 
upon the ratio of the financial organization’s gross receipts derived from West Virginia 
as compared to total gross receipts everywhere and may be stated as follows:

\[
\frac{(\text{Total Gross Receipts from WV})}{(\text{Total Gross Receipts})} \times \text{Adjusted Federal Taxable Income}
\]

Excluded from both the numerator and the denominator of the gross receipts factor 
are interest or fees earned on obligations and securities of the United States, West 
Virginia, or its political subdivisions and certain investments or loans secured by real 
property or mobile homes located in West Virginia and occupied by non-transients.

The following types of receipts (income, not principal) are to be included in both the 
umerator and the denominator:

- lease or rental of tangible property;
- loans secured by real or tangible property;
- consumer loans;
- commercial loans and installment obligations;
- syndication and participation loans;
- credit card service charges and fees;
- credit card merchant discount fees;
- performance of specified financial and fiduciary services;
- fees from travelers checks and money orders; and

All other types of receipts not allocable to another state where the financial 
organization is taxable are attributable to West Virginia or any other state based on 
the laws of the taxpayer's domicile.

The validity of the West Virginia statute recently was upheld in a court challenge. In 
this case, MBNA (see ¶ 102 above) argued that it did not have taxable nexus with West 
Virginia because it did not have any real or tangible personal property nor any 
employees located in West Virginia. The State argued that physical presence is not 
required to show a substantial nexus for purposes of the State’s taxation of financial
institutions domiciled outside the State. Rather, the State argued, MBNA’s significant business in this State was sufficient to meet the substantial nexus standard of the Commerce Clause of the U.S. Constitution. The West Virginia Supreme Court of Appeals agreed with the State and ruled that the imposition of West Virginia’s business franchise tax and corporation net income tax on MBNA for the years 1998 and 1999 did not violate the Commerce Clause. The U.S. Supreme Court rejected an appeal of the case.

Method of filing: For taxable years beginning before January 1, 2009, out-of-state financial organizations generally filed on a separate return basis. This is because the elective filing option was to file a West Virginia consolidated return that included all corporations included in the federal consolidated return. For taxable years beginning on or after January 1, 2009, financial organizations that are part of a unitary group doing business in West Virginia must file a combined report of the group’s business income. Each member of the group having taxable nexus with West Virginia will then file its separate West Virginia return. However, only those members of a combined group that use the same apportionment method may be included in a combined report. Therefore, when a combined or unitary group includes both financial institutions and other corporations and both types of corporations have one or more members with taxable nexus, two combined reports will needed to be prepared, one for the financial organizations and one for the other corporations.

Effective Date: Two different special apportionment rules for financial organizations apply to all taxable years beginning before January 1, 2009. The rule that applied depended upon the commercial domicile of the financial organization. A financial organization whose commercial domicile was in West Virginia was not allowed to apportion, but was allowed credit for income taxes paid to another state.

Financial Organization Transition Credit: Financial organizations may qualify for a transition tax credit equal to the net increase in Corporation Net Income Tax liability multiplied by 80% in 2009, 60% in 2010, 40% in 2011, 20% in 2012, 10% in 2013, and 0% in 2014. This transition tax credit may not reduce the annual Corporation Net Income liability below $1 million. (W. Va. Code § 11-24-9b.)

¶ 111 Rate of Tax

For taxable years beginning on or after: The rate of tax is:

January 1, 2012 7.75%
January 1, 2013 7.0%*
January 1, 2014 6.50%*

* See ¶ 101 above, footnote 1

---

5Taxable members of a combined group may elect to file a combined return under W.Va. Code § 11-24-13e in lieu of filing separate returns. The combined report is attached to the combined return.
For the period July 1, 1967 through December 31, 1982, the tax rate was 6% of West Virginia taxable income. A graduated rate structure was added on January 1, 1983, which continued through June 30, 1987. For this period the tax rate was 6% on the first $50,000, with the rate of 7% on the excess above $50,000 of taxable income.

For taxable periods beginning after June 30, 1987 and ending before January 1, 2007, the tax rates were as follows. Each of these rate changes took effect on July 1 the year, except for the rate changes that took effect on or after January 1, 2007:

<table>
<thead>
<tr>
<th>Year</th>
<th>Tax Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>9.75%</td>
</tr>
<tr>
<td>1988</td>
<td>9.60%</td>
</tr>
<tr>
<td>1989</td>
<td>9.45%</td>
</tr>
<tr>
<td>1990</td>
<td>9.30%</td>
</tr>
<tr>
<td>1991</td>
<td>9.15%</td>
</tr>
<tr>
<td>1992</td>
<td>9.00%</td>
</tr>
<tr>
<td>2007</td>
<td>8.75%</td>
</tr>
<tr>
<td>2009</td>
<td>8.50%</td>
</tr>
<tr>
<td>2011</td>
<td></td>
</tr>
</tbody>
</table>

¶ 112 Accounting Periods and Methods


*Comparable Federal:* IRC § 441 and following.

**Accounting period:** The accounting period (taxable year) for West Virginia tax purposes is the same as the taxpayer's federal accounting period. If a taxpayer's federal taxable period or year changes, the West Virginia taxable year also changes.

**Accounting method:** A taxpayer’s method of accounting for West Virginia income tax purposes is the same as the taxpayer’s method for federal income tax purposes. This rule also applies when the taxpayer changes its method of accounting for federal income tax purposes. In order to prevent amounts from being duplicated or omitted, the regulations simply state that adjustments are to be taken into account. (WVCSR § 110-24-8.4.a.)

**Change in accounting method:** If a taxpayer's method of accounting is changed, other than from an accrual to an installment method, any additional tax which results from adjustments determined to be necessary solely by reason of the change shall not be greater than if such adjustments were ratably allocated and included for the taxable year of the change and the preceding taxable years, not in excess of two, during which the taxpayer used the method of accounting from which the change is made. There is also a limitation of any additional tax resulting in a change from the accrual to the installment method. The tax forms and instructions have not provided for this tax break.

Although the tax forms and instructions have not provided for this adjustment, WVCSR 110-24-8.5.a.2 contains the following procedure for using this special tax computation:

1. Compute tax for current year, regular method, including determination of effective tax rate.
(2) Multiply the dollar amount of the income adjustments, included in the West Virginia taxable income, by the current year effective tax rate.

(3) Pro-rate the adjustments over the current year and no more than two preceding years.

(4) Multiply the dollar amount of the adjustments allocated to each of the years, to the extent included in West Virginia taxable income by the effective tax rate applicable to each of the years.

If the total tax on the adjustments for the three year period is less than the tax on the adjustments as determined for the current year, the differences may be used to reduce the current year’s tax liability.

Accounting adjustments: Since the starting point for West Virginia taxable income is federal taxable income, any accounting adjustments made for federal income tax purposes are also required.

If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, then the computation of taxable income is made under such a method that, in the opinion of the Tax Commissioner, clearly reflects income.

§ 113 Credits Against Tax


The following credits are currently available, subject to appropriate limitations:

(1) Strategic Research and Development Tax Credit – Schedule WV/SRDTC-1; (W. Va. Code § 11-13R-1 et seq.);

(2) Economic Opportunity Tax Credit – Schedule WV/EOTC-1; (W. Va. Code § 11-13Q-1 et seq.);

(3) Manufacturing Investment Tax Credit – Schedule WV/MITC-1; (W. Va. Code § 11-13S-1 et seq.);

(4) Historic Rehabilitated Buildings Investment Credit – Schedule RBIC; (W. Va. Code § 11-24-23a);

(5) West Virginia Neighborhood Investment Program Credit – Form WV/NIPA-2; (W. Va. Code § 11-13J-1 et seq.);

(6) Environmental Agricultural Equipment Tax Credit – Form WV/AG-1; (W.Va. Code § 11-13K-1 et seq.);
(7) Electric and Gas Utilities Rate Reduction Credit – Schedule L;  
   (W.Va. Code § 11-24-11);

(8) Telephone Utilities Rate Reduction Credit – Schedule K;  
   (W.Va. Code § 11-24-11a);

(9) West Virginia Military Incentives Credit – Schedule J;  
   (W.Va. Code § 11-24-12);

(10) Credit for utility taxpayers with net operating loss carryovers – Schedule  
     WV/UNOLC-1; (W.Va. Code §11-24-11b);

(11) Apprentice Training Tax Credit – Schedule WV/ATTC-1;  
     (W. Va. Code § 11-13W-1 et seq.);

(12) Film Industry Investment Tax Credit – Schedule WV/FIIA-TCS;  
     (W. Va. Code § 11-13X-1 et seq.);

(13) Manufacturing Property Tax Adjustment Credit – Schedule WV/MPTAC-1;  
     (W. Va. Code § 11-13Y-1 et seq.);

(14) Financial Organization Transition Credit – Schedule WV/FOTC-1;  
     (W. Va. Code § 11-24-9b);

(15) Alternative Fuel Tax Credit – Schedule AFTC-1;  
     (W. Va. Code §11-6D-1 et seq.);

(16) Commercial Patent Incentives Tax Credits – Schedule CPITC-1;  
     (W. Va. Code §11-13AA-1 et seq.);

The following credits are allowable if accrued prior to the expiration date, subject to  
appropriate limitations:

(1) Research and Development Projects Credit – Schedule R&D;  
   (W. Va. Code § 11-13D-e(f)) [not allowed for taxable years beginning after  
   December 31, 2002];

(2) High-Growth Business Investment Tax Credit – Schedule WV/HGBITC-1;  
   (W. Va. Code § 11-13U-4) [not allowed after June 30, 2008];

(3) Business Investment & Job Expansion Credit - Form WV/BCS-A, and  
    WV/BCS-1 or WV/BCS-Small;  
    (W. Va. Code § 11-13C) [not allowed for taxable years beginning after  
    December 31, 2002];

(4) Aerospace Industrial Facility Investment Credit – Form WV/AIF-1;
Also see Form WV/CNF-120TC (Summary of Corporation Net Income/Business Franchise Tax Credits).

In general, tax credits earned by one member of a combined or unitary group may not be applied against the West Virginia tax liabilities of any other member of that group, even if the taxable members of the group elect to file a combined return under W. Va. Code § 11-24-13e. However, a special rule applies to economic development credits that were earned during a tax year for which the taxpayer participated in the filing of a consolidated West Virginia corporation net income tax return. See W. Va. Code § 11-24-13c(b)(2).

¶ 114 Returns and Payment of Tax


Annual returns: An annual income tax return is required to be filed by any taxable West Virginia corporation, including S corporations. West Virginia Corporation Net Income/Business Franchise Tax Return Form WV/CNF-120 is to be used by all corporations, except S corporations, which must use West Virginia Income/Business Franchise Tax for S Corporation and Partnership WV/SPF-100. (W. Va. Code §§ 11-24-13, 11-24-13a, and 11-24-13b.)

Attachments and Statements Required: Attach the additional information and statements required as part of your Form WV/SPF-100 if they apply to your filing method. Attach a copy of pages 1 through 5 of your signed federal return (Form 1120S or 1065), and Schedule M-3 if applicable. If filing separate West Virginia and consolidated federal, attach your pro forma federal, consolidated federal, Form 851 (Affiliation Schedule), plus spreadsheet of income and expense, and balance sheet entries for every corporation included in the consolidated federal return. Attach a schedule of other states in which you have property or paid salaries during the taxable year; indicate those states in which you are filing corporate tax returns based on or measured by net income for this taxable year. Also, attach a schedule of other states in which you have sales of tangible personal property during the taxable year and which you are not taxed; indicate, by state, the amount of sales not subject to tax.

Due dates: The annual return is due on or before the 15th day of the third month after the close of the taxable year (March 15 for calendar-year corporations). Federal income tax returns are due at the same time. (W. Va. Code § 11-24-13.) Since the federal Form 990-T for unrelated business income of exempt organizations is due within four and one-half months (instead of two and one-half months) after the close of the taxable year, the Tax Department has informally stated that the West Virginia Corporation Net Income Tax Return will be considered due on the same date. In addition, federal extensions for exempt organizations filing Form 990-T will be recognized.
**Payment of tax:** Any balance of tax as shown on the return is due on the original due date of the return. An extension of time for filing does not extend the time for payment of the tax. In order to avoid interest and late payment penalties, the balance of the tax due must be paid by the original due date of the return. (W. Va. Code § 11-24-14.) This should be done by filing a tentative return, using Form WV/CNF-120T.

**Extension of time to file:** The attachment of a copy of the federal Application for Automatic Extension of Time to File Corporation Income Tax Return (Form 7004) to the annual West Virginia return will automatically extend the time for filing the West Virginia return. The Tax Commissioner has authority to grant and has granted extensions for reasonable cause for up to six months beyond the federal limit of six months. (W. Va. Code § 11-24-18.)

**Penalty for late filing and failure to include correct information:** Any S corporation or partnership that fails to file and/or include all the correct information on Form WV/SPF100 and Form WV/NRW-2 or Form WV/NRW-4 when applicable, by the required filing date is subject to a penalty of $50.00 for each information return that they failed to file or include correct information on, not to exceed $100,000.

**Report of change in federal taxable income:** If the amount of a taxpayer's federal taxable income reported on its federal income tax return for any taxable year is changed or corrected by the Internal Revenue Service, the taxpayer must report such change or correction in federal taxable income within 90 days after the final determination of such change. The regular form marked “Amended” must be used for this purpose. When making such report, the taxpayer must disclose to the Tax Commissioner the full particulars of such federal tax change or correction. Similar rules apply for S corporations.

This rule clearly applies when a taxable member of a combined or unitary group files a separate West Virginia return or elects under W. Va. Code § 11-24-13e to file a combined return with the other taxable members of the group. It is not clear, however, the extent to which this rule applies when there is a change in the federal taxable income of a member of a combined or unitary group and that member is not taxable in West Virginia, but the federal change affects the business income of the combined or unitary group.

**Amended returns:** If a federal amended return is required, then generally a West Virginia amended return is required unless there is no change in federal taxable income. In other words, a change in federal credits should not require an amended West Virginia return. An amended state return is filed on Form WV/CNF-120 marked “Amended” and is due within 90 days after filing an amended federal return. (W. Va. Code § 11-24-20.) This applies when the taxpayer files its annual return on a separate company basis. However, for a taxable year beginning after December 31, 2008, if the taxpayer is a member of a combined group engaged in unitary business in this state, the taxpayer shall file with the amended return an amended combined report for the combined group.
For any taxable year beginning after December 31, 2008, a taxpayer engaged in unitary business activity in the State that filed an amended return, which filed under a group return under W. Va. Code § 11-24-13e, may not file a separate amended return. The member that filed the group return shall file an amended corporation net income tax return for the group for the tax year. The member shall attach to the amended group return an amended combined report for the combined group engaged in unitary business in the state. (WVCSR § 110-24-20.)

Consistency in Reporting: In completing the West Virginia Corporation Net Income/Business Franchise Tax, if you depart from or modify past procedures for classifying business income and nonbusiness income, for valuing property or including or excluding property in the property factor, for treating compensation paid in the payroll factor, for including or excluding gross receipts in the sales factor, you must disclose by separate attached schedule the nature and extent of the variance or modification. If the corporation makes sales of tangible personal property which are shipped into a state in which the corporation is not taxable, the corporation must identify the state to which the property is shipped and report the total amount of sales assigned to such state. These sales are excluded from both the numerator and denominator of the sales factor. (See ¶ 108 above.)

Tentative carrybacks: West Virginia law permits the filing of a tentative loss carryback similar to federal law as the result of a net operating loss and/or capital loss carryback. Form WV/CNF-139 is used for this purpose. Unless there is a federal Form 1139 filed, the carryback will probably be challenged by the Department. (See ¶ 106 above.)

¶ 115 Business Activities Report


Introduction: Unless specifically exempted, every corporation or partnership that carries on any business activity or owns or maintains property in West Virginia must file an annual Business Activities Report (Form BAR-0) with the Tax Commissioner. This report must be filed on or before the 15th day of the 4th month after the end of a corporation’s or partnership’s taxable year. There are no taxes or fees associated with the filing of this report.

While the filing of a Business Activities Report is not to be used in considering whether or not a corporation or partnership is subject to taxation by West Virginia, there are adverse consequences to taxpayers that do not file the report. The statute specifically prohibits, until such a Business Activity Report is filed, any taxpayer from utilizing the West Virginia court system to pursue any claim not related to a tax liability. For example, a taxpayer will be prevented, until such time as current and past due Business Activity Reports have been filed, from pursuing in a West Virginia court a contractual dispute that is governed by West Virginia law.

Exemptions from Filing: A corporation or partnership will be exempt from filing a Business Activities Report if any of the following conditions are satisfied:
(1) During the taxable year for which a report is due, the corporation or partnership is registered to engage in business in West Virginia (see ¶ 1001, chapter 10 of this Guidebook).

(2) A tax return was filed for the taxable year in question covering any of the taxes subject to the provisions of the West Virginia Tax Procedures and Administration Act (see ¶ 902, Chapter 9 of this Guidebook).

(3) The corporation or partnership is an organization expressly exempted from taxation by West Virginia or Federal statute or regulation; or its activities are similarly exempted.

Business Activity: Unless exempted as noted above, all taxpayers that engage in any business activity or own or maintain property in West Virginia are required to file an annual Business Activities Report. The following activities, unless specifically exempted, will require the filing of a Business Activities Report:

(1) Maintaining an office or other place of business in West Virginia.

(2) The presence of employees, agents, representatives, or independent contractors within this State if they are conducting business on behalf of the corporation or partnership, regardless of whether the individual or person is residing or regularly stationed in West Virginia.

(3) Owning or maintaining any real, tangible or intangible property within West Virginia.

(4) Any activity carried on by a financial organization that would be includible in the numerator of the special apportionment formula to be used by financial organizations (see ¶ 206, Chapter 2 of this Guidebook).

¶ 116 Estimated Tax


A taxable corporation is required to file a Declaration of Estimated Corporation Net Income Tax (Form WV/CNF-120ES) and make estimated tax payments if its West Virginia taxable income can reasonably be expected to exceed $10,000. Estimated tax is defined as a corporation's expected income tax liability minus its credits. A corporation is generally required to pay in equal installments at least 90% of the tax due for the filing period. Installment payments are usually due in four equal installments. Returns and payments are due on or before the 15th day of the fourth, sixth, ninth, and twelfth months of the corporation's taxable year. These dates match the federal estimated tax payment dates.

Exceptions to the 90% estimated payment rule: There are two exceptions to the 90% general rule:
Exception 1, Prior Year's Tax: This exception applies if the corporation paid an amount equal to or more than the tax shown on its return for the preceding year. A return showing tax liability must have been filed for the preceding year and the preceding year must have been a period of twelve months.

Exception 2, Tax On Annualized Income: An amount equal to 90% of the tax determined by placing on an annual basis the taxable income for: (A) the first three months of the taxable year, in the case of the installment required to be paid in the 4th month, (B) either the first three months or the first five months of the taxable year in the case of the installment required to be paid in the 6th month, (C) either the first six months or the first eight months of the taxable year in the case of the installment required to be paid in the 9th month, and (D) either the first nine months or the first eleven months of the taxable year in the case of the installment required to be paid in the 12th month.

To annualize income, multiply taxable income for the period by 12 and divide the result by the number of months in the period (3, 5, 6, 8, 9, or 11, as the case may be).

Form WV/CNF-120U is used to compute the penalty and/or the exceptions to the penalty. The rate is subject to adjustment twice a year-on April 15 for the succeeding July 1 through December 31, and on October 15 for the succeeding January 1 through June 30. The current penalty rate is 9.5% per annum.

¶ 117 Consolidated Returns


Consolidated returns are not allowed for any taxable year beginning after December 31, 2008. For taxable years beginning before January 1, 2009, the following rules apply.

The prior regulations provide that a corporation that elects to file a consolidated federal income tax return as part of an affiliated group of corporations must file a separate West Virginia income tax return unless all members of the affiliated group elect to file a consolidated West Virginia income tax return. The filing of a consolidated West Virginia return is considered to be consent by the group. If a consolidated West Virginia return is filed for any taxable year ending after June 30, 1987, the members of the affiliated group must thereafter continue to file a consolidated return unless the Tax Commissioner consents to revocation of the election. (W. Va. Code § 11-24-13a(a) and (b)(1), prior WVCSR § 110-24-43a.) The filing method is also controlling for West Virginia business franchise taxes. However, there was a statutory change for taxable years ending after March 8, 1990, to remove this controlling filing method for severance and telecommunications taxes. (W. Va. Code § 11-24-13a(i).)

Prior regulations are not detailed except for computing taxable income applicable to financial institutions where a taxable year includes a time period prior to July 1,
The filing of West Virginia consolidated returns will not be permitted unless all members of the consolidated group have their commercial domicile in West Virginia. (WVCSR § 110-24-7.3.a.1.)

For taxable years beginning prior to January 1, 2009, the Tax Commissioner also has authority to require corporations to file consolidated returns to clearly reflect taxable income, if the Tax Commissioner determines that intercompany pricing or transactions have artificially shifted taxable income to, between, or among affiliated groups. However, under S. B. 749, a consolidated return may not be filed, or required by the Tax Commissioner, for taxable years beginning after December 31, 2008. (See ¶ 101 above.)

¶ 118 Nonresident Shareholder Withholding


S corporations are required to withhold West Virginia income tax from each nonresident shareholder that has not given to the S corporation a West Virginia Nonresident Income Tax Agreement, Form WV/NRW-4. The amount to be withheld for years beginning after December 31, 2007 is 6.5% of the nonresident shareholder’s share of the S corporation’s Federal Taxable Income or portion thereof that is derived from or attributable to West Virginia sources, whether such amount is actually distributed or is deemed to have been distributed for Federal Income Tax purposes.10

TAA 92-005 provides the following guidance regarding nonresident shareholders:

Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property constitute income from West Virginia sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in West Virginia. (W. Va. Code § 11-21-32(b)(2)). Accordingly, income of nonresident individuals from rents or royalties for the use of, or for the privilege of using in West Virginia, patents, copyrights, secret processes and formulas, goodwill, trademarks, trade brands, franchises, and other like property is taxable if such property has a business situs in West Virginia. Income of nonresidents from other intangible personal property such as shares of stock in C corporations, bonds, notes, bank deposits and other indebtedness is taxable if such property has a business situs in West Virginia.

Intangible personal property has a business situs in West Virginia if it is employed as capital in West Virginia, or the possession and control of the property has been localized in connection with a

10 For taxable years that began before January 1, 2008 the withholding tax rate was 4%.
business, trade, profession, or occupation carried on in West Virginia so that its substance and value attach to and become an asset of the business, trade, profession, or occupation carried on in West Virginia.

The individual nonresident shareholders may claim the amount withheld as a credit against their West Virginia Personal Income Tax liability by attaching a copy of the information statement provided by the S corporation to their West Virginia (Nonresident) Income Tax Return, Form IT-140.

**Payment of Tax Withheld:** The entire tax withheld from the nonresident shareholder is required to be paid on or before the 15th day of the 3rd month following the close of the taxable year and must accompany the corporation’s West Virginia S corporation return. An extension of time to file does not extend the date for payment of tax.

**Information Statement of Tax Withheld:** Every S corporation required to deduct and withhold tax on nonresident shareholders must provide an information statement to each nonresident shareholder. The information statement provided by the S corporation is not required to be attached to the nonresident shareholder’s West Virginia (Nonresident) Income Tax Return, Form IT-140. (For years prior to 2007, Form IT-140NR should be filed.) The S corporation may satisfy this requirement by indicating this information on Form WV/NRW-2, Statement of West Virginia Income Tax Withheld for Nonresident Individual or Organization or in the supplemental information area of the nonresident shareholder’s copy of Federal Schedule K-1 or by an attachment to the Federal Schedule K-1 listing the same information. The nonresident shareholders must complete and attach Form IT-140W (West Virginia Withholding Tax Schedule) to their West Virginia Nonresident Income Tax Return to claim credit for the tax withheld.

¶ 119 Composite Nonresident Personal Income Tax Return

**Law:** W. Va. Code § 11-21-51a

An S Corporation, instead of withholding tax on distributions of West Virginia source income to its nonresident shareholders, may elect to satisfy the nonresident withholding requirements by filing a West Virginia Nonresident COMPOSITE Income Tax Return (Form IT-140NRC) for one or more of its nonresident shareholders. A composite return is a return filed on a group basis as though there was only one taxpayer. A list setting forth the name, address, taxpayer identification number, and percent of ownership of each nonresident shareholder included in the return must be maintained. The list should NOT be submitted with the composite return, but should be made available to the State Tax Department upon request. The return does not have to be signed by each nonresident shareholder provided it is signed by a corporate officer. When filing a composite return, no personal exemptions may be utilized and the rate of tax is 6.5% of the taxable income. The S corporation is responsible for collecting and remitting all income tax due at the time the return is filed. The due date for a composite return is the 15th day of the 4th month following the
close of the taxable year. A $50.00 processing fee must also accompany the composite return.

Any nonresident shareholder included in a composite return, that has income from any other West Virginia source, must file a separate Nonresident Personal Income Tax Return for the taxable year to report and pay Personal Income Tax on all of his West Virginia source income. The nonresident may claim credit for his or her share of West Virginia income tax remitted with the composite return.

¶ 120 Recordkeeping Requirements


Every corporation subject to tax under the West Virginia Corporation Net Income Tax Act, and any corporation required to file a return of information with respect to income, must keep such permanent books of account or records as are sufficient to establish the amount of income, deductions, credits or other matters required to be shown by such corporation in any return of such tax or information. The Tax Commissioner is authorized to prescribe the content and form of returns and statements and may require the inclusion in a return, document, or statement of any information he deems necessary for the proper enforcement of the West Virginia Corporation Net Income Tax Act.

Bookkeeping entries of themselves are not conclusive of the amount of income. The actual facts rather than the book entries control. Also, entries on another individual's books are not conclusive against a taxpayer. The books or records required by this regulation must be kept at all times available for inspection by authorized representatives of the Tax Commissioner. The records required in this regulation must be kept accurately, but no particular form is required for keeping the records. Such methods of accounting must be used as will enable the Tax Commissioner to ascertain whether liability for tax has been incurred, and if so, the correctness of the amounts required to be reported in any return of tax or information.

¶ 121 Procedure and Administration


The West Virginia Tax Procedure and Administration Act discussed in Chapter 9 of this Guidebook applies to the corporation net income tax.

¶ 122 Corporation Net Income Tax Return Forms and Schedules

Forms discussed in this chapter are available at the Department’s website: http://www.wva.state.wv.us/wvtax/. Under the Forms icon located in the left column on that page and choose Business Tax Forms. On the next page, click on the heading Corporate Net / Business Franchise or Withholding, if applicable, that appears in the center of the page. The next page that appears will include some of the following forms and schedules, which are available to print or download:
### Forms:

<table>
<thead>
<tr>
<th>Form Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>BAR-0</td>
<td>Business Activity Report</td>
</tr>
<tr>
<td>WV/CNF-120</td>
<td>West Virginia Corporation Net Income/Business Franchise Tax Return</td>
</tr>
<tr>
<td>CNF-120 APT</td>
<td>Allocation and Apportionment for Multistate Businesses</td>
</tr>
<tr>
<td>CNF-120 ES</td>
<td>Estimated Corporate Income/Business Franchise Tax Payment</td>
</tr>
<tr>
<td>CNF-120-T</td>
<td>Tentative Corporation Net Income/Business Franchise Tax Payment</td>
</tr>
<tr>
<td>CNF-120-TC</td>
<td>Summary of Corporation Net Income Tax/Business Franchise Tax Credits</td>
</tr>
<tr>
<td>CNF-120-U</td>
<td>Underpayment of Estimated Tax Penalty</td>
</tr>
<tr>
<td>CNF-139</td>
<td>Corporation Application for Refund from Carryback of Net Operating Loss</td>
</tr>
<tr>
<td>SPF-100</td>
<td>Income/Business Franchise Tax Return for S Corporation and Partnership</td>
</tr>
<tr>
<td>SPF-100 APT</td>
<td>Allocation and Apportionment for Multistate Businesses</td>
</tr>
<tr>
<td>SPF-100 ES</td>
<td>Estimated Income / Business Franchise Tax Payment for S Corporation and Partnership</td>
</tr>
<tr>
<td>SPF-100-T</td>
<td>Extension of Time to File Information Returns</td>
</tr>
<tr>
<td>SPF-100-TC</td>
<td>Summary of Business Franchise Tax Credits</td>
</tr>
<tr>
<td>SPF-100-U</td>
<td>Underpayment of Estimated Business Franchise Tax</td>
</tr>
<tr>
<td>WV-100V</td>
<td>Income/Business Franchise Tax for S Corporations and Partnerships Electronic Payment Voucher and Instructions</td>
</tr>
<tr>
<td>WV-120V</td>
<td>Corporation Net Income/Business Franchise Tax Electronic Payment Voucher and Instructions</td>
</tr>
</tbody>
</table>

### Schedules:

<table>
<thead>
<tr>
<th>Schedule Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>SP</td>
<td>Income/Business Franchise Tax Return for S Corporations and Partnerships</td>
</tr>
<tr>
<td>UB-1</td>
<td>List of Members in Unitary Combined Group</td>
</tr>
<tr>
<td>UB-2</td>
<td>Calculation of WV Taxable Capital of Combined Group</td>
</tr>
<tr>
<td>UB-3</td>
<td>Calculation of WV Taxable Income for Combined Group</td>
</tr>
<tr>
<td>UB-4-APT</td>
<td>Allocation and Apportionment for Multistate Businesses</td>
</tr>
<tr>
<td>UB-4-COR</td>
<td>Schedule UB-4-COR (No Longer In Use)</td>
</tr>
<tr>
<td>UB-4-FRA</td>
<td>Schedule UB-4-FRA (No Longer In Use)</td>
</tr>
</tbody>
</table>
INDEX – CHAPTER 1 – CORPORATION NET INCOME TAX

accounting periods and methods ¶ 112
adjusted federal taxable income ¶ 106
aerospace industrial facility investment credit ¶ 113
allocation of income
  allocation of corporate partner’s distributive share ¶ 107
  allocation of nonbusiness income ¶ 107
  apportionment ¶ 108
    financial organizations ¶ 110
    motor carriers ¶ 109
allowance for certain obligations
  obligations secured by residential real property ¶ 106
  state an local obligations ¶ 106
alternative-fuel motor vehicle tax credit ¶ 113
alternative apportionment method ¶ 108
apportionment
  apportionment by three-factor formula (with double-weighted sales) ¶ 108
  apportionment – financial organizations ¶ 110
  apportionment – motor carriers ¶ 109
apprentice training tax credit ¶ 113
attachments to tax return ¶ 114
basis of tax ¶ 106
business activity report ¶ 115
  “business activity” defined ¶ 115
    exemptions from filing ¶ 115
  “business income” defined ¶ 107
business investment and jobs expansion credit ¶ 113; ¶ 338
change in accounting method ¶ 112
conformity with federal income tax law ¶ 101
combined reporting ¶ 101
  “combined report” defined ¶ 101
  “commonly owned or common ownership” defined ¶ 101
  “stapled entities” defined ¶ 101
  “unitary business” defined ¶ 101
combined returns ¶ 101
commercially domiciled financial organizations tax credit ¶ 113
composite nonresident personal income tax returns ¶ 119
consistency in reporting ¶ 114
consolidated returns ¶ 117
corporate partner’s distributive share ¶ 107
corporation defined ¶ 102
corporations subject to tax ¶ 102
controlled foreign corporations, income of ¶ 106

credits against tax

- aerospace industrial facility investment credit ¶ 113
- alternative fuel tax credit for commercial refueling facility infrastructure ¶ 113
- alternative fuel tax credit for purchase of new alternative-fuel vehicle or conversions of existing vehicle ¶ 113
- apprentice training tax credit ¶ 113
- business investment and jobs expansion credit ¶ 113; ¶ 338
- commercial patent incentives tax credit ¶ 113
- commercially domiciled financial organizations tax credit ¶ 113
- credit for utilities with net operating loss carryovers ¶ 113
- economic opportunity tax credit ¶ 113
- electric and gas utilities rate reduction credit ¶ 113
- environment agricultural equipment tax credit ¶ 113
- film industry tax credit ¶ 113
- high growth business investment tax credit ¶ 113
- historic building rehabilitation ¶ 113
- manufacturing investment tax credit ¶ 113
- manufacturing property tax adjustment tax credit ¶ 113
- research and development projects credit ¶ 113
- strategic research and development tax credit ¶ 113
- telephone utilities rate reduction credit ¶ 113
- W.Va. military incentive credit ¶ 113
- W.Va. neighborhood investment program ¶ 113

decreasing adjustments to federal taxable income ¶ 106

economic opportunity tax credit ¶ 113
- electric and gas utilities rate reduction credit ¶ 113
- engaging in business defined ¶ 102
- environment agricultural equipment tax credit ¶ 113
- estimated tax ¶ 116
  - exceptions to 90% estimated tax payment rule ¶ 116
- exempt corporations ¶ 103

- federal net operating loss deduction ¶ 106
- film industry tax credit ¶ 113
- financial organizations
  - apportionment – out-of-state financial organizations ¶ 110
  - financial organization defined ¶ 110
  - in-state financial organizations ¶ 110
  - out-of-state financial organizations ¶ 110
  - taxability of out-of-state financial organizations ¶ 110
- foreign source income ¶ 106
- foreign sourced dividends, adjustment for ¶ 106
- foreign taxes deducted for federal income tax purposes ¶ 105
gain from sale of assets acquired prior to July 1, 1967 ¶ 106

high growth business investment tax credit ¶ 113
historic rehabilitated buildings investment credit ¶ 113
history of tax ¶ 101

increasing adjustments to federal taxable income ¶ 105
  addback for intangible expense and interest expense paid to related person ¶ 101;
  ¶ 105
  addback for dividends paid deduction of captive real estate investment trusts ¶ 105
  addback for dividends paid deduction of regulated investment companies ¶ 105
  income from federal securities ¶ 105
  income from federal securities not exempt from state taxes ¶ 105
  income from state and local obligations ¶ 105
  interest to carry state and local disallowed for federal income tax purposes ¶ 106
  income-type taxes deducted for federal income tax purposes ¶ 106
  IRC § 199 deduction disallowed ¶ 105

manufacturing investment tax credit ¶ 113
manufacturing property tax adjustment tax credit ¶ 113

net operating losses ¶ 105; ¶ 106
nonresident S corporation shareholder withholding ¶ 118
  information statement of tax withheld ¶ 118
  payment of withheld tax ¶ 118

partnership distributive share ¶ 101
payment of tax ¶ 114
payroll factor ¶ 108
penalties
  late filing and incorrect information ¶ 114
  estimated taxes ¶ 116
pollution control facilities
  expensing of facility costs for CNIT purposes ¶ 106
  disallowance of depreciation for federal income tax purposes ¶ 105
procedure and administration ¶ 121
property factor ¶ 108

qualified production activity deduction ¶ 105

rate of tax ¶ 111
real estate investment trusts ¶ 101; ¶ 105
recordkeeping requirements ¶ 120
refund or credit for taxes included in federal income ¶ 106
regulated investment companies ¶ 101; ¶ 105
report of change in federal taxable income ¶ 114
research and development tax credit ¶ 113
returns and reports
  amended returns ¶ 114
  annual returns ¶ 114
  business activity report ¶ 115
  change in federal taxable income ¶ 114
  combined returns ¶ 101; ¶ 114
  consolidated returns ¶ 117
  due dates ¶ 114
  estimated tax ¶ 116
  extension of time to file ¶ 114
  report of change in federal taxable income ¶ 114
  specimen return ¶ 120; 122
  tentative loss carrybacks ¶ 114

sales factor ¶ 108
  sales of tangible property ¶ 108
  sales of other than tangible property ¶ 108
salary expenses disallowed by reason of federal jobs credit ¶ 106
Schedule UB ¶ 101; ¶ 108
strategic research and development tax credit ¶ 113

telephone utilities rate reduction credit ¶ 113
tentative loss carrybacks ¶ 114
taxable income, defined ¶ 104 – ¶ 106
  decreasing adjustments to federal taxable income ¶ 106
  increasing adjustments to federal taxable income ¶ 105

“unitary business” defined ¶ 101
unitary method of reporting ¶ 101; ¶ 108
unrelated business income of exempt corporations ¶ 105

W. Va. military incentive credit ¶ 113
W. Va. neighborhood investment program credit ¶ 113
W. Va. net operating loss deduction ¶ 106
CHAPTER 2
BUSINESS FRANCHISE TAX
By David L. Phillips

David L. Phillips is an executive director in charge of tax practice for the Charleston, West Virginia office of Ernst & Young. He was a special advisor to Governor Cecil H. Underwood’s Commission on Fair Taxation and is a frequent lecturer and author commenting on West Virginia tax matters.

Published by West Virginia Society of Certified Public Accountants
900 Lee Street, E. Suite 1201, Charleston, WV 25301
© 1993 Commerce Clearing House, Inc. © 2012 West Virginia Society of Certified Public Accountants
All Rights Reserved

Table of Contents

<table>
<thead>
<tr>
<th>¶ 201 Introduction</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>¶ 202 Taxpayers Subject to Tax</td>
<td>2-2</td>
</tr>
<tr>
<td>¶ 203 Exemptions from Tax</td>
<td>2-3</td>
</tr>
<tr>
<td>¶ 204 Tax Levied on Capital</td>
<td>2-4</td>
</tr>
<tr>
<td>¶ 205 Apportionment by Three-Factor Formula</td>
<td>2-8</td>
</tr>
<tr>
<td>¶ 206 Special Apportionment for Financial Organizations</td>
<td>2-11</td>
</tr>
<tr>
<td>¶ 207 Rate of Tax</td>
<td>2-13</td>
</tr>
<tr>
<td>¶ 208 Credits Against Tax</td>
<td>2-14</td>
</tr>
<tr>
<td>¶ 209 Accounting Periods and Methods</td>
<td>2-17</td>
</tr>
<tr>
<td>¶ 210 Annual Returns</td>
<td>2-17</td>
</tr>
<tr>
<td>¶ 211 Declaration and Payment of Estimated Tax</td>
<td>2-19</td>
</tr>
<tr>
<td>¶ 212 Return Requirements</td>
<td>2-19</td>
</tr>
<tr>
<td>¶ 213 Records</td>
<td>2-19</td>
</tr>
<tr>
<td>¶ 214 Business Activities Report</td>
<td>2-19</td>
</tr>
<tr>
<td>¶ 215 General Procedure and Administration</td>
<td>2-19</td>
</tr>
<tr>
<td>¶ 216 Specimen Return – Combined Corporation Net Income/Business Franchise Tax Return – Form WV/CNF-120</td>
<td>2-21</td>
</tr>
</tbody>
</table>

INDEX -- CHAPTER 2 -- BUSINESS FRANCHISE TAX

¶ 201 Introduction

History of tax: West Virginia's business franchise tax was enacted in 1985 to become effective for tax years beginning on or after July 1, 1987. The present law is codified at Chapter 11, Article 23, of the West Virginia Code.

The genesis for the business franchise tax can be found in the findings, conclusions, and recommendations made in March 1984 by the West Virginia Tax Study
Commission. The Commission recommended that the business and occupation tax, which imposed a tax on the gross receipts of all business activities carried on within the state be replaced with a variety of taxes, including a broad-based business franchise tax. The legislative authority for the franchise tax can be found in Article X, Section 1 of the Constitution of West Virginia, which states in part that:

"... the Legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations ..."

**Summary of tax:** The business franchise tax is imposed on all corporations, associations, and partnerships for the privilege of doing business in the state or owning or leasing property having a business situs within West Virginia. The tax is not an ad valorem property tax. The measure of the tax is the taxable "capital" of an entity, as adjusted and apportioned as provided by law.

## 202 Taxpayers Subject to Tax


The business franchise tax is imposed on the privilege of doing business in West Virginia and in consideration of the benefits and protections conferred by the state on businesses. The tax is imposed upon every domestic corporation, every corporation having its commercial domicile within the state, and every foreign or domestic corporation leasing property located within West Virginia or doing business within the state. The tax is also applicable to every partnership doing business within the state or owning or leasing property located within West Virginia. The term "doing business" is broadly defined and includes any activity of a corporation or partnership that results in nexus in the state.

For years beginning after December 31, 2008, West Virginia adopted a combined system of tax reporting for businesses. Comprehensive legislative rules for the corporation net income tax were promulgated by the Tax Commissioner that took effect May 11, 2010. These rules discuss unitary groups and combined reporting for purposes of the corporation net income tax. No rules or other written guidance have been provided by the State Tax Department explaining how combined reporting concepts are applied in the context of the business franchise tax. Regulations adopted prior to migration to the combined reporting system remain in effect for business franchise tax.

As discussed in the legislative rule for the corporation net income tax, for purposes of W. Va. Code § 11-23-1 *et seq.:

"a partnership shall be treated as conducted by its partners....to the extent of the partner’s distributive share of the partnership’s income.... A business conducted directly or indirectly by one corporation through its direct or indirect interest in a partnership will be unitary with that portion of a business conducted by one or more other corporations 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.\textsuperscript{1}

A partnership interest that is not part of a unitary business will be treated as a discrete separate business.

\section*{203 Exemptions from Tax}

\textit{Law:} W. Va. Code § 11-23-7 \textit{et seq.}

A number of organizations and persons are specifically exempted from the imposition of the business franchise tax. Some of the exemptions completely shelter an entity from tax while other exemptions are narrow and only partially exempt an entity from the business franchise tax. The exemptions are as follows:

\textit{Individuals doing business:} Natural persons doing business in West Virginia that are not doing business in the form of a corporation or partnership are exempt from tax. Natural persons include sole proprietors and other self-employed persons.

\textit{Insurance companies:} Insurance companies that pay the State of West Virginia a tax on premium income and insurance companies that pay the surcharge imposed by W. Va. Code § 23-2C-3(f)(1) or (3) are exempt from tax.

\textit{Farm credit associations:} Production credit associations organized under the provisions of the federal "Farm Credit Act of 1933" are exempt from tax. It should be noted, however, that this exemption is not applicable if the production credit association is organized under the cooperative association provisions of Chapter 19, Article 4 of the West Virginia Code.

\textit{Credit unions:} Credit unions organized under the provisions of Chapter 31 of the West Virginia Code are exempt from tax. It should be noted, however, that this exemption is not applicable if the credit union is organized under the cooperative association provisions of Chapter 19, Article 4 of the West Virginia Code.

\textit{State and local government corporations:} Corporations organized under West Virginia law which are political subdivisions of the State or which are an instrumentality of a political subdivision, if created pursuant to the West Virginia Code, are exempt from tax.

\textit{Race tracks:} A corporation or partnership licensed under the provisions of W. Va. Code § 19-23-1 is exempt from tax. However, if the entity is not exclusively engaged in a horse or dog racing activity, its tax base is apportioned among its several activities and only that portion attributable to the horse or dog racing activity is exempt from tax.

\textit{Certain trusts or employees:} Certain trusts established for employees under 29 U.S.C. Sec. 186 are exempt from tax.

\textsuperscript{1} As used here, "partnership" means any entity treated as a partnership for federal income tax purposes.
Farming entities: Corporations and partnerships whose principal activities are agricultural or farming are exempt from tax. To be exempt as an agriculture or farming entity, the activity must involve at least five acres of land and the production of at least $1,000 of product per year. The exception of agriculture and farming from the business franchise tax extends to activities of growing and managing timberland, provided there is no direct involvement in actual timbering activity and the other statutory quantifications and qualifications are met. Syllabus point 4, *Morris v. Heartwood Forestland Fund Ltd. P'ship*, 228 W. Va. 142, 718 S.E.2d 492 (2010).

Exempt organizations: A limited exemption is provided to entities that are exempt from federal income tax under the provisions of IRC § 501. To the extent that a tax-exempt entity is engaged in activities generating unrelated business income, the entity is subject to the business franchise tax. Therefore, the mere generation of gross unrelated business income will subject an otherwise tax-exempt entity to the business franchise tax. The measure of the tax is the portion of capital utilized in the unrelated business activities and is determined by multiplying the organization's capital by a fraction, the numerator of which is the entity's total gross unrelated business income, and the denominator of which is all gross income of the entity.

\[
\text{Taxable capital} = \text{Exempt organization's capital} \times \frac{\text{Unrelated gross income}}{\text{All gross income}}
\]

The tax base so determined is subject to normal apportionment and adjustment for certain governmental obligations and obligations secured by residential property.

Hunting clubs: Corporations and partnerships who operate as hunting clubs are exempt from tax, provided the corporation or partnership distributes no dividends or income to its owners.

Certified capital companies: Companies certified as West Virginia capital companies are exempt from tax on that portion of their capital used in providing venture capital to West Virginia businesses. However, if the entity is not exclusively engaged providing venture capital, its tax base is apportioned among its several activities and only that portion attributable to providing venture capital is exempt from tax.

Entities disregarded for federal tax purposes: Single-member limited liability companies that are disregarded for federal and state income tax purposes, along with partnerships that have elected out of partnership status under Internal Revenue Code §761 are exempt from tax. When the single member limited liability company is an individual, no business franchise tax return is filed by the disregarded limited liability company. When a disregarded single member limited liability company is owned by a corporation, the corporation must file a business franchise tax return.

¶ 204 Tax Levied on Capital


*Capital:* The tax base of a taxpayer subject to the business franchise tax is the
entity's average "capital" as apportioned and adjusted.

Corporations: Broadly speaking, capital of a corporation means the average of the beginning of the year and end of the year shareholders' equity as reflected on the corporation's federal Form 1120, Schedule L balance sheets, prepared in accordance with generally accepted accounting principles (GAAP) and filed with the Internal Revenue Service. Accordingly, capital includes all common and preferred stock, paid-in capital, capital surplus, retained earnings (whether appropriated or unappropriated) and, in the case of an S corporation, the amount of the accumulated adjustment account and any undistributed taxable income. It should be noted that, by definition, stock or shareholders' equity does not include non-voting stock that is limited and preferred as to dividends or treasury stock.

The term “corporation” includes any corporation, S corporation, joint stock company, and any association or other organization which is taxable as a corporation under federal income tax laws such as a limited liability company that elects to be treated as a corporation for federal and state income tax purposes.

Partnerships: For partnerships, the capital of a partnership means the average of the beginning and end of year balances of the partners' capital accounts as reflected on the partnership's federal Form 1065, Schedule L balance sheets, prepared in accordance with GAAP and filed with the Internal Revenue Service.

The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated by means of which a business is carried on and which is not a trust, estate, a corporation, or a sole proprietorship.

Commissioner's power to increase capital: Capital also includes any additional items or accounts of the taxpayer and any adjustments thereto that, in the opinion of the Tax Commissioner, are deemed necessary to represent equity or capital of the taxpayer under generally accepted accounting principles.

Combined reporting: The combined reporting rules used to apportion the unitary business income of the combined group also apply to computation of the taxable capital of members of the combined group for business franchise tax purposes. See W. Va. Code § 11-24-13a(e) and (j) and § 11-24-13f(c).

SB 386, which was passed by the Legislature on March 8, 2012, and took effect on June 6, 2012, amended and reenacted W. Va. Code § 11-24-13f relating to taxation of water’s-edge corporations under the West Virginia Corporation Net Income Tax Act. It exempts from taxation certain income which is exempt from taxation under certain federal tax treaties; clarifies the entities that must be included in a water’s-edge group combined report for corporation net income tax purposes; provides the Tax Commissioner with authority to require reports or make adjustments regarding combined reports; and authorizes the Tax Commissioner to promulgate legislative, procedural or emergency rules, as necessary. The provisions of SB 386 have effect as
taxpayers are required to apply the water’s edge reporting concepts to both income and business franchise tax computations. See W.Va. Code § 11-24-13f(5)(c).

As discussed above, as of the end of 2012, no regulations nor other written guidance have been provided by the West Virginia State Tax Department under Article 23 on how combined reporting concepts are applied in the context of the business franchise tax. Accordingly, there are numerous issues regarding determination of taxable capital that remain uncertain or unclear at this time.

Reliance on GAAP: The statute and regulations clearly indicate that a taxpayer’s federal income tax return balance sheet (Schedule L) should ideally be prepared in accordance with generally accepted accounting principles. In those cases where the federal tax return balance sheets and more specifically, the capital accounts appearing on the balance sheet, are not prepared in accordance with GAAP, taxpayers may be required by the Commissioner to make such adjustments to the capital accounts as are necessary to properly reflect capital on a GAAP basis. Informally, the State Tax Department has indicated that it will generally not exercise its authority to require GAAP basis computations unless the Department perceives an abusive situation. In cases where adjustments are required to reflect capital on a GAAP basis, details of the adjustments and a reconciliation from the tax return balance sheet capital accounts to GAAP basis capital accounts used for business franchise tax purposes should be prepared and filed with the return.

Adjustments to average capital: Once the average capital for the year has been determined, an adjustment must be made in situations where the taxpayer holds certain governmental obligations or obligations secured by residential property. A taxpayer is allowed to reduce its average capital by the proportion of capital attributable to the following assets owned by the taxpayer:

(1) Obligations and securities of the United States or any agency, authority, commission or instrumentality of the United States;

(2) Obligations of the State of West Virginia or any political subdivision of the state; and

(3) Investments or loans primarily secured by mortgages or deeds of trust on residential property or mobile homes located in West Virginia and occupied by non-transients.

The definition of federal obligations qualifying for a reduction to the tax base is rather broad and includes not only direct obligations of the federal government, but also direct obligations and securities of "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." (W. Va. Code § 11-23-3(b)(2)(E)(i)(l)) However, the regulations indicate that instruments that have a government guarantee as opposed to a direct obligation will not qualify for adjustment of the tax base.
In order to determine the proportion of average capital to be included in the tax base, it is necessary for taxpayers to determine the monthly averages of the obligations noted above as well as the monthly averages of the taxpayer's total assets. Monthly averages are determined by computing an average for each month of the taxable year and dividing the sum of the monthly averages by the number of months in the taxable year. Once monthly averages have been determined, the taxable proportion of capital can be computed by the following formula:

\[
\text{Average monthly balance of excluded obligations} = \text{Adjusted average capital} \times \left(1 - \frac{\text{Average monthly total assets}}{\text{Average capital}}\right)
\]

For purposes of determining average monthly balances, the regulations indicate that the balances should be determined at "cost" in the same manner as the obligations, investments, and loans are reported on Schedule L of the taxpayer's federal income tax return. Presumably "cost" can be either the book or tax basis of the obligation. An example of the foregoing computation is as follows:

**Example:** Assume a corporate taxpayer has the following assets and shareholders' equity for 20xx:

Total shareholders' equity or capital as of:
- 1/01/xx = $1,200,000
- 12/31/xx = $1,450,000
- Average = \( \frac{1,200,000 + 1,450,000}{2} = 1,325,000 \)

United States securities owned and total assets as of:

<table>
<thead>
<tr>
<th>Date</th>
<th>US Securities</th>
<th>Total Assets</th>
<th>Monthly Averages</th>
<th>US Securities</th>
<th>Total Assets</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/01/xx</td>
<td>$300,000</td>
<td>$2,000,000</td>
<td></td>
<td>$312,500</td>
<td>$2,100,000</td>
</tr>
<tr>
<td>2/01/xx</td>
<td>$325,000</td>
<td>$2,200,000</td>
<td></td>
<td>$337,500</td>
<td>$2,250,000</td>
</tr>
<tr>
<td>3/01/xx</td>
<td>$350,000</td>
<td>$2,300,000</td>
<td></td>
<td>$300,000</td>
<td>$2,275,000</td>
</tr>
<tr>
<td>4/01/xx</td>
<td>$250,000</td>
<td>$2,250,000</td>
<td></td>
<td>$175,000</td>
<td>$2,275,000</td>
</tr>
<tr>
<td>5/01/xx</td>
<td>$100,000</td>
<td>$2,300,000</td>
<td></td>
<td>$75,000</td>
<td>$2,325,000</td>
</tr>
<tr>
<td>6/01/xx</td>
<td>$ 50,000</td>
<td>$2,350,000</td>
<td></td>
<td>$25,000</td>
<td>$2,325,000</td>
</tr>
<tr>
<td>7/01/xx</td>
<td>-0-</td>
<td>$2,300,000</td>
<td>-0-</td>
<td>-0-</td>
<td>$2,300,000</td>
</tr>
<tr>
<td>8/01/xx</td>
<td>-0-</td>
<td>$2,300,000</td>
<td>-0-</td>
<td>-0-</td>
<td>$2,350,000</td>
</tr>
<tr>
<td>9/01/xx</td>
<td>-0-</td>
<td>$2,400,000</td>
<td>-0-</td>
<td>-0-</td>
<td>$2,425,000</td>
</tr>
<tr>
<td>10/01/xx</td>
<td>-0-</td>
<td>$2,450,000</td>
<td>$25,000</td>
<td>$2,450,000</td>
<td>$2,425,000</td>
</tr>
<tr>
<td>11/01/xx</td>
<td>$ 50,000</td>
<td>$2,400,000</td>
<td>$55,000</td>
<td>$2,425,000</td>
<td>$2,425,000</td>
</tr>
<tr>
<td>12/01/xx</td>
<td>$ 60,000</td>
<td>$2,450,000</td>
<td>$70,000</td>
<td>$2,455,000</td>
<td>$2,455,000</td>
</tr>
<tr>
<td>12/31/xx</td>
<td>$ 80,000</td>
<td>$2,460,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$1,375,000</strong></td>
<td><strong>$27,930,000</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Based upon the above, the corporation’s adjusted average capital is determined to be $1,260,075 as follows:

\[
\frac{1,375,000}{12} \times (1 - \frac{27,930,000}{12}) = 1,260,075
\]
Apportionment by Three-Factor Formula

A taxpayer who is doing business both within and without West Virginia and, accordingly, is taxable in another state must apportion its capital base to West Virginia. Apportionment, for taxpayers other than financial organizations, is accomplished by multiplying the tax base (after adjustment for governmental and mortgage obligations) by a fraction, the numerator of which is the sum of the property factor plus the payroll factor plus two times the sales factor, and the denominator of which is four. In cases where the denominator of a factor is zero, the denominator of the apportionment formula fraction is decreased by the number of factors having zero. If the denominator of the sales factor is zero, then the apportionment fraction denominator is decreased by two.

\[
\text{Property factor + payroll factor + \frac{\text{Adjusted average capital} \times (2 \times \text{sales factor})}{4}} = \text{Taxable capital}
\]

**Property factor:** The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used by the taxpayer within West Virginia during the taxable year, and the denominator of which is the average value of all real and tangible personal property owned or rented by the taxpayer.

\[
\text{Property factor} = \frac{\text{Average value of real and tangible personal property in W.Va.}}{\text{Average value of all real and tangible personal property}}
\]

The average value of all real and tangible personal property is taken from the taxpayer's federal income tax return, Schedule L. The average value of property is determined by averaging the values at the beginning and end of the taxable year. However, in cases where there are substantial fluctuations during the year, the Tax Commissioner may require the taxpayer to average monthly values. For purposes of determining the average value of property, original cost is to be used. Property that is not owned, but rented by the taxpayer, is valued at eight times the net annual rental rate. Rent includes all amounts payable under the lease arrangement in situations where a rental agreement obligates the lessee to pay for such items as interest, taxes, insurance, repairs, etc., as is typically found in a triple net lease. Leasehold improvements are considered property for purposes of apportionment, even if the improvements revert to the lessor upon termination of the lease.

For purposes of determining the property factor as it relates to moveable tangible personal property used within and without West Virginia, the value of the moveable property is determined by multiplying the original cost of such property by a fraction, the numerator of which is the number of days the moveable property has a physical presence in West Virginia and the denominator of which is the number of days of physical presence everywhere during the taxable year. Days of physical location can be determined by statistical methods or any other reasonable basis acceptable to the Tax Commissioner.
Value of moveable property = Cost of moveable property in W.Va. during any part of year \times \text{Days within W.Va.} \times \text{Days everywhere}

**Payroll factor**: The payroll factor is a fraction, the numerator of which is the total compensation paid in West Virginia during the taxable year, and the denominator of which is the total compensation paid by the taxpayer to all employees regardless of domicile as reflected on the taxpayer’s federal tax forms.

\[
\text{Payroll factor} = \frac{\text{Payroll in W.Va.}}{\text{Total payroll}}
\]

For purposes of the payroll factor, compensation typically means all wages and other forms of remuneration paid to employees for personal services that are reportable on federal Form W-2. Payments made to independent contractors or to individuals who are not deemed employees for federal income tax purposes are not considered compensation for purposes of the payroll factor.

Compensation is deemed paid in West Virginia and shall be considered as a part of the numerator in the payroll factor if the employee’s services are either:

1. Performed entirely within West Virginia; or
2. Performed both within and without the state, but the services performed outside of West Virginia are incidental to the employee’s services within the state; or
3. Performed both within and without West Virginia and one of the following elements is present:
   (a) The employee's base of operations is located within West Virginia; or
   (b) The employee has no base of operations but, the employee is directed or controlled from a location within West Virginia; or
   (c) There is no base of operations in any state in which some of the employee's services are performed and the employee's residence is located within West Virginia. (W. Va. Code § 11-23-5(j)).

**Sales factor**: The sales factor is a fraction, the numerator of which is the gross receipts of the taxpayer derived from normal business transactions and activities within West Virginia, net of any returns and allowances, and the denominator of which is the total gross receipts derived by the taxpayer from its normal business activities and reflected as gross income on its federal tax forms.

\[
\text{Sales Factor} = \frac{\text{Gross receipts from activities within W.Va.}}{\text{Total gross receipts}}
\]
Gross receipts typically means gross income and not gross profit or net income. Accordingly, no reduction for cost of goods sold or other expenses (except returns and allowances) shall be subtracted in arriving at gross receipts. In addition, if business income includes interest from governmental obligations exempt from taxation by West Virginia, such amounts shall be excluded from the numerator or denominator.

For purposes of determining the numerator in the sales factor, West Virginia has confirmed that it is a “Joyce” state. Accordingly, if the unitary member does not have nexus with West Virginia or if the unitary member is not taxable under the protections of PL 86-272, then that unitary member’s gross receipts derived from transactions and activity in the regular course of its trade or business in West Virginia are not included in the numerator of the sales factor when the tax return is prepared, and for combined group members, when the combined report is prepared. See W. Va. CSR § 110-24-7.7.d.2.

Sale of tangible personal property: Sales of tangible personal property are attributable to West Virginia under either of the following conditions:

(1) The property is delivered or shipped to a purchaser, other than the United States government, who is located within West Virginia. The f.o.b, point, or other conditions of sale, are irrelevant for this purpose. West Virginia sales include delivery to a third party located in West Virginia, if the seller is so directed by an out-of-state purchaser; or

(2) The tangible property is shipped from a West Virginia location and the purchaser is the United States government.

In situations where a taxpayer sells tangible personal property to a purchaser located within a state in which the purchaser is not taxed, then such sales shall be excluded from the denominator of the sales factor.

Sales other than tangible property: In cases where the taxpayer’s business activities consist of sales other than sales of tangible personal property, the sales will be considered West Virginia transactions if either:

(1) The income-producing activity is performed within West Virginia; or

(2) The income-producing activity is performed both within and without West Virginia and a greater proportion of the income-producing activity is performed within West Virginia as compared to any other state based on the cost of the performance of the service or sale.

The term “income-producing activity” refers to each separate type or item of income or transactions that are actively carried on by the taxpayer on a regular basis for the ultimate purpose of deriving gain or profit. Such term does not encompass activities performed on behalf of a taxpayer such as those conducted by an independent
contractor. "Income producing activity" includes the following:

(1) The performance of personal services by employees utilizing tangible and intangible property of the taxpayer.

(2) The sale, rental, leasing, licensing or other use of tangible or intangible personal property or real property. Note, however, that the mere holding of intangible personal property is not considered to be an income producing activity.

In situations where either the taxpayer or the Tax Commissioner believes the statutory apportionment formula does not fairly represent the extent of a taxpayer's business activities within West Virginia, the taxpayer may petition or the Tax Commissioner may require other methods of allocation including separate accounting, the exclusion of one of the factors, or the inclusion of one or more additional factors in order to equitably allocate or apportion the taxpayer's tax base. Taxpayers desiring approval to use an alternative method of allocation must file a petition with the Tax Commissioner no later than the due date (without regard to any extension) of the annual business franchise tax return.

§ 206 Special Apportionment for Financial Organizations


History: The West Virginia Legislature found during its 1991 Regular Session that the general formula set forth in W. Va. Code § 11-23-5 for apportioning the capital of corporations taxable in West Virginia 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, any organization that meets the statutory definition of a financial organization must use a special apportionment formula to determine its taxable capital.

Financial Organization Defined: The definition of a "financial organization" includes all bank holding companies or a subsidiary thereof, all regulated financial corporations or a subsidiary thereof, and any other entity (credit unions are exempt) so long as more than half of the entity's gross business income is derived from loans, the extension of credit, leasing and related activities, the operation of a credit card business, estate and trust services, and the acceptance of deposits.

Taxpayers that meet this definition of a financial organization are required to apportion their capital using specific apportionment rules and are not permitted to use the standard three factor formula provided in West Virginia law.

Apportionment of Tax Base

A financial organization that regularly engages in business in West Virginia and which is taxable in another state is not permitted to apportion its capital base using
standard three factor formula. Rather, it must apportion its capital base to West Virginia using the special single factor gross receipts formula described below.


In this case, the Court found that an out-of-state bank whose principal business was issuing and servicing credit cards for customers throughout the United States, including customers in West Virginia, had substantial nexus with West Virginia even though it did not have a physical presence in the state. The bank's "systematic and continuous business activity in . . . [West Virginia] produced significant gross receipts attributable to its West Virginia customers which indicate a significant economic presence sufficient to meet the substantial nexus prong of Complete Auto". Further, the Court found that Quill's physical presence requirement applies only to state sales and use taxes and not to state business franchise and corporation net income taxes.

For purposes of determining the special single factor gross receipts formula, gross receipts from certain types of property are not considered. Specifically, gross receipts from the following ownership interests (and certain related activities) are not considered in determining whether a financial organization is subject to taxation:

1. An interest in a real estate mortgage investment which is a conduit, such as a real estate investment trust or a regulated investment company;
2. An interest in security representing ownership or participation in a pool of promissory notes or certificates of interest that provide for payments in relation to payments on the notes or certificates;
3. An interest in a loan from which the interest is attributed to a consumer loan, a commercial loan or a secured commercial loan in which the payment obligations were solicited and entered into by a person that was independent and was not acting on behalf of the owner; or an interest in the right to service or collect income from such a loan; or
4. An amount held in an escrow or trust account with respect to the above interests.

If a financial organization is subject to taxation when gross receipts from the foregoing interests are not considered, such receipts must, however, be included when apportioning capital.

This single gross receipts factor is based upon the ratio of the financial
organization’s gross receipts derived from West Virginia as compared to total gross receipts everywhere and may be stated as follows:

\[
\frac{\text{(Total Gross Receipts from WV)}}{\text{(Total Gross Receipts)}} \times \text{Adjusted Average Capital}
\]

Excluded from both the numerator and the denominator of the gross receipts factor are interest or fees earned on obligations and securities of the United States, West Virginia, or its political subdivisions and certain investments or loans secured by real property or mobile homes located in West Virginia and occupied by non-transients.

The following types of receipts (income, not principal) which are included in both the numerator and the denominator are as follows:

- lease or rental of tangible property;
- loans secured by real or tangible property;
- consumer loans;
- commercial loans and installment obligations;
- syndication and participation loans;
- credit card service charges and fees;
- credit card merchant discount fees;
- performance of specified financial and fiduciary services;
- fees from travelers checks and money orders; and

All other types of receipts not allocable to another state where the financial organization is taxable are attributable to West Virginia or any other state based on the laws of the taxpayer's domicile.

**Method of Filing:** The West Virginia business franchise tax law presumes that any member of a unitary group that is required to use a special apportionment method, such as the single factory gross receipts formula described above is a “special apportionment member”. In such cases, the special apportionment formula is used to apportion the unitary group capital base. In lieu of using this approach, special apportionment members may seek authorization of the Tax Commissioner to limit application of said formula to other similar members or may seek authorization to report on a separate return basis.

\[\text{¶ 207 Rate of Tax}\]


For tax years beginning on or after January 1, 2012, but before January 1, 2013, the tax is 0.27% of a taxpayer’s adjusted and apportioned capital. This rate reduces to 0.21% for tax years that begin in 2013, on and after January 1, 2013.\(^2\) The effective

\(^2\) Senate Bill 680, enacted by the West Virginia Legislature during its 2008 Regular Session, provided for a scale back of the then current business franchise tax rate of 0.55%.
- Tax years beginning after December 31, 2008 – 0.48%
date and rate of tax for future years are as follows:

- Tax years beginning after December 31, 2011 – 0.27%
- **Tax years beginning after December 31, 2012** – 0.21%
- Tax years beginning after December 31, 2013 – 0.10%
- Tax years beginning after December 31, 2014 – No Tax

The minimum tax due is $50.00 for taxable years beginning before January 1, 2015.

*Short taxable years:* If a taxpayer's taxable year for federal income tax purposes is a short taxable year, the tax determined by applying the tax rate to the taxpayer's tax base is prorated based upon the ratio which the number of months in the short year bears to 12. In circumstances where a short year arises due to the fact that it is the taxpayer's first year in which it is subject to the business franchise tax, the taxpayer's liability is determined using a proration based upon the ratio of the number of months that the taxpayer was doing business in West Virginia bears to 12. In no event can the tax be less than $50.00.

¶ 208 Credits Against Tax


The statutes provide for a number of tax credits that may be utilized by qualifying taxpayers to offset their business franchise tax liability. None of the various credits are refundable nor can they be carried over to a future tax period, so they can only be used to offset a taxpayer's current year business franchise tax liability. To the extent the current year credits exceed the current year franchise tax liability, no future benefit of a credit can be obtained.

For tax years beginning on or after January 1, 2009, West Virginia has adopted a combined system of tax reporting for businesses. In general, no tax credit earned by one member of a combined group, but not fully used by or allowed to that member, may be used by another member of the combined group. Special transition rules are provided so that certain unused or unexpired economic development tax credits that were earned during a tax year in which a consolidated return was filed may be used against the taxes imposed on any member of a combined group to the extent the credits would have been allowed had the taxpayer continued to file a consolidated return. W. Va. Code § 11-23-17b.

*Credit for business and occupation tax:* Utilities, other than those engaged in telecommunication activities, that are subject to the West Virginia business and occupation tax (W. Va. Code § 11-13-1 *et seq.*) are allowed a credit for the portion of the franchise tax attributable to activities taxable under the business and occupation tax. The amount of the credit is determined by multiplying the franchise tax liability by a fraction, the numerator of which is the gross income of the business subject to the

- Tax years beginning after December 31, 2009 – 0.41%
- Tax years beginning after December 31, 2010 – 0.34%
business and occupation tax, and the denominator of which is the total gross income derived by the taxpayer from activity within West Virginia.

\[
\text{Gross income of business subject to B&O tax} = \text{Franchise tax liability} \times \frac{\text{Total gross income from W.Va. activity}}{\text{Credit}}
\]

**Credit for taxes paid by subsidiary:** In the case of an affiliated group of corporations filing separate West Virginia business franchise tax returns, the parent corporation will be allowed a credit for the "net amount of taxes that would have been paid" (W. Va. Code § 11-23-17(c)) by its subsidiaries without regard to the adjustments to capital of such subsidiaries for United States and West Virginia obligations and residential mortgages. In cases where a parent owns less than 100% of all classes of the subsidiary’s stock, the credit is scaled back proportionately. Finally, the credit should be computed without consideration of any credits that the subsidiary may be entitled to for such items as severance taxes or bank shares taxes paid by the subsidiary.

The subsidiary credit is also available to a corporate partner owning an interest in a partnership that is subject to the business franchise tax and to a partnership which owns an interest in another partnership. The amount of subsidiary credit claimed by the corporate or parent partnership partner cannot exceed the amount of business franchise tax paid by the partnership multiplied by the percentage of the partner's capital accounts owned by the corporate or parent partnership partner.

**Credit for contributions to qualified neighborhood organizations:** Taxpayers who make contributions to community based non-profit organizations that establish projects to assist neighborhoods and local communities are permitted a credit equal to 50% of the eligible contribution. In order for a contribution to be eligible for the credit, it must be made to a qualified charitable organization that has received approval from the Neighborhood Investment Advisory Board and the West Virginia Development Office.

**Credit for commercially domiciled financial organizations:** Financial organizations having their commercial domicile in West Virginia are permitted a credit for taxes paid to another state. The credit is equal to the lesser of a) the taxes actually paid to another state based on or measured by the financial organization’s capital or b) the portion of the tax actually paid that the financial organization would have paid if the West Virginia business franchise tax rate is applied to the tax base determined under the law of the other state. This credit is not allowed for taxable years beginning after December 31, 2008. W. Va. Code § 11-23-27(c).

**Tax credit for certain financial organizations for certain periods:** Financial organizations having their commercial domicile in West Virginia that acquire a financial organization that does not have its commercial domicile in West Virginia are permitted a credit equal to 50% of the goodwill associated with the acquisition multiplied by the tax rate applicable for the year. W. Va. Code § 11-23-5a(g).

**Tax credits for economic development:** Taxpayers who are eligible to take
advantage of West Virginia’s credits for economic development may, to the extent not utilized to offset other specifically enumerated taxes, use their available economic development credits to offset their annual business franchise tax liability. (For a discussion of these credits, see Chapter 3.) The credits include:

(1) Credit for strategic research and development (W. Va. Code § 11-13R-1 et seq.);

(2) Credit for investment in high-growth business projects (W. Va. Code § 11-13U-4 et seq.);

(3) Credit for investments by specific industries or businesses that create new jobs (W. Va. Code § 11-13Q et seq.);

(4) Credit for qualified investments for industrial expansion or revitalization (W. Va. Code § 11-13S et seq.);

(5) Credit for construction or revitalization of a new or existing coal loading facility (W. Va. Code § 11-13E-1 et seq.);

(6) Credit for capital investment in a qualified West Virginia capital company (W. Va. Code § 5E-1-8 et seq.);

(7) Credit for hours worked by apprentices in the construction trades (W. Va. Code § 11-13W-1 et seq.);

(8) Credit for certain expenditures made in West Virginia by eligible film production companies (W. Va. Code § 11-13X-1 et seq.);

(9) Credit for local property taxes paid on West Virginia manufacturing inventory (W. Va. Code § 11-13Y-1 et seq.)

Other tax credits: Other tax credits that may be applied against the business franchise tax include:

(1) Alternative-fuel tax credits for purchase of motor vehicle that runs on an alternative fuel (W. Va. Code § 11-6D-1 et seq.);

(2) Alternative-fuel tax credits for cost of purchasing and installing alternative fuel refueling infrastructure, whether facility is for private or public use (W. Va. Code § 11-6D-1 et seq.);

(3) Credit for developing patents in this State (W. Va. Code § 11-13AA-4);

(4) Credit for use of patent in manufacturing (W. Va. Code § 11-13AA-5);
(5) Credit for use of innovative mine safety technology (W. Va. Code § 11-13BB-1 et seq.).

These various tax credits are discussed in chapter 3 of this Guidebook.

Repealed and expired credits: Taxpayers who gained entitlement to certain credits prior to January 1, 2003 retain eligibility to apply those credits pursuant to the requirements and limitations of the original credit entitlement period. Included among these credits are the following:

(1) Credit for research and development projects (W. Va. Code § 11-13D-3 et seq.)

(2) Credit for business investment and jobs expansion (W. Va. Code § 11-13C et seq.);

(3) Credit for industrial expansion and revitalization (W. Va. Code § 11-13D et seq.);

(4) Credit for residential housing development projects (W. Va. Code § 11-13D et seq.);

(5) Credit for qualified investment in an aerospace industrial facility (W. Va. Code § 11-13D-3 et seq.)

¶ 209 Accounting Periods and Methods


A taxpayer’s accounting period for purposes of the business franchise tax must be the same as that used for federal income tax reporting purposes. If a taxpayer changes his taxable year for federal income tax purposes, the taxpayer must conform for purposes of the business franchise tax and provide a copy of the Internal Revenue Service authorization for change with its business franchise tax return.

The taxpayer’s method of accounting for the business franchise tax return must be the same as the accounting methods employed for federal income tax purposes. Similarly, as with changes in accounting periods, if the taxpayer’s method of accounting is changed for federal income tax purposes, a conforming change must be made for the business franchise tax with a copy of the Internal Revenue Service’s approval of the accounting change filed with the business franchise tax return.

¶ 210 Annual Returns


Due dates: The return due dates for the business franchise tax conform to the federal rules for corporations and partnerships. As such, annual business franchise
tax returns for corporations are due on the 15th day of the third month after the close of the taxable year. In the case of a partnership, the franchise return is due on or before the 15th day of the fourth month following the close of the tax year. The filing of a return is required whether or not any tax is due.

The corporation net income tax and business franchise tax annual returns have been combined. Corporations file Form CNF-120 Corporation Net Income/Business Franchise Tax Return. The income tax and business franchise tax returns of partnerships and S corporations have also been combined. Pass-through entities file Form SPF 100 West Virginia Income/Business Franchise Tax Return – S Corporations and Partnership (Pass-Through Entity).

**Extension of time to file:** An extension of time for filing a taxpayer's federal tax return will automatically extend the time for filing the West Virginia business franchise tax return for the same period as the federal extension. However, similar to the federal income tax provisions, an extension of time will not extend the time for payment of the business franchise tax. To avoid interest and late payment penalties, full payment of the business franchise tax must be made on or before the unextended due date of the return. Copies of the federal extension must be attached to the completed business franchise tax return when it is filed. A state extension of time to file may be obtained, even if a federal extension has not been requested, by providing a written request to the West Virginia State Tax Department prior to the due date of the West Virginia return.

**Consolidated returns:** Not allowed. For tax years beginning before January 1, 2009, members of an affiliated group filing a consolidated federal income tax return were required to file a separate business franchise tax return unless they elected to file a consolidated West Virginia's corporate net income tax return. If the consolidated group elected to file a consolidated West Virginia corporate net income tax return, a consolidated business franchise tax return was also required. Additionally, special rules were provided for an affiliated group that includes one or more financial organizations electing to file a consolidated return. These rules were repealed for tax years beginning on or after January 1, 2009.

**Combined reports:** For tax years beginning on or after January 1, 2009, members of a combined group engaged in a unitary business activity must combine their taxable capital and apportion the combined amount to West Virginia in the same manner as required for apportionment of combined business income. However, the combined report includes only group members that use the same apportionment formula. To date, no guidance has been issued by the Tax Commissioner on how the group’s taxable capital is to be divided when only a portion of a group member’s taxable capital is from activity that is unitary business activity.

**Combined returns:** Members of a combined group engaged in unitary business activity that have taxable nexus with West Virginia may designate one of their members as surety to file a combined return on behalf of the nexus members of the combined

¶ 211 Declaration and Payment of Estimated Tax


If a taxpayer can reasonably expect its business franchise tax liability for the taxable year to exceed $12,000, estimated tax declarations and payments are required. The due dates for filing declarations and payment of estimated taxes conform to federal income tax provisions for corporations in that one-fourth of the total estimated tax shall be due on the fifteenth of the fourth, sixth, ninth, and twelfth months of the taxable year.

¶ 212 Return Requirements


As part of a full and complete West Virginia business franchise tax return, taxpayers must attach a signed copy of their federal corporation income tax return or federal partnership return as filed with the Internal Revenue Service (Form 1120, 1120A, 1120S, 990T, or 1065) to their business franchise tax return.

If a consolidated federal income tax return is filed, taxpayers must include supporting consolidating schedules as well as federal Form 851, which details the members of the affiliated group. To the extent that there are differences between the balance sheet reported for federal consolidated filing purposes and the balance sheet reported for business franchise tax purposes, a signed statement explaining the differences must also be provided.

If filing as a member of an affiliated group for federal income tax purposes, but separately for West Virginia, the federal return requirement is satisfied with the attachment of a pro-forma federal document.

Franchise tax returns must be signed and dated by an officer or partner duly authorized to so act.

¶ 213 Records


All taxpayers must maintain appropriate records relating to the business franchise tax and its computation. These records must be maintained for a period of at least three years subsequent to the return filing. In cases where the time for making an assessment has been extended, the record retention period is automatically extended.

¶ 214 Business Activities Report


Introduction: Unless specifically exempted, every corporation or partnership that
carries on any business activity or owns or maintains property in West Virginia must file an annual Business Activities Report with the Tax Commissioner. This report must be filed on or before the 15th day of the 4th month after the end of a corporation's or partnership's taxable year. There are no taxes or fees associated with the filing of this report.

While the filing of a Business Activities Report is not to be used in considering whether or not a corporation or partnership is subject to taxation by West Virginia, there are adverse consequences to taxpayers that do not file the report. The statute specifically prohibits, until such a Business Activity Report is filed, any taxpayer from utilizing the West Virginia court system to pursue any claim not related to a tax liability. For example, a taxpayer will be prevented, until such time as current and past due Business Activity Reports have been filed, from pursuing in a West Virginia court a contractual dispute that is governed by West Virginia law.

**Exemptions from Filing:** A corporation or partnership will be exempt from filing a Business Activities Report if any of the following conditions are satisfied:

1. During the taxable year for which a report is due, the corporation or partnership is registered to engage in business in West Virginia in accordance with W. Va. Code § 11-12-1 et seq.

2. A tax return was filed for the taxable year in question covering any of the taxes subject to the provisions of the West Virginia Tax Procedures and Administration Act. See W. Va. Code § 11-10-1 et seq.

3. The corporation or partnership is a type of organization expressly exempted from taxation by West Virginia or Federal statute or regulation; or its activities are similarly exempted.

**Business Activity:** Unless exempted as noted above, all taxpayers that engage in any business activity or own or maintain property in West Virginia are required to file an annual Business Activities Report. The following activities, unless specifically exempted, will require the filing of a Business Activities Report:

1. Maintaining an office or other place of business in West Virginia.

2. The presence of employees, agents, representatives, or independent contractors within the state if they are conducting business on behalf of the corporation or partnership, regardless of whether the individual or person is residing or regularly stationed in West Virginia.

3. Owning or maintaining any real, tangible or intangible property within West Virginia.

4. Any activity carried on by a financial organization that would be includible in
the numerator of the special apportionment formula to be used by financial organizations (see ¶ 206).

¶ 215 General Procedure and Administration


As with other West Virginia taxes, the business franchise tax incorporates by reference the provisions of the West Virginia Tax Procedure and Administration Act discussed in chapter 9 of this Guidebook. This Act provides for uniform procedures for the assessment and collection of most West Virginia taxes. In addition, the Act provides for uniform provisions dealing with interest, additions to tax, and penalties. The business franchise tax also adopts the provisions of the West Virginia Tax Crimes and Penalties Act which provides criminal penalties for such matters as failure to file a return or pay tax, failure to maintain records, filing a false or fraudulent tax return, or otherwise attempting to evade tax.

¶ 216 Specimen Return – Combined Corporation Net Income/Business Franchise Tax Return – Form WV/CNF-120

The forms are available at the State Tax Department’s website: . Click on the Forms icon located in the left column on that page. On the next page that appears under the heading Business Taxes, click on Corporate Net/Business Franchise Tax.
INDEX -- CHAPTER 2 -- BUSINESS FRANCHISE TAX

accounting periods and methods ¶ 209
apportionment of capital
  general rule ¶ 205
  special rule – financial organizations ¶ 206

basis of tax
  apportionment ¶ 205; 206
  capital ¶ 204
business activities report ¶ 214

credits against tax ¶ 208
  commercially domiciled financial organizations ¶ 208
  credit for payment of business and occupation tax ¶ 208
  credit for contributions to qualified neighborhood organizations ¶ 208
  credit for taxes paid by subsidiary ¶ 208
economic development tax credits ¶ 208
  coal loading facilities tax credit ¶ 208; 326
  economic opportunity tax credit ¶ 208
  investment in high-growth business projects tax credit ¶ 208
  manufacturing investment tax credits ¶ 208
  strategic research and development tax credit ¶ 208
  apprenticeship training credit ¶ 208; 313
  film industry credit ¶ 208; 314
  manufacturing property tax adjustment credit ¶ 208; 303
tax credits repealed or expired
  credit for research and development projects ¶ 208
  credit for business investment and jobs expansion ¶ 208
  credit for industrial expansion and revitalization ¶ 208; 326
  credit for residential housing development projects ¶ 208; 317
  credit for qualified investment in aerospace industrial facility ¶ 208
  credit for investment in West Virginia capital company ¶ 208; 344

estimated tax
  declaration of tax of estimated tax ¶ 211
exemptions from tax ¶ 203

financial organizations
  apportionment of tax base ¶ 206
  “financial organization” defined ¶ 206
  method of filing returns ¶ 206

history of tax ¶ 201
measure of tax
  taxable capital ¶ 204

payment of tax
  estimated tax ¶ 211
procedure and administration ¶ 215

rate of tax ¶ 207
records
  record retention period ¶ 213
returns and reports
  annual return ¶ 210
  authority to sign ¶ 212
  business activities report ¶ 214
  consolidated federal income tax returns ¶ 212
  consolidated returns ¶ 210
  due dates ¶ 210
  extensions of time to file ¶ 210
  federal income tax return attached ¶ 212
  specimen return ¶ 216

taxpayers subject to tax ¶ 202
CHAPTER 3

TAX INCENTIVES FOR BUSINESS DEVELOPMENT IN WEST VIRGINIA

By Lydia S. McKee

Lydia is a Senior Manager with Dixon Hughes Goodman LLP specializing in the state and local tax area. Before working at Dixon Hughes Goodman, Lydia spent five years with the Charleston office of an international accounting firm working in the state and local tax area where she supervised several sales and use tax, health care provider tax, unclaimed property, franchise and income tax reviews for various companies. Lydia also has sixteen years experience with the West Virginia State Tax Department. She acted in several capacities with the Tax Commission, including General Counsel to Revenue Operations and Assistant Tax Commissioner.

Table of Contents

| ¶ 301 | ECONOMIC OPPORTUNITY CREDIT ............................................................... 3-5 |
| ¶ 301.1 | Introduction .............................................................................................. 3-5 |
| ¶ 301.2 | Eligible Taxpayers ...................................................................................... 3-5 |
| ¶ 301.3 | Amount of the Credit .................................................................................... 3-6 |
| ¶ 301.4 | Eligible Investment ...................................................................................... 3-6 |
| ¶ 301.5 | Qualified Investment ..................................................................................... 3-8 |
| ¶ 301.6 | New Jobs Percentage .................................................................................... 3-9 |
| ¶ 301.7 | “New Employee” Defined ........................................................................... 3-9 |
| ¶ 301.8 | Application of the Credit ........................................................................... 3-10 |
| ¶ 301.9 | Carryover of Unused Credit ....................................................................... 3-10 |
| ¶ 301.10 | Certified Projects ....................................................................................... 3-11 |
| ¶ 301.11 | Forfeiture and Redetermination of the Credit .............................................. 3-11 |
| ¶ 301.12 | Recapture Tax ............................................................................................. 3-11 |
| ¶ 301.13 | Recordkeeping Requirements ................................................................... 3-12 |
| ¶ 301.14 | Filing Requirements ................................................................................... 3-12 |
| ¶ 301.15 | Economic Opportunity Tax Credit for “Small Business” ................................ 3-13 |
| ¶ 301.16 | Economic Opportunity Credit for Corporate Headquarters Relocation .......... 3-13 |
| ¶ 301.17 | Economic Opportunity Tax Credit for High Technology Manufacturers ........ 3-13 |
| ¶ 301.18 | Economic Opportunity Tax Credit for Jobs Creation ................................... 3-16 |
| ¶ 302 | MANUFACTURING INVESTMENT CREDIT .................................................... 3-17 |
| ¶ 302.1 | Introduction ............................................................................................... 3-17 |
| ¶ 302.2 | Eligible Taxpayers ....................................................................................... 3-17 |
| ¶ 302.3 | Eligible Investment ...................................................................................... 3-17 |
¶ 302.4 Amount of the Credit ................................................................. 3-18
¶ 302.5 Qualified Investment ................................................................. 3-18
¶ 302.6 Application of the Credit ........................................................... 3-19
¶ 302.7 Forfeiture and Redetermination of Credits ................................. 3-19
¶ 302.8 Filing for the Credit ................................................................. 3-20
¶ 303 MANUFACTURING PROPERTY TAX CREDIT ADJUSTMENT .......... 3-20
¶ 303.1 Introduction ................................................................. 3-20
¶ 303.2 Eligible Taxpayers ................................................................. 3-20
¶ 303.3 Amount of the Credit ............................................................... 3-21
¶ 303.4 Application of the Credit .......................................................... 3-21
¶ 303.5 Filing for the Credit ................................................................. 3-21
¶ 304 INDUSTRIAL EXPANSION AND REVITALIZATION CREDIT FOR ELECTRIC POWER PRODUCERS ................................................................. 3-21
¶ 304.1 Introduction ................................................................. 3-21
¶ 304.2 Eligible Taxpayers ................................................................. 3-21
¶ 304.3 Eligible Investment ................................................................. 3-22
¶ 304.4 Amount of the Credit ............................................................... 3-22
¶ 304.5 Application of the Credit .......................................................... 3-22
¶ 304.6 Forfeiture and Redetermination of the Credit ................................. 3-23
¶ 304.7 Example of the Industrial Expansion and Revitalization Credit for Electric Power Producers ................................................................. 3-23
¶ 305 COAL LOADING FACILITY CREDIT .......................................... 3-24
¶ 305.1 Introduction ................................................................. 3-24
¶ 305.2 Eligible Taxpayers ................................................................. 3-24
¶ 305.3 Eligible Investment ................................................................. 3-24
¶ 305.4 Amount of the Credit ............................................................... 3-25
¶ 305.5 Application of the Credit .......................................................... 3-25
¶ 305.6 Forfeiture and Redetermination of the Credit ................................. 3-25
¶ 306 STRATEGIC RESEARCH AND DEVELOPMENT TAX CREDIT .......... 3-26
¶ 306.1 Introduction ................................................................. 3-26
¶ 306.2 Eligible Taxpayers ................................................................. 3-26
¶ 306.3 Qualified Research and Development Activities ............................... 3-26
¶ 306.4 Eligible Investment ................................................................. 3-26
¶ 306.5 Amount of the Credit ............................................................... 3-26
¶ 306.6 Application of the Credit .......................................................... 3-26
¶ 306.7 Refundable Credit for “Small Qualified Research and Development Company” ................................................................. 3-28
¶ 306.8 Forfeiture and Redetermination of the Credit ................................. 3-29
¶ 306.9 Transfer of Qualified Research and Development Property to Successors... 3-29
¶ 306.10 Filing Requirements ............................................................... 3-29
¶ 307 HIGH GROWTH BUSINESS INVESTMENT TAX CREDIT ............... 3-30
¶ 307.1 Introduction ................................................................. 3-30
¶ 307.2 Eligible Taxpayers ................................................................. 3-30
¶ 307.3 Eligible Investment ................................................................. 3-30
¶ 307.4 Amount of the Credit ............................................................... 3-31
¶ 307.5 Application of the Credit .......................................................... 3-31
¶ 320.1 Introduction

The economic opportunity credit was enacted for investment made in periods beginning on or after January 1, 2003 and replaced the business investment and jobs expansion credit. There are various differences between the business investment and jobs expansion credit and the economic opportunity credit. For example, multi-party projects are not permitted under the economic opportunity credit and the number of new jobs required to obtain the credit is 20 under the economic opportunity credit rather than the 50 required under the prior business investment and jobs expansion credit.

There are also several specialized economic opportunity credits that target either specific types of businesses or types of investment. For example there is an economic opportunity credit for small businesses which requires a lesser number of jobs to be created to be eligible for the credit. The corporate headquarters relocation credit provides an incentive for businesses that move their corporate headquarters from out of state into West Virginia. Beginning in 2008, a high technology economic opportunity credit provides an enhanced incentive to businesses that are engaged in various high technology activities that create new jobs. In 2009, a jobs creation economic opportunity credit was enacted for businesses that meet the requirements of the economic opportunity credit, but fall short of creating the required number of jobs.

¶ 301.2 Eligible Taxpayers

In order to qualify for the economic opportunity credit, the business must make qualified investment in a new or expanded business facility in West Virginia and be engaged in one of the following activities:

- manufacturing
- information processing
- warehousing
- non-retail goods distribution
• qualified research and development
• the relocation of a corporate headquarters
• destination-oriented recreation and tourism

The business must also create at least 20 new jobs within 3 years of its initial investment. In addition, the taxpayer must be subject to the business and occupation tax, the personal income tax, business franchise tax, or corporation net income tax.

For years prior to 2009, the term "eligible taxpayer" included members of an affiliated group of taxpayers if the group elected to file a consolidated corporation net income tax return. However, for years beginning on or after January 1, 2009, the filing of a consolidated return is no longer allowed under West Virginia law. Instead of consolidated returns, combined filing for unitary groups is required for tax years beginning on or after January 1, 2009. Currently the definition of "eligible taxpayer" does not specifically include members of a unitary group filing a combined corporation net income tax return.

¶ 301.3 Amount of the Credit


The amount of the credit is calculated by taking the qualified investment and multiplying it by the applicable jobs percentage. The credit is taken over a period of ten years at the rate of 10% per year.

¶ 301.4 Eligible Investment

*Law:* W. Va. Code § 11-13Q-3 (b) (20)

Qualified investment is property constructed, purchased, leased or transferred into West Virginia and placed in service or use as a component of a new or expanded business facility located in the state. A new or expanded business facility is a business facility which is employed by the taxpayer in the conduct of a business; the net income of which is or will be taxable in the future under the personal income tax or the corporation net income tax.

The facility must be purchased by, or leased to, the taxpayer on or after the first day of January 1, 2003 and cannot be purchased or leased by the taxpayer from a related person. The Commissioner may waive this requirement if the facility was acquired from a related party for its fair market value and the acquisition was not tax motivated.

The facility must not be in service or use during the 90 days immediately prior to transfer of the title to the facility, or prior to the commencement of the term of the lease of the facility: This 90-day period may be waived by the Commissioner if the Commissioner determines that persons employed at the facility may be treated as "new employees" because the jobs would be lost due to the facility being sold by the United States bankruptcy court in a liquidation sale, or the owner was insolvent, or the facility was destroyed in whole or in significant part by fire, flood, or other act of God.
A facility is not considered a new business facility in the hands of the taxpayer if the taxpayer’s only activity with respect to the facility is to lease it to another person or persons.

The types of property that are eligible for the credit are as follows:

- Real property and improvements with a useful life of four or more years; or

- Real property and improvements thereto, acquired by written lease having a primary term of ten or more years; or

- Tangible personal property placed in service or use by the taxpayer with respect to which depreciation or amortization in lieu of depreciation is allowable in determining the personal or corporation net income tax liability of the business taxpayer, and which has a useful life of four years or more years at the time it is placed in service; or

- Tangible personal property acquired by written lease having a primary term of four years or longer that is used as a component part of a new or expanded business facility; or

- Tangible personal property owned or leased, and used by the taxpayer at a business location outside the state which is moved into the state of West Virginia for use as a component part of a new or expanded business facility. In order to be eligible, the property must be depreciable or amortizable personal property for income tax purposes, and have a useful life of four or more years remaining at the time it is placed in service or use in the state, and if the property is leased, the primary term of the lease remaining at the time the leased property is placed in service or use in the state must be four or more years.

The types of property that are not eligible for the credit are as follows:

- Property owned or leased by the taxpayer for which the taxpayer was previously allowed tax credits;

- Repair costs, including materials used in the repair, unless the cost of the repair must be capitalized for federal income tax purposes, and not expensed.

- Airplanes;

- Property which is used outside of West Virginia, with use determined by the amount of time it is used within and without the state;

- Property which is acquired incident to the purchase of the stock or assets of the seller, unless for good cause shown, the Tax Commissioner consents to waiving this requirement;
• Natural resources in place;

• Purchased or leased property, the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time the property is placed in service or use; and

• Property acquired from one component member of a controlled group from another component member of the same controlled group. This requirement can be waived by the Tax Commissioner if the property was acquired from a related party for its fair market value at the time of acquisition, and the basis of the property is not determined by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired, or under IRC §1014 (e) as in effect on January 1, 2002.

¶ 301.5 Qualified Investment


In order to compute the credit, the amount of qualified investment must be determined. It is determined by taking the cost of the eligible investment and adjusting it by the useful life of the property as follows:

<table>
<thead>
<tr>
<th>Useful Life of Property</th>
<th>Applicable Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 years or more but less than 6 years</td>
<td>33 1/3%</td>
</tr>
<tr>
<td>6 years or more but less than 8 years</td>
<td>66 2/3%</td>
</tr>
<tr>
<td>8 years or more</td>
<td>100%</td>
</tr>
</tbody>
</table>

For example, if a piece of equipment is purchased for $100,000 and the useful life is six years, then the qualified investment related to this purchase would be $66,667 ($100,000 x 66 2/3%).

The useful life of any property is determined as of the date the property is first placed in service or use in this state.

Cost of the investment does not include the value of property given in trade or exchange for the property purchased for business expansion. If property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, then the cost of replacement property does not include any insurance proceeds received in compensation for the loss. Real property acquired by a written lease for a primary term of ten years or more is 100% of the rent reserved for the primary term of the lease, not to exceed twenty years. For tangible personal property, if the written lease is for four years but less than six years, the cost is one third of the rent reserved for the primary term of the lease. If it is six years but less than eight years, the cost is two thirds of the rent reserved for the primary term of the lease. If it is eight years or longer, the cost is 100% of the rent reserved for the primary term of the lease, not to exceed 20 years or the book life of the equipment using straight line depreciation.
In the case of self-constructed property, cost is the amount charged to the capital account for depreciation in accordance with federal income tax law. Transferred property is valued based on the remaining useful life of the property at the time it is placed in service or use in this state, and the cost is the original cost of the property to the taxpayer, less straight line depreciation for the tax years the property was used outside West Virginia. Leased property transferred into the state is valued based on the rent reserved for the remaining primary lease term, not to exceed twenty years or the remaining useful life of the property.

¶ 301.6 New Jobs Percentage

*Law: W. Va. Code § 11-13Q-9*

The new jobs percentage is based on the number of jobs created as a result of the qualified investment in a new or expanded business facility in West Virginia. It is applied to the qualified investment in order to determine the credit amount. In order to qualify for the economic opportunity credit, a taxpayer must create at least 20 new jobs. The new jobs credit can be as high as 30% if at least 520 new jobs are created.

<table>
<thead>
<tr>
<th>New Jobs Created</th>
<th>New Jobs Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>520</td>
<td>30%</td>
</tr>
<tr>
<td>280</td>
<td>25%</td>
</tr>
<tr>
<td>20</td>
<td>20%</td>
</tr>
<tr>
<td>15*</td>
<td>10%</td>
</tr>
<tr>
<td>10**</td>
<td>10%</td>
</tr>
</tbody>
</table>

* A taxpayer can earn economic opportunity credit for corporate headquarters relocation by moving its headquarters to West Virginia and creating 10 new West Virginia jobs.

** A taxpayer that meets certain payroll and gross receipts requirements can earn economic opportunity small business credit by creating 10 new jobs.

This percentage are increased by 5% if the project has qualified investment of $20,000,000 or more and is constructed using construction labor and mechanics numbering 75 or more employees or equivalent employees, who are paid average wages equal to at least the prevailing wage.

In order to determine the net increase in jobs, the taxpayers employment in the State must be determined on a controlled group basis rather than on an individual subsidiary basis.

¶ 301.7 “New Employee” Defined


In order to qualify as a “new employee” for purposes of the credit, the person must reside in and be domiciled in West Virginia. Except for the exceptions outlined below, the position or job that the employee fills must be a job that did not previously exist in the business prior to the qualified investment being made and placed in service.
There are two situations where a person that fills a position or job that previously existed may be treated as a “new employee.” If the position is saved as a result of the qualified investment being put into use and the Tax Commissioner finds on the basis of information supplied by the taxpayer that: (1) but for the new employer purchasing the assets of a business in bankruptcy under chapter seven or eleven of the United States bankruptcy code and making investment in the business, the assets would have been sold by the United States bankruptcy court in a liquidation sale and the jobs saved would have been lost; or (2) but for the taxpayer making qualified investment in the property, the business would have been closed and the employees located at the facility would have lost their jobs. In order to make this certification, the Tax Commissioner must find that the taxpayer is insolvent as defined in 11 U.S.C. § 101(32) or that the taxpayer’s business facility was destroyed, in whole or in significant part, by fire, flood or other act of God.

¶ 301.8 Application of the Credit


The economic opportunity tax credit can be used to offset the following taxes in the following order:

- The business and occupation tax
- The business franchise tax
- The corporation income tax
- The personal income tax on flow through business income

In order to be eligible for offset by the economic opportunity credit, the tax must be attributable to the qualified investment made to earn the credit. The amount of tax that is attributable to the qualified investment is determined by applying a payroll apportionment percentage factor to the total tax being offset. The payroll apportionment percentage is calculated by dividing the payroll attributable to the “new jobs” created by the investment over the total payroll of the taxpayer.

The credit can be used to offset up to 80% of the tax attributable to the investment. When the median salary of the new jobs is higher than the statewide average nonfarm payroll wage, the credit is allowed against 100% of the tax attributable to the qualified investment. In order to qualify for the higher offset percentage, the median compensation of the new jobs must be greater than $34,000 annually for new jobs filled in 2009; more than $35,985 for new jobs filled in 2010; and more than $36,895 for new jobs filled in 2011; and more than $37,701 in 2012.

¶ 301.9 Carryover of Unused Credit

Law: W. Va. Code § 11-13Q-7(h)

Unused credits may be carried forward from year to year during the initial 10-year period of the credit. After the initial 10-year period, unused credits may only be carried forward for 3 additional years, or years 11 through 13.
¶ 301.10 Certified Projects


A business that is making investment over a period of up to three years may apply for project certification from the Tax Commissioner. In order to be considered eligible for project certification, the investment must be made in accordance with a written business facility development plan, and the investment placed in service during the first year would not have been made without the expectation of making the qualified investment placed in service during the second and third years. The request for certification must be made prior to the claiming of any credit related to the project investment.

¶ 301.11 Forfeiture and Redetermination of the Credit


If a taxpayer disposes of qualified investment property before its useful life expires, or otherwise ceases to sue the property in an eligible business, the remainder of the credit related to that investment is forfeited. The credit already claimed attributable to the disposed investment must be recalculated using the actual useful life. If an excess amount of credit has been previously claimed based on the actual useful life, then a reconciliation schedule must be filed with payment of any additional tax and interest due. If the investment property has been used for less than four years, all credit is forfeited.

Forfeiture and required redetermination of the credit can also occur if the taxpayer either ceases to operate the business facility or fails to maintain the required number of new jobs necessary to claim the credit. If a taxpayer fails to create the minimum number of jobs within the required time period, the entire credit is forfeited.

If the number of new jobs is not maintained during any of the years four through ten of the credit, the credit for that particular year is forfeited, but will be reinstated upon attainment of the minimum number of new jobs required for the credit.

If a jobs percentage of 25% - 30% has previously been attained, but the number of new jobs maintained for the year has decreased below the amount required, the credit must be recalculated using the redetermined new jobs percentage related to the number of new jobs actually maintained for the year.

If the business is sold to a successor and the property continues to be used in an eligible activity, then the successor may continue to claim the unused portion of the credit.

¶ 301.12 Recapture Tax

If a taxpayer does not maintain the required number of jobs for the economic opportunity credit or disposes of qualified investment property prior to its useful life, they will be responsible for a recapture tax.

If the amount of new jobs maintained falls below 20, the recapture tax will be equal to the amount of credit claimed for the current year and all prior years on the qualified investment that was removed from services prematurely. If the amount of new jobs maintained does not fall below 20, but falls below the threshold number that the credit was originally based upon, the recapture tax will be equal to the amount of credit claimed for the current years and all prior years less the amount of credit based on a recalculation using the revised new jobs percentage and revised qualified investment amount that is still in service.

The recapture tax is due and payable on the date the taxpayer's annual personal income tax return or corporation income tax return is due for the year in which the recapture occurs. If the taxpayer is a partnership or S corporation, the recapture tax is paid by the partner, members, or shareholders in the taxable year in which the recapture occurs.

¶ 301.13 Recordkeeping Requirements


A taxpayer must keep records that provide information on the qualified investment. Information that must be maintained on the qualified investment include its identity, its actual or determined cost, its straight line depreciation life, the date it was placed in service, the amount of credit taken, and the date the investment was disposed of or otherwise ceased to be qualified.

If these records are not maintained, then the taxpayer is treated as having disposed of any property that it cannot establish was still on hand at the end of the year. Also, if a taxpayer cannot establish when investment property was placed in service, it is treated as being placed in service in the most recent year that similar property was placed in use, unless it can be proved that the property placed in service in the most recent year is still on hand. In that case, the taxpayer will be treated as having placed the property in service in the next most recent year.

¶ 301.14 Filing Requirements


In order to claim the credit, the taxpayer must apply for the credit by filing an application, Form WV/EOTC-A, no later than the due date for filing either the corporation net income tax return or personal income tax return, including any authorized extension of time for filing the return for the taxable year to which the credit was placed in service or use. Failure to file the application in a timely manner will result in a forfeiture of 50% of the annual credit allowance. The penalty will apply annually until the application is filed.
In addition, a Form WV/EOTC-1 tax credit schedule must be filed with the tax return on which the credit is claimed.

¶ 301.15 Economic Opportunity Tax Credit for “Small Business”
*Law:* W. Va. Code § 11-13Q-10

Special rules apply to economic opportunity tax credits for “small businesses.” A “small business” is a business or a controlled group of affiliated companies with annual gross sales not exceeding $7,000,000 with adjustment for a cost of living increase each year. The amount of adjusted annual gross sales per year is shown in the chart below:

<table>
<thead>
<tr>
<th>Year</th>
<th>Adjusted Annual Gross Sales</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>$7,000,000</td>
</tr>
<tr>
<td>2004</td>
<td>$7,159,600</td>
</tr>
<tr>
<td>2005</td>
<td>$7,324,500</td>
</tr>
<tr>
<td>2006</td>
<td>$7,552,050</td>
</tr>
<tr>
<td>2007</td>
<td>$7,846,850</td>
</tr>
<tr>
<td>2008</td>
<td>$8,026,350</td>
</tr>
<tr>
<td>2009</td>
<td>$8,368,450</td>
</tr>
<tr>
<td>2010</td>
<td>$8,384,000</td>
</tr>
<tr>
<td>2011</td>
<td>$8,507,850</td>
</tr>
<tr>
<td>2012</td>
<td>$8,714,300</td>
</tr>
<tr>
<td>2013</td>
<td>$8,938,250</td>
</tr>
</tbody>
</table>

A “small business” is allowed an economic opportunity credit if it makes eligible investment and creates at least 10 new jobs within twelve months. The amount of credit allowed is equal to 10% of the taxpayer’s qualified investment and is applied in the same manner as the other economic opportunity credits.

¶ 301.16 Economic Opportunity Credit for Corporate Headquarters Relocation

A company that relocates its corporate headquarters to West Virginia from a location outside of West Virginia may be eligible for the economic opportunity credit for corporate headquarters relocation. In order to be eligible, the company must create at least 15 new West Virginia jobs.

Qualified investment for purposes of the corporate headquarters relocation credit includes both the investment made in the real property and tangible personal property and the reasonable and necessary expenses incurred by the company to achieve the relocation. If the company creates between 15 and 20 new jobs, the economic opportunity credit is equal to 10% of the qualified investment.

The credit is applied in the same manner as the general economic opportunity credit, except for the corporation net income tax. The economic opportunity credit for corporate headquarters relocation can be applied to offset 100% of the corporation net income tax on allocated income and 80% of the corporate net income tax on apportioned income attributable to the investment.

¶ 301.17 Economic Opportunity Tax Credit for High Technology Manufacturers
*Law:* W. Va. Code § 11-13Q-10a
An economic opportunity credit is allowed eligible high technology manufacturing businesses that make qualified investment in a new or expanded high technology manufacturing business in West Virginia that results in the creation of 20 or more new jobs within 12 months of the qualified investment being placed in service and the median compensation of the new jobs is greater than $46,900 for new jobs created in 2009. This credit is effective January 1, 2008.

A "high technology manufacturing business" must be classified as having one or more of the following North American Industry Classification System codes:

- **Computer and Peripheral Equipment**
  - 334111 - Electronic Computers
  - 334112 - Computer Storage Devices

- **Electronic Components**
  - 334411 - Electron Tubes
  - 334414 - Electronic Capacitors

- **Semiconductors**
  - 334413 - Semiconductor & Related Devices
  - 333295 - Semiconductor Machinery

The annual amount of credit allowable under this subsection is 100% of the tax attributable to qualified investment, for each consecutive year of a twenty-year credit period.

The annual credit allowance may offset up to 100% of the tax attributable to the qualified investment each year for 20 consecutive years. This is in contrast to the 80% offset normally allowed for the economic opportunity credit for other businesses.

The credit can be applied in the following order to the following taxes: business and occupation tax, the business franchise tax, the corporation net income tax, and the personal income tax. The credit can only be applied to the tax attributable to and the direct consequence of the qualified investment in the new or expanded high technology manufacturing business in this state. The amount of tax that is attributable to the qualified investment is determined by applying a payroll apportionment percentage factor to the total tax being offset. The payroll apportionment percentage is calculated by dividing the payroll attributable to the “new jobs” created by the investment over the total payroll of the taxpayer.

The annual credit allowance must be taken beginning with the taxable year in which the taxpayer places the qualified investment into service or use in this state, unless the taxpayer elects to delay the beginning of the twenty-year credit period until the next succeeding taxable year. This election is made in the annual income tax return filed under this chapter by the taxpayer for the taxable year in which the qualified investment
is first placed in service or use. This election cannot be revoked. There is no carryover of the credit.

In order to be considered a new job for purposes of this credit, the job must be filled by a "new employee." In order to be a "new employee" the person must reside in and be domiciled in West Virginia. Except for the exceptions outlined below, the position or job that the employee fills must be a job that did not previously exist in the business prior to the qualified investment being made and placed in service.

There are two situations where a person that fills a position or job that previously existed may be treated as a “new employee.” If the position is saved as a result of the qualified investment being put into use and the Tax Commissioner finds on the basis of information supplied by the taxpayer that: (1) but for the new employer purchasing the assets of a business in bankruptcy under chapter seven or eleven of the United States bankruptcy code and making investment in the business, the assets would have been sold by the United States bankruptcy court in a liquidation sale and the jobs saved would have been lost; or (2) but for the taxpayer making qualified investment in the property, the business would have been closed and the employees located at the facility would have lost their jobs. In order to make this certification, the Tax Commissioner must find that the taxpayer is insolvent as defined in 11 U.S.C. §101(32) or that the taxpayer’s business facility was destroyed, in whole or in significant part, by fire, flood or other act of God.

Also, the new job must be attributable to the qualified investment. In order to be attributable to the qualified investment, the employee’s service must be performed or his or her base of operation must be at the new or expanded business facility. Also, it is necessary that the position did not exist prior to the construction, renovation, expansion or acquisition of the business facility and the making of the qualified investment, and would not have existed, but for the qualified investment being made by the taxpayer.

The median compensation of the new jobs attributable to the qualified investment must be greater than forty-five thousand dollars per year, adjusted for inflation by application of a cost-of-living adjustment annually. The median compensation requirement will be applied each year of the twenty year credit period. Failure of the taxpayer to meet the median compensation requirement for any particular year will result in forfeiture of the credit for that year. However, if the median compensation requirement is then met in a later year, the taxpayer shall regain entitlement to take the credit for that year. No credit that was forfeited in an earlier year can be taken in a later year.

<table>
<thead>
<tr>
<th>Year</th>
<th>Median Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>$45,000</td>
</tr>
<tr>
<td>2009</td>
<td>$46,900</td>
</tr>
<tr>
<td>2010</td>
<td>$47,000</td>
</tr>
<tr>
<td>2011</td>
<td>$47,650</td>
</tr>
<tr>
<td>2012</td>
<td>$48,850</td>
</tr>
</tbody>
</table>
The Tax Commissioner may require the taxpayer who intends to claim the high technology manufacturing tax credit to file a notice of intent to claim this credit before the taxpayer begins reducing his or her monthly or quarterly installment payments of estimated tax by the credit.

¶ 301.18 Economic Opportunity Tax Credit for Jobs Creation


Effective January 1, 2009, an Economic Opportunity Tax Credit for Jobs Creation is available to businesses that fail to meet the jobs creation requirement of the Economic Opportunity Tax Credit, but otherwise meet the requirements of the act.

To be eligible for the credit, the business must be engaged in the activities of manufacturing, warehousing, information processing, goods distribution, destination tourism, or research and development. In order to qualify for the credit, the jobs created must be full time, pay a minimum salary of $32,000, and offer health benefits. The minimum salary will be increased annually by a cost of living adjustment. See table below. The business does not have to raise the wages of employees in jobs upon which the initial credit was based by reason of the cost of living adjustment.

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>Minimum Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>$32,000</td>
</tr>
<tr>
<td>2010</td>
<td>$32,000</td>
</tr>
<tr>
<td>2011</td>
<td>$32,450</td>
</tr>
<tr>
<td>2012</td>
<td>$33,250</td>
</tr>
<tr>
<td>2013</td>
<td>$34,100</td>
</tr>
</tbody>
</table>

The credit is equal to $3,000 annually for a period of five years for each new job created. If the business has a net job decrease within the five years that the credit is allowed, counting both the new jobs and preexisting jobs, then the credit must be reduced by $3,000 for each net job lost.

The credit is applied in order to the business and occupation tax, business franchise tax, corporation net income tax, and the personal income tax in the same manner as the economic opportunity credit. The credit may only offset tax attributable to the taxpayer's operation in West Virginia. There is no carryforward or carryback of excess credit.

The credit may be taken in addition to the business investment and jobs expansion credit, industrial expansion and revitalization credit, coal loading facilities credit, credit for reducing electric and natural gas utility rates for low income residential customers, tax credit for reducing telephone utility rates for certain low-income residential customers, neighborhood investment tax credit, strategic research and development tax credit, and the manufacturing investment tax credit.
¶ 302 MANUFACTURING INVESTMENT CREDIT

¶ 302.1 Introduction


The manufacturing investment credit was enacted to encourage the establishment of new industrial facilities and the revitalization of existing industrial facilities in West Virginia. It applies to investment made on or after January 1, 2003.

¶ 302.2 Eligible Taxpayers


In order to claim the manufacturing investment credit, the taxpayer must make qualified investments in an industrial facility that is used in manufacturing. Manufacturing means any business activity classified under the North American Industry Classification System as having a sector identifier consisting of the first two digits of 31, 32, or 33 of the 6-digit sector identifier or the 6-digit code number 211112 (business of recovering liquid hydrocarbons from natural gas).

An additional requirement must be met by taxpayers who are engaged in the business of recovering liquid hydrocarbons from natural gas (NAICS 21112) that undertake to build a credit qualifying facility costing $500,000 or more. In that instance, the taxpayer must hire at least 75% of the workers building the facility either from West Virginia or from counties at least a portion of which is within fifty miles of the West Virginia border. This requirement can be waived by the West Virginia Tax Commissioner if the taxpayer’s efforts to comply are unsuccessful.

¶ 302.3 Eligible Investment


In order to qualify for the Manufacturing Investment Credit, the purchases must be “property purchased for manufacturing investment.” “Property purchased for manufacturing investment” includes real property, and improvements thereto, and tangible personal property, if the property was constructed, or purchased, for use as a component part of a new, expanded or revitalized industrial facility.

Only tangible personal property with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the federal income tax liability of the industrial taxpayer and that has a useful life, at the time the property is placed in service or use in this state, of four years or more, is eligible for the credit. Property acquired by written lease, for a primary term of 10 years or longer, if used as a component part of a new or expanded industrial facility, is also considered to be “property purchased for manufacturing investment.”

"Property purchased for manufacturing investment" does not include the following:
• Repair costs including materials used in the repair, unless for federal income tax purposes, the cost of the repair must be capitalized and not expensed;

• Motor vehicles licensed by the Department of Motor Vehicles;

• Airplanes;

• Off-premises transportation equipment;

• Property which is primarily used outside this state; and

• Property which is acquired incident to the purchase of the stock or assets of an industrial taxpayer, which property was or had been used by the seller in his or her industrial business in this state, or in which investment was previously the basis of a credit against tax taken under any other article of this chapter.

Purchases or acquisitions of land or depreciable property qualify as purchases of property purchased for manufacturing investment for purposes of this article only if the following are true:

• The property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under IRC § 267 or §707(b);

• The property is not acquired from a related person or by one component member of a controlled group from another component member of the same controlled group. The Tax Commissioner may waive this requirement if the property was acquired from a related party for its then fair market value; and

• The basis of the property for federal income tax purposes, in the hands of the person acquiring it, is not determined, in whole or in part, by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired; or under IRC § 1014(e).

¶ 302.4 Amount of the Credit

_Law:_ W.Va. Code § 11-13S-4

The credit amount is 5% of the qualified manufacturing investment and is taken over a 10-year period. One-tenth of the credit is taken each year.

¶ 302.5 Qualified Investment

The qualified manufacturing investment is the cost of the property purchased for manufacturing investment, adjusted for the useful life of the property. The investment is adjusted for the useful life of the property as follows:

<table>
<thead>
<tr>
<th>Useful Life of Property</th>
<th>Applicable Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 years or more but less than 6 years</td>
<td>33 1/3%</td>
</tr>
<tr>
<td>6 years or more but less than 8 years</td>
<td>66 2/3%</td>
</tr>
<tr>
<td>8 years or more</td>
<td>100%</td>
</tr>
</tbody>
</table>

The cost of property does not include the value of property given in trade or exchange for property purchased for manufacturing investment. It also does not include insurance proceeds received in compensation for the loss of property damaged or destroyed by fire, flood, storm or other casualty, or stolen. The cost of rental property that is leased for a term of 10 years or longer is 100% of the rent reserved for the primary term of the lease, not to exceed 20 years. The cost of self-constructed property shall be the amount properly charged to the capital account for purposes of depreciation. If property is purchased for multiple uses, the cost is apportioned between the eligible use and the non-eligible use, and the amount apportioned to the manufacturing business is treated as a qualified manufacturing investment.

¶ 302.6 Application of the Credit


The manufacturing investment credit can be used to offset up to 50% of the severance tax, business franchise tax, and corporation net income tax in that order. If the entity that is claiming the credit is also claiming the industrial expansion and revitalization credit, the sum of the two credits may not offset more than 50% of the total severance, business franchise, or corporation net income tax.

If the eligible entity is a limited liability company, small business corporation or a partnership, any unused credit, after application to severance tax, business franchise tax, and corporation net income tax, is allowed as a credit against the corporation net income tax on owners of the eligible taxpayer on conduit income directly derived from the eligible taxpayer by its owners. Personal income tax is not eligible for offset by the credit. Unused credit is forfeited and cannot be carried forward or backward.

Beginning in 2009, the manufacturing investment credit can be used to offset up to 60% of the severance tax, business franchise tax, and the corporation net income tax in that order.

¶ 302.7 Forfeiture and Redetermination of Credits


If property for which the credit was allowed ceases to be used in an industrial facility, the unused portion of the credit derived from that property for that year and future years is forfeited. Also, in the event of such cessation of use or disposition, the credits taken in
prior years are to be redetermined with the useful life of the property to be considered the period for which it was actually used. The percentage of the cost of the property which is an eligible investment is then redetermined accordingly. Any additional tax, interest and penalties owed should be filed together with a reconciliation statement.

A cessation due to a casualty loss of the eligible investment will not cause a redetermination of the credit for prior years although the credit is forfeited for that year and future years. Cessations for other reasons such as those resulting from labor disputes or lack of market are not similarly exempted. It is unclear how permanent a cessation must be before a redetermination of the credit is required. Presumably a temporary shutdown of business which is not a permanent abandonment of the use of the facility would not cause a redetermination of the credit. A sale to a purchaser who continues to operate the facility is not a disposition causing a redetermination of the credit. In the event of a transfer to a successor, the successor may take the remaining available credit.

¶ 302.8 Filing for the Credit


In order to claim the credit, the taxpayer must file a written application (Form WV/MITC-A) on or before the last day for filing the annual return, determined by including any authorized extension of time for filing the return for the taxable year in which the property to which the credit relates is placed in service or use. Failure to file the application for credit will result in forfeiture of the 50% of the annual credit allowance until the application is filed.

The taxpayer must also file a Schedule MITC-1 Credit for Manufacturing Investment with the tax return on which they claim the credit.

¶ 303 MANUFACTURING PROPERTY TAX CREDIT ADJUSTMENT

¶ 303.1 Introduction


Effective January 1, 2009, the Manufacturing Property Tax Adjustment Act was enacted to provide a credit against business franchise tax and corporate income tax for property tax paid during the tax year on manufacturing inventory.

¶ 303.2 Eligible Taxpayers

_**Law: W. Va. Code § 11-13Y-2(b)(5) and (6)**_

In order to be eligible for the credit, the taxpayer must be engaged in a business that is classified under the North American Industry Classification System (NAICS) codes as having a 31, 32, or 33 as the first two digits of its sector identifier. The taxpayer must be subject to West Virginia business franchise tax or corporation net income tax and have paid property tax on manufacturing inventory in a West Virginia county. Taxpayers
owning property assessed by the Board of Public Works are not eligible taxpayers for this credit.

Members of an affiliated group of taxpayers engaged in an unitary business in which one of the group is subject to either business franchise tax or corporation net income tax are eligible for this credit.

¶ 303.3 Amount of the Credit  

The amount of the credit is equal to the property tax paid during the tax year on manufacturing inventory.

¶ 303.4 Application of the Credit  

The credit is applied first to business franchise tax and then to corporation net income tax credit. Any excess credit is forfeited and cannot be carried forward or backward.

¶ 303.5 Filing for the Credit  

The taxpayer must prepare and file an annual schedule as required by the Tax Department with its business franchise tax and corporation net income tax returns in order to claim the credit.

¶ 304 INDUSTRIAL EXPANSION AND REVITALIZATION CREDIT FOR ELECTRIC POWER PRODUCERS

¶ 304.1 Introduction  

This credit is the vestige of the earlier industrial expansion and revitalization credit that was repealed for other types of taxpayers. The current credit only applies to electric power producers as described in West Virginia Code §11-13-2o on or after January 1, 2003.

¶ 304.2 Eligible Taxpayers  

Persons engaging or continuing within this State in the business of generating or producing electricity for sale, profit or commercial use, either directly or indirectly through the activity of others, in whole or in part, or in the business of selling electricity to consumers, or in both that make eligible investment in a electric power generation facility located in West Virginia are eligible for the credit.
§ 304.3 Eligible Investment


An eligible investment is an investment for expansion or revitalization of an "industrial facility" in this State made by an electric power producer. An industrial facility is broadly defined as almost any real or tangible personal property located within this State used in an "industrial business." The eligible investment is the cost of the property acquired or constructed, adjusted for the useful life of the property. The eligible investment is adjusted for the useful life of the property as follows:

<table>
<thead>
<tr>
<th>Useful Life of Property</th>
<th>Applicable Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 years or more but less than 6 years</td>
<td>33 1/3%</td>
</tr>
<tr>
<td>6 years or more but less than 8 years</td>
<td>66 2/3%</td>
</tr>
<tr>
<td>8 years or more</td>
<td>100%</td>
</tr>
</tbody>
</table>

Tangible personal property purchased to modernize buildings and equipment is an eligible investment if the property is capitalized for federal income tax purposes. If property is partly used in the expansion or revitalization of a business and is partly used for some non-qualifying purpose, the cost of the property is to be allocated in order to determine the eligible investment.

The cost of property acquired for industrial expansion or revitalization does not include credit given for trade-ins or insurance proceeds which are used to acquire replacement property. Property for which a credit was allowed which is acquired as a result of the acquisition of the assets or stock of a business does not qualify for the credit. However, property which was not previously used in this State and which was purchased as part of the acquisition of a business may be eligible for the credit. Property which is leased as part of an industrial expansion or revitalization is deemed to be an eligible investment if the lease is for a term of 10 years or longer, not including renewal periods. The cost of the leased property is considered to be the rentals that are to be paid over the primary term of the lease not to exceed 20 years.

§ 304.4 Amount of the Credit

*Law:* W. Va. Code § 11-13D-3(e)

The amount of the credit is 10% of the eligible investment. One-tenth of the credit is taken each year for ten consecutive years beginning with the year in which the property is first placed in service or use in this State.

§ 304.5 Application of the Credit


The credit may be applied against the taxpayer's liability for the business and occupation tax, the sales and service tax, the use tax, the severance tax and the business franchise tax. This credit cannot reduce the sum of the taxes against which the
credit may be taken below 50%. If the credit cannot be used in any one year because of these limitations, it is forfeited.

¶ 304.6 Forfeiture and Redetermination of the Credit


If property for which the credit was allowed ceases to be used in an electricity generation business, the unused portion of the credit derived from that property for that year and future years is forfeited. Also, in the event of such cessation of use or disposition, the credits taken in prior years are to be redetermined with the useful life of the property to be considered the period for which it was actually used. The percentage of the cost of the property which is an eligible investment is then redetermined accordingly.

Example: 100% of the cost of land acquired for an industrial site would be an eligible investment since the land would have a useful life of more than eight years. If the business conducted at the site was permanently shut down after five years, the useful life of the property would be considered to be five years and the allowable credit would be redetermined for all prior years, considering only one-third of the cost of the land as an eligible investment.

A cessation due to a casualty loss of the eligible investment will not cause a redetermination of the credit for prior years although the credit is forfeited for that year and future years. Cessations for other reasons such as those resulting from labor disputes or lack of market are not similarly exempted. It is unclear how permanent a cessation must be before a redetermination of the credit is required. Presumably a temporary shutdown of business which is not a permanent abandonment of the use of the facility would not cause a redetermination of the credit. A sale to one who continues to operate the facility is not a disposition causing a redetermination of the credit. In the event of a transfer to a successor, the successor may take the remaining available credit.

¶ 304.7 Example of the Industrial Expansion and Revitalization Credit for Electric Power Producers

A power company invests $300,000,000 in scrubbers for its existing power generation plant. Only nine new jobs are created by the investment so it does not qualify for the economic opportunity credit, but it will qualify for the industrial expansion and revitalization credit.

The economic useful life of the scrubbers is greater than eight years so 100% of the cost of the equipment is an eligible investment. The credit is 10% of the total eligible investment. The total available credit is $30,000,000. This credit is spread over 10 years so that there is a $3,000,000 credit for each of the ten successive years commencing with the year in which the property is placed into service.
§ 305 COAL LOADING FACILITY CREDIT

§ 305.1 Introduction

*Law: W. Va. Code § 11-13E-1 et seq*

An investment in a coal loading facility was not generally covered by the industrial expansion and revitalization credit due to the limitation on the type of business which was eligible for that credit. Consequently, a separate coal loading facilities credit was enacted.

§ 305.2 Eligible Taxpayers


Any taxpayer subject to the business and occupation tax, the severance tax or the business franchise tax is eligible to take the coal loading facility credit.

§ 305.3 Eligible Investment


Property purchased for the purpose of building, expanding or revitalizing a "coal loading facility" in this State is an investment eligible for the credit. A coal loading facility includes real and personal property used solely for the purpose of transferring coal from a coal preparation facility, from a coal storage facility or from any means of transportation to rail or barge transportation. It should be noted that only a coal tipple used to load railroad cars or river barges will qualify for this credit and any other type of coal tipple used, such as a truck tipple, will not be eligible. An investment in a coal loading facility does not include the cost of a coal preparation plant, or coal blending or sizing equipment. It does, however, include such items as conveyors, coal storage facilities, weighing equipment and railroad track, provided such items are directly associated with and used solely for the loading of coal. Therefore, land purchased to be used for the storage of coal in conjunction with a coal tipple will qualify for this credit as well as the cost of laying track to the tipple or the cost of constructing a dock for barges to be loaded from a coal tipple.

The cost of property purchased for the coal loading facility is adjusted for its useful life according to the following schedule:

<table>
<thead>
<tr>
<th>Useful Life of Property</th>
<th>Applicable Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 years or more but less than 6 years</td>
<td>331/3%</td>
</tr>
<tr>
<td>6 years or more but less than 8 years</td>
<td>662/3%</td>
</tr>
<tr>
<td>8 years or more</td>
<td>100%</td>
</tr>
</tbody>
</table>

If property is partly used in a coal loading facility business and is partly used for some non-qualifying purpose, the cost of the property is to be allocated in order to determine the qualified investment. However, there is no procedure set forth for determining how such allocation is to be made. The cost of property acquired for the
coal loading facility does not include credit given for trade-ins or insurance proceeds which are used to acquire replacement property.

Property which was previously used to compute any credit described in this chapter, which is acquired as a result of the acquisition of the assets or stock of a business, cannot be used to qualify for the coal loading credit. However, property which was not previously used in this State and which was purchased as part of the acquisition of a business may be eligible for the credit. Property which is leased as part of a coal loading facility is deemed to be an eligible investment if the lease is for a term of 10 years or longer, not including renewal periods. The cost of the leased property is considered to be the rentals that are to be paid over the primary term of the lease not to exceed 20 years.

¶ 305.4 Amount of the Credit

Law: W. Va. Code §§ 11-13E-3(c) and 11-13E-3(d)

The amount of the coal loading facility credit is 10% of the "eligible investment." One-tenth of the credit is taken each year for ten consecutive years beginning with the year in which the facility is first placed in service or use in this State. If the investment in the coal loading facility has been used to compute any other credit described in this chapter, it cannot be used to qualify for the coal loading facility credit.

¶ 305.5 Application of the Credit

Law: W. Va. Code § 11-13E-3(d)

The credit may be applied against the taxpayer's liability for the business and occupation tax, the severance tax and the business franchise tax. The credit cannot reduce the sum of the taxes against which the credit may be taken below 50%. If the credit cannot be used in any one year because of these limitations, it is forfeited.

¶ 305.6 Forfeiture and Redetermination of the Credit


If property for which the credit was allowed ceases to be used in a coal loading facility, the unused credits derived from that property for that year and future years are forfeited. Also, in the event of such cessation of use or disposition, the credits taken in prior years are to be redetermined considering the useful life of the property to be the period for which it was actually used. The percentage of the cost of the property which is an eligible investment is redetermined accordingly. A cessation due to a casualty loss of the eligible investment will not cause a redetermination of the credit for prior years although the credit is forfeited for that year and future years. Cessations for other reasons such as economic decline are not similarly exempted. A sale to one who continues to operate the property as a coal loading facility is not a disposition causing a redetermination of the credit. In the event of a transfer to a successor, the successor may take the remaining available credit.
¶ 306 STRATEGIC RESEARCH AND DEVELOPMENT TAX CREDIT

¶ 306.1 Introduction


The strategic research and development tax credit was enacted to encourage research and development in West Virginia in order to promote economic development and increase employment.

¶ 306.2 Eligible Taxpayers

_Law:_ W. Va. Code § 11-13R-3(b)(6)

A credit is available to any taxpayer who purchases property or services for the purpose of conducting qualified research and development activities.

¶ 306.3 Qualified Research and Development Activities

_Law:_ W. Va. Code § 11-13R-3(b)(10)

Qualified research and development activities mean systematic scientific, engineering or technological study and investigation in a field of knowledge in the physical, computer or software sciences, often involving the formulation of hypotheses and experimentation, for the purpose of revealing new facts, theories or principles, or increasing scientific knowledge, which may reveal the basis for new or enhanced products, equipment or manufacturing processes.

Research and development includes, but is not limited to, design, refinement and testing of prototypes of new or improved products, or equipment, or design, refinement and testing of manufacturing processes before commercial sales relating thereto have begun. Commercial sales include, but are not limited to, sales of prototypes or sales for market testing.

Research and development does not include: market research; sales research; efficiency surveys; consumer surveys; product market testing; product testing by product consumers or through consumer surveys for evaluation of consumer product performance or consumer product usability; the ordinary testing or inspection of materials or products for quality control (quality control testing); management studies; advertising; promotions; the acquisition of another's patent, model, production or process or investigation or evaluation of the value or investment potential related thereto; research in connection with literary, historical or similar activities; research in the social sciences, economics, humanities or psychology and other non-technical activities; and the providing of sales services or any other service, whether technical service or non-technical service.

¶ 306.4 Eligible Investment

_Law:_ W. Va. Code § 11-13R-4
The annual combined qualified research and development expenditure is the sum of the applicable percentage of the cost of depreciable property purchased for the conduct of a qualified research and development activity, which is placed in service or use in this State during the taxable year, plus the amount of qualified research and development expenses deducted by the eligible taxpayer, for federal income tax purposes for the taxable year.

Qualified research and development credit property means depreciable property purchased for the conduct of qualified research and development. The amount of qualified investment property research and development property is determined by adjusting the cost of the property by a percentage based on the useful life of the property.

<table>
<thead>
<tr>
<th>Useful Life of Property</th>
<th>Applicable Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 years or more but less than 6 years</td>
<td>33 1/3%</td>
</tr>
<tr>
<td>6 years or more but less than 8 years</td>
<td>66 2/3%</td>
</tr>
<tr>
<td>8 years or more</td>
<td>100%</td>
</tr>
</tbody>
</table>

Qualified research and development expenses means the sum of in-house and contract research and development expenses allocated to West Virginia, which are paid or incurred by the eligible taxpayer during the taxable year. Ineligible expenses include any expenses that must be capitalized and depreciated for federal tax purposes, and any expenses related to the ascertaining the existence, location, extent or quality of any deposit of coal, limestone, oil and gas, or other natural resource. In addition, wage and salary expense reported on a Form W-2 for federal income tax purposes on which the West Virginia personal income tax is imposed and against which the strategic research and development credit is applied are also ineligible.

In house research and development expenses include wages paid or incurred to an employee for qualified services performed in this State by the employee; amounts paid or incurred for supplies used in the conduct of qualified research in this State; and amounts paid or incurred to another person for the right to use personal property in the conduct of qualified research and development in this State.

Contract research and development expenses include 65% of any amount paid or incurred by the taxpayer to any person for qualified research and development. It does not include amounts paid to employees. The expenses are treated as paid or incurred during the taxable year during which the research is conducted, not the year they are paid.

Contract research and development expenses also include 65% of the amounts paid to colleges, universities, and nonprofit organizations exempt from federal income taxes, which are organized and operated primarily to conduct scientific research, and are not a private foundation for federal income tax purposes.
Property or expenses that were the basis of any other credit against tax is not eligible for the strategic research and development credit.

¶ 306.5 Amount of the Credit


The amount of the credit is either the greater of 3% of the annual qualified research and development expenditures within West Virginia, or 10% of the excess of the annual qualified research and development expenditure within West Virginia over the base amount. The base amount is the average annual research and development expenditure within West Virginia during the 3 years preceding the current year.

If a taxpayer has filed a business franchise tax return for fewer than three years, the base amount is the average annual combined qualified research and development expenditure for the number of taxable years immediately preceding, other than short taxable years, that the taxpayer has filed a business franchise tax return. If the taxpayer has not filed a business franchise tax return for at least 1 year, based on all the filings of the controlled group, the base amount is zero.

¶ 306.6 Application of the Credit


The credit may be used to offset up to 100% of the taxpayer’s annual liability for business franchise tax, corporation net income tax, and personal income tax on flow through business profits in that order. The credit is first applied to the business franchise tax before any other investment credits but after any credits contained in §11-23-17. Any remaining credit is then applied to the corporation income tax of the eligible taxpayer before application of any other investment credit. If the eligible taxpayer is a limited liability company, an electing small business corporation as defined in IRC §1361, or a partnership, any unused credit is then applied against the corporation net income tax liability of the owners of the eligible taxpayers. The tax credit shall be allocated among the owners in the same ratio as profits and losses. After application to the business franchise tax and corporation income tax, any remaining credit may be applied to the personal income tax of the eligible taxpayer. If the eligible taxpayer is a limited liability company, an electing small business corporation as defined in IRC §1361, or a partnership, any unused credit is then applied against the personal income tax liability of the owners of the eligible taxpayers. The tax credit shall be allocated among the owners in the same ratio as profits and losses.

¶ 306.7 Refundable Credit for “Small Qualified Research and Development Company

Law: W. Va. Code § 11-13R-6(i)

For investment made on or after July 1, 2004, but prior to January 1, 2008, the taxpayer and owners of the eligible taxpayer may claim for any year there is excess credit available after application of the credit to the business franchise tax, corporation
net income tax and the personal income tax, the excess amount as a refundable credit, not to exceed one hundred thousand dollars. In order to claim a refundable credit, the eligible taxpayer must have gross revenues of not more than $20,000,000 and a payroll of not more than $2,500,000. If the taxpayer is a member of a controlled group, the gross revenues of all the members of the controlled group must be considered when determining if this test is met.

Not more than $1,000,000 may be approved for refundable credit by the Tax Commissioner during any fiscal year. Eligibility for the refundable credit will be determined by the Tax Commissioner based on the filing date of the claim for refund with the earlier claims having priority over later claims.

¶ 306.8 Forfeiture and Redetermination of the Credit

**Law**: W. Va. Code § 11-13R-7

If a taxpayer disposes of qualified research and development property before its useful life expires, or otherwise ceases to use the property in a qualified research and development activity, the remainder of the credit related to that investment is forfeited. The credit already claimed attributable to the disposed property must be recalculated using the actual useful life. If an excess amount of credit has been previously claimed based on the actual useful life of the property, then a reconciliation schedule must be filed with payment of any additional tax and interest due. If the property has been used for less than four years, all credit is forfeited.

The forfeiture rules do not apply if the property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen.

¶ 306.9 Transfer of Qualified Research and Development Property to Successors

**Law**: W. Va. Code § 11-13R-8

If a taxpayer changes the form of conducting its business, but retains a controlling interest in the successor business, and the qualified research and development property is retained in a business in West Virginia and used in research and development, the forfeiture and redetermination rules do not apply, and the successor business is allowed to claim the amount of credit still available for subsequent years. The same is true where property is transferred or sold to a successor business that continues to use the property in a qualified research and development activity.

¶ 306.10 Filing Requirements

**Law**: W. Va. Code § 11-13R-6(j)

In order to claim the credit, taxpayer must file an application (Form WV/SRDTC-A) with the Tax Commissioner in order to receive certification of the research and development project or program. The application must be filed by no later than the due date of the annual state income tax, including lawful extensions of time to file, for the tax year in which the qualified research and development activity occurred. Failure to file
the application will result in forfeiture of 100% of the tax credit for the time periods until the application is filed.

In addition, a schedule WV/SRDTC-1 must be filed with the tax return on which the credit is claimed.

¶ 307 HIGH GROWTH BUSINESS INVESTMENT TAX CREDIT

¶ 307.1 Introduction


The high growth business investment tax credit was enacted in 2005 to encourage investment in start-up, growth-oriented, research and development businesses in this State and thereby increase employment and economic development. (NOTE: This credit program expired July 1, 2008. However, taxpayers who became entitled to the credit before that date may continue to apply the credit in subsequent years as if the program had not expired.)

¶ 307.2 Eligible Taxpayers


An eligible taxpayer is a person that is subject to business franchise tax, corporation net income tax, or personal income tax that has made investment in a qualified research and development company, and received certification from the economic development authority that a portion of the annual available high growth business investment credit has been allocated to it.

¶ 307.3 Eligible Investment

*Law: W. Va. Code §§ 11-13U-3(5) and 11-13U-5*

“Qualified investment” means an equity financing of a West Virginia qualified strategic research and development company. The investment must be in cash or in cash equivalents and cannot be an exchange of in-kind property. A “qualified strategic research and development company is an entity that has been certified by the State Tax Commissioner as eligible for the West Virginia research and development tax credit as provided in W. Va. Code § 1-13R that has annual gross receipts of less than $20,000,000, annual payroll of less than $2,500,000, and maintains its corporate headquarters in West Virginia. The total amount of qualified investment that a qualified research and development company may accept from all eligible taxpayers in any particular taxable year is one million dollars.

Investment must be maintained in a qualified strategic research and development company for a minimum period of five years. If an investment is repaid before the expiration, the eligible taxpayer has 3 months from the date of repayment to reinvest the repaid amount in another qualified research and development company for a period of at least equal to the remaining period of the initial 5-year term.
Investment may not be made in an entity that is the alter ego of an eligible taxpayer. The alter ego of an eligible taxpayer means a qualified research and development company where the ownership of the business is “substantially related to the ownership of the eligible taxpayer or where the board of directors of the qualified research and development company is controlled by the eligible taxpayer. “Substantially related” means a 5% common ownership interest exists between the eligible taxpayer and the qualified research and development company. An eligible taxpayer is considered to have control of the qualified research and development company when it controls a simple majority of the board of directors.

¶ 307.4 Amount of the Credit

Law: W. Va. Credit § 11-13U-4(a)

The high growth business investment credit will be equal to 50% of the total value of the qualified investment in the taxable year when the qualified investment was actually made. The total amount of credits allocated by the Economic Development Authority for any one fiscal year cannot exceed $1,000,000. The credits are allocated by the Economic Development Authority in the order in which applications are received.

¶ 307.5 Application of the Credit


The credit is first applied to the business franchise tax before any other investment credits but after any credits contained in § 11-23-17. Any remaining credit is then applied to the corporation income tax of the eligible taxpayer before application of any other investment credit. If the eligible taxpayer is a limited liability company, an electing small business corporation as defined in IRC § 1361, or a partnership, any unused credit is then applied against the corporation net income tax liability of the owners of the eligible taxpayers. The tax credit shall be allocated among the owners in the same ratio as profits and losses. After application to the business franchise tax and corporation income tax, any remaining credit may be applied to the personal income tax of the eligible taxpayer. If the eligible taxpayer is a limited liability company, an electing small business corporation as defined in IRC § 1361, or a partnership, any unused credit is then applied against the personal income tax liability of the owners of the eligible taxpayers. The tax credit shall be allocated among the owners in the same ratio as profits and losses.

The total amount of tax credit that may be used in any taxable year by an eligible taxpayer in conjunction with the owners of the taxpayer is $50,000. Excess credit may be carried forward for a period of four years from the year the investment was initially made. Any remaining credit is forfeited.

¶ 307.6 Filing for the Credit

In order to receive the credit, an eligible taxpayer must make written application to the economic development authority to receive the amount of tax credit to be allocated to it. In addition to the written application, the eligible taxpayer must file with the economic development authority the certification received from the Tax Commissioner by the qualified research and development company and the certificate of incorporation for the qualified research and development company.

In order to claim the credit, the eligible taxpayer must file with the Tax Commissioner, Schedule WV/HGBITC-1.

¶ 308 TOURISM DEVELOPMENT CREDIT

¶ 308.1 Introduction


The tourism development credit allows an approved company that invests in and operates a new or expanding tourism destination project to retain some of the sales tax that it collect from its customers on sales from operation of the tourism attraction or facility. The amount is based on a percentage of approved costs and is prorated over a 10-year period.

¶ 308.2 Eligible Taxpayers

*Law*: W. Va. Code § 5B-2E-3(b)(7)

In order to qualify for the credit, the taxpayer must operate either a tourism development project or a tourism development expansion project that has been approved for the credit by the West Virginia Development Office. An eligible taxpayer may operate the project directly or indirectly through a lessee.

¶ 308.3 Tourism Development Project


A new or expanded tourism development project involves the acquisition, constructing and equipping of a tourism attraction or the expansion of an existing tourism attraction, including the acquisition of real estate by a leasehold interest with a minimum term of ten years, the construction and installation of improvements to facilities necessary or desirable for the acquisition, construction, installation of a new tourism attraction or the expansion of an existing tourist attraction. The improvements may include surveys, installation of utilities, which may include water, sewer, sewage treatment, gas, electricity, communications and similar facilities, and off-site construction of utility extensions to the boundaries of the real estate on which the facilities are located, all of which are to be used to improve the economic situation of the approved company in a manner that allows the approved company to attract persons. It does not include a project that will be substantially owned, managed or controlled by an eligible company with an existing project located within a 10 mile radius, or by a person...
or persons related by a family relationship to the owner of an eligible company with an existing project located within a 10 mile radius.

¶ 308.4 Application and Approval Process

_Law_: W. Va. Code § 5B-2E-5

In order to qualify for the credit, an eligible company must file a written application for approval of the project with the development office. The application must include a description and location of the project, capital and other anticipated expenditures for the project and the sources of funding therefor; the anticipated employment and wages to be paid at the project; business plans that indicate the average number of days in a year in which the project will be in operation and open to the public; and the anticipated revenue and expenses generated by the project.

Within forty-five days of receipt of the application, the director of the development office will either grant or deny preliminary approval of the application. After the preliminary approval of a project, the development office will engage a competent consulting firm paid for by the applicant to prepare a report analyzing the data provided by the applicant and gathering additional data to determine if in their independent judgment, the project will meet the following criteria:

(1) Likely will attract at least 25% of its visitors from outside of this State;

(2) Will have approved costs in excess of $1,000,000;

(3) Will have a significant and positive economic impact on this State considering, among other factors, the extent to which the project will compete directly with or complement existing tourism attractions in this State and the amount by which increased tax revenues from the project will exceed the credit given to the approved company;

(4) Will produce sufficient revenues and public demand to be operating and open to the public for a minimum of 100 days per year; and

(5) Will provide additional employment opportunities in this State.

Within 50 days of receipt of the report from the consulting firm, or other requested information, the director of the development office shall review the report and act to approve or not approve the application as an approved company. The decision by the Director of the Development Office is final.

A project that is approved for the tourism development credit will not be eligible for the economic development credit, nor will a project that qualifies for the economic development credit be eligible to qualify for the tourism development credit.
¶ 308.5 Agreement between West Virginia Development Office and Approved Company

_Law: W. Va. Code § 5B-2E-6_

Upon final approval of the project, the development office and approved company enter into an agreement containing provisions outlining the amount of approved costs of the project that will qualify for the sales tax credit and a date certain that the project will be completed and opened to the public. Within 3 months of the completion date, the approved company must provide a certification of the actual costs of the project reviewed by a certified public accountant acceptable to the Development Office.

Extensions of time to complete and open the project not exceeding 3 years from the date of final approval can be given by the Development Office.

¶ 308.6 Amount of the Credit

_Law: W. Va. Code §§ 5B-2E-7 and 5B-2E-7a_

An approved company is allowed a credit against the sales tax that has been collected on sales generated by or arising from the operations of the tourism development project. The credit cannot be taken against sales tax arising from activities other than the new or expanded tourist development project.

In the case of an expanded tourist development project, only the increase in sales tax attributable to the expansion of the project may be offset by the credit. In order to determine the increase in sales tax, a baseline is determined by the Development Office and only the sales tax that is in excess of the baseline may be offset by the credit.

The maximum amount of the credit is 25% of the approved company's approved costs as provided in the agreement between the Development Office and the approved company.

If the tourism development project site is located within the permit area or an adjacent area of a surface mining operation from which all coal has been extracted prior to commencement the tourism development project, the maximum amount of the credit allowable will be 35% of the approved company's costs as provided in the agreement between the Development Office and the approved company.

However, “approved cost” does not include any portion of the cost for the acquisition, construction, equipping or installation of a project that is financed with governmental incentives, grants or bonds or for which the eligible taxpayer elects to qualify for other tax credits, including, but not limited to, the economic opportunity tax credit discussed in ¶ 301 above.

¶ 308.7 Application of the Credit

_Law: W. Va. Code §§ 5B-2E-7 and 5B-2E-7a_
The credit allowable is taken over a 10 year period, at the rate of one tenth of the total credit per year. The credit is first taken in the year the tourism development project is opened to the public, unless the approved company opts to delay the beginning of the ten-year period until the next succeeding tax year. This election is made with the first sales tax return filed by the approved company following the opening of the project, and cannot be revoked.

The credit is claimed on the monthly sales tax returns filed by the approved company by reducing the monthly tax remittance amount until the annual allowance has been claimed. If there is any excess annual credit allowance remaining, it may be carried over to the next tax year until the third tax year following the end of the initial ten year period. No carryback of the credit to a prior year is allowed.

¶ 308.8 Forfeiture of Tax Credits and Credit Recapture

Law: W. Va. Code § 5B-2E-8

If after the first year of operation, the new or expanded tourism development project fails to attract at least 25% of its visitors from among persons who are not residents of this State or is not open to the public for at least one hundred days, then the credit will be forfeited and the recapture tax will be due and owing. The credit will also be forfeited and the recapture tax due and owing if the approved company has an outstanding Worker's Compensation obligation, unemployment compensation tax obligation, or other State tax obligation. The recapture tax will be equal to all previously claimed tourism development project tax credit taken by the approved company. The recapture tax will be paid by the filing of amended returns and the payment of any tax due together with applicable interest.

¶ 308.9 Annual Reporting

Law: W. Va. Code § 5B-2E-8(c)

Within 45 days after the end of each calendar year during the term of the agreement, the approved company will provide the development office with all reports and certifications required by the development office to demonstrate that the project is in compliance with all applicable laws. The Development Office will then review this documentation and certify to the Tax Commissioner that the project is in compliance.

¶ 308.10 Transferability to Successor

Law: W. Va. Code § 15B-2E-8(d)

This tax credit is transferable to an eligible successor company that continues to operate the approved project. The Development Office must give written consent to the transfer.
¶ 309 ENVIRONMENTAL AGRICULTURAL EQUIPMENT TAX CREDIT

¶ 309.1 Introduction


This credit was enacted to encourage the agricultural industry to invest in equipment and structures that are protective of the environment.

¶ 309.2 Eligible Taxpayers


To be eligible for the credit, the taxpayer must be engaged in agricultural operations in West Virginia and purchase and install qualified agricultural equipment for use in that activity. Agricultural operations include the commercial production of food, fiber, or woodland products (but not timbering activity) by means of cultivation, tillage, of the soil or by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, aquacultural activity, horticultural activity, or any other plant or animal production activity and all farm practices related, usual or incidental to the operations.

Commercial production consists of annual sales by the producer of at least $1,000 of agricultural products. This requirement does not need to be met in order for the activity to be commercial production of an agricultural product in the first twelve months after: (1) the occurrence of a catastrophe (such as fire, drought or flood), other than mere mechanical breakdowns, which substantially destroyed the agricultural product being produced or the means for harvesting that product, or (2) the commercial producer of an agricultural product has first commenced the production activity.

¶ 309.3 Qualified Agricultural Equipment and Structures

*Law*: W. Va. Code § 11-13K-2(g)

Equipment and structures that are considered to be qualified agricultural equipment and structures and eligible for the credit include the following:

- Advanced technology pesticide and fertilizer application equipment
- Conservation tillage equipment
- Dead poultry composting facility
- Mortality incinerator
- Nutrient management system
- Stream bank and shoreline protection system
- Stream channel stabilization systems
- Stream crossing or access plans
- Waste management systems
- Waste storage facilities
- Waste treatment lagoons
¶ 309.4 Amount of the Credit  

The credit is equal to 25% of the price of all certified expenditures for qualified agricultural equipment. Expenditures for land do not qualify.

¶ 309.5 Application of the Credit  

The amount of claim claimed in any one year may not exceed $2500 or the total amount of the taxpayer’s liability under either the corporation net income tax, personal income tax, or personal income tax attributable to the flow through of income from an S corporation, partnership, or limited liability company that is attributable to agricultural operations in this State. Excess credits may be carried forward for five years and must be used before any credit earned from new purchases is applied.

¶ 309.6 Filing Requirements  

In order to claim the credit, the taxpayer must file Form WV/AG1, the West Virginia Environmental Agricultural Equipment Tax Credit Schedule. The taxpayer must also provide proof of purchase and installation specific to identity the item as qualified agricultural equipment. Written certification by the Commissioner of Agriculture that each item purchased is in fact qualified agricultural equipment must also be attached to the tax credit schedule. If the qualified agricultural equipment is advanced technology pesticide and fertilizer application equipment, the written certification must be obtained from the West Virginia Department of Environmental Protection. If the qualified equipment is a mortality incinerator, the written certification is obtained from the Office of Air Quality at the Department of Environmental Protection.

¶ 310 HISTORIC REHABILITATED BUILDINGS INVESTMENT CREDIT

¶ 310.1 Introduction  
*Law: W. Va. Code §§ 11-24-23a and 11-24-23g*

This credit was enacted to encourage the restoration of historic buildings in West Virginia and is modeled on the Federal Certified Historic Structure Credit. The standards are the same as the federal program. Unlike most other credits, eligible taxpayers may transfer, sell, or assign these credits upon approval by the West Virginia Department of Culture and History.

¶ 310.2 Eligible Taxpayers  
*Law: W. Va. Code § 11-24-23a*

Taxpayers eligible for the historic rehabilitated buildings investment credit include taxpayers who make qualified rehabilitation project expenditures on or after June 6,
1990 on residential and nonresidential properties located in West Virginia that are designated by the National Park Service, Department of the Interior, as “certified historic structures” and as “qualified rehabilitated structures.”

¶ 310.3 Eligible Investment

Rehabilitation costs are the same as those that qualify for the federal credit. In order to qualify for the credit, rehabilitation costs must within a 24-month period within the total period of the renovation exceed the greater of $5,000, or the adjusted basis of the property.

¶ 310.4 Amount of Credit

The credit is equal to 10% of the qualified expenditures. Excess credits may be carried back one year and forward for 20 years similar to the federal credit.

¶ 310.3 Application of the Credit

The credit may be used to offset the personal income tax and the corporation income tax. It is applied after all other allowable tax credits.

¶ 310.4 Filing Requirements
Law: W. Va. Code § 11-24-23c

In order to claim the credits, the taxpayer must file Schedule RBIC, together with a copy of the request for a final National Park Service certification (NPS Form 10-168 c).

¶ 311 RESIDENTIAL HISTORIC REHABILITATED BUILDINGS INVESTMENT CREDIT

¶ 311.1 Introduction

This credit was enacted to encourage the rehabilitation of residential homesteads that are certified historic structures.

¶ 311.2 Eligible Taxpayers
Law: W. Va. Code §§ 11-21-8 and 11-21-8a

Taxpayers eligible for the residential historic rehabilitated building investment credit include persons who make qualified purchases on or after January 1, 2000 for the restoration of residential homesteads that have been designated by the West Virginia Department of Culture and History as “certified historic structures” and as a “qualified rehabilitated structures.” Unlike most other credits, eligible taxpayers may transfer, sell,
or assign these credits upon approval by the West Virginia Department of Culture and History.

¶ 311.3 Eligible Investment
*Law:* W. Va. Code §11-21-8g

The taxpayer must receive certification from the West Virginia Department of Culture and History for the expenditures made on the building. The certificate received from the West Virginia Department of Culture and History is attached to the credit schedule when claiming the credit.

¶ 311.4 Amount of Credit
*Law:* W. Va. Code § 11-21-8g

The credit is equal to 20% of the qualified expenditures.

¶ 311.5 Application of the Credit
*Law:* W. Va. Code § 11-21-8g

The credit can be used to offset up to 100% of the personal income tax liability of the taxpayer after application of all other credits. Any excess credit may be carried forward for a total of 5 years, similar to the treatment for the federal credit.

¶ 311.6 Filing Requirements

A copy of the request for certification (Form 10-168c) filed with the West Virginia Department of Culture and History should be attached to the personal income tax return, together with Schedule RBIC-A.

¶ 312 NEIGHBORHOOD INVESTMENT CREDIT

¶ 312.1 Introduction
*Law:* W. Va. Code § 11-13J-2; WVCSR § 145-7-1 et seq.

This legislation was enacted to provide credit to individuals or businesses that make eligible contributions to community based nonprofit organizations that establish projects to assist neighborhoods and local communities. The total tax credits allowed annually to project plans certified by the West Virginia Development Office is $3,000,000.

¶ 312.2 Eligible Taxpayers

An eligible taxpayer is a person or entity subject to the West Virginia business franchise tax, corporate income tax, or personal income tax that makes an eligible contribution to a qualified charitable organization pursuant to the terms of a Certified Neighborhood Investment Program Project Plan.
¶ 312.3 Eligible Contributions  

Eligible contributions include cash, tangible personal property (valued at fair market value), real property (valued at fair market value), and in kind professional services (valued at 75% of their fair market value). Publicly traded corporate stock can also be contributed, but must be sold within 180 days after its receipt. The maximum contribution by a taxpayer for a taxable year is $200,000. The minimum annual contribution eligible for the credit is $500.

¶ 312.4 Eligible Project Plans  

Eligible project plans are determined by the West Virginia Development Office and the Neighborhood Investment Advisory Board by qualification based on contributions destined for a certified economically disadvantaged area or by need.

¶ 312.5 Amount of Credit  
*Law:* W. Va. Code § 11-13J-5(b)

The amount of the credit is 50% of the taxpayer’s eligible contributions.

¶ 312.6 Application of the Credit  
*Law:* W. Va. Code §§ 11-13J-5 and 11-13J-6(b)

The credit is first applied against the business franchise tax to offset up to 50% of that tax, after application of the credits contained in W. Va. Code § 11-23-17, but before any other tax credits. The credit is then applied against the corporation net income tax to offset up to 50% of the tax before application of any other tax credits.

If the taxpayer is either an electing small business corporation as defined in IRC §1361, a partnership, a limited liability company, treated as a partnership for federal tax purposes, or a sole proprietorship, then any unused credit, after application against the business franchise tax or corporate net income tax, is allowed against the personal income tax of the partners, members, or owners, to offset up to 50% of the personal income tax attributable to the income from the business. The credit is allocated to the members or partners in the same manner as profits or losses are allocated for the year.

An individual taxpayer, who makes an eligible contribution to a qualified charitable organization, and receives back from that organization a properly completed neighborhood investment program tax credit voucher, is eligible to claim the credit to offset up to 50% of their personal income tax regardless of the source of the income whether it is from wages, passive investment or retirement income, income from a trade or business or any other source.
The amount of the charitable contribution deduction taken for federal purposes must be added back to taxable income when computing the amount of tax eligible for offset by this credit. The maximum credit allowed per year per taxpayer is $100,000. The credit must be taken over a 5-year period. Any unused credit available after the 5-year period is forfeited.

¶ 312.7 Termination Date  

The Neighborhood Investment Program Act shall terminate on July 1, 2016, unless the program is extended by the Legislature before that date. No entitlement to the tax credit under this article shall result from any contribution made to any certified project after July 1, 2016, and no credit shall be available to any taxpayer for any contribution made after that date. Taxpayers which have gained entitlement to the credit pursuant to eligible contributions made to certified projects prior to that date shall retain that entitlement and apply the credit as prescribed.

¶ 312.8 Filing for the Credit  
*Law: W. Va. Code §11-13J-7*

To claim the credit, the taxpayer must file Form WV/NIPA-2, Neighborhood Investment Program Tax Credit Schedule and attach it to their tax return. In addition, a copy of the Neighborhood Investment Program Tax Credit Voucher (WV/NIPS-1) issued by the organization sponsoring the Neighborhood Investment Project must be attached to the tax credit schedule.

¶ 313 APPRENTICESHIP TAX TRAINING CREDITS

¶ 313.1 Introduction  

This credit is available to taxpayers who participate in a qualified apprenticeship training program for the construction trades on or after January 1, 2008.

¶ 313.2 Eligible Taxpayers  
*Law: W. Va. Code §§ 11-13W-1(a) and 11-13W-1(c)*

To be eligible for the credit the taxpayer must participate in a qualified apprenticeship training program that is jointly administered by labor and management trustees in accordance with 29 USC § 50 and is certified according to regulations adopted by the U.S. Bureau of Apprenticeship and training. The program must consist of at least 2000, but no more than 10,000 hours of on the job apprenticeship. The apprentice must be registered with the U.S. Department of Labor, Office of Apprenticeship, West Virginia State Office.
¶ 313.3 Amount of Credit

*Law:* W. Va. Code § 11-13W-1(b)

For tax years beginning on or after January 1, 2012, the tax credit is equal to two dollars per hour multiplied by the total number of hours worked during the apprenticeship program. The total credit for tax years beginning on after January 1, 2012 may not exceed $2000 or 50% of actual wages paid in the tax year for the apprenticeship, whichever is less. For tax years beginning prior to January 1, 2012, the tax credit is equal to one dollar per hour multiplied by the total number of hours worked during the apprenticeship program. The total credit may not exceed $1000 or 50% of actual wages paid in the tax year for the apprenticeship, whichever is less.

¶ 313.4 Application of the Credit

*Law:* W. Va. Code § 11-13W-1(d)

The apprenticeship training credit may be used to offset business franchise tax, corporation net income tax, and personal income tax. The credit is applied first to the business franchise tax, after application of the credits contained in W. Va. Code § 11-23-17, but before any other tax credits. The credit is then applied against the corporation net income tax before any other tax credits.

If the taxpayer is either an electing small business corporation as defined in IRC §1361, a partnership, a limited liability company, treated as a partnership for federal tax purposes, a sole proprietorship, then any unused credit after application against the business franchise tax or corporate net income tax credit is allowed against the personal income tax attributable to the income from the business. The credit is allocated to the members or partners in the same manner as profits or losses are allocated for the year.

The credit may not be carried forward to a future taxable year or carried back into a prior taxable year. Any unused credit is forfeited.

¶ 314 FILM INDUSTRY INVESTMENT TAX CREDIT

¶ 314.1 Introduction


The credit was enacted in 2007 and amended in 2008 and 2009 to encourage economic growth through the production of motion pictures and other commercial film or audiovisual projects in West Virginia. The total amount of tax credits granted each year will not exceed $10,000,000 and will be allocated by the Film Office based on the order the applications are received.

¶ 314.2 Eligible Taxpayers

The film industry investment credit may be claimed by an "eligible company." An "eligible company" is a person or entity that engages in the business of producing "film industry productions." A "film industry production" is a "qualified project" intended for reasonable national or international commercial exploitation. A "qualified project" is a feature length theatrical or direct-to-video motion picture, a made-for-television motion picture, a commercial, a music video, commercial still photography, a television pilot program, a television series and a television mini-series that incurs a minimum of $25,000 in direct production expenditures and post-production expenditures in West Virginia. It does not include news or current affairs programming, a weather or market program, an interview or talk show, a sporting event or show, an awards show, a gala, a production that solicits funds, a home shopping program, a program that primarily markets a product or service, political advertising or a concert production. The qualified project may be produced on any single media or multimedia program that is fixed on a delivery medium, can be viewed or reproduced, is not intended to violate a provision of W. Va. Code §68-8c, is not obscene or sexually explicit, is intended for reasonable commercial exploitation for the delivery medium used, and does not contain content that portrays the State of West Virginia in a significantly derogatory manner.

¶ 314.3 Eligible Investment


Eligible investment for the film investment tax credit includes the direct production expenditures and postproduction expenditures made in West Virginia and subject to taxation in West Virginia directly attributable to the production of a film or commercial audiovisual product.

Direct production expenditures include the payment of wages, fringe benefits or fees for talent, management, or labor that are subject to West Virginia income tax. Direct production expenditures also include payment to a personal services corporation for the services of a performing artist if the personal services corporation pays West Virginia income tax on those payments, and the performing artist receiving payments from the personal services corporation is subject to West Virginia income tax. Other direct production expenditures include payment provided by a vendor for the story and scenario to be used by a film, set construction and operations, wardrobe, accessories and related services, photography, sound synchronization, lighting, and related services, editing and related services, rental of facilities and equipment, leasing of vehicles, food or lodging, airfare if purchased through a West Virginia based travel agency or travel company, insurance coverage and bonding if purchased through a West Virginia based insurance agent, and other direct costs of producing a film in accordance with generally accepted entertainment industry practices.

Postproduction expenditures include an expenditure that occurs in West Virginia or with a West Virginia vendor after the completion of principal and ongoing photography, including an expenditure for editing and negative cutting, Foley recording and sound effects, automatic dialogue replacement, sound editing, special effects, including computer-generated imagery or other effects, scoring and music editing, beginning and
end credits, soundtrack production, subtitling or addition of sound or visual effects, but not including an expenditure for advertising, marketing, distribution or expense payments.

¶ 314.4 Amount of Credit


The base amount of the credit is 22% of direct production and postproduction expenditures made in West Virginia that are directly attributable to the production in West Virginia of a film or commercial audiovisual product and subject to taxation by the State of West Virginia.

Additional credit is also allowed for the hiring of local workers. An additional 4% of credit is allowed if the film production company or its authorized payroll service company employs 10 or more West Virginia residents as full time employees working in this State or as apprentices working in this State.

¶ 314.5 Application of the Credit

*Law:* W. Va. Code §§ 11-13X-7 and 11-13X-8

The credit can be used to offset the business franchise tax, corporation net income tax, and the personal income tax. The credit is applied first to the business franchise tax, after application of the credits contained in W. Va. Code § 11-23-17, but before any other tax credits. The credit is then applied against the corporation net income tax before any other tax credits.

If the taxpayer is either an electing small business corporation as defined in IRC § 1361, a partnership, a limited liability company, treated as a partnership for federal tax purposes, a sole proprietorship, then any unused credit after application against the business franchise tax or corporate net income tax credit is allowed against the personal income tax attributable to the income from the business. The credit is allocated to the members or partners in the same manner as profits or losses are allocated for the year.

Any excess credit can be carried forward for two years and applied as described above. Any remaining credit after the two succeeding years is forfeited. Excess credit can also be transferred or sold to another West Virginia taxpayer provided that the film office approves the transfer or sale. The sale or transfer of the credit does not extend the period of time in which the credit may be used. Carryback of the credit is allowed, but only to a prior taxable year that does not have qualified expenditures for the amount of any unused portion of any annual credit allowance.

¶ 314.6 Filing Requirements

In order to receive the credit, the film production company must file the forms the film office prescribes, file required West Virginia tax returns and pay the tax due on those returns, and file an expense verification report prepared by an independent CPA, utilizing "agreed upon procedures" which are prescribed by the film office in accordance with generally accepted accounting standards in the United States. In addition if the film production company is seeking the additional 4% credit, it must provide a listing of the names and addresses and home telephone numbers of all West Virginia residents employed full time or hired as apprentices in this State. Once all filing requirements are met, the Film Office will issue a document granting the appropriate tax credit.

§ 314.7 Additional Requirements  
*Law: W. Va. Code § 11-13X-6*

In order to claim the film industry investment credit, the taxpayer must agree that the phase "Filmed in West Virginia with assistance of the West Virginia Film Industry Investment Act" appear in the closing credits of the film. The taxpayer must provide to the West Virginia Film Office the information required by it to demonstrate conformity to the following requirements in writing:

1. To pay all obligations the film production company has incurred in West Virginia;

2. To publish, at completion of principal photography, a notice at least once a week for three consecutive weeks in local newspapers in regions where filming has taken place to notify the public of the need to file creditor claims against the film production company by a specified date;

3. That outstanding obligations are not waived should a creditor fail to file by the specified date; and

4. To delay filing of a claim for the film production tax credit until the film office delivers written notification to the Tax Commissioner that the film production company has fulfilled all requirements for the credit.

§ 315 RESIDENTIAL SOLAR ENERGY TAX CREDIT

§ 315.1 Introduction  

The residential solar energy credit was enacted in 2009 to provide a credit against personal income tax for persons who install a solar energy system in their home.

§ 315.2 Eligible Taxpayers  
Persons who install a solar energy system in their home are eligible for the residential solar energy tax credit. The system must be installed on or after July 1, 2009, but prior to June 30, 2013. In order to be eligible, the property must be located in West Virginia, used as a residence and owned by the taxpayer.

The solar energy system must use solar energy to either generate electricity, heat or cool a structure, or provide hot water for use in the structure or to provide solar process heat. If the system is used to provide hot water, at least 50% of its energy to heat or cool must be from the sun. Swimming pools, hot tubs or any other energy storage medium that has a function other than storage of energy are not eligible for the credit.

¶ 315.3 Amount of the Credit


The credit is equal to 30% of the cost to purchase and install the solar energy system up to a maximum amount of $2,000. The credit may be carried over to subsequent years until exhausted.

¶ 316 NONFAMILY ADOPTION CREDIT

¶ 316.1 Introduction

*Law: W. Va. Code § 11-21-10a*

The nonfamily adoption credit was enacted to provide a credit to be applied against personal income tax for the adoption of a nonfamily child.

¶ 316.2 Eligible Taxpayers

*Law: W. Va. Code § 11-21-10a*

In order to be eligible for the credit, the taxpayer must adopt a nonfamily child whose age at adoption is less than 18 years of age. A nonfamily adoption means adoption of a child or children by a taxpayer or taxpayers who are not the father, mother, or stepparent of the child.

¶ 316.3 Amount of the Credit

*Law: W. Va. Code § 11-21-10a*

The amount of the credit is $4000 in the tax year of the nonfamily adoption. The credit may be taken at the taxpayer's option over 3 years.

¶ 317 COMMERCIAL PATENT INCENTIVES CREDIT

¶ 317.1 Introduction

The commercial patent incentives credit was passed to encourage the development and use of patents in West Virginia. The bill was effective June 9, 2010, but only applies to patents developed or used in West Virginia for the first time during the years beginning January 1, 2011 and ending December 31, 2015. It does not apply to copyrights, trademarks, mask works, trade secrets or any intellectual property that is not a patent. A patent is a United States patent issued pursuant to 35 U.S.C. § 101, et seq. or the Patent Cooperation Treaty done at Washington, on June 19, 1970 and is limited to plant patents, design patents, and patents developed in West Virginia for direct use in a manufacturing process or product, or both developed for use and directly used in a manufacturing process or product in West Virginia.

¶ 317.2 Eligible Taxpayers


There are two types of persons who are eligible for the commercial patent incentives credit:

- A person who develops patents in West Virginia for direct use in a manufacturing process or product who has an agreement entered into after December 31, 2010, between a person developing patents in West Virginia and either a corporation formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12-3, or a center for economic development and technical advancement formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12A-3, for purposes of developing a patent eligible for this credit; or

- A person who directly uses a patent developed in West Virginia in a manufacturing process or product in West Virginia

"Development of a patent" means the act of inventing or discovering any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereto through significant investment of money, performance of research, or application of design or engineering expertise, which culminates in the issuance of a patent.

"Directly used in a manufacturing process or product" means application or incorporation of a patented process, machine, article of manufacture of composition of matter, in manufacturing operations or processes, or in manufactured products, in circumstances where United States or foreign patent laws require that the specific patent for the process, machine, article of manufacture or composition of matter be owned by the manufacturer, or purchased, leased, licensed or authorized by contract to be applied or incorporated in the manufacturing operation, processes or product, and where such lawful ownership, purchases, lease, licensure or contractual authorization is in effect.
The person may be a natural person, corporation, limited liability company, or partnership. Manufacturing includes those business activities classified as having a sector identifier, consisting of the first two digits of the six-digit North American Industry Classification System (NAICS) code number of 31, 32 or 33.

¶ 317.3 Amount of the Credit


The tax credit for developing patents in West Virginia for direct use in a manufacturing process or product is equal to 20% of the royalties, license fees, or other consideration received by the developer during the year from the sale, lease or licensing of the patent. However, no credit is allowed for consideration received by the developer from a related party as defined IRC §267. The tax credit increases to 30% when the developer reinvests at least 80% of the amount of the credit for the year in one of the following ways:

- In depreciable property purchased for purposes of developing additional patents in West Virginia or improving upon a patent developed in West Virginia; or
- By contributing to a stipend to retain a graduate or post-doctoral student in West Virginia integral to the development of the patents or related technology and the developer has an agreement entered into after December 31, 2010, with either a corporation formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12-3, or a center for economic development and technical advancement formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12A-3, for purposes of developing a patent eligible for this credit.

The tax credit for using a patent developed in West Virginia in a manufacturing process or product is equal to 20% of the "net profit attributable to the patent." The tax credit is increased to 30% of the "net profit attributable to the patent" when the taxpayer reinvests at least 80% of the tax credit for the year in capital improvements to add product lines to or increase productivity in West Virginia during the next taxable year.

The "net profit attributable to the patent" is calculated differently depending on whether the patent is being used in an ongoing or new manufacturing process or product.

If the patent is being used in an ongoing manufacturing process, the "net profit attributable to the patent" is the West Virginia taxable income that is in excess of the "base net profit" accrued through the manufacturing process that has an integrated patent eligible for the credit. The "base net profit" accrued through the manufacturing process is equal to the portion of the West Virginia taxable income attributable to the manufacturing process for the year immediately preceding the introduction of the patent.

If the patent is being used in a new manufacturing process, the "net profit attributable to the patent" is the total net profit from the manufacturing process multiplied
by a fraction, with the numerator being the total cost of using the patent, and the
denominator being the total cost of the manufacturing process.

If the patent is being used in a new manufactured product, the "net product
attributable to the patent" is the total net profit accrued through the sale or use of the
product utilizing the product multiplied by a fraction, with the numerator being the total
cost of using the patent and the denominator being the total cost of producing the
product.

The total cost of using the patent is equal to the total amount of royalties, license
fees or other consideration paid for the right to use a patent. For a developer, the total
cost of using a patent is the total cost of developing the patent divided by the 20-year
life of the patent. For any other patent holder, the total cost of a patent is the total cost
of acquiring the patent divided by the remaining years of the 20-year life of the patent.

Amounts received from a related person as defined by IRC §267 are not allowed
when calculation the net profit attributable to a patent.

¶ 317.4 Application of the Credit


The commercial patent tax credit can be applied only after all other allowable credits
have been applied. It is not refundable and cannot offset the tax to below zero. The
credit is not assignable. Credit is not allowed for any activity; investment, assets, or
expenditures for which any other tax credits have been authorized, taken or allowed.

The credit shall be applied first against the taxpayer's business franchise tax liability. Any remaining credit may be applied against the taxpayer's corporate net income tax
liability. If the taxpayer is a pass-thru entity or sole proprietorship, the credit may be
applied against the personal income tax. If the taxpayer is a pass-thru entity and there is
credit remaining after application to the business franchise tax liability, the remaining
credit may be applied to the West Virginia personal income tax liabilities of the owners
of the pass-through entity. The credit should be distributed to the owners of the pass-
thru entity in the same manner as the items of income, gain, loss or deduction are
distributed or allocated to the owners.

Any unused credit maybe carried forward for a period of 9 consecutive years from
the year that the credit was earned. Any credit not used within the 10-year period will be
forfeited.

¶ 317.5 Transfer of the Credit to Successors


The commercial patent credit may be transferred or sold to a successor business as
long as the patent continues to be used in a manufacturing process or product in West
Virginia. The successor business may claim the amount of credit that remains available when the transfer or sale occurred.

If the form of the business changes, the credit maybe transferred to the successor business as long as the patent continues to be used in a manufacturing process or product in West Virginia and the person who developed the patent retains a controlling interest in the successor business.

¶ 317.6 Recordkeeping


Every developer of a patent in this State for direct use in a manufacturing process or product who claims a credit under this article must maintain sufficient records to establish the following facts for each item of a patent for which a credit is claimed:

1. The patent number and title.

2. The amount of royalties, license fees or the consideration received for use of the patent.

3. The month and taxable year in which the agreement with either a corporation formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12-3, or a center for economic development and technical advancement formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12A-3, for purposes of developing a patent eligible for this credit was entered into.

4. The month and taxable year in which the patent was first used, placed in service or directly used in the person’s manufacturing process or product in this State.

5. The amount of credit taken.

6. The date the patent was disposed of or otherwise ceased to be used in a manufacturing process or product in West Virginia.

7. The direct cost for developing the patent.

8. The direct cost for developing the patent in this State.

Any person who develops a patent for use in a manufacturing process or product in West Virginia and claims the enhanced 30% credit under W. Va. Code § 11-13AA-4 must maintain sufficient records to clearly establish entitlement to claim the amount of the enhanced credit. At a minimum those records must identify all the items listed above as well as the following additional items:

1. Each and every item of depreciable property purchased for purposes of claiming the enhanced credit;
(2) The date the depreciable property was purchased, its cost and its estimated useful life determined using the straight-line method of depreciation;

(3) The date the depreciable property was placed in service or used in the person's business activity in West Virginia.

(4) The date the depreciable property was taken out of service or use in the person's business activity in West Virginia and the reason why the property was taken out of service or use.

Every person who uses a patent directly in a manufacturing process or product in this State must maintain sufficient records to clearly establish entitlement to the credit and the following information concerning each patent.

(1) The patent number and title.

(2) The amount of net profit attributable to the patent along with all information used to derive this figure in accordance with the applicable law and regulations.

(3) The month and taxable year in which the agreement with either a corporation formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12-3, or a center for economic development and technical advancement formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12A-3, for purposes of developing a patent eligible for this credit was entered into.

(4) The month and taxable year in which the patent was first used, placed in service or directly used in the person's manufacturing process or product in this State.

(5) The amount of credit taken.

(6) The date the patent was disposed of or otherwise ceased to be used in a manufacturing process or product in West Virginia.

Any person who uses a patent in a manufacturing process or product in West Virginia and claims the enhanced 30% credit under W. Va. Code § 11-13AA-5 must maintain sufficient records to clearly establish entitlement to claim the amount of the enhanced credit. At a minimum those records must identify all the items listed above as well as the following additional items:

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

(2) The date the depreciable property was purchased, its cost and its estimated useful life determined using the straight-line method of depreciation;
(3) The date the depreciable property was placed in service or used in the person's business activity in West Virginia.

(4) The date the depreciable property was taken out of service or use in the person's business activity in West Virginia and the reason why the property was taken out of service or use.

Every person who claims a commercial patent incentives tax credit must also maintain sufficient records to establish the number and types of new jobs, if any created the wages and benefits paid to the employees filling the new jobs and the duration of each job.

These recordkeeping requirements do not apply to an owner of a pass-through entity that develops or uses a patent for which a credit is claimed.

If the taxpayer does not maintain the required records for identification of a patent for which a credit was claimed, the patent is treated as having been disposed of by the taxpayer during the taxable year in which the records are unavailable to establish that the patent was being directly used in the person's manufacturing process or product in West Virginia at the end of the taxable year. If the taxpayer cannot establish when a patent was placed in service in the manufacturing process or product in West Virginia, no credit will be allowed.

¶ 317.7 Filling Requirements


To claim the tax credit, the eligible taxpayer will timely provide any forms, returns, schedules or other information that the Tax Commissioner may require.

¶ 318 INNOVATIVE MINE SAFETY TECHNOLOGY TAX CREDIT

¶ 318.1 Introduction


Beginning in 2010 and terminating on December 31, 2014, the Office of Miner's Health, Safety and Training will allocate $2 million of tax credits during each fiscal year to taxpayers who invest in innovative mine safety technology. No one taxpayer may be allocated more than $100,000 in credit in any given year. The allocation is done based on the order the applications are received by the Office of Mine Safety and Training. A lot of the eligible taxpayers and amount of credit claimed will be published in the State Register by the State Tax Commissioner each year.

¶ 318.2 Eligible Taxpayers


In order to qualify for the credit, the taxpayer must be a coal mining company which purchases eligible safety property. A coal mining company includes companies subject
to the severance tax imposed by W. Va. Code §11-13A-3 or companies working as a contract miner, mining coal under contract with a person subject to the severance tax imposed by West Virginia Code § 11-13A-3.

¶ 318.3 Eligible Investment

Law: W. Va. Code §§ 11-13BB-3(b)10 and 11-13BB-4

Investment in "eligible safety equipment" is eligible for the credit. In order to qualify as "eligible safety equipment" the item must be on the list of approved innovative mine safety technology. This list will be compiled and maintained by the Mine Safety Technology Task Force. The list will be published by the West Virginia Office of Miner's Health Safety and Training.

According to the legislation, the list is to include only safety equipment that is so new to the industry and innovative in concept, design, operation or performance that it is not yet required by any state or federal agency to be used in a coal mine or on a mine site.

If any equipment on the list is later adopted as required safety equipment by a state or federal agency, or is determined to no longer be innovative or is determined to be ineffective, or to meet the expectations of the Mine Safety Technology Task Force, or fails to prove its value in minimizing workplace injuries or fatalities, the equipment shall be removed from the list of approved innovative mine safety technologies compiled and issued for the next period.

If the item is delisted, any taxpayer who invested in the equipment while it was on the list of approved innovative safety technologies will not have to forfeit the credit so long as all other requirements are met.

Qualified purchases will include leases of eligible safety property or equipment if the lease was entered into and became effective at a time when the equipment is on the list of approved innovative mine safety technology and the primary term of the lease is five years or more.

Qualified purchases do not include the following:

- Purchases or leases of realty or any cost for, or related to, the construction of any building, facility or structure attached to realty;
- Purchases or leases of any property not exclusively used in West Virginia;
- Repair costs including materials used in the repair, unless for federal income tax purposes, the cost of the repair must be capitalized and not expensed;
- Motor vehicles licenses by the Department of motor Vehicles;
Clothing;
Airplanes;
Off-premises transportation equipment
Leases of tangible personal property having a primary term of less than five years;
Property that is used outside West Virginia;
Property that is acquired incident to the purchase of the stock or assets of an industrial taxpayer, which property was or had been used by the seller in his or her business in West Virginia and any other tax credit was taken relating to the property.

The property may not be acquired from a related person or by one member of a controlled group from another member of the same controlled group. The Tax Commissioner can waive this requirement if the property was acquired from a related party for its fair market value.

The property may not be acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under IRC §§267 or 707(b). The property is only eligible if the basis of the property for federal income tax purposes, in the hands of the person acquiring it, is not determined, in whole or in part, by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired or under IRC § 1014(e).

¶ 318.4 Qualified Investment


The qualified investment in eligible safety property is 100% of the cost of a qualified purchase. The property must be placed in service or use in West Virginia during the tax year. The property is considered placed in service or use during the earlier of either the taxable year when federal income tax depreciation begins in regard to the property, or the taxable year when the property is placed in condition or state of readiness and availability for a specifically assigned function.

The cost of the qualified investment does not include the value of property given in trade or exchange for eligible safety property. It also does not include insurance proceeds received in compensation for the loss of property damaged or destroyed by fire, flood, storm or other casualty, or stolen. The cost of rental property that is leased for a term of 5 years or longer is 100% of the rent reserved for the primary term of the lease, not to exceed 10 years. If property is purchased for multiple uses and is not principally and directly used to minimize workplace injuries and fatalities in a coal mine, the cost does not qualify as qualified investment for purposes of this credit.
¶ 318.5 Amount of the Credit

The amount of the credit is equal to 50% of the amount of the qualified investment in the eligible innovative mine safety equipment. The amount of credit is applied over a period of 5 years at the rate of one-fifth of the credit beginning with the year the equipment is first placed in service or use.

¶ 318.6 Application of the Credit

The credit is applied first against the taxpayer liability for the business franchise tax and then against the corporation net income tax. The credit may be used to offset up to 50% of the liability of the taxpayer for these taxes before application of any other credits other than the credit in W.Va. Code § 11-23-17 (credit for business franchise tax paid by a subsidiary).

If the taxpayer is an LLC, small business corporation or a partnership, then any credit remaining after application to business franchise tax or corporate net income tax of the eligible taxpayer is allowed to be applied to offset up to 50% of the corporation net income tax imposed on the owners of the eligible taxpayer on the conduit income directly derived from the eligible taxpayer. This credit should be allocated among the owners in the same rates as profits and losses are allocated. The credit may not be used to offset personal income tax.

If the credit cannot be used due to these limitations, it is forfeited and cannot be carried forward or backward to another taxable year.

¶ 318.7 Filing Requirements

In order to obtain the credit, the taxpayer must file an application for certification of the proposed tax credit with the Office of Miner's Health, Safety and Training. The credit may not be claimed until the taxpayer receives from the Office of Miner's Health, Safety and Training, certification of the amount of tax credit to be allocated to them.

¶ 318.8 Forfeiture of Credit

If the taxpayer disposes of the eligible safety property or ceases to use the property in a coal mine prior to the end of the fourth tax year after the tax year in which the property was placed in service or use, then the unused portion of the credit allowed for the property is forfeited for the tax year in which the disposition or cessation of use occurred and for all ensuing years.
¶ 318.9 Transfer of Credit to Successors


If a taxpayer changes the form of conducting its business, but retains a controlling interest in the successor business, and the certified eligible safety equipment is retained in a business in West Virginia for use in a coal mine in West Virginia, the forfeiture and redetermination rules do not apply, and the successor business is allowed to claim the amount of credit still available for subsequent years. The same is true where property is transferred or sold to a successor business that continues to use the property in a coal mine in West Virginia.

Upon the transfer or sale of the property, the successor acquires the amount of credit still remaining for each taxable year subsequent to the year of transfer. The credit available to the successor for the year of transfer is based on the ratio of the number of days remaining in the transferor’s taxable year to the total number of days in the transferor’s year. The transferor does not have to redetermine the amount of credit taken in earlier years.

¶ 318.10 Recordkeeping Requirements


The taxpayer must keep records on their investment property. Information that must be maintained includes its identity and actual or reasonably determined cost, its straight-line depreciation life, the month and taxable year it was placed in service, the amount of credit taken, and the date the investment was either disposed of or ceased being actively used in the mine.

If these records are not maintained, then the taxpayer is treated as having disposed of any property that it cannot establish was still on hand and used in a coal mine at the end of the year. Also, if a taxpayer cannot establish when certified eligible safety property was placed in service, it is treated as being placed in service in the most recent year that similar property was placed in use, unless it can be proved that the property placed in service in the most recent year is still on hand. In that case, the taxpayer will be treated as having placed the property in service in the next most recent year.

¶ 318.11 Disclosure of Tax Credit Claimants


Although most tax information is confidential under W.Va. Code §11-10-5d, the Tax Commissioner is required to annually publish in the State Register the name and address of every eligible taxpayer and the amount of the tax credit claimed.

¶ 319 ALTERNATIVE-FUEL MOTOR VEHICLE TAX CREDIT

¶ 319.1 Introduction

The alternative-fuel motor vehicles tax credit is available for tax years beginning on or after January 1, 2011. The credit was enacted to encourage the use of alternative fuel vehicles. It expires December 31, 2021.

¶ 319.2 Eligible Taxpayers

Law: W.Va. Code § 11-6D-4

In order to qualify for the alternative-fuel motor vehicle tax credit, the taxpayer must do one of the following:

(1) Convert a motor vehicle presently registered in West Virginia to operate exclusively on alternative fuels.

(2) Purchase a new dedicated or bi-fueled alternative-fuel motor vehicle for which the taxpayer then obtains a valid West Virginia registration.

(3) Construct or purchase and install a qualified alternative-fuel vehicle refueling infrastructure or qualified alternative-fuel vehicle home refueling infrastructure that is capable of dispensing alternative fuel for alternative-fuel motor vehicles.

A "qualified alternative-fuel vehicle refueling infrastructure" includes property owned by the applicant for the tax credit and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles, including but not limited to, compression equipment, storage tanks and dispensing units for alternative-fuel at the point where the fuel is delivered. This infrastructure must be in West Virginia and cannot be at a private residence or home.

A "qualified alternative-fuel vehicle home refueling infrastructure" includes property owned by the applicant for the tax credit located on a private residence or private home and used for storing alternative fuels and for dispensing such alternative fuels into fuel tanks of motor vehicles, including but not limited to, compression equipment, storage tanks and dispensing units for alternative-fuel at the point where the fuel is delivered or for providing electricity to plug-in hybrid electric vehicles or electric vehicles. The infrastructure must be in West Virginia.

Only the home refueling infrastructure includes dispensing units for electricity. The credit cannot be claimed by persons who are under an obligation set forth under state or federal law to convert to the use of alternative fuel vehicles.

¶ 319.3 Amount of Credit


For credits related to the purchase or conversion of an alternative-fuel vehicle, the amount of the credit depends on the weight of the vehicle. The amount of the credit is as follows:
For vehicles weighing less than 26,000 pounds:
- 35% of the purchase price to a maximum of $7,500
- 50% of the cost of conversion to a maximum of $7,500

For vehicles weighing more than 26,000 pounds:
- 35% of the purchase price to a maximum of $25,000
- 50% of the conversion costs to a maximum of $25,000

For credits related to the construction or purchase and installation of an alternative-fuel vehicle refueling infrastructure, the amount of credit varies depending on the time period.

- For years 2011-2013, the credit is 50% of the costs up to a maximum of $250,000 or 62.5% of the costs up to a maximum of $312,500 if the facility is generally accessible for public use.
- For years 2014-2015, the credit is 50% of the costs up to a maximum of $200,000 or 62.5% of the costs up to a maximum of $250,000 if the facility is generally accessible for public use.
- For years 2016-2021, the credit is 50% of the costs up to a maximum of $150,000 or 62.5% of the costs up to a maximum of $187,500 if the facility is generally accessible for public use.

The credit for construction or purchase and installation of an alternative-fuel vehicle home refueling infrastructure is 50% of the costs up to a maximum of $10,000.

"Alternative-fuel" includes compressed natural gas; liquefied natural gas; liquefied petroleum gas; ethanol; fuel mixtures that contain 85% or more by volume, when combined with gasoline or other fuels, of methanol, ethanol, or other alcohols; natural gas hydrocarbons and derivatives; hydrogen; coal derived liquid fuels; and electricity, including electricity from solar power.

An "alternative-fuel motor vehicle" means a motor vehicle that as a new or retrofitted or converted fuel vehicles operates either solely on one alternative fuel, or is capable of operating on one or more alternative fuels, or is capable of operating on an alternative fuel and is also capable of operating on gasoline or diesel fuel. A "bi-fueled motor vehicle" is an alternative-fuel vehicle that can operate on an alternative fuel and another form of fuel.

A "plug-in hybrid electric vehicle" is a hybrid electric vehicle manufactured by an established motor vehicle manufacturer of plug-in hybrid electric vehicles that can operate solely on electric power and that is capable of recharging its battery from an on-board generation source and an off-board electricity source. A "plug-in hybrid electric vehicle" also includes a hybrid electric vehicle conversion that provides an increase in city fuel economy of 75% or more as compared to a comparable nonhybrid version.
vehicle for a minimum of twenty miles and that is capable of recharging its battery from an on-board generation source and an off-board electricity source. A vehicle is comparable if it is the same model year and the same vehicle class as established by the United States Environmental Protection Agency and is comparable in weight, size and use. Fuel economy comparisons shall be made using city fuel economy standards in a manner that is substantially similar to the manner in which city fuel economy is measured in accordance with procedures set forth in 40 C.F.R. 600 as in effect on January 1, 2011.

¶ 319.4 Application of the Credit


The alternative-fuel motor vehicle tax credit may be applied against the taxpayer’s personal income tax, business franchise tax or corporation net income tax. If the taxpayer is a pass-through entity treated like a partnership for federal and state income tax purposes, the credit shall flow through to the equity owners of the pass-through entity in the same manner that distributive share flows through to the equity owners. The credit cannot be applied against employer withholding taxes.

The credit can be carried forward until the full amount of the excess tax credit is used. No carryback of the credit is permitted.

¶ 319.5 Recapture of the Credit


The tax credit can be recaptured or reduced if it is determined by the State Tax Commissioner that a taxpayer was not entitled to the credit, in whole or in part, in the tax year in which it was claimed by the taxpayer.

¶ 320 ENERGY INTENSIVE INDUSTRIAL CONSUMERS REVITALIZATION TAX CREDIT

¶ 320.1 Introduction


The Energy Intensive Industrial Consumers Revitalization Tax Credit was enacted in 2012 and provides a tax credit to coal producers that supply coal to a West Virginia electric utility that provides a special rate to one or more energy intensive industrial consumers of electric power. The credit is designed to encourage energy intensive industrial consumers to locate, remain, or resume operations in West Virginia.

¶ 320.2 Eligible Taxpayers


In order to be eligible for the credit, the taxpayer must be a coal producer subject to the coal severance tax imposed under W.Va. Code 11-13A-3(a) and (b). The coal
producer must also provide coal to a West Virginia electric utility that provides a special rate to an eligible energy intensive industrial consumer as defined pursuant to W.Va. Code §24-2-1j (g).

¶ 320.3 Amount of the Credit


The amount of the credit is determined by the Public Service Commission under the provisions of W. Va. Code §24-2-1j(g). The total amount of credits available to all taxpayers cannot exceed $20 million in any calendar year. If the total amount of $20 million is not allocated and used during the calendar year, annual credit up to a total of $15 million may be carried forward to future years.

The amount of credit available to any taxpayer in a calendar year cannot exceed 93% of the taxpayer’s total annual coal severance tax liability.

¶ 320.4 Applicability to Minimum Severance Tax

*Law:* W. Va. Code § 11-13CC-3a

The tax credit can be used by the taxpayer to offset the minimum coal severance tax imposed by W. Va. Code §11-12b in an amount up to the amount of the tax credit applied against the coal severance tax imposed under W. Va. Code § 11-13A-3(a) and (b).

¶ 320.5 Required Payment by Coal Producer to Electric Public Utility


In order to receive the tax credit, the taxpayer must make payment of 97% of the amount of the credit to the public utility providing electric power to the special rate customer, whose special rate was determined by the Public Service Commission pursuant to the provisions of W. Va. Code § 24-2-1j(g).

This payment is treated in the same manner as a payment of coal severance tax and shall not be treated as an adjustment to the price of coal sold to the electric utility. The payment must be made to the electric utility no later than the date the coal severance tax would have been due to the State.

The remaining 3% of the tax credit may be kept by the taxpayer as an inducement to participate in this program and to offset the costs of participation.

¶ 320.6 Notification and Exchange of Information Between Parties


The taxpayer that wishes to participate in this tax credit program shall notify the West Virginia State Tax Department through the form of notification prescribed by the Department. The State Tax Department and Public Service Commission may exchange
information necessary for the efficient and accurate administration of the tax credit program, including the identity of the taxpayer.

The Public Service Commission may also disclose to the electric utility providing the electricity to the special rate customer, necessary information to calculate the allocated share of tax credits available and the payments required to be made to the utility.

¶ 320.7 Expiration of Tax Credit Program


This tax credit expires and is no longer usable in tax years beginning on or after December 31, 2021.
### INDEX -- CHAPTER 3 – TAX INCENTIVES FOR BUSINESS DEVELOPMENT

**Alternative-fuel Motor Vehicle Tax Credit** ¶ 319  
- Amount of credit ¶ 319.3  
- Application if the credit ¶ 319.4  
- Eligible taxpayers ¶ 319.2  
- Introduction ¶ 319.1  
- Recapture of the credit ¶ 319.5

**Apprenticeship Tax Training Credits** ¶ 313  
- Amount of Credit 313.3  
- Application of the Credit ¶ 313.4  
- Eligible Taxpayers ¶ 313.2  
- Introduction ¶ 313.1

**Coal Loading Facility Credit** ¶ 305  
- Amount of the Credit ¶ 305.4  
- Application of the Credit ¶ 305.5  
- Eligible Investment ¶ 305.3  
- Eligible Taxpayers ¶ 305.2  
- Forfeiture and Redetermination of the Credit ¶ 305.6  
- Introduction ¶ 305.1

**Commercial Patent Incentives Credit** ¶ 317  
- Amount of credit ¶ 317.3  
- Application of the credit ¶ 317.4  
- Eligible taxpayer’s ¶ 317.2  
- Filing requirements ¶ 317.7  
- Introduction ¶ 317.1  
- Recordkeeping ¶ 317.6  
- Transfer of credit to successor’s ¶ 317.5

**Economic Opportunity Credit** ¶ 301  
- Amount of the Credit ¶ 301.3  
- Application of the Credit ¶ 301.8  
- Carryover of Unused Credit ¶ 301.9  
- Certified Projects ¶ 301.10  
- Economic Opportunity Credit for Corporate Headquarters Relocation ¶ 301.16  
- Economic Opportunity Tax Credit for High Technology Manufacturers ¶ 301.17  
- Economic Opportunity Tax Credit for Jobs Creation ¶ 301.18  
- Economic Opportunity Tax Credit for “Small Business”¶ 301.16  
- Eligible Taxpayers ¶ 301.2  
- Eligible Investment ¶ 301.4  
- Filing Requirements ¶ 301.14  
- Forfeiture and Redetermination of the Credit ¶ 301.11
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>301.1</td>
</tr>
<tr>
<td>New Jobs Percentage</td>
<td>301.6</td>
</tr>
<tr>
<td>“New Employee” Defined</td>
<td>301.7</td>
</tr>
<tr>
<td>Qualified Investment</td>
<td>301.5</td>
</tr>
<tr>
<td>Recapture Tax</td>
<td>301.12</td>
</tr>
<tr>
<td>Recordkeeping Requirements</td>
<td>301.13</td>
</tr>
<tr>
<td>Energy Intensive Industrial Consumers Revitalization Tax Credit</td>
<td>320.3</td>
</tr>
<tr>
<td>Amount of the Credit</td>
<td>320.4</td>
</tr>
<tr>
<td>Applicability to Minimum Severance Tax</td>
<td>320.2</td>
</tr>
<tr>
<td>Eligible Taxpayers</td>
<td>320.7</td>
</tr>
<tr>
<td>Introduction</td>
<td>320.1</td>
</tr>
<tr>
<td>Notification and Exchange of Information Between Parties</td>
<td>320.6</td>
</tr>
<tr>
<td>Required Payment by Coal Producer to Electric Public Utility</td>
<td>320.5</td>
</tr>
<tr>
<td>Environmental Agricultural Equipment Tax Credit</td>
<td>309</td>
</tr>
<tr>
<td>Amount of the Credit</td>
<td>309.4</td>
</tr>
<tr>
<td>Application of the Credit</td>
<td>309.5</td>
</tr>
<tr>
<td>Eligible Taxpayers</td>
<td>309.2</td>
</tr>
<tr>
<td>Filing Requirements</td>
<td>309.6</td>
</tr>
<tr>
<td>Introduction</td>
<td>309.1</td>
</tr>
<tr>
<td>Qualified Agricultural Equipment and Structures</td>
<td>309.3</td>
</tr>
<tr>
<td>Film Industry Investment Tax Credit</td>
<td>314</td>
</tr>
<tr>
<td>Additional Requirements</td>
<td>314.7</td>
</tr>
<tr>
<td>Amount of Credit</td>
<td>314.4</td>
</tr>
<tr>
<td>Application of the Credit</td>
<td>314.5</td>
</tr>
<tr>
<td>Eligible Investment</td>
<td>314.3</td>
</tr>
<tr>
<td>Eligible Taxpayers</td>
<td>314.2</td>
</tr>
<tr>
<td>Filing Requirements</td>
<td>314.6</td>
</tr>
<tr>
<td>Introduction</td>
<td>314.1</td>
</tr>
<tr>
<td>High Growth Business Investment Tax Credit</td>
<td>307</td>
</tr>
<tr>
<td>Amount of the Credit</td>
<td>307.4</td>
</tr>
<tr>
<td>Application of the Credit</td>
<td>307.5</td>
</tr>
<tr>
<td>Eligible Investment</td>
<td>307.3</td>
</tr>
<tr>
<td>Eligible Taxpayers</td>
<td>307.2</td>
</tr>
<tr>
<td>Filing for the Credit</td>
<td>307.6</td>
</tr>
<tr>
<td>Introduction</td>
<td>307.1</td>
</tr>
<tr>
<td>Historic Rehabilitated Buildings Investment Credit</td>
<td>310</td>
</tr>
<tr>
<td>Amount of Credit</td>
<td>310.4</td>
</tr>
<tr>
<td>Application of the Credit</td>
<td>310.3</td>
</tr>
<tr>
<td>Eligible Investment</td>
<td>310.3</td>
</tr>
<tr>
<td>Eligible Taxpayers</td>
<td>310.2</td>
</tr>
</tbody>
</table>
Industrial Expansion and Revitalization for Electric Power Producers ¶ 304
   Amount of the Credit ¶ 304.4
   Application of the Credit ¶ 304.5
   Eligible Taxpayers ¶ 304.2
   Eligible Investment ¶ 304.3
   Example of IE&RC for Electric Power Producers ¶ 304.7
   Forfeiture and Redetermination of the Credit ¶ 304.6
   Introduction ¶ 304.1

Innovative Mine Safety Technology Credit ¶ 318
   Amount of the credit ¶ 318.5
   Application of the credit ¶ 318.6
   Disclosure of credit claimants ¶ 318.11
   Eligible investment ¶ 318.3
   Eligible taxpayers ¶ 318.2
   Filing requirements ¶ 318.7
   Forfeiture of credit ¶ 318.8
   Introduction ¶ 318.1
   Qualified investment ¶ 318.4
   Recordkeeping requirements ¶ 318.10
   Transfer of credit to successors ¶ 318.9

Manufacturing Investment Credit ¶ 302
   Amount of the Credit ¶ 302.4
   Amount of the Credit ¶ 302.4
   Application of the Credit ¶ 302.6
   Eligible Taxpayers ¶ 302.2
   Eligible Investment ¶ 302.3
   Filing for the Credit ¶ 302.8
   Forfeiture and Redetermination of Credits ¶ 302.7
   Introduction ¶ 302.1
   Qualified Investment ¶ 302.5

Manufacturing Property Tax Credit Adjustment ¶ 303
   Amount of the Credit ¶ 303.3
   Application of the Credit ¶ 303.4
   Introduction ¶ 303.1

Neighborhood Investment Credit ¶ 312
   Amount of Credit ¶ 312.5
   Application of the Credit ¶ 312.6
   Eligible Contributions ¶ 312.3
   Eligible Project Plans ¶ 312.4
   Eligible Taxpayers ¶ 312.2
Filing for the Credit ¶ 312.8
Introduction ¶ 312.1
Termination Date ¶ 312.7

Nonfamily Adoption Credit ¶ 316
Amount of the Credit ¶ 316.3
Eligible Taxpayers ¶ 316.2
Introduction ¶ 316.1

Residential Historic Rehabilitated Building Investment Credit ¶ 311
Amount of Credit ¶ 311.4
Application of the Credit ¶ 311.5
Eligible Investment ¶ 311.3
Eligible Taxpayers ¶ 311.2
Filing Requirements ¶ 311.6
Introduction ¶ 311

Residential Solar Energy Tax Credit ¶ 315
Amount of the Credit ¶ 315.3
Eligible Taxpayers ¶ 315.2
Introduction ¶ 315.1

Strategic Research and Development Tax Credit ¶ 306
Amount of the Credit ¶ 306.5
Application of the Credit ¶ 306.6
Eligible Investment ¶ 306.4
Eligible Taxpayers ¶ 306.2
Filing Requirements ¶ 306.10
Forfeiture and Redetermination of the Credit ¶ 306.8
Introduction ¶ 306.1
Qualified Research and Development Activities ¶ 306.3
Refundable Credit for “Small Qualified Research
And Development Company ¶ 306.7
Transfer of Qualified Research and Development Property to Successors ¶ 306.9

Tourism Development Credit ¶ 308
Agreement between W Va. Development Office and Approved Company ¶ 308.5
Amount of the Credit ¶ 308.6
Annual Reporting ¶ 308.9
Application and Approval Process ¶ 308.4
Application of the Credit ¶ 308.7
Eligible Taxpayers ¶ 308.2
Forfeiture of Tax Credits and Credit Recapture ¶ 308.8
Introduction ¶ 308.1
Tourism Development Project 308.3
Transferability to Successor ¶ 308.10
CHAPTER 4

NON-CORPORATE INCOME TAXES

By Kevin A. Highlander

Kevin A. Highlander, CPA, is a tax partner in the Charleston, West Virginia office of Hayflich Grigoraci PLLC. He oversees the firm’s tax advisory practice and regularly consults with companies on state and local tax issues.
¶ 401 INDIVIDUAL INCOME TAXES

¶ 401.1 Introduction

The West Virginia Personal Income Tax Act was enacted by the 1961 legislature. The tax became effective in 1961. The West Virginia personal income tax is generally based on federal income tax law. Consequently, terms used in the West Virginia law such as “federal adjusted gross income” have the same meaning as when used in comparable context in the federal law. Any reference to the federal law shall mean the provisions of the Internal Revenue Code of 1986, as amended,\(^1\) and such other previous codes of the laws of the United States as related to the determination of income for federal income tax purposes.

\(^1\) The definition of “federal adjusted gross income” and certain other terms used in the West Virginia Personal Income Tax Act do not automatically incorporate changes in federal income tax law. To retain conformity, the Legislature annually amends W. Va. Code § 11-21-9.
The West Virginia Personal Income Tax Act applies to individuals, whether resident or nonresident. The tax applies to resident and nonresident partners\(^2\) of partnerships\(^3\) doing business\(^4\) in West Virginia or deriving income from West Virginia sources. It applies to resident and nonresident shareholders of electing small business corporations\(^5\) doing business in West Virginia or deriving income from West Virginia sources. It also applies to resident and nonresident beneficiaries of estates and trust.

This Act does not apply to corporations subject to the West Virginia corporation net income tax discussed in chapter 1 of this Guidebook such as C corporations, unincorporated associations, such as Massachusetts business trusts, and publically traded partnerships.

\section*{¶ 401.2 Basis of Tax}

\textit{Comparable Federal:} IRC § 63  

The West Virginia income tax is imposed on an individual's West Virginia taxable income, which is his or her West Virginia adjusted gross income for the taxable year less allowable personal exemptions. West Virginia adjusted gross income means adjusted gross income as defined in the Internal Revenue Code for the taxable year with the modifications discussed in this chapter. \textit{See, e.g.,} ¶ 404, ¶ 405 and ¶ 406 below.

\section*{¶ 401.3 Tax year, Accounting Periods and Methods.}

\textit{Law:} W. Va. Code § 11-21-6; WVCSR §110-21-6  
\textit{Comparable Federal:} IRC §§ 441, 442, 443, 446  

\textit{Accounting periods:} A taxpayer's taxable year for purposes of the West Virginia income tax is the same as his or her taxable year for federal income tax purposes.

\textit{Change of accounting periods:} If a taxpayer's taxable year is changed for federal income tax purposes, his or her taxable year for purposes of the West Virginia income tax is similarly changed. If a taxable year of less than 12 months results from a change of taxable year, the West Virginia personal exemptions and the credits allowed against the tax must be prorated under regulations of the Tax Commissioner.

\(^2\)“Partner” includes any equity owner of a partnership.

\(^3\)“Partnership” includes any partnership, limited liability or other entity treated like a partnership for federal income tax purposes for the taxable year.

\(^4\)“Doing business in this State” means any activity of a corporation or partnership that enjoys the benefits and protection of the government and laws of this State.

\(^5\)“Electing small business corporation” mean a corporation that made an election under IRC § 1362 to be treated for federal income tax purposes under Subchapter S of the Internal Revenue for the taxable year.
Accounting methods: A taxpayer’s method of accounting for West Virginia income tax purposes is the same as his or her method of accounting for federal income tax purposes. In the absence of any method of accounting for federal income tax purposes, West Virginia taxable income shall be computed under the method that, in the opinion of the Tax Commissioner, clearly reflects income.

Change of accounting methods: When taxpayer’s method of accounting is changed for federal income tax purposes, the following rules apply:

1. If a taxpayer's method of accounting is changed for federal income tax purposes, his or her method of accounting for West Virginia income tax purposes is similarly changed.

2. If a taxpayer's method of accounting is changed, other than from an accrual to an installment method, any additional tax which results from adjustments determined to be necessary solely by reason of the change may not be greater than if the adjustments were rateably allocated and included for the taxable year of the change and the preceding taxable years, not in excess of two, during which the taxpayer used the method of accounting from which the change is made.

3. If a taxpayer's method of accounting is changed from an accrual to an installment method, any additional tax for the year of the change of method and for any subsequent year which is attributable to the receipt of installment payments properly accrued in a prior year shall be reduced by the portion of tax for any prior taxable year attributable to the accrual of such installment payments, in accordance with regulations of the Tax Commissioner.

¶ 401.4 Modifications Increasing Federal Adjusted Gross Income

Law: W. Va. Code § 11-21-12(b) and §§ 11-21-12a, 11-21-12f, and 11-21-12g; WVCSR § 110-21-12

The following items of income, unless already included in federal adjusted gross income, are added to federal adjusted gross income to arrive at West Virginia adjusted gross income:

1. Income from obligations of other states: The amount of interest income on obligations of any state, other than obligations of the State of West Virginia, or of a political subdivision of any other state, unless created by compact or agreement to which West Virginia is a party. (W. Va. Code § 11-21-12(b)(1).) The amount to be added to federal adjusted gross income is the gross amount of such interest, without reduction for incidental expenses incurred by the taxpayer, such as custodial fees, investment advisory fees or similar expenses.

Example: The gross amount of interest received by a resident individual on bonds of the State of California must be added to his federal adjusted gross
income in arriving at his West Virginia adjusted gross income, for this interest is subject to West Virginia income tax but not federal income tax. If a resident individual receives interest income on obligations of the State of West Virginia, the interest is not subject to West Virginia income tax, for interest income on West Virginia obligations is excluded from taxation. (WVCSR § 110-21-12.2.1.2.)

(2) Income from federal obligations not exempt from state taxes but exempt from federal taxes: The amount of interest or dividend income on obligations or securities of any authority, commission, or instrumentality of the United States, which the laws of the United States exempt from federal income tax but not from state income taxes. (W. Va. Code § 11-21-12(b)(2).)

(3) Any deduction allowed when determining federal adjusted gross income for federal income tax purposes for the taxable year that is not allowed as a deduction for the taxable year under the West Virginia Personal Income Tax Act. (W. Va. Code § 11-21-12(b)(3).)

(4) Interest to carry exempt state obligations deductible for federal tax purposes: Interest on indebtedness incurred or continued to purchase or carry obligations or securities the income from which is exempt from West Virginia tax, to the extent that such interest is deductible in determining federal adjusted gross income. (W. Va. Code § 11-21-12(b)(4).)

Example: An individual borrowed $50,000 from his bank to purchase a new issue of the United States Treasury certificates. In computing his federal adjusted gross income, he includes the interest income received on these certificates and deducts as a business expense the interest payable on the bank loan. However, the interest income received on the certificates is not subject to West Virginia tax and is subtracted from federal adjusted gross income in computing his West Virginia adjusted gross income. Conversely, the interest on the bank loan incurred to purchase these certificates is not deductible for purposes of the West Virginia income tax and must be added back to federal adjusted gross income in computing West Virginia adjusted gross income. (WVCSR § 110-21-12.2.3.)

(5) Certain lump sum distributions: The amount of a lump sum distribution for which the taxpayer has elected under IRC § 402(e) to be separately taxed for federal income tax purposes, (W. Va. Code § 11-21-12(b)(6).) (See ¶ 434 below for estates and trusts.)

(6) Certain withdrawals from medical savings accounts: Amounts withdrawn from a medical savings account established by or for an individual under W. Va. Code § 33-15-20 or § 33-16-15 that are used for a purpose other than payment of medical expenses, as defined in those sections. (W. Va. Code § 11-21-12(b)(7).)

(7) Any distribution from an IRC § 529 prepaid tuition plan or other education savings plan that was used for purposes other than those qualified expenses
authorized by IRC § 529 (qualified tuition programs), unless already included in federal adjusted gross income for the taxable year. (W. Va. Code § 11-21-12f.)

(8) The amount deducted under IRC § 199 (income attributable to domestic production activities) when determining federal adjusted gross income for the taxable year for federal income tax purposes. (W. Va. Code § 11-21-12g.)

(a) When taxpayer’s federal adjusted gross income includes distributive share of income, gain or loss of a partnership, limited liability company, or other entity treated as a partnership for federal income tax purposes, and when taxpayer’s distributive share for the taxable year includes a deduction, or portion of a deduction computed under IRC § 199 for the taxable year, then in addition to amounts added to federal taxable income pursuant to W. Va. Code § 11-21-12(b), unless already included therein, taxpayer shall add the amount computed under IRC § 199 that flows through to the taxpayer for federal income tax purposes for the taxable year. Taxpayer must file with its annual West Virginia personal income tax return a copy of all schedules K-1 it received showing allocation of a IRC § 199 deduction and such other information as the Tax Commissioner may require.

(b) Failure to attach required schedules: When a taxpayer fails to include with the annual West Virginia personal income tax return the schedule or schedules required by W. Va. Code § 11-21-12g, the Tax Commissioner is required to treat the return as an incomplete return until the day the required schedule or schedules are filed with the Tax Commissioner. Additionally, an incomplete return showing an overpayment of tax will not be treated as a claim for refund until the day the defect is cured and the filing of an incomplete return does not start the running of the period of time during which the Tax Commissioner may issue a deficiency assessment or take other action to enforce compliance with the West Virginia Personal Income Tax Act.

¶ 401.5 Modifications Decreasing Federal Adjusted Gross Income

Law: W. Va. Code § 12-21-12(c) and §§ 11-21-12a, 11-21-12c, 11-21-12d, 11-21-12e, 11-21-12h and 11-21-12i; WVCSR 110-21-12

The following items of income, to the extent included in federal adjusted gross income, are subtracted from federal adjusted gross income to arrive at West Virginia adjusted gross income:

(1) Interest or dividend income from federal obligations that are exempt from state taxation: The amount of interest or dividend income on obligations or securities of the United States and its possessions, to the extent includable in gross income for federal income tax purposes, but exempt from state taxation under the laws of the United States. (W. Va. Code § 11-21-12(c)(1).)
Example: Interest on United States savings bonds is subject to federal income tax but not subject to state income tax. Therefore, the amount of such interest should be subtracted from federal adjusted gross income when computing West Virginia adjusted gross income. (WVCSR § 110-21-12.3.1.1.)

(2)(a) Interest from other federal obligations: Interest or dividend income on obligations or securities of any authority, commission or instrumentality of the United States or of the State of West Virginia to the extent includable in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States or of the State of West Virginia. (W. Va. Code § 11-21-12(c)(2).)

(2)(b) Dividends paid by RICs: Federal interest or dividends paid to shareholders of a regulated investment company, under IRC § 852 (taxation of regulated investment companies and their shareholders) to the extent includable in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States. (W. Va. Code § 11-21-12(c)(2).)

(3) Any amount included in federal adjusted gross income for federal income tax purposes for the taxable year that is not included in federal adjusted gross income under the West Virginia Personal Income Tax Act for the taxable year. (W. Va. Code § 11-21-12(c)(3).)

(4) Refunds or credit for overpayment of taxes: Any refund or credit for overpayment of income taxes imposed by this State or any other taxing jurisdiction, to the extent properly included in gross income for federal income tax purposes. (W. Va. Code § 11-21-12(c)(4).)

This modification applies to any refund of income taxes which was actually included in federal adjusted gross income, whether the refund represented West Virginia income taxes or the income taxes of another state, a political subdivision of any state or any foreign government. However, the modification does not include any portion of the total refund which represents interest received. Such interest, whether received in connection with a state, federal or other tax refund, is not exempt from tax.

(5) State retirement benefits: Annuities, retirement allowances, returns of contributions and any other benefit received under the West Virginia Public Employees Retirement System, the West Virginia State Teachers Retirement System and all forms of military retirement, including regular armed forces, reserves and National Guard, including any survivorship annuities derived therefrom, to the extent includable in gross income for federal income tax purposes. However, this decreasing modification is limited to the first $2,000 of benefits received under the West Virginia Public Employees Retirement System, the West Virginia State Teachers Retirement System and, including any survivorship annuities derived therefrom, to the extent includable in gross income for federal income tax purposes.; and the first $2,000 of benefits received under any federal retirement system to
which Title 4 U.S.C. §111 applies. However, the total decreasing modification under this paragraph (5) may not exceed $2,000 per person receiving retirement benefits and this limitation. (W. Va. Code § 11-21-12(c)(5).)

(6) **Police and firemen retirement benefits**: Retirement income received in the form of pensions and annuities under any West Virginia police, West Virginia Firemen’s Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes. (W. Va. Code § 11-21-12(c)(6).)

(7) **Military retirement income**: The first $20,000 of military retirement income, including retirement income from the regular armed forces, reserves and National Guard paid by the United States or by this State, including any survivorship annuities, to the extent included in gross income for federal income tax purposes for the taxable year. (W. Va. Code § 11-21-12(c)(7)(B).)

(8) **Retirement or disability income**: Federal adjusted gross income in the amount of $8,000 received from any source by any person who has attained the age of 65 on or before the last day of the taxable year, or by any person certified by proper authority as permanently and totally disabled, regardless of age, on or before the last day of the taxable year, to the extent includable in federal adjusted gross income for federal tax purposes. However, if a person has a medical certification from a prior year and he or she is still permanently and totally disabled, a copy of the original certificate is acceptable as proof of disability. A copy of the form filed for the federal disability income tax exclusion is acceptable proof of permanent and total disability. (W. Va. Code § 11-21-12(c)(8).) This decreasing modification is subject to the following adjustments:

(a) When the total modification under subparagraphs (1), (2), (5), (6) and (7) of this ¶ 401.5 is $8,000, no deduction is allowed under the paragraph (8); and

(b) Where the total modification under subparagraphs (1), (2), (5), (6) and (7) of this ¶ 401.5 is less than $8,000 per person, then the total modification allowed under this paragraph (8) for all gross income received by that person is limited to the difference between $8,000 and the sum of the modifications under subparagraphs (1), (2), (5), (6) and (7) of this ¶ 401.5 for the taxable year.

(9) **Retirement or disability income of surviving spouse**: Federal adjusted gross income in the amount of $8,000 received from any source by the surviving spouse of any person who had attained the age of 65 or who had been certified as permanently and totally disabled, to the extent includable in federal adjusted gross income for federal tax purposes. (W. Va. Code § 11-21-12(c)(9).) However, this decreasing modification is subject to the following limitations:
(a) Where the total modification under subparagraphs (1), (2), (5), (6), (7) and (8) of this ¶ 401.05 is $8,000 or more, no deduction is allowed under paragraph (9); and

(b) Where the total modification under subparagraphs (1), (2), (5), (6), (7) and (8) of this ¶ 401.5 is less than $8,000, then the total decreasing modification allowed under this subparagraph (9) for all gross income received by that person is limited to the difference between $8,000 and the sum of decreasing modification under subparagraphs (1), (2), (5), (6), (7) and (8) of this ¶ 401.5 for the taxable year.

(10) Contributions to medical savings account: Contributions from any source to a medical savings account established by or for the individual pursuant to W. Va. Code §§ 33-15-20 or 33-16-15, plus interest earned on the account, to the extent includable in federal adjusted gross income for federal income tax purposes. However the maximum decreasing modification under subdivision (10) is limited to $2,000 plus the amount of interest earned on the account for that taxable year. For married individuals filing a joint return, the maximum deduction is computed separately for each individual. (W. Va. Code § 11-21-12(c)(10).)

(11) Any other income which this State is prohibited from taxing under the laws of the United States. (W. Va. Code § 11-21-12(c)(12).) For example, West Virginia does not tax United States railroad retirement benefits. All types of United States Railroad Retirement Board benefits, including unemployment compensation, disability and sick pay included on the federal return are allowed as a decreasing modification to federal adjusted gross income.

(12) Payments to certain prepaid tuition contracts or college savings plans: Payments made under “West Virginia College Prepaid Tuition and Savings Program Act,” codified in W. Va. Code § 18-30-1 et seq., to the extent not allowed as a deduction when determining federal adjusted gross income for the taxable year. (W. Va. Code § 11-21-12a.)

(13) Payments for long-term care insurance: Any payment during the taxable year for premiums for a long-term care insurance policy as defined in W. Va. Code § 33-15A-4 that offers coverage to either the taxpayer, the taxpayer's spouse, parent or a dependent as defined in IRC § 152, but only to the extent the amount is not allowable as a deduction when arriving at the taxpayer's federal adjusted gross income for the taxable year in which the payment is made. (W. Va. Code § 11-21-12c.)

(14) Pension benefit guaranty modification: Any person who retires under an employer-provided defined benefit pension plan that terminates prior to or after the retirement of that person and the pension plan is covered by a guarantor whose maximum benefit guarantee is less than the maximum benefit to which the retiree was entitled had the plan not terminated may subtract annually from his or her
federal adjusted income a sum equal to the difference in the amount of the maximum annual pension benefit the person would have received for such tax year had the plan not terminated and the maximum annual pension benefit actually received from the guarantor under a benefit guarantee plan. This modification is available regardless of the type of return form filed. (W. Va. Code § 11-21-12d.) However, if the Tax Commissioner determines that this adjustment reduces the revenues of this State by $2 million or more in any one year, then the Tax Commissioner is required to reduce the percentage of the reduction to a level at which the Commissioner believes will reduce the cost of the adjustment to $2 million for the next year. (This tax adjustment terminates for taxable years beginning after December 31, 2012 unless the Legislature amends W. Va. Code § 11-21-12d.)

(15) Certain income of members of national guard or armed forces reserves: An individual on active duty as a member of the national guard or armed forces reserves called to active duty pursuant to an Executive Order of the President of the United States for domestic security duty is an authorized modification reducing federal adjusted gross income for the amount of active duty military pay received for the period of time an individual is on active duty pursuant to the Executive Order, but only to the extent the active duty military pay is included in federal adjusted gross income for the taxable year in which it is received. (W. Va. Code § 11-21-12e.)

(16) Certain turnpike tolls: Any payment during the taxable year for amounts expended by an individual for tolls paid electronically through use of a West Virginia Parkways, Economic Development and Tourism Authority PAC card (parkways authority commuter card) account for noncommercial commuter passes for travel on toll roads in West Virginia, not including amounts paid as refundable transponder deposits or amounts reimbursed by an employer or otherwise. (W. Va. Code § 11-21-12h.)

However, this decreasing modification is allowed only to the extent the amount is not allowable as a deduction when arriving at the taxpayer's federal adjusted gross income for the taxable year in which the payment is made. In the case of a single person, a head of household or a married couple filing a joint return, or a married person filing a separate return, this authorized modification reducing federal adjusted gross income applies only to the portion of the expended amount that equals or exceeds $25 and the total amount deducted for a taxable year may not exceed $1,200. Any amount of qualified tolls paid and eligible for this decreasing modification and not used in the taxable year when tolls were paid may be carried forward for up to 3 taxable years subsequent to the taxable year when paid. Qualified toll payments not used by the end of the carry forward period are forfeited.

(17) Contributions to qualified trust for child with autism: The amount of any qualifying contribution to a qualified trust maintained for the benefit of a child with autism by the parent or guardian of a child with autism, up to a maximum of $1,000 per year for individual filers and persons who are married but filing separately, and $2,000 per year for persons who are married and filing jointly, but only to the extent
the amount is not allowable as a deduction when arriving at the taxpayer's federal adjusted gross income for the taxable year in which the payment is made. This modification is available for taxable years beginning after December 31, 2010 regardless of the type of return form filed. (W. Va. Code § 11-21-12i.)

The taxpayer may elect to carry forward this modification and apply it over a period not to exceed 4 tax years, beginning in the tax year in which the payment was made. However, the amount of this decreasing modification, in combination with all other decreasing modifications authorized in the West Virginia Personal Income Tax Act may not reduce taxable income below zero. Any unused decreasing modification carryforward amount remaining after the 4-year carryforward period is forfeited. The accrued deposits and earnings on the qualified trust account for a child with autism and the subsequent withdrawal of funds from that trust account, made in accordance with the provisions of W. Va. Code § 44-16-1 et seq. may not be treated as West Virginia taxable income to either the trust or the beneficiary. (W. Va. Code § 11-21-12i.)

¶ 401.6 Low income earned income exclusion


Earned income exclusion: In the case of an eligible taxpayer, there is allowed as a deduction from federal adjusted gross income the amount of his or her earned income included therein, not to exceed $5,000, except that when a husband and wife file separate West Virginia returns this exclusion may not exceed $2,500 per separate return. This exclusion applies only to earned income received that is included in the taxpayer's federal adjusted gross income. Except in the case of a taxable year closed by reason of the death of the taxpayer, no low-income deduction is allowed in the case of a taxable year covering a period of less than 12 months.

"Eligible taxpayer" defined: The term "eligible taxpayer" means:

(1) Any unmarried individual and any husband and wife filing a joint West Virginia income tax return who has or have federal adjusted gross income of $10,000 or less for the taxable year; or

(2) Any husband or wife filing a separate West Virginia return who has federal adjusted gross income of $5,000 or less.

"Earned income" defined: For purposes of this exclusion, the term "earned income" means:

(1) Wages, salaries, tips, and other employee compensation; plus

(2) The amount of the taxpayer's net earnings from self-employment for the taxable year (within the meaning of IRC § 1402(a)), but such net earnings
must be determined with regard to the deduction allowed to the taxpayer under IRC § 164.

*Exclusions from earned income:* No amount received as pension or annuity income is taken into account, and no amount received for services provided by an individual while the individual is an inmate at a penal institution is taken into account.

¶ 401.7 Other Modifications to Federal Adjusted Gross Income

*Law:* W. Va. Code §§ 11-21-12(d) and 11-21-12(e)

In addition to the modifications to federal adjusted gross income discussed in ¶ 401.4, ¶ 401.5, and ¶ 401.6 above, the following modifications are also allowed or required:

(1) *Fiduciary adjustment for estate or trust income:* Where a resident individual is a beneficiary of an estate or trust, his or her federal adjusted gross income should be increased or decreased by his or her share of the West Virginia fiduciary adjustment applicable to the estate or trust. This fiduciary adjustment is the net amount of modifications relating to estate or trust items of income, gain, loss or deduction, and is computed by the fiduciary on the fiduciary’s return for the estate or trust. The fiduciary also allocates to each beneficiary his or her proportionate share of this fiduciary adjustment. Each beneficiary, on his or her individual West Virginia return, must apply his or her share of the fiduciary adjustment as a modification of his or her West Virginia adjusted gross income in order to determine his or her West Virginia adjusted gross income. (WVCSR § 110-21-12.4.2.)

(2) *Partners and S corporation shareholders -- Modification of federal adjusted gross income for partnership or S corporation income or loss reportable by a partner or shareholder:* Where a resident individual is a member of a partnership or S corporation, the modifications as outlined above are to be made with reference to items of partnership or S corporation income, gain, loss or deduction which are reflected in his or her federal adjusted gross income for the taxable year.

These modifications are applicable since each item of partnership or S corporation income, gain, loss or deduction has the same character for a partner or S corporate shareholder as for federal income tax purposes. If the partnership or S corporation item is not characterized for federal income tax purposes, it has the same character for a partner or S corporation shareholder as if it were realized directly by him or her from the source from which realized by the partnership or S corporation, or incurred by him or her in the same manner as incurred by the partnership or S corporation. (WVCSR § 110-21-12.5.)

¶ 401.8 West Virginia Adjusted Gross Income of Nonresident Individual

The computation of the West Virginia source income of a nonresident requires a separate determination of those items of income, gain, loss and deduction entering into his or her federal adjusted gross income that are derived from or connected with West Virginia sources. These items, thus determined, are subject to the same modifications as are applicable for a resident individual. (WVCSR § 110-21-32.1.)

*Income connected with the State:* A nonresident individual's items of income, gain, loss and deduction derived from or connected with West Virginia sources are items attributable to:

1. The ownership of any interest in real or tangible personal property in this State;

2. A business, trade, profession or occupation carried on in this State; or

3. Personal services performed in this State.

A nonresident who is a partner in a partnership, a shareholder in an electing small business corporation or a beneficiary of an estate or trust that has West Virginia source income is subject to the West Virginia personal income tax.

*Earned income:* Compensation for services rendered by a nonresident individual wholly outside this State is not included in his or her West Virginia source income, regardless of the fact that payment may be made from a point within the state or that the employer is a resident individual, partnership or corporation. If services are performed within West Virginia, whether or not as an employee, the compensation for such services includible in federal adjusted gross because the income constitutes income from West Virginia sources. However, an individual who resides in Kentucky, Maryland, or Ohio, and whose only income from a West Virginia source is from salaries or wages, does not have to report the salary or wage income earned from a West Virginia source due to reciprocal agreements practiced with these states. This rule also applies to residents of the Commonwealths of Pennsylvania and Virginia who are physically in this West Virginia for 183 days or less of the taxable year. If the resident of Pennsylvania or Virginia is physically present in West Virginia for more than 183 days during the taxable years then the resident of Pennsylvania or Virginia is a resident of West Virginia for income tax purposes even though their domicile is in the Commonwealth of Pennsylvania or Virginia. *See also ¶ 401.39 below.*

If employee services were performed in part within West Virginia and in part without West Virginia, the portion of the compensation attributable to the services performed within West Virginia is determined in accordance with the ratio of days worked within West Virginia to the total days worked over the period during which the compensation was earned.

*Example:* X, a nonresident individual, is a salaried employee of a North Carolina construction company. X works partly within West Virginia and partly within North
Carolina. X earns twenty thousand dollars ($20,000) during tax year 2012. The amount allocable to West Virginia sources is that portion of X's salary income which the number of days worked in West Virginia bears to the total days worked during the year (excluding non-working days; such as, Saturdays, Sundays, holidays, vacations, sick leave, etc.) both within and without West Virginia. Out of the total of two hundred eighty (280) working days, X worked seventy (70) days within West Virginia. X determines his West Virginia income in the following manner:

\[
\frac{\text{Days actually worked during year in West Virginia}}{\text{Total days worked during the year}} = \frac{70}{280} = 25\%
\]

Since the number of days worked within West Virginia amounts to 25% of X's total working days, X multiplies his or her total salary by 25% to arrive at the amount of his West Virginia income. His or her West Virginia income is $5,000 (25% X $20,000 = $5,000). (WVCSR § 110-21-32.2.1.2.e.)

**Awards and prizes**: Prizes, awards, and similar payments are derived from or connected with West Virginia sources are West Virginia source income to the extent they are incident to the nonresident's presence or other activities within West Virginia.

**Estate or trust income**: The West Virginia source income of a nonresident individual includes the West Virginia source income of an estate or trust of which he or she is a beneficiary.

**Income from a business within and without the State**: Since the West Virginia source income of a nonresident individual takes into account only items of income, gain, loss and deduction derived from or connected with West Virginia sources, an apportionment and allocation of items of income, gain, loss and deduction are required when a nonresident individual carries on a business, trade, profession or occupation partly within and partly without this State. A nonresident individual, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, is not deemed to be carrying on a business; trade, profession or occupation in this state solely by reason of the purchase and sale of property within this State for his or her own account. (WVCSR § 32.3.1.)

**Income from intangibles**: Items of income, gain, loss and deductions attributable to a nonresident individual's ownership of intangible personal property with a situs in West Virginia, including annuities, dividends, interest, and gains and losses from the disposition of intangible personal property, do not constitute items of income, gain, loss and deduction derived from or connected with West Virginia sources except to the extent attributable to property employed in a business, trade, profession, or occupation carried on in this State.

**Partnership income**: The West Virginia source income of a nonresident individual includes the West Virginia source income of a partnership allocated to the nonresident.
**Pensions**: Pensions and retirement pay which are eligible for federal tax treatment under IRC § 72 as "amounts received as an annuity" under an annuity, endowment or life insurance contract are considered to be income from annuities and not taxable by West Virginia to nonresidents even though the nonresident would not be entitled to the pension or retirement pay but for his or her employment in West Virginia.

**S Corporation income**: The West Virginia source income of a nonresident individual includes the West Virginia source income of a corporation which is an electing small business corporation that is allocated to the nonresident shareholder.

**Servicemembers Income from Armed Forces**: If the servicemember’s domicile was West Virginia at the time he or she entered military service, assignment to duty outside this State does not change his or her domicile.6 The servicemember must file a West Virginia personal income tax return and pay the tax due in the same manner as any other resident individual unless the service member did not have a physical presence in West Virginia for more than 30 days during the taxable year. Servicemember who is domiciled in West Virginia but does not spend more than 30 days in West Virginia is considered to be a nonresident of West Virginia for income tax purposes and his or her military compensation is not taxable by West Virginia. This is true even though the servicemember maintains a permanent place of abode in West Virginia.

When a servicemember whose domicile is West Virginia spend more than 30 days in West Virginia during the taxable year, the servicemember must file a resident return and report all of his or her income to West Virginia. If no West Virginia income tax is withheld from the service member’s military income, the service member may need to make quarterly estimated tax payments using Form IT-140ES.7

A servicemember who was domiciled in another state at the time he or she entered military service and who is stationed in West Virginia for some or all of the taxable year does not pay West Virginia income tax on his or her military compensation even if he or she is stationed here for more than 183 days during the taxable year.

However, any servicemember who has income from a West Virginia source, other than his or her military compensation, such as, for example, rental or royalty income

---

6 10 U.S.C. § 501(a). The United States Department of Defense has procedure by which a member of the service may change his or her state of legal residence. (DD Form 2058, State of Legal Residence Certificate).

7 However, 10 U.S.C. § 510 provides for deferral of income taxes if a servicemember’s ability to pay the income tax is materially affected by military service. Upon notice to the Internal Revenue Service or the tax authority of a State or a political subdivision of a State, the collection of income tax on the income of a servicemember falling due before or during military service is deferred for a period not more than 180 days after termination of or release from military service, if a servicemember’s ability to pay such income tax is materially affected by military service. No interest or penalty may accrue for the period of deferment by reason of nonpayment on any amount of tax deferred under § 510 and the running of a statute of limitations against the collection of tax deferred under § 510, by seizure or otherwise, is suspended for the period of military service of the servicemember and for an additional period of 270 days thereafter.
from property located in this State, is required to file a nonresident West Virginia income
tax return.

*Combat pay:* Combat pay received during the taxable year that is not taxable on the
federal income tax return is not taxable on the West Virginia return.

*Active duty military pay:* Military pay received while a resident individual is a member
of the National Guard or Armed Forces Reserves called to duty pursuant to an
Executive Order of the President of the United States is not subject to West Virginia
income. This income is shown on Schedule M of the annual return as a decreasing
modification to federal adjusted gross income.

*Spouses of United States military servicemembers:* Spouses of military
servicemembers are exempt from West Virginia income tax on wages received from
services performed in West Virginia when all three of the following conditions are met:

1. The servicemember is present in West Virginia in compliance with military
   orders;
2. The spouse is in West Virginia solely to be with the servicemember; and
3. The spouse maintains his or her domicile in another state.\(^8\)

There is no requirement that both spouses have the same state of domicile, nor in
the case of border installations, live in the state where the servicemember is stationed.
Eligible spouses desiring to claim this exemption from income tax and avoid withholding
of West Virginia tax may file a copy of Form WV/IT-104 with his or her employer. A copy
of their “spouse military identification card” should be attached to the form.

However the spouse of a military servicemember who receives other types of West
Virginia income, such as, for example, business income, interest income,
unemployment compensation, etc. is subject to West Virginia income tax on that income
if it exceeds the spouse’s personal exemption and must file a West Virginia income tax
return. For additional information, see State Tax Department Publication TSD-430
(January, 2012).

**¶ 401.9 West Virginia Adjusted Gross Income -- Part-Year Resident**


The West Virginia adjusted gross income of a part-year resident consists of two
parts – the individual’s adjusted federal adjusted gross income for the portion of the
year during which he or she was a resident of West Virginia, and the individual’s West

---

\(^8\) The Military Spouses Residency Relief Act (Public Law No. 111-97) provides that the spouse of a
service member who is domiciled in another state does not acquire residence or domicile in West Virginia
because the service member serving in the Armed Forces is stationed in West Virginia. Therefore, the
wages of a spouse of a service member are exempt from West Virginia income tax as provided in the Act.
Virginia source income for the remaining portion of the taxable year during which he or she was a nonresident.

A part-year resident is subject to West Virginia tax on the following:

1. Taxable income received from all sources while a resident of West Virginia;
2. West Virginia source income earned during the period of nonresidence; and
3. Applicable special accruals.

The West Virginia source income of a nonresident is derived from the following sources included in the nonresident’s federal adjusted gross income:

1. Real or tangible personal property located in West Virginia;
2. Employee services performed in West Virginia;
3. A business, trade, profession, or occupation conducted in West Virginia;
4. Distributive share of an S corporation doing business in West Virginia or deriving income from West Virginia sources in which the nonresident is a shareholder, to the extent allocated to West Virginia;
5. Distributive share of a partnership doing business in West Virginia or deriving income from West Virginia sources in which the nonresident is a partner, to the extent allocated to West Virginia;
6. The nonresident beneficiary’s share of West Virginia source income of an estate or trust.
7. West Virginia Unemployment Compensation benefits.

Special accruals: If an individual changes his or her status from West Virginia resident to nonresident, he or she must, regardless of the method of accounting he or she normally employs, accrue and include in his or her West Virginia return for the portion of the year prior to the change of residency, any items of income, gain, loss or deduction accruing prior to the change if not otherwise properly includible or allowable for West Virginia income tax purposes for the portion of the taxable year, or for a prior taxable year, during which he or she was a resident of West Virginia. That is, in computing his or West Virginia taxable income for that period, he or she must include all the items he or she would be required to include if he or she were filing a federal return for the same period on the accrual basis, together with any other accruals such as deferred gain on installment obligations, which are not otherwise includible or deductible for federal or West Virginia income tax purposes either for the period or for a prior taxable period during which he or she was a resident of this State.
**Example:** A taxpayer sells his business in West Virginia at a gain, under a contract whereby the purchase price is to be paid in installments, and later changes his status from resident to nonresident, he must accrue the entire amount of the gain remaining unpaid from such installment obligations, regardless of the method of accounting he normally uses in reporting his transactions. Likewise, where a beneficiary of an estate or trust changes his status during the taxable year from resident to nonresident, he must accrue on his West Virginia return for the resident period of any estate or trust income credited, distributable, payable or required to be distributed to him as of the date of his change of residence. (WVCSR § 110-21-54.3.1.1)

**Example:** A taxpayer moves from West Virginia and sells his or her West Virginia home on an installment plan. Taxpayer must report all gain from the sale, in the year of the sale, even though federal income tax is deferred until the gain is actually received. The only exception is where taxpayer sells his or her principal residence in West Virginia and purchases a new principal residence in the other state. In this instance, all gain on the sale is deferred for federal income tax purposes and special accrual does not apply.

When an individual changes his or her status from nonresident of West Virginia to resident, the individual must, regardless of his or her method of accounting, accrue to the portion of the taxable year prior to the change in status any items of income, gain, loss, or deduction accruing prior to the change of status (other than items derived from or connected with West Virginia sources) if not otherwise properly entering into his or her federal adjusted gross income for that portion of the taxable year or for a prior taxable year under his or her method of accounting, for the period prior to the change of residency. (WVCSR §110-21-54.3.2.)

No item of income, gain, loss or deduction accrued for the portion of a taxable year prior to a change from nonresident to resident status is taken into account when determining West Virginia adjusted gross income for any taxable period that begins after the date of the change from nonresident to resident status.

**Example:** A taxpayer moves from Ohio to West Virginia and sells his Ohio home on an installment plan. The taxpayer excludes from West Virginia income all income from the sale of the Ohio home even though federal income tax is deferred until the installment payments are actually received, which is after the taxpayer becomes a resident of West Virginia. The only exception is where taxpayer sells his or principal residence in Ohio and purchases a new principal residence in West Virginia residence and any gain on the sale is deferred for federal income tax purposes and special accrual does not apply.

**Example:** John Smith, a cash-basis calendar year taxpayer residing in Kentucky, performs services in Kentucky in March, 2012, for which he is paid $10,000 in September, 2012, from the employer's West Virginia office. On August 10, 2012, John Smith moves to West Virginia where on September 1, 2012, he receives the
$10,000 payment of salary. For 2012, John Smith is required to file two (2) West Virginia returns, one (1) as a nonresident and one (1) as a resident. No part of the $10,000 salary is taken into account as this item was sourced in another state which preceded the date of the change of residence. (WVCSR § 110-21-54.3.3.1)

¶ 401.10 West Virginia Taxable Income


After computing the West Virginia adjusted gross income of an individual, there is subtracted the taxpayer’s personal exemptions, see ¶ 401.11 below, and the resulting balance is the individual’s West Virginia taxable income.

An individual is not allowed any standard deduction or any itemized deductions when computing West Virginia taxable income.

¶ 401.11 Personal Exemptions of Resident and Nonresident Individuals


Comparable Federal: IRC § 151

An individual is allowed the same number of personal exemptions for West Virginia income tax purposes as the individual is allowed for federal tax purposes for the taxable year.

The West Virginia personal exemption is $2,000 for each exemption properly allowable to the taxpayer for the taxable year for federal income tax purposes, except that if a child is claimed as a dependent on the return of his or her parent and the child files a West Virginia return, the child is allowed a personal exemption of only $500 for the taxable year.

When a resident husband and wife file a joint federal return and also a joint West Virginia return, the same personal exemptions are allowed on the joint West Virginia return as on the joint federal return. Likewise, where a husband and wife file separate federal returns, the same personal exemptions are allowed on the separate West Virginia resident returns of each spouse as on the respective separate federal returns. However, if a husband and wife file a joint federal return but separate West Virginia returns, each of them is entitled to a West Virginia exemption of $2,000 for each federal exemption of which he or she would be separately entitled if they had filed separate federal returns.

A surviving spouse is allowed one additional exemption of $2,000 for the two taxable years beginning after the year of death of the deceased spouse. A surviving spouse is a taxpayer whose spouse died during the taxable year prior to the taxable year for which the annual return is being filed and who has not remarried at any time before the end of the taxable year for which the annual return is being filed.
¶ 401.12 "Resident" and "Nonresident" Defined


**Resident individual:** An individual may be a resident of West Virginia for income tax purposes, even though he or she would not be deemed a resident for other purposes. The term "resident individual" includes: (1) all persons "domiciled" in this State, subject to the exceptions below; and (2) any individual, other than a member of the Armed Forces of the United States, who is not domiciled in this State but who maintains a "permanent place of abode" in this State and spends in the aggregate more than 183 days of the taxable year in this State.

In the case of a person domiciled in West Virginia, the maintenance of a permanent place of abode in this State alone is sufficient to make him a resident for tax purposes, even though he remains outside this State for the entire year. The 183-day rule applies only to taxpayers who are not domiciled in West Virginia.

**Exception to when person domiciled in West Virginia not considered a resident:** Any person domiciled in West Virginia is a resident for income tax purposes for a specified taxable year, unless for that year he or she satisfies all three of the following conditions:

1. The person maintains no permanent place of abode in this State;
2. The person maintains a permanent place of abode elsewhere; and
3. The person spends in the aggregate not more than 30 days of the taxable year in this State.

**Example:** An individual, although retaining his West Virginia domicile, maintains his or her only permanent place of abode in the state of New York. As long as this individual continues to meet all three (3) conditions set forth in the preceding paragraph, he or she will be treated a nonresident of West Virginia for income tax purposes. If, however, for any taxable year there is a failure to meet any one (1) of the three (3) conditions set forth in the preceding paragraph, the individual is subject to West Virginia's personal income tax as a resident for that year. (WVCSR § 110-21-7.1.5.1.)

**Days in and out of state:** In counting the number of days spent within and without this State, presence within this State for any part of a calendar day constitutes a day spent within this State. However, such presence within this State may be disregarded if it is solely for the purpose of boarding a plane, train or bus for travel to a destination outside of this State, or while traveling by motor, plane or train through this State to a destination outside this State. Any person domiciled outside this state who maintains a permanent place of abode within this state during any taxable year and claims to be a nonresident must keep and have available for examination by the Tax Commissioner adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within this State.
**Domicile:** In general, domicile is the place which an individual intends to be his or her permanent home; the place to which he or she intends to return whenever he or she is absent from the domicile. A domicile once established continues until the person moves to a new location with the bona fide intention of making his or her fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The fact that a person registers and votes in one place is important but not necessarily determinative, especially if the facts indicate that he or she did this merely to escape taxation in some other jurisdiction.

**Domicile is not dependent on citizenship.** An alien who has permanently established his or her home in West Virginia is domiciled in this State regardless of whether he or she has become a United States citizen or has applied for citizenship. However, a United States citizen ordinarily will not be deemed to have changed his or her domicile by going to a foreign country unless it is clearly shown that he intends to remain there permanently. For example, a United States citizen domiciled in West Virginia, who goes abroad because of an assignment by his employer or for study, research or recreation, does not lose his West Virginia domicile unless it is clearly shown that he or she intends to remain abroad permanently and not to return.

**A person can have only one domicile.** If a person has two or more homes, his or her domicile is at the home which he or she regards and uses as his or her principal and permanent home. In determining his or her intention in the matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out above, a person who maintains a permanent place of abode in this State and spends more than 183 days of the taxable year in this State, is taxable as a resident regardless of his domicile.

A wife's domicile follows that of her husband unless a separate domicile has been established by her. Likewise, a child's domicile ordinarily follows that of his or her father, or of his or her mother after the father's death, until he or she reaches the age of self-support and actually establishes his or her own separate domicile.

**Permanent place of abode:** A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and generally includes a dwelling place owned or leased by his or her spouse. A camp or cottage that is suitable and only used for vacations or for hunting or fishing, is not a permanent place of abode. Also, a place of abode, whether in this State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. Thus, an individual domiciled in another state may be assigned to his or her employer's West Virginia office for a fixed and limited period, after which he is to return to his permanent location. If such an individual takes an apartment in West Virginia during this period, he or she will not be deemed a resident, even though he or she spent more than 183 days of the taxable year in West Virginia, because his or her place of abode here is not permanent. The individual will, of course, be taxable as a
nonresident on his or her income from West Virginia sources, including his or her salary or other compensation received for services performed in West Virginia. However, if the individual’s assignment to his or her employer’s West Virginia office is not for a fixed or limited period, but is for an indefinite period, then the West Virginia apartment will be deemed a permanent place of abode and the individual will to be a resident for tax purposes if he or she spends more than 183 days of the year in West Virginia.

Nonresident individual: For income purposes, a nonresident individual is anyone who is not a resident as defined above.

¶ 401.13 Rate of Tax


Single individuals, estates and trusts, married individuals filing joint returns: The tax imposed on West Virginia taxable income of every individual (except married individuals filing separate returns), every individual who is a head of household in the determination of his or her federal income tax for the taxable year, every husband and wife who file a joint return, every individual who is entitled to file his or her federal income tax return for the taxable year as a surviving spouse, and every estate and trust is determined in accordance with the following table:

<table>
<thead>
<tr>
<th>If taxable income is:</th>
<th>Over</th>
<th>But not over</th>
<th>The tax is:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$0</td>
<td>$10,000</td>
<td>3% of the taxable income</td>
</tr>
<tr>
<td></td>
<td>$10,000</td>
<td>$25,000</td>
<td>$300 plus 4.0% of excess over $10,000</td>
</tr>
<tr>
<td></td>
<td>$25,000</td>
<td>$40,000</td>
<td>$900 plus 4.5% of excess over $25,000</td>
</tr>
<tr>
<td></td>
<td>$40,000</td>
<td>$60,000</td>
<td>$1,575 plus 6.0%, of excess over $40,000</td>
</tr>
<tr>
<td></td>
<td>$60,000</td>
<td></td>
<td>$2,775 plus 6.5% of excess over $60,000</td>
</tr>
</tbody>
</table>

Married individuals filing separate returns: In the case of husband and wife filing separate returns for the taxable year, the tax imposed on the West Virginia taxable income for each spouse is determined in accordance with the following table:

<table>
<thead>
<tr>
<th>If taxable income is:</th>
<th>Over</th>
<th>But not over</th>
<th>The tax is:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$0</td>
<td>$5,000</td>
<td>3% of the taxable income</td>
</tr>
<tr>
<td></td>
<td>$5,000</td>
<td>$12,500</td>
<td>$150 plus 4.0% of excess over $5,000</td>
</tr>
<tr>
<td></td>
<td>$12,500</td>
<td>$20,000</td>
<td>$450 plus 4.5% of excess over $12,500</td>
</tr>
<tr>
<td></td>
<td>$20,000</td>
<td>$30,000</td>
<td>$787.50 plus 6.0% of excess over $20,000</td>
</tr>
<tr>
<td></td>
<td>$30,000</td>
<td></td>
<td>$1,387.50 plus 6.5% of excess over $30,000</td>
</tr>
</tbody>
</table>

¶ 401.14 Resident Partners

Law: W. Va. Code § 11-21-17; WVCSR § 110-21-17

Partner’s modifications: When determining the West Virginia adjusted gross income and the West Virginia taxable income of a resident partner, any modification described
in ¶ 401.4, ¶ 401.5 or ¶ 401.7, above, that relates to an item of partnership income, gain, loss or deduction is made in accordance with the partner’s distributive share, for federal income tax purposes, of the items to which the modifications relate.

When a partner's distributive share of any such item is not required to be taken into account separately for federal income tax purposes, then the partner's distributive share of the item is his or her distributive share for federal income tax purposes of partnership taxable income or loss generally.

Character of items: Each item of partnership income, gain, loss, or deduction has same character for a partner for purposes of the West Virginia income tax as it has for federal income tax purposes. When an item is not characterized for federal income tax purposes, it has 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.

West Virginia tax avoidance or evasion: When 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 the item, and where the principal purpose of the provision is the avoidance or evasion of West Virginia income tax, the partner's distributive share of such item, and any modification required with respect to the item must be determined as if the partnership agreement made no special provision with respect to the item.

¶ 401.15 Nonresident Partners


Nonresident partners: When determining the West Virginia source income of a nonresident partner of any partnership formed under the laws of this State or doing business in this State, there is included only the portion of the partner's distributive share, for federal income tax purposes, that is derived from or connected with West Virginia sources of items of partnership income, gain, loss and deduction, as such portion is determined under regulations of the Tax Commissioner consistent with the applicable rules of W. Va. Code § 11-21-32. (W. Va. Code § 11-21-37(a)(1).)

Special rules as to West Virginia sources: When determining the sources of a nonresident partner's income, no effect is given to a provision of the partnership agreement which:

(1) Characterizes payments to the partner as being for services or for the use of capital; or

(2) Allocates to the partner, as income or gain from sources outside West Virginia, a greater proportion of his or her distributive share of partnership income or gain than the ratio of partnership income or gain from sources
outside West Virginia to partnership income or gain from all sources, except as authorized when a resident partner becomes a nonresident partner; or 

(3) Allocates to the partner a greater proportion of a partnership item of loss or deduction connected with West Virginia sources than his or her proportionate share, for federal income tax purposes, of partnership loss or deduction generally, except when an alternative method of allocation is authorized by the Tax Commissioner. (W. Va. Code § 11-21-37(b).)

*Alternative methods:* The Tax Commissioner may, on written application filed on or before the due date of the partner's West Virginia income tax return for that taxable year (determined without regard to any extension of time for filing), authorize the use of such other method or methods of determining the nonresident partner's portion of partnership items derived from or connected with West Virginia sources, and the modifications related thereto, as may be appropriate and equitable, and on such terms and conditions as the Tax Commissioner may require. (W. Va. Code § 11-21-37(c).)

The following rules applicable to resident partners also apply to nonresident partners:

(1) In determining West Virginia adjusted gross income and West Virginia taxable income of a nonresident partner, any modification described in ¶ 401.4, ¶ 401.5 or ¶ 401.7, 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. When 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 that item shall be his or her distributive share for federal income tax purposes of partnership taxable income or loss generally.

(2) The character of partnership items for a nonresident partner is determined under the rule applicable to resident partners. Each item of partnership income, gain, loss, or deduction has the same character for a partner for West Virginia income tax purposes as for federal income tax purposes. Where an item is not characterized for federal income tax purposes, it has 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.

(3) The effect of a special provision in a partnership agreement, other than a provision described in the special rule discussed above (W. Va. Code § 11-21-37(b)), having the principal purpose of avoidance or evasion of West Virginia income is determined under the following rule. When 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 the provision is the avoidance or evasion of West Virginia income tax, the partner's distributive share of the item, and any modification required with respect thereto is determined as if the partnership agreement made no special provision with respect to the item.

§ 401.16 Resident Shareholders of S Corporations

*Law:* W. Va. Code § 11-21-17a; WVCSR § 110-21-17a

*S corporation shareholder's modifications:* When determining the West Virginia adjusted gross income and West Virginia taxable income of a resident S corporation shareholder, any modification described in § 401.4, § 401.5 or § 401.7, above, that relates to an item of income, gain, loss or deduction must 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.

When 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 the item is his or her pro rata share for federal income tax purposes of S corporation taxable income or loss generally.

*Character of items:* Each item of S corporation income, gain, loss or deduction has the same character for a shareholder for West Virginia income tax purposes that it has for federal income tax purposes. When an item is not characterized for federal income tax purposes, it has 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.

§ 401.17 Nonresident Shareholders of S Corporations


When determining the West Virginia source income of a nonresident shareholder of an S corporation doing business in this State or deriving income from sources in this State, there is included only the portion of the nonresident shareholder's pro rata share of items of S corporation income, gain, loss and deduction entering into the shareholder's federal adjusted gross income that are derived from or connected with West Virginia sources, increased by reductions for taxes described in IRC § 1366(f)(2) and (3), as such portion of these items is determined under regulations of the Tax Commissioner consistent with the applicable methods and rules for allocation under the West Virginia Corporation Net Income Tax Act. *See* chapter 1 of this Guidebook for discussion of the corporation net income tax.

*Alternative methods:* The Tax Commissioner may, on written application filed on or before the due date of the S corporation shareholder's West Virginia income tax return for the taxable year (determined without regard to any extension of time for filing), authorize the use of such other method or methods of determining the nonresident S corporation shareholder's portion of S corporation items, derived from or connected with
West Virginia sources, and the modifications related thereto, as may be appropriate and equitable, and on such terms and conditions as the Tax Commissioner may require.

The following rules applicable to resident shareholders also apply to nonresident shareholders of S corporations:

1. **S corporation shareholder's modifications**: When determining West Virginia adjusted gross income and West Virginia taxable income of a nonresident S corporation shareholder, any modification described in ¶ 401.4, ¶ 401.5 or ¶ 401.7, above, that relates to an item of income, gain, loss or deduction are 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. When 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 the item is his or her pro rata share for federal income tax purposes of S corporation taxable income or loss generally.

2. **Character of items**: Each item of S corporation income, gain, loss or deduction has the same character for a shareholder for West Virginia income tax purposes as it has for federal income tax purposes. When an item is not characterized for federal income tax purposes, it has 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.

### ¶ 401.18 Share of resident estate or trust beneficiary fiduciary adjustment

**Law:** W. Va. Code § 11-21-19; WVCSR § 110-21-19

An adjustment is made under ¶ 401.7 above when determining the West Virginia adjusted gross income of a resident beneficiary of any estate or trust in the amount of the share of each beneficiary in the West Virginia fiduciary adjustment determined as provided in W. Va. Code § 11-21-19.

The West Virginia fiduciary adjustment is the net amount of the modifications described in ¶ 401.4, ¶ 401.5 or ¶ 401.7, above, that relate to items of income, gain, loss or deduction of an estate or trust.

**Shares of West Virginia fiduciary adjustment**: The respective shares of an estate or trust and its beneficiaries (including, solely for the purpose of this allocation, nonresident beneficiaries) in the West Virginia fiduciary adjustment shall be in proportion to their respective shares of distributable net income of the estate or trust for federal income tax purposes for the year.

If the distributable net income for the taxable year of the estate or trust is zero, the share of each beneficiary in the West Virginia fiduciary adjustment is in proportion to his or her share of the estate or trust income for that year, under local law or the governing
instrument, which is distributed within the year, or is required to be distributed currently. Any balance of the West Virginia fiduciary adjustment is allocated to the estate or trust.

Alternate attribution of modifications: The Tax Commissioner may, on application, authorize the use of such other methods of determining to whom the items comprising the fiduciary adjustment shall be attributed, as may be appropriate and equitable, on such terms and conditions as the Commissioner may require.

¶ 401.19 Nonresident Beneficiary Share of West Virginia Source Income of Estate or Trust


The share of a nonresident beneficiary of any estate or trust in estate or trust income, gain, loss and deduction from West Virginia sources is determined under W. Va. Code § 11-21-32(a) as follows:

Items of distributable net income from West Virginia sources: First, there is determined the items of income, gain, loss and deduction, derived from or connected with West Virginia sources, which would be included in the determination of federal adjusted gross income if the estate or trust were an individual and which enter into the definition of federal distributable net income of the estate or trust for the taxable year, including such items from another estate or trust of which the first estate or trust is a beneficiary. The determination of the source of the item is made in accordance with the applicable rules of W. Va. Code § 11-21-32 as in the case of a nonresident individual.

Next the items of income, gain, loss and deduction, derived from or connected with West Virginia sources are allocated among the estate or trust and its beneficiaries (including, solely for the purposes of this allocation, resident beneficiaries) in proportion to their respective shares of federal distributable net income.

Character of items: The amounts so allocated shall have the same character for West Virginia income tax purposes that they have for federal income tax purposes. When an item entering into the computation of such amounts is not characterized for federal income tax purposes, it has the same character as if realized directly from the source from which realized by the estate or trust, or incurred in the same manner as incurred by the estate or trust.

Alternative methods of determining shares of distributable net income include:

(1) If the estate or trust has no federal distributable net income for the taxable year, the share of each beneficiary (including, solely for the purposes, of this allocation, resident beneficiaries) in the net amount income, gain, loss and deduction, derived from or connected with West Virginia sources, as above determined is in proportion to the beneficiary's share of the estate or trust income for the year, under local law or the governing instrument, which is required to be distributed currently and any such other amounts of such
income distributed for the taxable year. Any balance of the net amounts is allocated to the estate or trust.

(2) The Tax Commissioner may, on written application filed on or before the due date of the West Virginia fiduciary return for the estate or trust (determined without regard to any extension of time for filing the return) authorize use of such other methods of determining the representative shares of the beneficiaries and of the estate or trust in its income derived from West Virginia sources, and the modifications related thereto, as may be appropriate and equitable, on such terms and conditions as the Commissioner may require.

(3) The Tax Commissioner may by regulation establish such other method or methods of determining the respective shares of the beneficiaries and of the estate or trust in its income derived from West Virginia sources as may be appropriate and equitable. Such method may be used by the fiduciary in his or her discretion whenever the allocation of the respective shares under the general allocation rule would result in an inequity which is substantial in amount.

¶ 401.20 Computation of Tax on West Virginia Source Income of Nonresidents

Personal income tax due on income derived from sources in West Virginia by a nonresident individual is computed in the following manner:

(1) The tax liability is first computed as if the taxpayer were a West Virginia resident for the entire tax year. The result of this computation is known as the tentative tax.

(2) Tentative tax determined under (1) above is then multiplied by the quotient of West Virginia source income of the nonresident divided by federal adjusted gross income for the year.

(3) The result of the computation in (2) above is the tax liability of the nonresident or part year resident.

¶ 401.21 Computation of Tax of Part-Year Resident

Personal income tax due on income derived by a taxpayer from all sources while a resident of West Virginia and on all income derived from West Virginia sources while a nonresident of West Virginia is computed in the following manner:

(1) The tax liability is first computed as if the taxpayer were a West Virginia resident for the entire tax year. The result of this computation is known as the tentative tax.
(2) Tentative tax determined under (1) above is then multiplied by the quotient of the sum of the West Virginia income of the taxpayer for the period of residency plus the West Virginia source income of the taxpayer for the period of nonresidency, divided by the taxpayer’s federal adjusted gross income for the year.

(3) The result of the computation in (2) above is the tax liability of a taxpayer who is a part year resident of West Virginia.

¶ 401.22 Declarations of Estimated Tax

Comparable Federal: IRC § 6654

Every resident and nonresident individual whose West Virginia adjusted gross income, other than from wages on which the proper amount of tax is withheld, can reasonably be expected to exceed $400 plus the sum of his or her West Virginia personal exemptions must make and file a West Virginia declaration of estimated tax for the taxable year unless: (1) the estimated tax otherwise due in installment payments is remitted through additional withholding by the employer from the employee’s wages during the taxable year; or (2) withholding satisfies at least 90% of the annual tax liability.

Example: X, a taxpayer making his return on the calendar year basis, is married and has two (2) dependent children. X is sole proprietor of a retail business which is his only source of income. X can reasonably expect to realize twenty-five thousand dollars ($25,000) from the business during 2012, based on prior year’s earnings. Therefore, X is required to make a declaration of estimated tax, because his income can reasonably be expected to exceed the sum of his personal exemptions plus four hundred dollars (2,000 X 4 + 400 = $8,400) for 2012. (WVCSR § 110-21-55.1.2.)

Example: Y is a cash basis taxpayer with three (3) personal exemptions including himself. Y is employed and expects to receive twenty-three thousand dollars ($23,000) subject to withholding during calendar year 1989. Also, Y expects to receive twelve thousand dollars ($12,000) of income during the taxable year from the practice of a profession on his own account. Y is required to file a West Virginia declaration of estimated tax, for Y’s income ($12,000) not subject to withholding exceeds four hundred dollars ($400). The sum of his personal exemptions (2,000 X 3 = $6,000) was considered in determining the amount withheld from his wages for the 2012 taxable year. Alternatively, Y could increase the amount being withheld for West Virginia personal income taxes by his employer. If the amount of estimated tax due on Y’s other income is remitted through additional withholding, Y will not be required to file a declaration of estimated tax and make quarterly installment payments. (WVCSR § 110-21-55.1.2.)

Definition of estimated tax: In the case of an individual, the term “estimated tax” means the amount which an individual estimates to be his or income tax liability under
the provisions of the West Virginia Personal Income Tax Act and the related regulations for the taxable year, less the amount the individual estimates to be the sum of any credits allowable against the tax.

Joint declaration of husband and wife: A husband and wife may make a joint declaration of estimated tax as if they were one taxpayer, in which case the liability with respect to the estimated tax is joint and several. No joint declaration may be made if husband and wife are separated under a decree of divorce or of separate maintenance, or if they have different taxable years. If a joint declaration is made but husband and wife elect to determine their income tax liability separately, the estimated tax for the year may be treated as the estimated tax of either husband or wife, or it may be divided between them, as they may elect.

Declaration for deceased taxpayer: No declaration of estimated income tax is required to be filed for a decedent subsequent to the date of his or her death. However, a short year tax return may need to be filed and additions to tax may be due for any failure of the decedent to timely file a declaration of estimated tax required to timely pay any installment of estimated tax required, or to properly estimate his tax.

¶ 401.23 Payment of Estimated Tax

Comparable Federal: IRC § 6315

The amount of estimated income tax due as shown on a declaration of estimated income tax must be paid in installments unless the taxpayer elects the entire amount of estimated tax at the time of filing the declaration. If the estimated income tax is paid in installments, the first payment must accompany the declaration.

When timely declaration is filed: When a declaration of estimated tax is required to be filed, the declaration is due along with the first installment payment on April 15th of the calendar year. The remaining installment payments are June 15th and September 15th of the calendar year and January 15th of the next calendar year. When the due date falls on Saturday, Sunday, or a legal holiday in this State, the payment is due the next business day. A payment placed in the mail, postage prepaid, on or before the due date, is considered timely paid. Unless electronic filing or electronic payment is required, the declaration of estimated tax and installment payments of estimated tax may be hand delivered, or delivered by a package delivery service to the State Tax Department located at 1001 Less Street, East, Charleston, West Virginia, 25301. Note that if a package delivery service is used, the package must be physically delivered to the State Tax Department on or before the statutory due date, unless the due date is a Saturday, Sunday or legal holiday in this state, in which case the package must be delivered by the next business day.

---

9 When the taxpayer’s tax year is not the calendar year, the declaration of estimated tax and the first installment payment is due 15 days after the end of the third month of the tax year. The remaining installment payments are due on the 15th day of the 6th and 9th months of the tax year and the 15th day of the 1st month of the next tax year.

10 Unless electronic filing or electronic payment is required, the declaration of estimated tax and installment payments of estimated tax may be hand delivered, or delivered by a package delivery service to the State Tax Department located at 1001 Less Street, East, Charleston, West Virginia, 25301. Note that if a package delivery service is used, the package must be physically delivered to the State Tax Department on or before the statutory due date, unless the due date is a Saturday, Sunday or legal holiday in this state, in which case the package must be delivered by the next business day.
In some cases, the requirement to file a declaration of estimated tax may first be met after March 31 of the taxable year, due to a change in circumstances, such as a change in income, deductions or exemptions. In this case the due date of the declaration of estimated tax and the due dates of the installment payments are as follows:

<table>
<thead>
<tr>
<th>If the requirement to file declaration of estimated tax is met after:</th>
<th>Declaration due date is:</th>
<th>Required installment payment due:</th>
</tr>
</thead>
<tbody>
<tr>
<td>After March 31 but before June 1</td>
<td>June 15</td>
<td>50% of estimated tax due June 15; 25% due September 15; and 25% due January 15 of next tax year</td>
</tr>
<tr>
<td>After May 31 but before September 1</td>
<td>September 15</td>
<td>75% of estimated tax due September 15; and 25% due January 15 of next tax year</td>
</tr>
<tr>
<td>After August 31 but before January 1 of next tax year</td>
<td>January 15 of next tax year</td>
<td>100% of estimated tax due January 15 of the next year</td>
</tr>
</tbody>
</table>

Where an individual first makes and files a declaration of estimated income tax after September 15th of the taxable year, the estimated income tax must be paid in full at the time of the filing of the declaration as provided under W. Va. Code § 11-21-56(b). (WVCSR § 110-21-56.2)

_Filing of declaration of estimated tax by farmers:_ Special provisions apply to the filing of the declaration estimated tax and to the payment of estimated tax by an individual whose estimated West Virginia adjusted gross income for the taxable year is at least two-thirds (2/3) from farming as defined in WVCSR § 55.5.1.2. The declaration of a farmer may be filed on or before January 15th of the succeeding taxable year, in lieu of the time prescribed for taxpayers generally. (W. Va. Code § 11-21-56(b)).

_Return of farmer as declaration of estimated tax._ If on or before March 1 of the next taxable year, an individual who is a farmer files his or her annual return for the taxable year for which the declaration was required, and pays therewith the full amount of the tax shown to be due on the return, the annual return is considered to be his or her declaration, if no declaration was required to be filed during the taxable year, but is otherwise required to be filed on or before the January 15 of the next taxable year. (W. Va. Code § 11-21-55(l)).

_Return as declaration of estimated tax:_ If on or before the February 15 of the next taxable year an individual, other than a farmer, files his or her annual return for the prior taxable year for which the declaration is required, and pays with the return the full amount of the tax shown to be due on the return then the annual return will be
considered as his or her declaration of estimated tax, if no declaration was required to be filed during the taxable year, but is otherwise required to be filed on or before the January 15 of the next taxable year.

When amended declaration is filed: If an amended declaration of estimated tax is filed, the remaining installments, if any, must be ratably increased or decreased, as the case may be, to reflect the increase or decrease in the estimated income tax by reason of the amendment.

If an amended declaration of estimated tax is filed after September 15 of the taxable year, any increase in the estimated income tax by reason thereof must be paid in full at the time the amended declaration is filed. If the amend declaration shows a decrease in the amount of estimated tax, the last installment payment may be reduced. If after the fourth installment payment is reduced to zero there is an overpayment of estimated tax, a claim for refund cannot be filed until the annual return for the taxable year is filed.

Return as amendment of declaration of estimated tax: The annual return, if filed on or before the January 15 of the next taxable year, will be considered an amendment of the declaration of estimated tax if the tax shown on the annual return is greater than the estimated tax shown on the declaration of estimated tax previously filed for the taxable year.

¶ 401.24 Amount of Estimated Tax Payments

Law: WVCSR § 110-21-56a

Estimated tax payments are required when an individual’s estimated tax liability for the taxable year exceeds the amount of estimated withholding tax and other allowable credits by more than $400. In sum, at least 90% of an individual’s tax liability for the taxable year must be prepaid, unless an exception applies. The term "estimated tax payments" includes both the amount of installment payments remitted and the amount of taxes withheld from wages.

To determine if an individual's estimated tax payments (including withholding taxes) required for the taxable year equal at least 90% of his or her actual liability for the tax, determined after allowable credits, other than credits for withheld tax, are considered, the following procedure is applied:

(1) Determine the sum of the individual's income tax shown on his or her return for the prior taxable year (as reduced by the amount of allowable credits). If no annual return was filed, take 100% of the total tax determined to be due for the taxable year.

(2) Take 90% of the above amount.
(3) Divide the amount in (2), above, by the number of installments required for the year. Generally, this will require dividing by four, but may be three, two or one. The result is the amount of each installment payment.

(4) For each installment payment computed in (3), above, find the excess, if any, of the installment over the amount actually paid or credited toward that installment payment. (Add in any overpayment of estimated tax available from the previous installment payment.) If there is no excess, no further computation is necessary for that installment.

Wages are presumed to be received in equal payments throughout the year and that the employer withheld West Virginia income taxes in equal installments.

Any excess computed above for any installment is the amount of underpayment of that installment. If the actual payment made does not meet at least one of the available “safe harbors” discussed in ¶ 401.25 below additions for underpayment of estimated tax must he paid.

¶ 401.25 Additions to Tax for Underpayment of Estimated Tax


Nonwaivable additions to tax, rather than interest, are imposed for the underpayment of estimated income tax required to be paid for the taxable year. The amount of this addition to tax is computed by applying the statutory rate of interest on underpayments of tax\(^{11}\) to the amount of the underpayment of estimated tax, for the period of the underpayment. This rate is currently 9.5% per annum.

This addition to tax is computed separately for each period. Because this addition is computed separately for each installment payment period, an individual may owe this addition to tax for an earlier payment period even if the individual later paid enough to make up the underpayment. Additionally, this addition to tax may be due even if the individual is due a refund when the individual files his or her income tax return for the taxable year.

Amount of underpayment: For purposes of this addition to tax, the amount of the underpayment is the excess of the amount determined under subparagraph (1) below over the amount determined under subparagraph (2) below.

(1) The amount of the installment required to be paid on or before the due date for the installment, if the estimated tax due for the taxable year were an

\(^{11}\) The rate of interest on underpayments of tax is determined semiannually by the Tax Commissioner as provided in W. Va. Code §§ 11-10-17 and 11-10-17a. The minimum rate of interest on underpayments is 9.5% simple interest. Twice each year, the Tax Commissioner publishes in the State Register an administrative notice setting the interest rates for the next six months. These administrative notices are also posted at the State Tax Department’s website.
amount equal to 90% of the tax shown due on the annual return for the taxable year divided by the number of installments taxpayer was required to make for the taxable year, or, if no return was filed, 90% of the tax for the taxable year divided by the number of installment payments taxpayer was required to make for the taxable year.

(2) The amount, if any, of the installment paid on or before the last date prescribed for payment of that installment. Generally, April 15, June 15, September 15, and January 15 of the next year. See ¶ 401.23 above.

Period of underpayment: The period of underpayment of an installment runs from the date the installment was required to be paid (due date) to whichever of the following dates is the earlier:

(1) The due date of the annual return following the close of the taxable year for which the installment was due (determined without regard to any extension of time for filing such annual return); or

(2) With respect to any portion of the underpayment, the date on which the portion is paid. For purposes of this paragraph (2), a payment of estimated tax is credited against unpaid required installments in the order in which the installments payments are required to be paid.

For example, if a taxpayer’s estimated tax liability for the year is $6,000 the amount of each installment payment is $1,350. ($8,000 x 90% = $7,200 ÷ 4 = $1,800.) If taxpayer files his or her declaration of estimated and pays tax of $1,000 on April 15, 2012, and pays $2,600 on June 15, 2012, the period of underpayment of estimated tax is two months. On the other hand, if the $800 underpayment of estimated tax is not paid until the annual return for the taxable year is filed on April 15, 2013 the underpayment period is 12 months.

Exceptions: No additions to tax for underpayment of estimated tax is imposed if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment of each installment equals or exceeds the amount which would have been required to be paid on or before that date if the estimated tax were whichever of the following amounts is lesser:

(1) Prior year’s tax: The estimated tax payments aggregate 100% of the tax shown on the return of the taxpayer for the preceding taxable year, if a return showing a liability for tax was filed by the taxpayer for the preceding taxable year and the preceding year was a taxable year of twelve months; or

(2) Annualized tax: In the case of any required installment, if the taxpayer establishes that the annualized income installment is less than the amount of the installment determined using 100% of last year’s tax and is less than the installment determined using 90% of this year’s tax, then the amount of the
required installment is the annualized income installment. For purposes of determining the annualized installment payment the payment is computed as if four installment payments are required for the taxable year and the "annualized income installment" is the difference, if any, determined by subtracting the aggregate amount of any prior installments for the taxable year from the amount of tax for the taxable year computed by placing on an annualized basis the taxable income of the individual for months in the taxable year ending before the due date for the installment. When making these computations, the following rules apply:

a. **Annualization**: Taxpayer's taxable income is placed on an annualized basis in the same manner that taxable income is annualized for federal income tax purposes for the taxable year.

b. **Applicable percentage**: The applicable percentage is determined from the following table:

<table>
<thead>
<tr>
<th>In the case of the following required installments:</th>
<th>The applicable percentage is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st payment</td>
<td>22.5%</td>
</tr>
<tr>
<td>2nd payment</td>
<td>45%</td>
</tr>
<tr>
<td>3rd payment</td>
<td>67.5%</td>
</tr>
<tr>
<td>4th payment</td>
<td>90%</td>
</tr>
</tbody>
</table>

**Additional exceptions**: Additions to tax for underpayment of estimated tax also do not apply:

1. When the balance of tax shown to be due on the annual return is less than $600; and

2. When the individual had no West Virginia personal income tax liability for the preceding taxable year if:

   a. The individual's preceding taxable year was a taxable year of 12 months;

   b. The individual did not have any West Virginia personal income tax liability for the preceding taxable year;

   c. The individual was a citizen or resident of the United States throughout the preceding taxable year; and

   d. The individual's West Virginia personal income tax liability for the year for which the annual return was filed, is less than $5,000.

**Waiver in certain cases**: No addition to tax for underpayment of estimated tax will be imposed with respect to any underpayment of estimated tax if and to the extent the Tax
Commissioner determines that by reason of casualty, disaster or other unusual circumstances the imposition of this addition to tax would be against equity and good conscience.

_Tax computed after application of credits against tax:_ As used in this ¶ 401.25, the term "tax" means the amount personal income tax that is generally payable in two or more installment payments during the taxable year, minus the amount of credits allowable against the tax, other than:

1. Taxes on wages withheld as discussed in ¶ 401.44 below;

2. Taxes on distributions of pass-through income to nonresidents who are partners, S corporation shareholders or beneficiaries of an estate or trust, withheld as discussed in ¶ 401.49 below;

3. Taxes withheld on sales or real property by nonresidents as discussed in ¶ 401.51 below; and

4. Taxes on gambling winnings withheld as discussed in ¶ 401.52 below.

_Application of additions to tax for underpayment of estimated tax in case of personal income tax withheld on wages:_ For purposes of applying the addition to tax for underpayment of estimated tax, the amount of the credit allowed for employer withholding taxes discussed in ¶ 401.44 below for the taxable year is deemed to be a payment of estimated tax, and an equal part of the tax withheld by the employer is deemed to have been paid on each installment payment due date for the taxable year, unless the taxpayer establishes the specific dates on which all amounts were actually withheld, in which case the amounts so withheld are deemed to be payments of estimated tax on the dates when the amounts were actually withheld by the employer.

¶ 401.26 Returns and Liabilities


_Due date of annual return:_ An annual West Virginia personal income tax return must be filed on or before April 15 of the next taxable year (15 day of the fourth month following the close of the taxable year) by or for the following:

1. Every resident individual who is required to file a federal income tax return for the taxable year, or if the West Virginia adjusted gross income of the individual for the taxable year exceeds the sum of his or her West Virginia personal exemptions. (W. Va. Code § 11-21-51(a)(1).)

2. Every resident or nonresident individual who is entitled to and claims an overpayment for the taxable year even though he or she would not otherwise be required to file a return. For example, a taxpayer who has had West Virginia income tax withheld from his or her wages, or has paid estimated tax
during the taxable year but whose West Virginia adjusted gross income for such taxable year does not exceed his or her exemptions, must file a West Virginia return to obtain a refund.

(3) A nonresident individual that has West Virginia adjusted gross income for the taxable year in excess of the sum of his or her personal exemptions. (W. Va. Code § 11-21-51(a)(3).) However, a nonresident individual is not required to file a West Virginia income tax return if all of his or her West Virginia source income is reported on a composite return. See ¶ 427 below.

Returns of husband and wife: If a husband or wife files and determines his or her tax liability on separate federal returns, they must file separate West Virginia income tax returns. (W. Va. Code §§ 11-21-11(b)(1) and 11-21-51(b)(1).)

If a husband and wife file and determine their federal tax liability on a joint federal return, or if neither spouse files a federal return, they may either file a joint West Virginia income tax return in which event their tax liability is joint and several and each is liable for the entire tax on such joint return, even though one spouse has no income, or file separate West Virginia income tax returns. In this event, their tax liabilities are separate. (W. Va. Code §§ 11-21-11(b)(2) and 11-21-51(b)(2).) An election to file a joint West Virginia return is binding and may not be changed after the due date of the original West Virginia return. (WVCSR §110-21-60.2.1.2.)

If either the husband or the wife is a resident and the other spouse is a nonresident of West Virginia, they must file separate West Virginia income tax returns regardless of the method of filing for federal tax purposes, in which event their West Virginia tax liabilities are separate. (W. Va. Code § 11-21-51(b)(3).) However, a West Virginia joint resident return may be filed by the husband and wife provided:

(1) They are otherwise entitled to file a joint return,

(2) Each spouse maintained his or her status as a resident or nonresident during the entire taxable year, and

(3) They elect to determine their West Virginia taxable income on a joint return as if both were residents of this State for the entire taxable year.

(W. Va. Code § 11-21-11(b)(3).) In the event the husband and wife qualify under the above requirements and file a joint resident West Virginia return, their tax liabilities are joint and several. Additionally, an election to file a joint West Virginia return is binding and may not be changed after the due date of the West Virginia annual return. (WVCSR §110-21-60.2.1.2.)

Return of decedent: The executor or administrator of the estate of an individual who died during the taxable year, or other person charged with the property of a decedent, must make and file an income tax return for the decedent on the form that would have
been appropriate had the decedent lived. A decedent’s taxable year encompasses only the portion of the taxable year that the decedent was alive and the income tax return will cover only that period. Post death income is reported on the return filed by the fiduciary of the decedent’s estate (fiduciary income tax return.)

Joint return after death: Where both spouses are residents of this State and one or both spouses die during the year, a joint West Virginia income tax return may be made and filed if:

(1) A joint federal return was filed for the taxable year.

(2) The taxable year of both decedents or of the decedent and the surviving spouse will begin on the same calendar day and end on different calendar days only because of the death of either or both spouses.

(3) Neither taxpayer was reporting for a fractional part of a year as a result of a change in accounting; and

(4) The surviving spouse had not remarried before the end of the taxable year. (WVCSR §110-21-51.3.2.)

Individuals under a disability: The return for an individual who is unable to make a return by reason of minority or other disability shall be made and filed by his or her guardian, committee, fiduciary or other person charged with the care of his or her person or property (other than a receiver in possession of only a part of his or her property), by his or her duly authorized agent. (W. Va. Code § 11-21-51(d.).)

¶ 401.27 Income Taxes of Members of Armed Forces on Death


General rule: When an individual dies while in active service as a member of the armed forces of the United States and the death occurred while serving in a combat zone (as determined under IRC § 112) or as a result of wounds, disease or injury incurred while serving in a combat zone:

(1) West Virginia income tax does not apply with respect to the taxable year in which falls the date of his or her death, or with respect to any prior taxable year ending on or after the first day he or she served in a combat zone; and

(2) Any West Virginia income tax for taxable years preceding the date he or she began serving in a combat zone which is unpaid at the date of his or her death (including interest, additions to tax and additional amounts) may not be assessed by the Tax Commissioner. If the taxes have been assessed, the assessment must be abated by the Tax Commissioner and if the assessment has been collected, the amount collected must be credited or refunded as an overpayment of tax.
**Individuals in missing status:** In the case of an individual who was in a missing status within the meaning of IRC § 6013(f)(3)(A), the date of the individual's death is treated as being not earlier than the date on which a determination of the individual's death is made under 37 U.S.C. § 556. West Virginia income tax does not apply with respect to the taxable year in which falls the date of his or her death, or with respect to any prior taxable year ending on or after the first day he or she served in a combat zone, except that this exclusion does not apply for any taxable year beginning more than two years after the date designated under IRC § 112 as the date of termination of combatant activities in a combat zone.

**Certain military or civilian employees of the United States dying as a result of injuries sustained overseas:** In the case of any individual who dies while a military or civilian employee of the United States, if the death occurs as a result of wounds or injury incurred while the individual was a military or civilian employee of the United States and were incurred outside the United States in a terroristic or military action, as defined in IRC § 692, West Virginia income tax does not apply:

1. With respect to the taxable year in which falls the date of the individual's death; and
2. With respect to any prior taxable year in the period beginning with the last taxable year ending before the taxable year in which the wounds or injury were incurred.

### ¶ 401.28 Composite Returns

*Law:* W. Va. Code § 11-21-51a; WVCSR § 110-21-51a

Nonresident individuals who are partners, S corporation shareholders, or beneficiaries of an estate or trust that derives income from West Virginia sources are required to file nonresident income tax returns. However, as a convenience to these taxpayers, they may elect to have the partnership, S corporation, estate or trust, as the case may be, file a composite return on their behalf. A composite return is a return filed on a group basis as though there were a single taxpayer. A processing fee of $50 is required.

In filing a composite return and determining the tax due thereon, no personal exemptions may be utilized, and the rate of tax is 6.5% of the taxable income. The entity or entities to which the composite return relates are responsible for collection and remittance of all income tax dues at the time the return is filed.

The composite return must set forth the name, address, taxpayer identification number and percentage ownership or interest of each nonresident individual. It need not be signed by all nonresident individuals on whose behalf the return is filed. However, the return must be signed by a partner, in the case of a partnership, by a corporate officer, in the case of an S corporation, by a trustee, in the case of a trust, or by an executor or administrator, in the case of an estate.
When a composite return is filed and the taxes shown due thereon are paid by April 15 following close of the calendar tax year, the entity is not required to comply with the withholding requirements discussed in ¶ 401.49 below.

¶ 401.29 Signing of Returns and Other Documents


In general, any return, declaration, statement or other document required to be made pursuant to the West Virginia Personal Income Tax Act must be signed in accordance with regulations or instructions prescribed by the Tax Commissioner. The fact that an individual's name is signed to a return, declaration, statement, or other document is prima facie evidence for all purposes that the return, declaration, statement or other document was actually signed by him or her.

Partnerships: Any return, statement or other document required of a partnership must be signed by one or more partners. The fact that a partner's name is signed to a return, statement, or other document is prima facie evidence for all purposes that the partner is authorized to sign on behalf of the partnership.

Certifications: The making or filing of any return, declaration, statement or other document or copy thereof required to be made or filed pursuant the West Virginia Personal Income Tax Act, including a copy of a federal return, constitutes a certification by the person making or filing the return, declaration, statement or other document or copy thereof that the statements contained therein are true and that any copy filed is a true copy.

¶ 401.30 When Amended Return Required


Any taxpayer filing an amended federal income tax return must also, within 90 days thereafter, file an amended West Virginia return and give the Tax Commissioner such information as the Commissioner may require.

¶ 401.31 Report of Change in Federal Taxable Income


If the amount of a taxpayer's federal taxable income reported on his or her federal income tax return for any taxable year is changed or corrected by the United States Internal Revenue Service or other competent authority, or as the result of a renegotiation of a contract or subcontract with the United States, the taxpayer must report the change or correction in federal taxable income to the Tax Commissioner within 90 days after the final determination of the change, correction, or renegotiation, or as otherwise required by the Tax Commissioner. When the change is reported, the taxpayer must concede the accuracy of the determination or state why it is erroneous.
¶ 401.32 Change of Election

Law: W. Va. Code § 11-21-60; WVCSR § 110-21-60

Any election expressly authorized by the West Virginia Personal Income Tax Act may be changed on such terms and conditions as the Tax Commissioner may prescribe by regulation.

Any change of election made by a taxpayer for federal income tax purposes pursuant to the provisions of the Internal Revenue Code and applicable Treasury regulations, which increases or decreases the taxpayer's federal taxable income for a taxable year, must also be made identically for West Virginia income tax purposes, except to the extent that the federal provisions are inconsistent with the West Virginia Personal Income Tax Act. A taxpayer making a change of election for federal income tax purposes that changes his or her federal taxable income must file an amended West Virginia return.

A change of election is subject to the approval of the Tax Commissioner and, for this purpose, the Commissioner may require such information, records or evidence that he or she deems necessary and may attach such conditions or limitations to the approval of the change of election as the Commissioner considers advisable.

Returns of husband and wife.

Change from separate to joint return: A husband and wife can file separate West Virginia returns, and then, after the time for filing returns (April 15, for calendar year taxpayers) has passed, they may elect to file a joint West Virginia return. This election may be made within three (3) years after the date the original return was originally due, without regard to any extension of time. This election to change from separate to joint may only be made however if the taxpayer has made the same election for federal income tax purposes.

Change from joint return to separate returns: A husband and wife that determined their federal taxable income on a joint federal return may elect to determine their West Virginia taxable income on a joint West Virginia return. If the taxpayers elect to change from a joint return to separate returns for federal income tax purposes, the taxpayers must also make the same election for West Virginia purposes. However, in the absence of a change of election for federal income tax purposes, an election to file a joint West Virginia return is binding and may not be changed for that taxable year after the due date of the original West Virginia return. A different election may be made for the next taxable year.

Husband and wife with different resident status: When either husband or wife is a resident and the other is a nonresident, they must file separate West Virginia returns unless they were otherwise entitled to file a joint federal return and both elect to file a joint West Virginia return for the taxable year as if both were residents of West Virginia. A husband and wife may elect to file a joint West Virginia return only if one spouse was
a resident for the entire taxable year and the other spouse was a nonresident for the entire taxable year. If they may this election, they will be permitted to change their original election to file separate West Virginia returns and to make, instead, a joint return as if both were residents in accordance provided tax shown to be due on the joint return must be paid in full at the time it is filed. (W. Va. Code §§ 11-21-11 and 11-21-32.)

Approval for change of election: Elections to make the changes discussed in this ¶ 401.30 and to file amended returns is subject to the Tax Commissioner's approval and discretion. No amended return filed with the Tax Commissioner is valid unless the amount of tax shown to be due, if any, on the amended return is paid in full at the time the amended return is filed.

¶ 401.33 Payment of Tax


A person must pay in full the tax due to the State Tax Commissioner on or before the due date for filing the return (determined without regard to any extension of time). However, if an individual's income other than employee compensation exceeds $400.00 plus the sum of his or her West Virginia personal exemptions, the individual may be required to remit estimated income taxes. (See ¶ 401.22 above.)

¶ 401.34 Method of Paying Tax Due


The remittance (check or money order) for the balance of the tax show to be due on the return must be made payable to the West Virginia State Tax Department. In addition to payment by check or money order, a balance due can also be remitted by electronic funds transfer or paid by credit card. For additional information on ACH debit payments, see State Tax Department Publication TSD-431 (September 2011).

¶ 401.35 Extension of Time to File Declaration of Estimated Tax or Annual Return


Comparable Federal: IRC § 6081

The Tax Commissioner may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by the West Virginia Personal Income tax Act. The extension, if granted, will be on such terms and conditions as the Tax Commissioner may require. Except for a taxpayer who is outside the United States, the extension may not exceed six months.

Automatic extension of time to file return: If a taxpayer will have a federal extension of time to file his or her federal income tax return for the year, the taxpayer is not required to request a separate extension of time to file his or her West Virginia return unless he or she wants to obtain an additional extension of time to file the West Virginia annual return. If the taxpayer obtains an extension of time federally, he or she must
make a notation on his or her West Virginia return of the date on which the federal extension was granted, and a copy of the request for federal extension must be attached to the West Virginia return when it is filed.

**West Virginia extension of time to file return:** When the taxpayer does not have an extension of time to file his or her federal return but wants an extension of time to file his or her West Virginia income tax return, the taxpayer must timely request from the Tax Commissioner an extension of time to file the West Virginia return. A taxpayer desiring a separate extension of time to file should prepare and file Schedule L, Application for Extension of Time to File, which is included in the IT-140 form and instructions book, on or before the due date of the annual return, determined without regard to any extension of time.

¶ 401.36 Extension of Time to Pay Tax


*Comparable Federal:* IRC § 6161

The Tax Commissioner may grant a reasonable extension of time for payment of tax or estimated tax (or any installment) on such terms and conditions as the Tax Commissioner may require. Except for a taxpayer who is outside the United States, no extension of time to pay may exceed six months.

*Amount determined as deficiency:* The Tax Commissioner may, under regulations, extend the time for payment of an amount determined as a deficiency for a period not to exceed 18 months from the date designated for payment of the deficiency, and under exceptional circumstances, for an additional period not more than 12 months. An extension of time to pay may be granted only where it is established to the satisfaction of the Tax Commissioner that the payment of a deficiency upon the date designated for payment would result in undue hardship. No extension of time to pay may be granted if any part of the deficiency is due to intentional disregard of rules and regulations or to fraud.

*Claims in bankruptcy or receivership proceedings:* Extension of time for payment of any portion of a claim for tax allowed in bankruptcy, receivership or similar proceedings, which is unpaid, may be granted subject to the same provisions and limitations as in the case of a deficiency in the tax.

*Furnishing of security:* If any extension of time is granted for payment of any tax or deficiency, the Tax Commissioner may require the taxpayer to furnish a bond or other security in an amount not exceeding twice the amount for which the extension of time for payment is granted on such terms and conditions as the Tax Commissioner may require.

¶ 401.37 Minimum Tax

There is no minimum tax. The West Virginia minimum tax was repealed for tax years beginning on or after January 1, 2010. For tax years that began before that date, West Virginia imposed a minimum tax, which was equal to the excess, if any, by which an amount equal to 25% of any federal minimum tax or alternative minimum tax for the taxable year exceeded the individual's regular West Virginia personal income tax for the taxable year.

¶ 401.38 Credit for Taxes Paid to Other States


Subject to certain limitations, a West Virginia resident may claim a credit against his or her West Virginia income tax for any income tax lawfully paid for the taxable year to another state, upon income derived from sources within the other state. The purpose of this credit is to prevent double taxation of such income.

A resident of West Virginia may claim credit on his or her West Virginia Resident Income Tax Return (For IT-140) for state income tax paid, as a nonresident, to the following 39 states:

Alabama  
Arizona  
Arkansas  
California  
Colorado  
Connecticut  
Delaware  
District of Columbia  
Georgia  
Hawaii  
Idaho  
Illinois  
Indiana  
Iowa  
Kansas  
Louisiana  
Maine  
Massachusetts  
Michigan  
Minnesota  
Mississippi  
Missouri  
Montana  
Nebraska  
New Hampshire  
New Jersey  
New Mexico  
New York  
North Carolina  
North Dakota  
Oklahoma  
Oregon  
Pennsylvania  
Rhode Island  
South Carolina  
Utah  
Vermont  
Virginia  
Wisconsin

* If a West Virginia resident is employed or otherwise present in either Pennsylvania or Virginia for more than 183 days of the taxable year, the West Virginia resident is also deemed to be a resident of Pennsylvania or Virginia for income tax purposes and must file a resident income tax return with those Commonwealths. When the West Virginia income tax return is filed, he or she will be allowed credit against the West Virginia income tax subject to the following limitations. If a resident of West Virginia has income, other than employee compensation, which is sourced to Kentucky, Maryland Ohio, Pennsylvania or Virginia, the tax paid on the other income to these states is allowed as a credit against West Virginia income tax, subject to the following rules.

The amount of this credit is subject to the following limitations:

(1) The credit may not exceed the amount of tax actually payable to the other state on income also subject to West Virginia tax. This is the actual amount of income tax computed on the nonresident return filed with the other state.
(2) The credit may not exceed the percentage of the West Virginia tax determined by dividing the portion of the taxpayer's West Virginia income subject to taxation in another state by the total amount of the taxpayer’s West Virginia income. For example, if the total income of a resident was $5,000, $2,000 of which was subject to tax by another state, the amount of West Virginia tax credit would be limited to 40% ($2,000 divided by $5,000) of the West Virginia tax.

(3) The credit may not reduce the West Virginia tax due to an amount that is less than the amount that would have been due if the income subject to taxation by the other state was excluded from the taxpayer’s West Virginia income. If in the example above, the taxpayer's West Virginia tax would have been $42 by eliminating the other state’s income from the total income subject to West Virginia tax, the credit could not offset the $42.

(4) No credit is allowed for payment of wage taxes, income taxes or any other tax measured by income, gross or net, wages or employee compensation to a political subdivision of another state, such as a municipality, a county or a school district.

The amount of the credit allowed is determined in accordance with forms and instructions provided by the Tax Commissioner. A taxpayer desiring to claim this credit should file Schedule H, Credit for Income Tax Paid to Another State, with his or her West Virginia personal income tax return.

The Tax Commissioner, by instruction or otherwise, may require any resident individual to provide evidence, including but not limited to a copy of the completed and signed nonresident personal income tax return filed with the other taxing jurisdiction for the taxable year, in order to establish that the individual is entitled to claim this credit.

West Virginia residents who are employed in Kentucky, Maryland, Ohio, Pennsylvania and Virginia will generally not pay tax on their employee compensation to those states because of reciprocal agreements West Virginia has executed with those states. This general rule does not apply to earned income taxes, income taxes, wage taxes or other taxes measure by employee compensation that are imposed by a political subdivision of these border states. Application of the general rule is subject to the following rules:

**Kentucky**

If a West Virginia resident’s Kentucky income during the year was from wages and/or salaries only, he or she is not subject to Kentucky income tax on his or her employee compensation and may not claim credit for payment of that tax on the West Virginia income tax return. In order to receive a refund of Kentucky tax erroneously withheld, he or she must file a return with Kentucky. If a West Virginia resident has income sourced to Kentucky from a source other than wages and/or
salaries, he or she must file a nonresident return with the Kentucky. The amount of income tax paid to Kentucky on his or her Kentucky source income other than employee compensation is allowed as a credit on the West Virginia income tax return subject to the credit limitation rules previously discussed.

If a Kentucky resident’s West Virginia source income during the year was from wages and/or salaries only, he or she is not subject to West Virginia income tax on his or her employee compensation and his or her employer should withhold Kentucky income tax. In order to receive a refund of West Virginia tax erroneously withheld, he or she must file a return with West Virginia. If a Kentucky resident has income sourced to West Virginia from a source other than wages and/or salaries, he or she must file a nonresident West Virginia income tax return when his or her West Virginia source income from other sources exceeds the amount of his or her allowable personal exemptions.

Maryland

If a West Virginia resident’s Maryland income during the year was from wages and/or salaries only, he or she is not subject to Maryland income tax on his or her employee compensation and may not claim credit for payment of that tax on the West Virginia income tax return. In order to receive a refund of Maryland tax erroneously withheld, he or she must file a return with Maryland. If a West Virginia resident has income sourced to Maryland from a source other than wages and/or salaries, he or she must file a nonresident return with the Maryland. The amount of income tax paid to Maryland on his or her Maryland source income other than employee compensation is allowed as a credit on the West Virginia income tax return subject to the credit limitation rules previously discussed.

If a Maryland resident’s West Virginia source income during the year was from wages and/or salaries only, he or she is not subject to West Virginia income tax on his or her employee compensation and his or her employer should withhold Maryland income tax. In order to receive a refund of West Virginia tax erroneously withheld, he or she must file a return with West Virginia. If a Maryland resident has income sourced to West Virginia from a source other than wages and/or salaries, he or she must file a nonresident West Virginia income tax return when his or her West Virginia source income from other sources exceeds the amount of his or her allowable personal exemptions.

Ohio

If a West Virginia resident’s Ohio income during the year was from wages and/or salaries only, he or she is not subject to Ohio income tax on his or her employee compensation and may not claim credit for payment of that tax on the West Virginia income tax return. In order to receive a refund of Ohio tax erroneously withheld, he or she must file a return with Ohio. If a West Virginia resident income sourced to Ohio from a source other than wages and/or salaries, he or she must file a nonresident return with the State of Ohio. The amount of income tax paid to Ohio on
his or her Ohio source income other than employee compensation is allowed as a credit on the West Virginia income tax return subject to the credit limitation rules previously discussed.

If an Ohio resident’s West Virginia source income during the year was from wages and/or salaries only, he or she is not subject to West Virginia income tax on his or her employee compensation and his or her employer should withhold Ohio income tax. In order to receive a refund of West Virginia tax erroneously withheld, he or she must file a return with Ohio. If an Ohio resident has income sourced to West Virginia from a source other than wages and/or salaries, he or she must file a nonresident West Virginia income tax return when his or her West Virginia source income from other sources exceeds the amount of his or her allowable personal exemptions.

**Pennsylvania**

Except as discussed below, if a West Virginia resident’s Pennsylvania income during the year was from wages and/or salaries only, he or she is not subject to Pennsylvania income tax on his or her employee compensation and may not claim credit for payment of that tax on the West Virginia income tax return. In order to receive a refund of Pennsylvania tax erroneously withheld, he or she must file a return with Pennsylvania. If a West Virginia resident has income sourced to Pennsylvania from a source other than wages and/or salaries, he or she must file a nonresident income tax return with Pennsylvania. The amount of income tax paid to Pennsylvania on his or her Pennsylvania source income other than employee compensation is allowed as a credit on the West Virginia income tax return subject to the credit limitation rules previously discussed.

Except as discussed below, if a Pennsylvania resident’s West Virginia source income during the year was from wages and/or salaries only, he or she is not subject to West Virginia income tax on his or her employee compensation and his or her employer should withhold Pennsylvania income tax. In order to receive a refund of West Virginia tax erroneously withheld, he or she must file a nonresident income tax return with West Virginia. If a Pennsylvania resident has income sourced to West Virginia from a source other than wages and/or salaries, he or she must file a nonresident West Virginia income tax return when his or her West Virginia source income from other sources exceeds the amount of his or her allowable personal exemptions.

**Caveat:** The above rules are disregarded when the Pennsylvania resident is physically present in West Virginia for more than 183 days during the taxable year and when the West Virginia resident is physically present in Pennsylvania for more than 183 days during the taxable year. In these instances, the Pennsylvania resident is a resident of West Virginia for income tax purposes for the taxable year and the West Virginia resident is a resident of Pennsylvania for income tax purposes for the taxable year. In this situation, the West Virginia resident may claim credit on his or
her West Virginia income tax return for income taxes paid to Pennsylvania subject to the credit limitation rules previously discussed.

**Virginia**

Except as discussed below, if a West Virginia resident’s Virginia income during the year was from wages and/or salaries only, he or she is not subject to Virginia income tax on his or her employee compensation and may not claim credit for payment of that tax on the West Virginia income tax return. In order to receive a refund of Virginia tax erroneously withheld, he or she must file a return with Virginia. If a West Virginia resident has income sourced to Virginia from a source other than wages and/or salaries, he or she must file a nonresident income tax return with Virginia. The amount of income tax paid to Virginia on his or her Virginia source income other than employee compensation is allowed as a credit on the West Virginia income tax return subject to the credit limitation rules previously discussed.

Except as discussed below, if a Virginia resident’s West Virginia source income during the year was from wages and/or salaries only, he or she is not subject to West Virginia income tax on his or her employee compensation and his or her employer should withhold Virginia income tax. In order to receive a refund of West Virginia tax erroneously withheld, he or she must file a return with West Virginia. If a Virginia resident has income sourced to West Virginia from a source other than wages and/or salaries, he or she must file a nonresident West Virginia income tax return when his or her West Virginia source income from other sources exceeds the amount of his or her allowable personal exemptions.

**Caveat:** The above rules are disregarded when the Virginia resident is physically present in West Virginia for more than 183 days during the taxable year and when the West Virginia resident is physically present in Virginia for more than 183 days during the taxable year. In these instances, the Virginia resident is a resident of West Virginia for income tax purposes for the taxable year and the West Virginia resident is a resident of Virginia for income tax purposes for the taxable year. In this situation, the West Virginia resident may claim credit on his or her West Virginia income tax return for income taxes paid to Virginia subject to the credit limitation rules previously discussed.

¶ 401.39 Senior Citizens’ and Disabled Persons Tax Credit for Property Taxes


A low-income senior citizen or disabled person who is allowed a $20,000 homestead exemption from the assessed value of his or her homestead for ad valorem property tax purposes, as provided in W. Va. Code § 11-6B-3, is allowed a refundable credit against West Virginia income taxes equal to the amount of ad valorem property taxes paid on up to the first $20,000 of taxable assessed value of the homestead for property tax years unless the individual is required to pay federal alternative minimum tax for the
taxable year. For tax years beginning on or after January 1, 2012, taxpayers must calculate this credit prior to calculating the credit authorized in W. Va. Code § 11-21-23.

Example: John Smith is aged 66. He owns and lives in a residence that has a market value of $80,000. The homestead is assessed for ad valorem property taxes at $48,000. The first $20,000 of this assessed value is exempt from property taxes under Article X, § 1b and W. Va. Code § 11-6B-3. John Smith pays ad valorem property taxes on the next $28,000 of assessed value ($383.99). The amount of those taxes attributable to the first $20,000 of taxable assessed value ($274.28) may be claimed as a refundable tax credit on the West Virginia income tax return filed by John Smith provided John Smith does not pay federal alternative minimum tax for the 2012 taxable year.

\[
\begin{align*}
\text{\$ 80,000 market value} \\
\times 60\% \\
- \text{\$ 48,000 assessed value} \\
- 20,000 \text{ Senior citizen homestead exemption} \\
\text{\$ 28,000 taxable assessed value} \\
\times 1.3714\% \text{ aggregate levy rate} \\
\text{\$ 383.99 property tax liability for 2012} \\
\end{align*}
\]

\[
\$20,000 \times 1.3714\% = \$274.28
\]

Due to the administrative cost of processing, the refundable credit may not be refunded if the credit is less than $10.

The credit for each property tax year is claimed on the annual West Virginia income tax return or by filing a claim for refund within three years after the due date for the annual income tax return upon which the credit may first be claimed.

Certain terms defined: For purposes of this credit:

(1) "Low income" means federal adjusted gross income for the taxable year that is 150% or less of the federal poverty guideline for the year in which property tax was paid, based upon the number of individuals in the family unit residing in the homestead, as determined annually by the United States Secretary of Health and Human Services.

(2) "Taxes paid" means the aggregate of regular levies, excess levies and bond levies extended against not more than $20,000 of the taxable assessed value of a homestead that are paid during the calendar year determined after application of any discount for early payment of taxes but before application of any penalty or interest for late payment.

Confidentiality: The Tax Commissioner may utilize property tax information in the statewide electronic data processing system network to the extent necessary for the
purpose of administering this tax credit, notwithstanding the confidentiality provisions of W. Va. Code § 11-1A-23 to the contrary.

¶ 401.40 Low Income Refundable Credit -- Property Taxes Paid on Homestead


Any homeowner living in his or her homestead is allowed a refundable credit against the his or her West Virginia income tax equal to the amount of real property taxes paid on the homestead that are in excess of 4% percent of his or her gross household income. However, for taxable years that beginning on or after January 1, 2012, any low income homeowner living in his or her homestead in this State is allowed a refundable credit against his or her West Virginia income taxes equal to the amount by which the difference between West Virginia real property taxes paid on the homestead for the tax year, minus the amount of credit authorized in W. Va. Code § 11-21-21, exceeds 4% of the taxpayer's gross household income for the taxable year.

When the amount of this refundable credit exceeds the amount of West Virginia income taxes imposed for the taxable year, the excess amount is refunded to the homeowner. However, due to the administrative cost of processing, the amount may not be refunded if it is less than $10.

This credit is claimed for each property tax year by filing a claim for refund with the Tax Commissioner within 12 months after the real property taxes are paid on the homestead.

*Certain terms defined:* For the purposes of this credit:

When a homeowner is eligible to claim this credit and the tax credit discussed ¶ 401.39, the homeowner should compute the amount of credit allowable under both provisions and then claim the credit that provides the homeowner with the greater benefit. Prior to January 1, 2012, no homeowner could receive benefits under both this paragraph and ¶ 401.39 during the same taxable year. However, for taxable years beginning on or after January 1, 2012, a homeowner may take the this credit and the credit discussed in ¶ 401.39.

*Exception:* Any person who is required to pay the federal alternative minimum income tax for the taxable year for which the federal income tax return is filed is disqualified from receiving any tax credit under W. Va. Code § 11-21-23.

*Limitations:* No homeowner may receive a refundable tax credit discussed in ¶ 401.39, ¶ 401.40 and ¶ 401.41 in excess of $1,000 per taxable year. This cap is subject to annual review by the Legislature to determine if an adjustment is necessary.

Additionally, for taxable years commencing on or after January 1, 2012, the credit allowed by W. Va. Code § 11-21-23 may not be taken for property taxes paid on any
homestead that is owned, in whole or in part, by any person who is not a low income person.

Terms defined: For purposes of the credit allowed by W. Va. Code § 11-21-23:

(1) "Assessed value" means the value of property as determined under for ad valorem property tax purposes under W. Va. Code § 11-3-1 et seq.

(2) "Gross household income" is defined as federal adjusted gross income plus the sum of the following:

(a) Modifications in W. Va. Code § 11-21-12(b) increasing federal adjusted gross income;

(b) Federal tax-exempt interest reported on federal tax return; Federal tax-exempt interest reported on federal tax return;

(c) Workers' compensation and loss of earnings insurance; and

(d) Nontaxable Social Security benefits.

(3) "Homestead" means a homestead qualified for the homestead property tax exemption authorized in W. Va. Code § 11-6-1 et seq., but limited to a single-family residential house, including a mobile or manufactured or modular home, and the land, not exceeding one acre, surrounding the structure that is owned by the owner of the single-family residential house, including a mobile or manufactured or modular home; or a mobile or manufactured or modular home regardless of whether the land upon which such mobile or manufactured or modular home is situated is owned by another.

(4) "Low income" means federal adjusted gross income for the tax year that is 300% or less of the federal poverty guideline for the year in which property tax was paid, based upon the number of individuals in the family unit residing in the homestead, as determined annually by the United States Secretary of Health and Human Services.

(5) A "low income person" means a person whose federal adjusted gross income for the tax year meets the definition of "low income" as above defined.

(6) "Owner" or "homeowner" means the person who is possessed of the homestead, whether in fee or for life. A person seized or entitled in fee subject to a mortgage or deed of trust shall be considered the owner. A person who has an equitable estate of freehold, or is a purchaser of a freehold estate who is in possession before transfer of legal title is also considered the owner. Personal property mortgaged or pledged is, for the purpose of taxation, considered the property of the party in possession.
(7) "Real property taxes paid" means, the aggregate of regular levies, excess levies and bond levies extended against the homestead that are paid during the calendar year and determined after any application of any discount for early payment of taxes but before application of any penalty or interest for late payment of property taxes.

(8) "Senior citizen property tax relief tax credit" means the tax credit discussed in ¶ 401.40.

(9) "Sixty-five years of age or older" includes a person who attains the age of 65 on or before June 30 following the July 1 assessment day.

(10) "Tax increment" means the increase of ad valorem taxes levied on the homestead, determined as the difference between the ad valorem taxes levied on the homestead for the current property tax year and the ad valorem taxes levied on the homestead for the property tax year immediately preceding the property tax year for which the taxpayer's application for the tax credit discussed in ¶ 401.40 is approved by the assessor, or otherwise finally approved in accordance with the provisions of the West Virginia Personal Income Tax Act.

(11) "Tax year" means the property tax calendar year following the July 1 assessment day.

(12) "Used and occupied exclusively for residential purposes" means that the property is used as an abode, dwelling or habitat for more than six consecutive months of the calendar year prior to the date of application by the owner thereof; and that subsequent to making application for tax credit, the property is used only as an abode, dwelling or habitat to the exclusion of any commercial use.

¶ 401.41 Senior Citizen Property Tax Relief for Tax Years Beginning Before 2012.


Refundable credit: Subject to the requirements and limitations of W. Va. Code § 11-21-24, for the tax years beginning on or after January 1, 2009 but before January 1, 2012, any homeowner having a gross household income equal to or less than $25,000 for the tax year, living in his or her homestead is allowed a refundable credit against the West Virginia income tax equal to the amount of real property taxes paid that are attributable to the tax increment of ad valorem taxes assessed under the authority of W. Va. Code § 11-3-1 et seq. on the homestead. This $25,000 gross household income figure is adjusted annually by the Tax Commissioner in accordance with the consumer price index. This credit is applied against the West Virginia income tax for the income tax when the property tax increment was actually paid. Due to the administrative cost of processing, this credit may not be refunded if the amount to be refunded is less than $10.
The credit for each property tax year is claimed by filing a claim for refund with the Tax Commissioner within 12 months after the real property taxes are paid on the homestead.

Notwithstanding the provisions of W. Va. Code § 11-21-21 and § 11-21-23, for property tax years that begin on or after January 1, 2009, a homeowner was eligible to compute his or her credit under W. Va. Code § 11-21-21, § 11-21-23 and § 11-21-24 and then claim the credit that provided the greater benefit as determined by the homeowner. No homeowner could receive benefits under more than one of these sections during the same taxable year.

Definitions: As used in W. Va. Code § 11-21-24, the following terms mean:

(1) "Assessed value" means the value of property as determined under W. Va. Code § 11-3-1 et seq.

(2) "Real property taxes paid" means, for the tax years beginning on or after January 1, 2009, the aggregate of regular levies, excess levies and bond levies extended against the homestead that are paid during the calendar year and determined after any application of any discount for early payment of taxes but before application of any penalty or interest for late payment of property taxes.

(3) "Senior citizen property tax relief tax credit" means the tax credit discussed in ¶ 401.41.

(4) "Gross household income" is defined as federal adjusted gross income plus the sum of the following:

(a) Modifications discussed in ¶ 401.4 increasing federal adjusted gross income;

(b) Federal tax-exempt interest reported on federal tax return;

(c) Workers' compensation and loss of earnings insurance; and

(d) Nontaxable Social Security benefits.

(5) "Homestead" means a homestead qualified for the homestead property tax exemption authorized in article six-b of this chapter, but limited to a single-family residential house, including a mobile or manufactured or modular home, and the land, not exceeding one acre, surrounding such structure that is owned by the owner of the single-family residential house, including a mobile or manufactured or modular home; or a mobile or manufactured or modular home regardless of whether the land upon which such mobile or manufactured or modular home is situated is owned by another.
(6) "Owner" or "homeowner" means the person who is possessed of the homestead whether in fee or for life. A person seized or entitled in fee subject to a mortgage or deed of trust shall be considered the owner. A person who has an equitable estate of freehold, or is a purchaser of a freehold estate who is in possession before transfer of legal title shall also be considered the owner. Personal property mortgaged or pledged shall, for the purpose of taxation, be considered the property of the party in possession.

(7) "Sixty-five years of age or older" includes a person who attains the age of 65 on or before June 30 following the July 1 assessment day.

(8) "Tax increment" means the increase of ad valorem taxes levied on the homestead, determined as the difference between the ad valorem taxes levied on the homestead for the current tax year and the ad valorem taxes levied on the homestead for the tax year immediately preceding the tax year for which the taxpayer's application for this tax credit is approved by the assessor, or otherwise finally approved in accordance with the provisions of the West Virginia Personal Income Tax Act.

(9) "Tax year" means the property tax calendar year following the July 1 assessment day.

(10) "Used and occupied exclusively for residential purposes" means that the property is used as an abode, dwelling or habitat for more than six consecutive months of the calendar year prior to the date of application by the owner thereof; and that subsequent to making application for tax credit, the property is used only as an abode, dwelling or habitat to the exclusion of any commercial use.

**Qualification for tax credit:** The following homesteads qualify for the tax credit discussed in this ¶ 401.41:

(1) Any homestead owned by an owner 65-years of age or older and used and occupied exclusively for residential purposes by such owner; and

(2) Any homestead that:

   (a) Is owned by an owner 65-years of age or older who, as a result of illness, accident or infirmity, is residing with a family member or is a resident of a nursing home, personal care home, rehabilitation center or similar facility;

   (b) Was most recently used and occupied exclusively for residential purposes by the owner or the owner's spouse; and

   (c) Has been retained by the owner for noncommercial purposes.
For tax years commencing on or after January 1, 2009 but before January 1, 2012, the owner of a homestead meeting the qualifications set forth above could apply for a tax credit in the amount of the tax increment of ad valorem taxes levied on the homestead, subject to the limitations discussed in this ¶ 401.41, except that the tax credit may be authorized only when the tax increment is the greater of $300 or 10% or more of the taxable assessed value.

In lieu of the tax credit discussed in this ¶ 401.41, a taxpayer entitled to the credit could elect to instead apply the deferment of the tax increment authorized pursuant to W. Va. Code § 11-6H-1 et seq., which was repealed in 2011. Any taxpayer making this election was subject to the terms and limitations set forth W. Va. Code § 11-6H-1 et seq.

Application for tax credit: No tax credit discussed in this ¶ 401.41 was allowed unless an application for tax credit was filed with the assessor of the county in which the homestead is located, on or before November 1 following mailing of the tax ticket in July of the property tax year showing the tax increment that is the subject of the application was contained. In the case of sickness, absence or other disability of the owner, the application could be filed by the owner or his or her duly authorized agent.

Renewals: After the owner filed an application for tax credit with his or her assessor, there was no need for that owner to refile an application for the tax credit for a subsequent year. However, the taxpayer must in all cases file a West Virginia income tax return in order to claim the credit in any tax year beginning before January 1, 2012.

Determination by county assessor: The assessor as soon as practicable after an application for tax credit is filed reviews the application and either approve or deny it. If the application is denied, the assessor must promptly, but not later than January 1, serve the owner with written notice explaining why the application was denied and furnish a form for filing with the county commission, should the owner desire to take an appeal. The notice required or authorized by W. Va. Code § 11-21-24 is served on the owner or his or her authorized representative either by personal service or by certified mail. The assessor must approve or disapprove an application for tax credit within 30 days of receipt. Any application not approved or denied within 30 days is deemed to be approved.

Revocation of tax credit authorization: When the assessor has information sufficient to form a reasonable belief that an owner, after having been originally granted a tax credit, is no longer eligible for the tax credit, the assessor shall, within 30 days after forming this reasonable belief, revoke the tax credit and serve the owner with written notice explaining the reasons for the revocation and furnish a form for filing with the county commission should the owner desire to take an appeal.

Appeal procedure:
(1) **Notice of appeal; thirty days:** Any owner aggrieved by the denial of his or her application for tax credit or for the revocation of a previously approved tax credit may appeal to the county commission of the county within which the property is situated. All such appeals must be filed within 30 days after the owner’s receipt of written notice of the denial of an application or the revocation of a previously approved tax credit, as applicable.

(2) **Review; determination; appeal:** The county commission must complete its review and issue its determination as soon as practicable after receipt of the notice of appeal, but in no event later than February 28 following the tax year for which the tax credit was sought. In conducting its review, the county commission may hold a hearing on the application. The assessor or the owner may apply to the circuit court of the county for review of the determination of the county commission in the same manner as is provided for appeals from the county commission in W. Va. Code § 11-3-25.

**Termination of tax credit:** Any approved tax credit terminates immediately when any of the following events occur:

1. The death of the owner of the property for which the tax credit was authorized;
2. The sale of the property for which the tax credit was approved; or
3. A determination by the assessor that the property for which the tax credit was approved no longer qualifies for the tax credit in accordance with the provisions of this section;
4. The Legislature sunset the credit for taxable years beginning on or after January 1, 2012.

**Forms, instructions and regulations:** The Tax Commissioner is required to prescribe and supply all necessary instructions and forms for administration of W. Va. Code § 11-21-24. Additionally, the Tax Commissioner may promulgate legislative rules in accordance with the provisions of W. Va. Code § 29A-3-1 et seq. that the Tax Commissioner considers necessary for the implementation of this W. Va. Code § 11-21-24.

**Criminal penalty for false or fraudulent claim for tax credit:** Any property owner who willfully files a fraudulent application for tax credit and any person who knowingly assisted in the preparation or filing of the fraudulent application for tax credit or who knowingly supplied information upon which the fraudulent application for tax credit was prepared or allowed is guilty of a misdemeanor and, upon conviction thereof, may be fined not less than $250 nor more than $500, or imprisoned in a regional jail for not more than one year, or both fined and imprisoned.
**Restitution:** In addition to the criminal penalty discussed above, upon conviction for any of the above offenses, the court is required to order the defendant to make restitution to the State for all taxes not paid due to an improper tax credit, or continuation of a tax credit, and to pay interest thereon at the legal rate until paid.

### ¶ 401.42 Low-income Family Tax Credit

**Law:** W. Va. Code § 11-21-22

In order to eliminate West Virginia income tax on families with incomes below the federal poverty guidelines and to reduce the West Virginia income tax on families with incomes that are immediately above the federal poverty guidelines, the Legislature created a nonrefundable tax credit, known as the low-income family tax credit, against the West Virginia personal income tax.

The low-income family tax credit is based upon family size and the federal poverty guidelines applicable for the year for which the West Virginia return is filed. However, any individual who is required to pay the federal alternative minimum income tax for the taxable year is not eligible for the low-income family tax credit.

### ¶ 401.43 Other Credits against Tax

West Virginia allows certain tax credits to be claimed against the West Virginia personal income tax. These credits are claimed on schedules filed with the annual West Virginia income tax return. Each credit is discussed Chapter 3 of this Guidebook.

<table>
<thead>
<tr>
<th>Credit</th>
<th>Schedule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alternative-Fuel Tax Credit</td>
<td>AFTC-1</td>
</tr>
<tr>
<td>Apprenticeship Training Tax Credit</td>
<td>WV/ATTC-1</td>
</tr>
<tr>
<td>Business Investment and Jobs Expansion Credit</td>
<td>BCS-PIT</td>
</tr>
<tr>
<td>Commercial Patent Incentives Tax Credit</td>
<td>CPITC-1</td>
</tr>
<tr>
<td>Credit for Income Tax paid to another state(s)</td>
<td>Schedule E</td>
</tr>
<tr>
<td>General Economic Opportunity Tax Credit</td>
<td>WV/EOTC-PIT</td>
</tr>
<tr>
<td>High-Growth Business Investment Tax Credit</td>
<td>WV/HGBITC-1</td>
</tr>
<tr>
<td>Historic Rehabilitated Buildings Investment Credit</td>
<td>RBIC</td>
</tr>
<tr>
<td>Homestead Excess Property Tax Credit</td>
<td>WV/HEPTC-1</td>
</tr>
<tr>
<td>Neighborhood Investment Program Credit</td>
<td>NIPA-2</td>
</tr>
<tr>
<td>Non-family Adoption Credit</td>
<td>WV/NFA-1</td>
</tr>
<tr>
<td>Qualified Rehabilitated Buildings Investment Credit</td>
<td>RBIC-A</td>
</tr>
<tr>
<td>Solar Energy Tax Credit</td>
<td>WV/SETC</td>
</tr>
<tr>
<td>Strategic Research and Development Tax Credit</td>
<td>WV/SRDTC-1</td>
</tr>
<tr>
<td>WV Capital Company Credit</td>
<td>CCP</td>
</tr>
<tr>
<td>WV Environmental Agricultural Equipment Credit</td>
<td>WV/AG-1</td>
</tr>
<tr>
<td>WV Film Industry Investment Tax Credit</td>
<td>WV/FIIA-TCS</td>
</tr>
<tr>
<td>WV Military Incentive Credit</td>
<td>Schedule J</td>
</tr>
</tbody>
</table>
¶ 402 WITHHOLDING TAXES

¶ 402.1 Withholding of Income Tax by Employers

Comparable Federal: IRC § 3402

Who must withhold: Every employer maintaining an office or transacting business in West Virginia and making payment of any wages taxable to a resident or nonresident individual is required to deduct and withhold from the wages for each payroll period the amount of personal income tax that will result in withholding from the employee’s wages during each calendar year an amount substantially equivalent to the tax estimated to be due as the result of the inclusion in the employee’s West Virginia adjusted gross income of his wages received during the calendar year.

Any remuneration that constitutes wages for federal withholding tax purposes also constitutes wages for West Virginia withholding tax purposes. (WVCSR 110-21-71.1.2.) If an employer is relieved from federal withholding tax as a result of a determination by the Internal Revenue Service, the employer is also relieved from West Virginia withholding tax. (WVCSR 110-21-71.1.3.)

Definition of employee: For this purpose, the provisions of the federal Internal Revenue Code and its applicable regulations, with respect to withholding tax and of various federal terms (such as "employer," "employee," "wages," "payroll period," "withholding exemptions") apply for West Virginia income tax purposes.

Amount of tax to withhold: The amount of tax to be withheld by the employer is determined on the basis of the employee’s withholding exemption certificate and the applicable rate of tax. To determine the amount of tax to be withheld, the employer may use the tax tables or the percentage method. (WVCSR § 110-21-71.6.)

Withholding tax exemptions: An employee is entitled to the same number of West Virginia withholding exemptions as the number of withholding exemptions to which he or she is entitled for federal income tax withholding purposes. An employer may rely upon the number of federal withholding exemptions claimed by the employee, except where the employee claims a higher number of West Virginia withholding exemptions. (W. Va. Code § 11-21-71(b); WVCSR § 110-21-71.2.) The employer may accept Federal Form W-4 unless the employee elects to file a West Virginia exemption certificate, Form IT-104. (WVCSR § 110-21-71.2.1.)

Employees exempt from withholding: Resident individuals of Kentucky, Maryland, Ohio who work in West Virginia are exempt from West Virginia withholding taxes on wages and salaries earned in West Virginia. The West Virginia employer should not withhold West Virginia income tax from their salaries earned in West Virginia but instead should withhold tax for their state of domicile.
Individuals who are resident of Pennsylvania or Virginia and who work in West Virginia for more than 183 days, or are otherwise present in West Virginia for more than 183 days, are treated as West Virginia residents for income tax purposes and are subject to West Virginia withholding. If a resident of Pennsylvania or Virginia works in West Virginia for 183 days or less, or is otherwise present in West Virginia for not more than 183 days, is exempt from West Virginia withholding tax and the employer should withhold tax for the employee’s state of domicile.

The compensation paid to a nonresident employee for services rendered entirely without this State is not considered West Virginia wages and therefore is not subject to West Virginia withholding whether payment is made from within or without this State.

Employees partly exempt from withholding: If a nonresident employee performs service for his or her employer partly within and partly without West Virginia, the employer may withhold on the basis of the apportionment shown by the nonresident employee.

Employees entirely subject to withholding: Wages paid to a resident of West Virginia are fully subject to withholding even though some or all of the services may have been rendered outside of West Virginia.

§ 402.2 Duties of Employers With Respect to Withholding Taxes


Every employer required to deduct and withhold West Virginia income tax from employees is required to file a withholding return as prescribed by the Tax Commissioner and pay over to the Tax Commissioner the taxes required to be deducted and withheld, in accordance with the procedures established by the Internal Revenue Service pursuant to IRC § 3402.

The due dates for returns and payments shall be established by the Tax Commissioner to match as closely as practicable the due dates in effect for federal income tax purposes, in accordance with the procedures established by the Internal Revenue Service pursuant to IRC § 3402. (W. Va. Code § 11-21-74(b).)

Electronic filing: Beginning January 1, 2013, employers with 50 or more employees are required to file withholding returns using electronic filing. Failure to do so will result in penalties unless reasonable cause is shown. (W. Va. Code §22-21-74(h); (WVCSR §§110-10D-3 and 110-10D-9 Appendix 1.) State Tax Department Taxpayer Services Division Publication TSD-381 (August, 2011) and Taxpayer Services Division Publication TSD-428 (August 1, 2011). Employers with less than 50 employees may elect to file returns electronically.

Electronic payment of tax: The Tax Commissioner promulgated a procedural regulations that requires certain taxpayers to remit tax by electronic funds transfer (EFT) For years beginning on or after January 1, 2013, any person who had total annual
remittance for any single tax equal to or greater than $50,000 during the immediately preceding tax year (2012) must file electronically all returns and pay by EFT all taxes administered under the West Virginia Tax Procedure and Administration Act, W. Va. Code § 11-10-1 et seq. This lookback threshold amount is reduced to $25,000 for tax returns and payments due in 2014; and to $10,000 for returns and payments due for tax years beginning on or after January 1, 2015. (W. Va. Code § 11-10-5z(a); WVCSR § 110-10D-9 and 9.3.a, and §110-10F-3.2.)

Final return: If an employer ceases doing business or if a change occurs in ownership, or if any other event occurs that permanently eliminates all of an employer's liability for further withholding, the employer must submit to the Tax Accounting Division of the State Tax Department the final monthly, quarterly or annual report form upon the last payment of wages. All West Virginia income tax withheld, or which should have been withheld, and not previously remitted must be remitted with the final report.

Deposit in trust for Tax Commissioner: Whenever any employer fails to collect, truthfully account for or pay over the tax, or to make returns of the tax as required by law, the Tax Commissioner may serve a notice requiring the employer to collect the taxes which become collectible after service of the notice, to deposit the taxes in a bank approved by the Tax Commissioner, in a separate account, in trust for and payable to the Tax Commissioner and to keep the amount of the tax in the separate account until payment over to the Tax Commissioner. The notice remains in effect until a notice of cancellation is served by the Tax Commissioner. (W. Va. Code § 11-21-74(d).)

Annual reconciliation: An annual reconciliation of West Virginia personal income tax withheld must filed by the employer on or before February 28 following the close of the calendar year, together with Tax Division copies of all withholding tax statements for that preceding calendar year. The reconciliation must be accompanied by a list of the amounts of income withheld for each employee in such form as the Tax Commissioner prescribes and must be filed separately from the employer's monthly or quarterly return. (W. Va. Code § 11-21-74(g).)

¶ 402.3 Information Statement for Employee (Form W-2)

Law: W. Va. Code §§ 11-10-19(b) and 11-21-72; WVCSR § 110-21-72
Comparable Federal: IRC § 6051

Every employer required to deduct and withhold West Virginia income tax from the wages of an employee, or who would have been required so to deduct and withhold tax if the employee had claimed no more than one withholding exemption, is required to furnish to each employee, on or before February 15 of the succeeding year, a withholding statement in respect of the wages paid by the employer to the employee during the calendar year. If the employee is terminated from employment before the close of the calendar year, this statement must be provided to the employee on the date on which the last payment of the wages is made. The form of this statement is prescribed by the Tax Commissioner and must show the amount of wages paid by the
employer to the employee, the amount deducted and withheld as tax, and such other information as the Tax Commissioner may prescribe.

For the willful furnishing of a false withholding statement or for the willful failure to furnish a withholding statement by February 15, the employer is subject to a $50 money penalty for each failure. (W. Va. Code § 11-10-19(b).

¶ 402.4 Employer’s Liability for Withheld Taxes

*Law:* W. Va. Code § 11-21-75; WVCSR § 110-21-75

*Comparable Federal:* IRC § 3403

Every employer required to deduct and withhold West Virginia income taxes is made liable for withholding of the tax. For purposes of collection of the withholding tax any amount required to be withheld and paid over to the Tax Commissioner is considered the tax of the employer. Any amount of tax actually deducted and withheld from employees is deemed to be held to be a special fund in trust for the Tax Commissioner.

¶ 402.5 Employer’s Failure to Withhold

*Law:* W. Va. Code § 11-21-76; WVCSR § 110-21-75

If an employer fails to deduct and withhold tax as required, and thereafter the tax against which the tax may be credited is paid, the tax so required to be deducted and withheld may not be collected from the employer, but the employer is not relieved from liability for any penalties, interest, or additions to the tax otherwise applicable in respect of the failure to deduct and withhold tax.

100% money penalty: Additionally, any person required to collect, account for and pay over employer withholding taxes who willfully fails truthfully to account for and pay over the tax, and any person who willfully attempts in any manner to evade or defeat any employer withholding tax or the payment thereof, is, in addition to other penalties provided by law, liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over. (W. Va. Code § 11-10-19(a).)

¶ 402.6 Withholding Tax on West Virginia Source Income Distributable to Nonresident Partners, S Corporation Shareholders, Estate and Trust Beneficiaries

*Law:* W. Va. Code § 11-21-71a

*General rule:* A partnership, S corporation, estate or trust (*i.e.* pass through entities for federal income tax purposes) that has West Virginia source income allocable to a nonresident must withhold West Virginia income tax from actual or deemed distributions of West Virginia source income to the nonresident.

*Rate of withholding tax:* 6.5% on West Virginia source income allocated to the nonresident.

*Payment of withheld tax:* The amount required to be withheld is due no later than:
(1) For S corporations—the 15th day of the 3rd month following the close of the taxable year with the annual information return due to the state.

(2) For partnerships, estates and trusts—the 15th day of the 4th month following the close of the taxable year with the annual return of the partnership or trust due to the state. For composite returns—the 15th day of the 4th month of the taxable year with the composite return filed.

Nonresidents may elect of have the partnership, S corporation, estate or trust file a composite return and pay the tax shown due on that return by the due date of the composite return. See ¶ 401.28 above for discussion of composite returns. In this situation, the pass-through entity remits tax due rather than withheld tax.

¶ 402.7 Credit for Withheld Taxes

*Law:* W. Va. Code § 11-21-71a(f)

**Allowance of credit:** Each nonresident partner, shareholder or beneficiary is allowed credit for his or her share of taxes withheld by the pass-through entity. For individuals this credit is taken against their West Virginia income tax liability. Tax withheld is treated as distributed on the earlier of:

(1) The day on which the tax was paid; or

(2) The last day of the taxable year for which the tax was paid.

**Information statement:** On or before the due date of the pass-through entity’s West Virginia tax return, every pass-through entity required to withhold tax must furnish to each nonresident partner, shareholder or beneficiary, as the case may be, a written statement showing for the preceding year the amount of distributions for federal income tax purposes, the amount of tax withheld and such other information as the Tax Commissioner may require.

¶ 402.8 Withholding Tax When West Virginia Real Property Sold by Nonresident


When a nonresident sells real property located in West Virginia, the real estate reporting person, as defined for federal income tax purposes, is required to withhold from the net proceeds of sale allocated to the nonresident a 2.5% tax, unless the transaction is exempt from withholding.

For the purposes of this withholding requirement, “nonresident” includes individuals, trusts, partnerships, corporations, limited liability companies, limited liability partnerships, and unincorporated organizations.

The real estate reporting person, sometimes called the closer, is responsible for withholding the tax and remitting it to the State Tax Commissioner. The term “real estate
reporting person” means any of the following persons involved in a real estate transaction, in the following order:

1. The person (including any attorney or title company) responsible for closing the transaction,
2. The mortgage lender,
3. The seller's broker,
4. The buyer's broker, or
5. Such other person designated in regulations prescribed by the Secretary of the United State Department of the Treasury, as provided in IRC § 6045.

The person responsible for closing the transaction, the “closer,” will always be responsible for Section 71b withholding. CAVEAT: Under regulations of the Secretary of the United State Department of the Treasury, the various parties participating in a real estate transaction may sometimes agree amongst themselves who will be the real estate reporting person for purposes of IRC § 6045. However, until the Tax Commissioner promulgates an administrative rule adopting that position, the safe practice is for the real estate reporting person as defined in W. Va. Code § 11-21-71b to do the closing.

_When Withholding Required:_ Withholding is required only when the transferor is NOT a resident of West Virginia. Rules for determining whether a transferor is a resident or nonresident are as follows:

1. **Resident individual** means an individual:

   a. Who is domiciled in this State, unless he or she maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this State, or
   
   b. Who is not domiciled in this State but maintains a permanent place of abode in this State and spends in the aggregate more than 183 days of the taxable year in this State.

2. **Nonresident individual** means an individual who is not a resident, as above defined.

3. **Resident business entity** means is any entity that:

   a. Is formed under the laws of West Virginia; or
(b) Is formed under the laws of another state and is qualified by or registered with the Tax Commissioner to do business in this State, \textit{e.g.}, has a current business registration certificate issued under W. Va. Code § 11-12-4.\footnote{A nonresident business entity authorized by the West Virginia Secretary of State to do business in West Virginia must also have a current business registration certificate issued by the State Tax Commissioner, as provided in W. Va. Code § 11-12-4, in order to be a resident for purposes of this withholding tax.}

(4) \textit{Nonresident business entity} means any entity that:

(a) Is not formed under the laws of West Virginia; and

(b) Is not qualified by or registered with the Tax Commissioner to do business in this State.

(5) \textit{Resident estate or trust} means and includes:

(a) The estate of a decedent who at his or her death was domiciled in this State;

(b) A trust created by will of a decedent who at his or her death was domiciled in this State; or

(c) A trust created by, or consisting of property of, a person domiciled in this State.

(6) \textit{Nonresident estate or trust} means any estate or trust that is not a resident estate or trust, as above defined.

\textit{Multiple Transferors}: When two or more persons sell property they own as joint tenants or as tenants in common, each seller’s respective residency is determined separately. Withholding is required only on the net proceed of sale payable at closing to the nonresident transferor(s).

\textit{Rate of Tax and Measure of Tax}: Except when the alternative rate and measure of tax are used, the rate of this withholding tax is 2.5\% which is applied against net proceeds of sale distributable to a nonresident. “Net proceeds of sale” means total sale price paid to the transferor less:

(1) Debts of the transferor secured by a mortgage or other lien on the property being transferred that are being paid upon the sale or exchange of the property; and

(2) Other expenses of the transferor arising out of the sale or exchange of the property and disclosed on a settlement statement prepared in connection with
the sale or exchange of the property, but not including adjustments in favor of the transferee.

“Net proceeds” does not include adjustments in favor of the transferor that are disclosed on a settlement statement prepared in connection with the sale or exchange of the property.

*Alternative rate and measure of tax:* An alternative for calculating the withholding is to use the seller’s gain. When the alternative measure of tax is used, the rate of tax is 6.5%. Because the real estate reporting person will ordinarily not know the amount of the transferor’s taxable gain, the transferor should make an Affidavit of Nonresident Seller’s Gain, attesting to the amount of the taxable gain. The transferor is responsible for computing the gain. It is suggested that a copy of this Affidavit be sent to the State Tax Commissioner when the real estate reporting person remits the withheld tax, if there is a balance due. The Affidavit of Nonresident Seller’s Gain along with an explanation of the cost basis and expenses must be kept with the closing file. The real estate reporting person may rely on the Seller’s affidavit unless the real estate reporting person has actual or constructive notice that the affidavit is false or contains erroneous information.

*Total payment form:* For every deed or other instrument of writing that effects a change of ownership on the land books of a county assessor and for which an amount is required to be withheld as described in this ¶ 401.51, the total payment for the transfer must be described in a form prescribed by the Tax Commissioner. “Total payment” means the net proceeds of a sale actually paid to a transferor, including the fair market value of any property transferred to the transferor. This form must be signed under oath by:

(1) The transferor of the property;

(2) An agent of the transferor; or

(3) The real estate reporting person.

*When cash at closing is less than withholding tax:* If the computed amount of this withholding tax is more than the cash received by the transferor at closing, the real estate reporting person must withhold and remit only the net proceeds otherwise payable to the nonresident seller.

*When withholding not required:* There are a number of exceptions or exemptions to this withholding requirement. They include:

(1) *Residency exception:* If the transferor is a resident of West Virginia, no withholding is required. However, to claim this exception, the deed recitals must state that the transferor is a resident of West Virginia, or an affidavit of residency must be made and recorded with the deed.
(2) **Principal residence exception:** If the property transferred qualifies as a principal residence of the transferor under IRC § 121, the exemption from withholding applies for the amount of gain that is excluded from Federal adjusted gross income (FAGI) under the Internal Revenue Code. This exemption is available whether the transferor is a resident or nonresident of West Virginia. However, to claim this exemption, the deed recitals must state that the property being transferred is the transferor’s principal residence, as that term is used in IRC § 121, or an affidavit to that effect must be made and recorded with the deed.

(3) **Foreclosure exception:** The real estate reporting person is not subject to the withholding requirements if the transfer is pursuant to a deed in lieu of foreclosure\(^\text{13}\) or a transfer pursuant to a foreclosure of a mortgage, deed of trust, or other lien instrument.\(^\text{14}\) When foreclosed property is sold, that sales transaction is not subject to the withholding tax.

\(^{13}\) “Transfer pursuant to a deed in lieu of foreclosure” is defined in W. Va. Code § 11-21-71b(a)(6) and includes:

(A) A transfer by the owner of the property to:
   (i) With respect to a deed in lieu of foreclosure of a mortgage, the mortgagee, the assignee of the mortgage, or any designee or nominee of the mortgagee or assignee of the mortgage;
   (ii) With respect to a deed in lieu of foreclosure of a deed of trust, the holder of the debt or other obligation secured by the deed of trust or any designee, nominee, or assignee of the holder of the debt or other obligation secured by the deed of trust;
   (iii) With respect to a deed in lieu of foreclosure of any other lien instrument, the holder of the debt or other obligation secured by the lien instrument or any designee, nominee, or assignee of the holder of the debt secured by the lien instrument; and

(B) A transfer by any of the persons described in subparagraph (i) of this paragraph to a subsequent purchaser for value.

\(^{14}\) “Transfer pursuant to a foreclosure of a mortgage, deed of trust, or other lien instrument” is defined in W. Va. Code § 11-21-71b(a)(7) and includes:

(A) With respect to the foreclosure of a mortgage:
   (i) A transfer by the mortgagee, the assignee of the mortgage, the attorney named in the mortgage, or the attorney or trustee conducting a foreclosure sale pursuant to the mortgage to:
      (I) The mortgagee or the assignee of the mortgage;
      (II) Any designee, nominee, or assignee of the mortgagee or assignee of the mortgage; or
      (III) Any purchaser, substituted purchaser, or assignee of any purchaser or substituted purchaser of the foreclosed property; and
   (ii) A transfer by any of the persons described in subparagraph (i) of this paragraph to a subsequent purchaser for value;

(B) With respect to the foreclosure of a deed of trust:
   (i) A transfer by the trustees, successor trustees, substituted trustees under the deed of trust, or trustees conducting a foreclosure sale pursuant to the deed of trust to:
      (I) The holder of the debt or other obligation secured by the deed of trust;
      (II) Any designee, nominee, or assignee of the holder of the debt secured by the deed of trust; or
   (iii) Any purchaser, substituted purchaser, or assignee of any purchaser or substituted purchaser of the foreclosed property; and
   (ii) A transfer by any of the persons described in subparagraph (i) of this paragraph to a subsequent purchaser for value; and

(C) With respect to the foreclosure of any other lien instrument:
   (i) A transfer by the party authorized to make the sale to:
(4) Federal and state agencies exception: The transaction is not subject to the withholding requirements if the transferor is an agency of the United States or the State of West Virginia.

(5) FNMA, GNMA, or FHLMC exception: The transaction is not subject to withholding when the transferor is the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation.

(6) Tax Exempt Organization exception: The transaction is not subject to withholding when the transferor is a tax exempt organization, or an insurance company that pays a tax on its premium income to the State of West Virginia, and the income from the sale is not subject to State income tax. To claim this exemption, the transferor must provide the real estate reporting person with a certificate of no tax due issued by the West Virginia Tax Commissioner.

(7) Like kind exchange: The transaction is a like kind exchange and all of the income from the sale is not subject to federal or state income tax. To claim this exemption, the transferor must provide the real estate reporting person with a certificate of no tax due issued by the State Tax Commissioner.

(8) Zero consideration: The property is transferred pursuant to a deed or other instrument of writing that includes a statement indicating that the consideration for the transfer is zero.

Payment of Tax: The real estate reporting person must collect the withholding tax before the deed is recorded and remit the amount of tax withheld to the Tax Commissioner within 30 days after the tax was withheld by the real estate reporting person.

¶ 402.9 Withholding Tax on Certain Lottery Winnings


Lottery winnings subject to withholding: Proceeds of more than $5,000 from any lottery prize awarded by the West Virginia State Lottery Commission are subject to withholding. The Lottery Commission is required to deduct and withhold from the payment a tax in an amount equal to 6.5% of the payment when the proceeds are more than $5,000.

---

(I) The holder of the debt or other obligation secured by the lien instrument;
(II) Any designee, nominee, or assignee of the holder of the debt secured by the lien instrument; or
(III) Any purchaser, substituted purchaser, or assignee of any purchaser or substituted purchaser of the foreclosed property; and

(ii) A transfer by any of the persons described in subparagraph (i) of this paragraph to a subsequent purchaser for value.
Withholding statement by recipient: Every person who will receive payment of lottery winnings that are subject to withholding must provide the person making the payment with a statement made under the penalties of perjury containing the name, address and taxpayer identification number of the person receiving the payment and of each person entitled to any portion of the payment.

Backup withholding: Beginning July 1, 2012, every person who is required to file Internal Revenue Service form W-2G, and who is subject to backup withholding under federal law, is subject to West Virginia backup withholding. The payor, whether a licensed racetrack, a limited video lottery retailer or The Greenbrier Hotel, when making any payment of a gambling prize subject to backup withholding is required to deduct and withhold from the payment a tax in an amount equal to 6.5% of the payment.

Lottery winnings treated as employee compensation. For purposes of determining liability for payment of taxes and filing of returns, payments of lottery winnings that are subject to withholding or backup withholding are to be treated as if they were wages paid by an employer to an employee.

The next paragraph is ¶ 403.
¶ 403 ESTATE AND TRUST INCOME TAXES

¶ 403.1 In General

In general, every resident estate and trust that is required to file a federal return for the taxable year or that has West Virginia taxable income is required to file a West Virginia income tax return. Nonresident estates and trusts that have West Virginia source income are also required to file a West Virginia return. The return filed is form IT-141 Fiduciary Income Tax Return.

The fiduciary of the estate or trust is required to make and file the West Virginia return. (W. Va. Code § 11-21-51 and WVCSR § 110-21-51.)

All items of income and deduction to be used for West Virginia tax purposes are the same items used for federal tax purposes and the meaning of all terms is the same.

¶ 403.2 Resident and Nonresident Estate or Trust

For income tax purposes, a “resident estate or resident trust” means:

(1) The estate of a decedent who at his or her death was domiciled in West Virginia;

(2) A trust created by will of a decedent who at his or her death was domiciled in West Virginia; or

(3) A trust created by, or consisting of property of, a person domiciled in West Virginia.

A nonresident estate or trust is one that is not a resident estate or resident trust as above defined. The state of residence of the fiduciary does not affect the classification of the estate or trust as a resident or nonresident.

¶ 403.3 West Virginia Source Income of Nonresident Estate or Trust

The West Virginia source income of a nonresident estate or trust is determined as provided in this paragraph.

(1) Items in distributable net income: The distributable net income of the nonresident estate or trust must be analyzed to determine the portion that represents income, gain, loss and deduction from West Virginia sources. These are the items of income, gain, loss and deduction, derived from or connected with West Virginia sources, that would
be included in the determination of federal adjusted gross income if the estate or trust were an individual and that enter into the definition of federal distributable net income of the estate or trust for the taxable year including such items from another estate or trust of which the first estate or trust is a beneficiary. This determination of source is made in accordance with the applicable rules of W. Va. Code § 11-21-32 in the case of a nonresident individual. Income and deductions from West Virginia sources include:

(a) Items of income, gain, loss and deduction derived from or connected with West Virginia sources that are attributable to:

(i) The ownership of any interest in real or tangible personal property in this State; or

(ii) A business, trade, profession or occupation carried on in this State; or

(iii) In the case of a shareholder of an S corporation, the ownership of shares issued by such corporation, to the extent determined under W. Va. Code § 11-21-37.

(b) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, constitutes income derived from West Virginia sources only to the extent that the income is from property employed in a business, trade, profession or occupation carried on in this State.

(c) Deductions with respect to capital losses and net operating losses must be based solely on income, gain, loss and deduction derived from or connected with West Virginia sources, determined under regulations of the Tax Commissioner, but otherwise determined in the same manner as the corresponding federal deductions.

(e) The deduction allowed by IRC § 215 of the Internal Revenue Code, relating to alimony, does not constitute a deduction derived from West Virginia sources.

*Income and deductions partly from West Virginia sources:* If a business, trade, profession or occupation is carried on partly within and partly without this State, as determined under regulations of the Tax Commissioner, the items of income, gain, loss and deduction derived from or connected with West Virginia sources is determined by apportionment and allocation under those regulations. (W. Va. Code § 11-21-32.)

(2) *Items not in federal distributable net income:* There is added to or subtracted (as the case may be) the amount derived from or connected with West Virginia sources of any income, gain, loss and deduction which would be included in the determination of federal adjusted gross income if the estate or trust were an individual and which is recognized for federal income tax purposes, but excluded from the definition of federal distributable net income of the estate or trust. The source of such income, gain, loss
and deduction is determined in accordance with the applicable rules of W. Va. Code § 11-21-32 as in the case of a nonresident individual.

*Items in distributable net income from West Virginia sources:* Income of an estate or trust and the related deductions, to the extent they are West Virginia source items, are taxable in West Virginia. Nonresident estates or trusts with both West Virginia source income and non-West Virginia source income must allocate the income. An item of income, gain, loss or deduction is considered derived from or connected with West Virginia sources when any such item is attributable to the ownership by the estate or trust of any interest in real or tangible personal property in this State or when the item is attributable to a business, trade, profession or occupation carried on in this State by the estate or trust.

*Items not in distributable net income:* The amount of any West Virginia connected items of income, gain, loss and deduction recognized for federal income tax purposes but excluded from the federal definition of distributable net income, must be added to or subtracted from, as the case may be, the estate's or trust's share of items reflected in distributable net income.

### ¶ 403.4 Charitable Deductions

The West Virginia charitable deduction for nonresident estates or trusts is carried over from the federal tax return, except that a nonresident estate or trust is limited to the extent that the contribution must be made to a West Virginia charity or to this State or a political subdivision thereof, so that West Virginia source income may only be offset by contributions to West Virginia charities.

### ¶ 403.5 West Virginia Taxable Income of Resident Estate of Trust


The West Virginia taxable income of a resident estate or trust is its federal taxable income for the taxable year as defined in the laws of the United States for the taxable year, with the following modifications:

1. There is subtracted $600 as the West Virginia personal exemption of the estate or trust, and there is added the amount of its federal deduction for a personal exemption.

2. There is added or subtracted, as the case may be, the share of the estate or trust in the West Virginia fiduciary adjustment determined under W. Va. Code § 11-21-19.

3. There is added to federal adjusted gross income, unless already included therein, the amount of a lump sum distribution for which the taxpayer has elected under IRC § 402(e) to be separately taxed for federal income tax purposes.
(4) An electing small business trust as defined in IRC § 1361(e) which is a shareholder in one or more electing small business corporations, must add the portion of the trust's income attributable to electing small business corporation stock held by the trust that is not included in the trust's federal taxable income pursuant to IRC § 641.

¶ 403.6 Lump Sum Distribution


The amount of a lump sum distribution for which the taxpayer has elected under IRC § 402(e) to be separately taxed for federal income tax purposes must be added to federal adjusted gross income.

¶ 403.7 Fiduciary Adjustment


In general, the fiduciary adjustment is the net of all addition modifications and subtraction modifications of the estate or trust. The same modifications available for the West Virginia individual income tax return are available for the fiduciary income tax return. This fiduciary adjustment is then allocated between the beneficiaries and the estate or trust. In general, the percentage share of each beneficiary and of a fiduciary of an estate or trust in the West Virginia fiduciary adjustment is equal to the percentage share of the beneficiary and of the fiduciary in the federal distributable net income of the estate or trust. If the federal distributable net income of the estate or trust for the taxable year is zero or a negative figure, the share of each beneficiary in the West Virginia fiduciary adjustment is in proportion to his share of the income of the estate or trust for the taxable year, determined under local law or the governing instrument. The beneficiary’s share of such income consists of the amount thereof which is required to be distributed to him during the taxable year, or which is distributed to him during the taxable year although not required to be distributed currently. Any balance of the West Virginia fiduciary adjustment not so allocable to the beneficiary is allocable to the estate or trust. If any of the fiduciary adjustment is allocable to the fiduciary, it is added to or subtracted from the income of the fiduciary.

Special rule where estate or trust has no federal distributable net income: When the federal distributable net income of an estate or trust for the taxable year is zero or a negative number, the share of each beneficiary in the West Virginia fiduciary adjustment is in proportion to his or her share of the income of the estate or trust for the taxable year, determined under local law or the governing instrument. The beneficiary’s share of such income consists of the amount thereof which is required to be distributed to him or her during the taxable year, or which is distributed to him or her during the taxable year although not required to be distributed currently. Any balance of the West Virginia fiduciary adjustment not so allocable to the beneficiary is allocable to the estate or trust. (WVCSR § 110-21-19.3.)
Alternative apportionment of West Virginia fiduciary adjustment between the estate or trust and its beneficiaries: When the methods of apportionment discussed above will not result in a fair and equitable apportionment of the West Virginia fiduciary adjustment, the fiduciary may, upon application to the Tax Commissioner, adopt and use on a return for the taxable year of the estate or trust, any other method which is equitable, subject to such terms and conditions as the State Tax Commissioner may require. (WVCSR § 110-21-19.4.)

No alternative method will be approved that results in the inclusion in the West Virginia adjusted gross income of the beneficiary an amount greater than the amount of estate or trust income paid, credited, or required to be distributed to the beneficiary for the taxable year. (WVCSR §110-21-19.4.1.)

Any fiduciary whose alternative method of apportionment is approved by the Tax Commissioner must attach to the West Virginia fiduciary income tax return for the particular year a signed statement containing a summary of the facts relied upon and used to support the position that the alternative allocation, rather than the general rule for allocation, is fair and equitable. (WVCSR § 110-19-4.2.)

¶ 403.8 Exemption for Estates or Trusts


The West Virginia personal exemption for all estates or trusts (regardless of whether it is simple, complex or the final return) is $600.

¶ 403.9 Rate of Tax


The following tax rate schedule applies to all estates and trusts:

<table>
<thead>
<tr>
<th>If taxable income is:</th>
<th>the tax is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over $0</td>
<td>But not over $10,000</td>
</tr>
<tr>
<td>$10,000</td>
<td>$25,000</td>
</tr>
<tr>
<td>$25,000</td>
<td>$40,000</td>
</tr>
<tr>
<td>$40,000</td>
<td>$60,000</td>
</tr>
<tr>
<td>$60,000</td>
<td></td>
</tr>
</tbody>
</table>

¶ 403.10 Computation of Tax on Income of Nonresident Estates and Trusts


Income tax due on income derived from West Virginia sources by a nonresident, estate or trust is computed in the following manner:

(1) The tax liability is first computed as if the estate or trust were a West Virginia resident to determine what is known as the tentative tax.
(2) The amount of tentative tax determined under (1), above, is then multiplied by the quotient of West Virginia source income of the nonresident estate or trust divided by federal adjusted gross income.

(3) The product of the computation under paragraph (2), above, is the West Virginia income tax liability of the nonresident estate or trust for the taxable year.

¶ 403.11 West Virginia Source Income of Nonresident Estate or Trust


In general the West Virginia source income of a nonresident estate or trust is determined as follows:

**Items in distributable net income:** A nonresident estate or trust determines its share of income, gain, loss and deduction from West Virginia sources under W. Va. Code § 11-21-39 (relating to items entering into the definition of distributable net income). See ¶ 471 below.

**Items not in distributable net income:** A nonresident estate or trust adds to or subtracts (as the case may be) the amount derived from or connected with West Virginia sources of any income, gain, loss and deduction which would be included in the determination of federal adjusted gross income if the estate or trust were an individual and which is recognized for federal income tax purposes, but excluded from the definition of federal distributable net income of the estate or trust. The source of this income, gain, loss and deduction is determined in accordance with the applicable rules of W. Va. Code § 11-21-32, as in the case of a nonresident individual. See ¶ 401.19 above.

**Special West Virginia source rules:** Deductions with respect to capital losses and net operating losses are based solely on income, gains, losses and deductions derived from or connected with West Virginia sources, under regulations of the Tax Commissioner, but otherwise determined in the same manner as the corresponding federal deductions.

¶ 403.12 Share of Nonresident Estate, Trust or Beneficiary in West Virginia Source Income.


In general, the share of a nonresident estate or trust determined under W. Va. Code § 11-21-38(a)(1) and the share of a nonresident beneficiary of any estate or trust determined under W. Va. Code § 11-21-32(a) in estate or trust income, gain, loss and deduction from West Virginia sources is determined as follows:

**Items of distributable net income from West Virginia sources:** First there is determined the items of income, gain, loss and deduction, derived from or connected with West Virginia sources, which would be included in the determination of federal adjusted gross income if the estate or trust were an individual and which enter into the
definition of federal distributable net income of the estate or trust for the taxable year including those items from another estate or trust of which the first estate or trust is a beneficiary. Determination of source of the income, gain, loss or deduction is made in accordance with the applicable rules of W. Va. Code § 11-21-32 as in the case of a nonresident individual.

**Allocation among estate or trust beneficiaries:** The amounts determined under the preceding paragraph are allocated among the estate or trust and its beneficiaries (including, solely for the purposes of this allocation, resident beneficiaries) in proportion to their respective shares of federal distributable net income.

The amounts so allocated have the same character for West Virginia income tax purposes as they have for federal income tax purposes. When an item entering into the computation of these amounts is not characterized for federal income tax purposes, it the item has the same character as if realized directly from the source from which realized by the estate or trust, or incurred in the same manner as incurred by the estate or trust.

**Alternative methods of determining shares:**

If the estate or trust has no federal distributable net income for the taxable year, the share of each beneficiary (including, solely for the purposes, of this allocation, resident beneficiaries) in the net amount determined under the preceding paragraphs shall be in proportion to the beneficiary’s share of the estate or trust income for such year, under local law or the governing instrument, which is required to be distributed currently and any such other amounts of income distributed for the taxable year. Any balance of the amounts is allocated to the estate or trust.

The Tax Commissioner may, on written application filed on or before the due date of the West Virginia fiduciary return for the taxable year, determined without regard to any extension of time for filing the return, authorize use of such other methods of determining the representative shares of the beneficiaries and of the estate or trust in its income derived from West Virginia sources, and the modifications related thereto, as may be appropriate and equitable, on such terms and conditions as the Tax Commissioner may require.

The Tax Commissioner may allow the use of other methods of determining the respective shares of the beneficiaries and of the estate or trust in its income derived from West Virginia sources, and the modifications related thereto, if such other methods are fair and equitable to all parties concerned, and if a full disclosure of the adopted method is made to the Tax Commissioner. (WVCSR § 110-21-39.2.1.)

¶ 403.13 Fiduciary Income Tax Returns

Fiduciary returns must be filed on or before the 15th day of the fourth month following the close of the taxable year for:

(1) Every resident estates or trusts required to file a federal income tax return for the taxable year, or having any West Virginia taxable income for the taxable year as determined under W. Va. Code § 11-21-18 and WVCSR § 110-21-18.

(2) Every nonresident estate or trust having items of income or gain derived from West Virginia sources, determined in accordance with W. Va. Code § 11-21-32 and the applicable rules of WVCSR § 110-21-32 as in the case of a nonresident individual, in excess of its $600 West Virginia exemption.

The fiduciary may make and file a composite income tax return for those nonresident beneficiaries that elect to join in the filing of the composite return. For additional information on composite returns, see ¶ 401.28 above. When a composite return is timely filed, the taxes remitted with the composite return satisfy the fiduciary’s requirement to withhold and remit the withholding tax discussed in ¶ 401.49 above.

¶ 403.14 Resident and Nonresident Qualified Funeral Trust

A qualified funeral trust (QFT) is a domestic trust that meets all of the following requirements:

(1) The trust arose as a result of a contract with a person engaged in the trade or business of providing funeral or burial services or property to provide those services;

(2) The sole purpose of the trust is to hold, invest, and reinvest funds in the trust and to use those funds solely to pay for funeral or burial services or property to provide funeral or burial services for the benefit of the beneficiaries of the trust;

(3) The only beneficiaries are individuals for whom funeral or burial services or properties are to be provided at their death under the contracts described above;

(4) The only contributions to the trust are contributions by or for the benefit of the beneficiaries of the trust; the trustee makes or previously made the election to treat the trust as a QFT;

(5) The trust would have been treated as owned by the purchasers of the contracts under the grantor trust provisions of the Internal Revenue Code if the QFT election had not been made.

Qualified Funeral Trust filing requirements: The trustee of a qualified funeral trust files Form IT-141 marked as QFT. This return is required when the Federal 1041-QFT is
filed under IRC § 685, which permits certain trusts to elect Qualified Funeral Trust status.

Qualified Funeral Trust Composite Return: A trustee may file a single, composite Form IT-141 for all qualified funeral trusts of which he or she is the trustee by marking the IT-141 as a Qualified Funeral Trust Composite. Generally, a qualified funeral trust included in a composite return must have the calendar year as its tax year. However, the return may also include a qualified funeral trust that terminated during the tax year, resulting in a short tax year, provided the tax year of the qualified funeral trust would have been the calendar year (before termination) and the composite return is filed no later than the due date of the return for the short tax year.

The trustee of a QFT must maintain and make available to the State Tax Department, upon request, a schedule to a composite form IT-141 for each qualified funeral trust (or separate interest if treated as a separate qualified funeral trust). The schedule information must include, for each qualified funeral trust, the name of the owner or beneficiary and, if the trust has more than one beneficiary, the apportioned shares for each beneficiary; the type and gross amount of each type of income earned by the qualified funeral trust for the tax year; the type and amount of each deduction and credit allocable to the QFT; the tax payments for each QFT; the termination date if the QFT was terminated during the year.

The next paragraph is ¶ 404.
¶ 404 PARTNERSHIP RETURNS

¶ 404.1 Filing Requirements

*Law:* W. Va. Code §§ 11-21-3(b) and 11-21-58(b)

West Virginia imposes no income tax at the partnership level. All resident partnerships and nonresident partnerships with either income connected with West Virginia sources or partners who are West Virginia residents, are required to file annual returns with the State Tax Department. If, however, a federal partnership return is not required for a taxable year, then a West Virginia partnership return is not required. The West Virginia Partnership Return of Income is due three and one-half months after the partnership’s year end. Obtaining an extension for filing the federal partnership return automatically extends the due date for filing the State partnership return. The West Virginia partnership return and the business franchise tax return have been combined. Partnerships now file form SPF 100 West Virginia Income/Business Franchise Tax Return – S Corporations and Partnership (Pass-Through Entity).

Note: A partnership is subject to the West Virginia business franchise tax, which is discussed in chapter 2 of this Guidebook. This tax is being phased out over a period of years and will not apply for taxable years beginning on or after January 1, 2015.

¶ 404.2 Partnership Income and Deductions

*Law:* W. Va. Code § 11-21-17; WVCSR 110-21-17

* Resident partnerships: The income and deductions of a resident partnership, except items reported separately on the federal return, are listed as they are reported on the federal return. Separately stated income and deductions and a schedule of modifying items is provided for federal/West Virginia difference. For each partner, the name, address, social security number, ownership percentage and share of income and deductions must be listed.

The West Virginia resident partnership return reports ordinary income and deduction items and separately states items much as they are reported on the federal return. Partners’ names, addresses, and deductions are listed on a single schedule. No separate schedule for each partner, like the federal Schedule K-1, is required.

* Nonresident partnerships: Nonresident partnerships report amounts allocated to West Virginia. An allocation schedule is provided with the return for net income not specifically allocable to West Virginia or any state.

¶ 404.3 "Resident" and "Nonresident" Partnership Defined

A resident partnership is one organized under the laws of West Virginia whose principal office, place of business or other activity is within West Virginia regardless of
the fact that it may also conduct its business in other states. A nonresident partnership is any partnership that is not a resident partnership.

¶ 404.4 Direct Allocation of Income and Deductions-in General

_Law:_ W. Va. Code § 11-24-7

When a partnership has income derived from or connected with both West Virginia and non-West Virginia sources, its income and deductions must be allocated. Those items of income and deduction that can be directly allocated by reason of their connection with income-producing property should be directly allocated. However, since the partnership income tax return and the partnership business franchise tax return have been combine that return requires the income of a partnership from multistate business activity to be apportioned using the partnership’s apportionment factor for business franchise tax purposes.

¶ 404.5 Allocation and Apportionment -- Multistate Businesses

For taxpayers other than motor carriers and financial organizations, after the direct allocation of certain nonbusiness income, the remaining adjusted federal taxable income is apportioned by multiplying by a fraction, the numerator of which is the sum of the property factor plus the payroll factor plus two times the sales factor, and the denominator of the fraction is four. Where any fraction has a numerator of zero and a denominator of other than zero, the factor is deemed to be zero, _i.e._, 0/100 = 0. (WVCSR § 110-24-7.3.a.) In cases where a factor has a denominator of zero, the denominator of the apportionment formula fraction is decreased by the number of factors having zero. If the sales factor denominator is zero, then the apportionment fraction denominator is decreased by two. The following formula is applicable:

\[
\text{Taxable income subject to apportionment} \times \frac{\text{Property factor} + \text{payroll factor} + (2 \times \text{sales factor})}{4} = \text{Apportioned taxable income}
\]

_Property factor:_ The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used by the taxpayer within West Virginia during the taxable year, and the denominator is the average value of all real and tangible personal property owned or rented and used by the taxpayer during the taxable year. The formula is as follows:

\[
\text{Property factor} = \frac{\text{Average value of real and tangible personal property in W.Va.}}{\text{Average value of all real and tangible personal property}}
\]

The average value of all real and tangible personal property is taken from the taxpayer's federal income tax return, Schedule L. The average value of property is determined by averaging the values at the beginning and end of the taxable year. However, in cases where there are substantial fluctuations during the year, the Tax

15 “Business income” and “nonbusiness income” are not defined in the West Virginia Personal Income Tax Act. They are defined in the West Virginia Corporation Net Income Tax Act and means ______.

“Nonbusiness income” means all income other than business income.
Commissioner may require the taxpayer to average monthly values. For purposes of determining the average value of property, original cost is to be used. Property that is not owned, but rented by the taxpayer, is valued at eight times the net annual rental rate. Rent includes all amounts payable under the lease arrangement in situations where a rental agreement obligates the lessee to pay for such items as interest, taxes, insurance, repairs, etc., as is typically found in a triple net lease. Leasehold improvements are considered property for purposes of apportionment, even if the improvements revert to the lessor upon termination of the lease.

For purposes of determining the property factor as it relates to moveable tangible personal property used within and without West Virginia, the value of the moveable property is determined by multiplying the original cost of such property by a fraction, the numerator of which is the number of days the moveable property has a physical presence in West Virginia and the denominator of which is the number of days of physical presence everywhere during the taxable year. Days of physical location can be determined by statistical methods or any other reasonable basis acceptable to the Tax Commissioner. The following formula is appropriate:

\[
\text{Value of moveable} = \frac{\text{Cost of moveable property in W.Va. during any part of year} \times \text{Days within W.Va.}}{\text{Days everywhere}}
\]

**Payroll factor:** The payroll factor is a fraction, the numerator of which is the total compensation paid in West Virginia during the taxable year, and the denominator of which is the total compensation paid by the taxpayer to all employees regardless of domicile as reflected on the taxpayer's federal income tax return. The formula follows:

\[
\text{Payroll Factor} = \frac{\text{Payroll in W.Va.}}{\text{Total payroll}}
\]

For purposes of the payroll factor, compensation typically means all wages and other forms of remuneration paid to employees for personal services that are reportable on federal Forms W-2. Payments made to independent contractors or to individuals who are not deemed employees for federal income tax purposes are not considered compensation for purposes of the payroll factor.

Compensation is deemed paid in West Virginia and is considered as a part of the numerator in the payroll factor if the employee's services are either:

1. Performed entirely within West Virginia; or
2. Performed both within and without this State, but the services performed without West Virginia are incidental to the employee's services within this State; or
3. Performed both within and without West Virginia and one of the following elements is present:
   a. The employee's base of operations is located within West Virginia; or
(b) The employee has no base of operations but the employee is directed or
controlled from a location within West Virginia; or

(c) There is no base of operations in any state in which some of the
employee’s services are performed and the employee’s residence is located
within West Virginia.

Sales factor: The sales factor is a fraction, the numerator of which is the gross
receipts of the taxpayer derived from normal business transactions and activities within
West Virginia, net of any returns and allowances. The denominator of the fraction is the
total gross receipts derived by the taxpayer from its normal business activities and
reflected as gross income on its federal income tax return. Below is the applicable
formula:

\[
\text{Sales Factor} = \frac{\text{Gross receipts from activities within W.Va.}}{\text{Total gross receipts}}
\]

The West Virginia net income tax includes a throwout rule,\(^\text{16}\) with respect to the
sales factor. A throwout rule eliminates from the denominator of the sales factor (i) all
destination sales to those states in which the taxpayer transacts no business, (ii) sales
to those states where no business is subject to a corporation income tax, franchise tax,
or corporation stock tax, or (iii) where the destination state lacks jurisdiction to impose a
corporation net income tax, irrespective of whether such state imposes such tax.
(WVCSR § 110-24-7.7.g.)

Gross receipts typically means gross income and not gross profit or net income, and
it includes all interest income, service charges, carrying charges, federal and state
excise taxes (including sales taxes) passed on to the buyer. (WVCSR § 110-24-
7.7.a.2.A.) Accordingly, no reduction for cost of goods sold or other expenses (except
returns and allowances) shall be subtracted in arriving at gross receipts. If business
income includes interest from governmental obligations exempt from taxation by West
Virginia, such amounts shall be excluded from the numerator and denominator.

If a taxpayer departs from or modifies the basis for excluding or including gross
receipts in the sales factor used in returns for prior years, it must disclose such
information by attaching a statement to the West Virginia corporation income tax return,
setting forth the nature and effect of the change. (WVCSR § 110-24-7.7.b.)

\(^\text{16}\) The only other states that adopted the throwout rule are Maine and New Jersey. New Jersey repealed
the rule while litigation over the constitutionality of the throwout rule was working its way through the
courts. On July 28, 2011, the Supreme Court of New Jersey issued its decision in Whirlpool Properties,
Inc. v. Tax Division, upholding application of the throwout rule when the corporation has substantial nexus
with New Jersey and the receipts thrown out are from sales to customers in states where Whirlpool does
not have constitutional nexus or the state is prohibited from taxing the receipts because of Public Law 86-
272. Today, West Virginia and Maine are the only states that require taxpayers to reduce the denominator
of their sales factor by the amount of sales to customers located in the states where the taxpayer is not
taxable.
Sale of tangible personal property: Sales of tangible personal property are deemed attributable to West Virginia under either of the following conditions:

1. The property is delivered or shipped to a purchaser other than the United States government, who is located within the State of West Virginia. The f.o.b. point or other conditions of sale are irrelevant for this purpose. West Virginia sales include delivery to a third party within West Virginia, even if the product is then delivered outside West Virginia.

2. The tangible property is shipped from a West Virginia location and the purchaser is the United States government.

In situations where a taxpayer sells tangible personal property to a purchaser located within a state in which the taxpayer is not taxed, then such sales shall be excluded from the denominator of the sales factor.

Sales of other than tangible property: In cases where the taxpayer's business activities consist of sales other than sales of tangible personal property, the sales are considered West Virginia transactions if either:

1. The income-producing activity is performed within West Virginia;

2. The income-producing activity is performed both within and without West Virginia and a greater proportion of the income-producing activity is performed within West Virginia as compared to any other state based on the cost of the performance of the service or sale (WVCSR § 110-24-7.7.h.1.); or

3. If the sale constitutes business income to the taxpayer, or the taxpayer is a financial organization subject to special apportionment rules.

Alternative apportionment methods: In situations where either the taxpayer or the Tax Commissioner believes the statutory allocation and apportionment provisions do not fairly represent the extent of a taxpayer's business activities in West Virginia, the taxpayer may petition or the Tax Commissioner may require, with respect to all or part of the taxpayer's business activities: (1) separate accounting; (2) the exclusion of one of the factors; (3) the inclusion of one or more additional factors; or (4) the use of any other method, including a unitary basis in order to equitable allocate or apportion the taxpayer's income. Taxpayers (including public utilities) desiring approval to use an alternative method of allocation must file a petition with the Tax Commissioner no later than the original due date (without regard to any extension) of the annual West Virginia corporation income tax return. (W. Va. Code § 11-24-7(h)(1).)

¶ 404.6 Special Allocations Between Partners

Law: W. Va. Code § 11-21-17(c)
When a partnership agreement provides for a special allocation among the partners of any item of income or deduction that is held to have as its principal purpose the avoidance or evasion of West Virginia income tax, the provision must be disregarded and each partner's share of the pertinent item must be determined in accordance with his or her share of the partnership's ordinary income or loss.

Whether the principal purpose of a special allocation of an item is the avoidance or evasion of West Virginia income tax depends on all the surrounding facts and circumstances. Among the relevant circumstances to be considered are the following:

1. Whether the partnership or a partner individually has a business purpose for the allocation;
2. Whether the allocation has "substantial economic effect," that is, whether the allocation may actually affect the dollar amount of the partners' shares of the total partnership income or loss independently of West Virginia income tax consequences;
3. Whether the related items of income, gain, loss or deduction from the same source are subject to the same allocation;
4. Whether the allocation was made without recognition of normal business factors and only after the amount of the specially allocated item could reasonably be estimated;
5. The duration of the allocation; and
6. The overall tax consequences of the allocation.

¶ 404.7 Modifications of Federal Adjusted Gross Income

Law: W. Va. Code § 11-21-17(a)

Partnership income for federal tax purposes may be subject to certain modifications for West Virginia tax purposes and the distributive share of each partner. Some of these modifications increase and others decrease federal adjusted gross income.

*Increasing modifications:*

1. Interest income on obligations of any state or its political subdivisions other than West Virginia;
2. Interest or dividend income on securities of any United States instrumentality that is exempt from federal but not West Virginia income tax;
3. State or local income taxes to the extent they are treated as deductions on the federal return; and
(4) Interest on indebtedness to purchase or carry exempt securities.

Decreasing modifications:

(1) Interest income on United States obligations or securities of United States instrumentalities to the extent included in federal taxable income; and

(2) Refunds of any state or local income tax to the extent included in federal taxable income.

¶ 404.8 Exemptions and Credits

Because the partnership is not an income tax-paying entity, there are no exemptions or credits available at the partnership level. However, a number of West Virginia tax credits are applied first against the business franchise tax liability of a partnership. In most but not all cases, unused credits then flow through to partners in the same manner as distributive share.

The next paragraph is ¶ 405.
¶ 405 S CORPORATION RETURNS

¶ 405.1 Summary and Filing Requirements

Law: W. Va. Code §§ 11-24-5(d) and 11-24-13b
Comparable Federal: IRC §§ 1361 and 1362

A small business corporation that elects under IRC § 1362 to be treated under Subchapter S of the Internal Revenue Code is known as an S corporation.

West Virginia imposes no income tax at the S corporation level. All resident S corporations and all nonresident S corporations having either income connected with West Virginia sources or shareholders who are West Virginia residents are required to file annual information returns with the State Tax Department.

The S corporation information return and the S corporation business franchise tax return have been combined. S corporations doing business in this State or deriving income from this State are required to file form SPF 100 West Virginia Income/Business Franchise Tax Return – S Corporations and Partnership (Pass-Through Entity). An S corporation must file this return with the State Tax Commissioner on or before the 15th day of the third month following the closed of the taxable year. See W. Va. Code § 11-24-13b. Obtaining an extension of time for filing the federal S corporation return automatically extends the due date for filing Form SPF-100. This extension does not extend the time for paying the business franchise tax.

The penalty for failure to timely file required information return or for filing an information return that is not complete or provides incorrect information is $50 per return. This penalty imposed by and administered under W. Va. Code § 11-10-19a. See chapter 9 of this Guidebook.

Note: An S corporation is subject to the West Virginia business franchise tax, which is discussed in chapter 2 of this Guidebook. This tax is being phased out over a period of years and will not apply for taxable years beginning on or after January 1, 2015.

¶ 405.2 "Resident" and "Nonresident" S Corporations Defined

A resident S corporation is one that is recognized as an S corporation for federal purposes for the taxable year, is organized under the laws of West Virginia and whose principal office, place of business or other activity is within West Virginia, regardless of the fact that it may also conduct its business in other states. A nonresident S corporation is any S corporation that is not a resident S corporation.

¶ 405.3 S Corporation Income and Deductions

Resident S corporations: The West Virginia taxable income of a resident S corporation is the same as is reported on the federal return. All shareholders' names,
addresses, social security numbers, ownership percentage and amount of distributions are listed.

Shareholders’ names, addresses, and distributions are listed on a single schedule. No separate schedule for each shareholder, like the federal Schedule K-1, is required.

Nonresident S corporations: The West Virginia source income of a nonresident S corporation is the amount reported on the federal return that is allocated or apportioned to West Virginia. An allocation schedule is provided for net income not specifically allocable to West Virginia or any state. This allocation, discussed below, is based on a three-factor formula that is weighted 25% property, 25% salaries and 50% sales.

¶ 405.4 Direct Allocation of Nonbusiness income and Deductions


When an S corporation has income derived from or connected with both West Virginia and non-West Virginia sources, its income and deductions must be allocated. Those items of income and deduction that can be directly allocated by reason of their connection with income-producing property should be directly allocated. This direct allocation is the same as for purposes of the corporation net income tax which is discussed in Chapter 1, ¶ 107.

¶ 405.5 Allocation and Apportionment of Business Income and Deductions

If items of income and deduction are applicable to business carried on within West Virginia and at least one other state then they shall be indirectly allocated by multiplying the items by a fraction, the numerator of which is the property factor plus the payroll factor plus twice the sales factor and the denominator of which is four. This formula is the same as the formula for purposes of the corporation net income tax which is discussed in Chapter 1, ¶ 108 of this Guidebook. Also see ¶ 403.5 above.

¶ 405.6 Modifications of Federal Adjusted Gross Income


S corporation income for federal tax purposes may be subject to certain modifications for West Virginia tax purposes and the distributive share of each shareholder. These modifications increase and others decrease federal adjusted gross income in the same manner as the adjustments for the corporation net income tax discussed in Chapter 1, ¶ 105 and 106.

¶ 405.7 Exemptions and Credits

Because the S corporation is not an income tax-paying entity, there are no exemptions or credits available at the S corporation level. However S corporations doing business in West Virginia or deriving income from West Virginia sources are subject to the business franchise tax. A number of tax credits are allowed against the
business franchise tax. Unused credits frequently, but not always, flow through to shareholders of S corporations in the same manner as distributive share.

The next paragraph is ¶ 406.
¶ 406 PROCEDURE AND ADMINISTRATION

¶ 406.1 Procedure and Administration

Law: W. Va. Code § 11-21-95

The West Virginia Tax Procedure and Administration Act codified in W. Va. Code § 11-10-1 et seq. is applicable to the personal income tax as it relates to individuals, trusts and estates, partnerships, S corporations and withholding agents. For additional information about this Act, see chapter 9 of this Guidebook.


¶ 406.2 Overpayments of West Virginia Income Taxes

Law: W. Va. Code §§ 11-10-11, 11-10-14 and 11-10-17

A signed annual return showing an overpayment of West Virginia income tax constitutes a claim for refund. The Tax Commissioner has six months within which to determine whether to grant or deny the claim for refund in whole or in part. If the refund is granted or the overpayment is established as a credit within this 6-month period, no interest is paid by the Tax Commissioner on the amount of the overpayment.

If a claim for refund is denied in whole or in part, the taxpayer may file a petition for refund with the West Virginia Office of Tax Appeals. See chapter 9 of this Guidebook for additional information regarding claims for refund and petitions for refund.

Intercept of refund or credit: Whenever a taxpayer has overpaid his or her West Virginia income tax, the Tax Commissioner may reduce the amount of the refund or credit by the amount of any tax collected by the Tax Commissioner, whether it be the same tax or a different tax, that is owed by the taxpayer.

Agreements with IRS: The Tax Commissioner may offset State tax refunds against federal tax liabilities just as the IRS may offset federal tax refunds against West Virginia income tax liabilities. At the times moneys are received as a result of an offset of a taxpayer's federal tax refund under the provisions of IRC § 6402(e), the taxpayer is given credit against state tax liability for the amount of the offset less a deduction for the offset fee imposed by the Internal Revenue Service. The amount of the offset fee imposed by the Internal Revenue Service is then added to the taxes, interest and penalties owed by the taxpayer to this State.

Municipal costs offset program: The Tax Commissioner may withhold or deny personal income tax refunds from taxpayers who owe municipal costs, fines, forfeitures or penalties in excess of $50. Taxpayers may appeal to the Office of Tax Appeals within 60 days of receipt of the Tax Commissioner's notice of withholding or denial of taxpayer's refund or credit. An injured spouse is not subject to withholding under the
refund offset program if (1) a joint return was filed; (2) the separate tax liabilities of both spouses could be reasonably determined and each spouse's proportional share of the refund could be allocated accordingly; and (3) it is inequitable to hold the injured spouse accountable for the obligation of the other, for which the refund is being withheld. (WVCSR §§110-40-1; through 10-40-6.)

*Intercept for delinquent child support:* The Tax Commissioner is required to intercept a State income tax refund upon notice from the Child Support Enforcement Division of the Department of Health and Human Resources that the taxpayer owes delinquent child support. (W. Va. Code § 48-18-118(a).)

Before issuing the notice to intercept to the Tax Commissioner the Child Support Enforcement Division must:

(1) Examined the obligor's pattern of payment of support and the obligee's likelihood of successfully pursuing other enforcement actions; and

(2) Have determined that the amount of past-due support that will be owed, when support is withheld, will be one $100 more. (W. Va. Code §48-18-118(b).)

The next paragraph is ¶ 402.

¶ 406.3 Interest and Additions to Tax

*Law:* W. Va. Code §§ 11-10-17, 11-10-18, and 11-10-18a

Interest and additions to tax are imposed on underpayments of West Virginia personal income tax, including underpayments of estimated tax, pursuant to provisions of the West Virginia Tax Procedure and Administration Act, W. Va. Code § 11-10-1 et seq. These provisions are discussed in Chapter 9 of this Guidebook. For information on the addition to tax for under payment of estimated tax, see ¶ 401.24 above.

¶ 406.4 Penalties for abusive tax shelters and failure to report listed transactions


A penalty is imposed on every person who engages in activities promoting abusive tax shelters described in IRC § 6700(a), or any subsequent corresponding provisions of the Internal Revenue Code, as from time to time amended, and who is subject to a penalty imposed under IRC § 6700, whether or not the penalty has been imposed, where such activities affect tax returns required to be filed with the Tax Commissioner.

The amount of the West Virginia penalty is equal to 50% of the gross income derived from activities by the person who is subject to the penalty under IRC § 6700(a)(2)(A) for making a false or fraudulent statement; and shall be the lesser of $1,000 or 100% of the gross income when the activity is subject to that penalty under IRC § 6700(a)(1).
When a return is audited and it appears that any part of the deficiency for which an assessment is made is due to failure to disclose a listed transaction or a reportable transaction other than a listed transaction, as the terms are defined in IRC § 6707A on the taxpayer's federal income tax return, there is imposed a penalty, which in the case of a unreported listed transaction is equal to 75% of the amount of the deficiency, and, in the case of other reportable transactions, is equal to 35% of the amount of the deficiency.

Except as otherwise provided in rules of the Tax Commissioner, these penalties are in addition to any other penalty imposed by the West Virginia Tax Procedure and Administration Act or the Tax Shelter Voluntary Compliance Program.\(^1\)

**¶ 406.5 Innocent Spouse Relief**

_Law:_ W. Va. Code § 11-10-18(k)

A spouse relieved of liability for delinquent personal income taxes in certain cases, under regulations prescribed by the Tax Commissioner, if:

(1) A joint personal income tax return was made for a taxable year;

(2) On the return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse;

(3) The other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was a substantial understatement; and

(4) Taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for the taxable year attributable to the substantial understatement, then the other spouse is relieved of any liability for tax, including interest, additions to tax, and other amounts for the taxable year to the extent the liability is attributable to the substantial understatement.

The term "grossly erroneous items" means, with respect to any spouse:

(1) Any item of gross income attributable to a spouse which is omitted from gross income; and

(2) Any claim of a deduction, credit or basis by a spouse in an amount for which there is no basis in fact or law.

Innocent spouse relief is available only when:

\(^1\) The West Virginia Tax Procedure and Administration Act is codified in W. Va. Code § 11-10-1 et seq.

The Tax Shelter Voluntary Compliance Program is codified in W. Va. Code § 11-10C-1 et seq.
(1) There is a “substantial understatement” of tax. For this purpose, the term "substantial understatement" means any understatement, as defined in regulations prescribed by the Tax Commissioner which exceed $500.

(2) The understatement exceeds the amounts specified in paragraphs (a) and (b), below, and complies with the requirements of paragraphs (c), (d) and (e) below.

(a) **W. Va. adjusted gross income of $20,000 or less**: If the innocent spouse’s West Virginia adjusted gross income for the readjustment year is $20,000 or less, this the innocent spouse relief applies only if the understated liability is greater than 10% of the adjusted gross income of the innocent spouse.

(b) **W. Va. adjusted gross income of more than $20,000**: If the innocent spouse’s West Virginia adjusted gross income for the readjustment year is more than $20,000, the innocent spouse relief applies only if the understated liability is greater than 25% of the adjusted gross income of the innocent spouse.

(c) As used in paragraphs (a) and (b) above, the term "readjustment year" means the most recent taxable year of the spouse ending before the date the deficiency notice was mailed.

(d) If the innocent spouse is married to another spouse at the close of the readjustment year, the innocent spouse's adjusted gross income includes the income of the new spouse whether or not they file a joint return.

(e) Innocent spouse relief is not available if the for any liability attributable to the omission of an item from gross income.

### ¶ 406.6 Forms and Schedules

The State Tax Department’s website has many of the forms, schedules, instructions and publications mentioned in this chapter. These documents are in PDF format that taxpayers may download, and some forms web fill-in versions. These forms can be accessed at [http://www.wva.state.wv.us/wvtax/default.aspx](http://www.wva.state.wv.us/wvtax/default.aspx).

#### Form No. Name of Form

<table>
<thead>
<tr>
<th>Form No.</th>
<th>Name of Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>IT-100.1A</td>
<td>Certification of Exemption from Withholding upon Disposition of West Virginia Real Estate</td>
</tr>
<tr>
<td>IT-100.1A</td>
<td>Affidavit of Residence or Principal Residence</td>
</tr>
<tr>
<td>IT-101A</td>
<td>Employers Withholding Tax Tables - Booklet</td>
</tr>
<tr>
<td>IT-101Q</td>
<td>Employer’s Annual Return of Income Tax Withheld</td>
</tr>
<tr>
<td>IT-101Q</td>
<td>Employer's Quarterly Return of Income Tax Withheld – Form and Instructions</td>
</tr>
<tr>
<td>Form</td>
<td>Description</td>
</tr>
<tr>
<td>------</td>
<td>-------------</td>
</tr>
<tr>
<td>IT-101-V</td>
<td>Employer's West Virginia Income Tax Withheld</td>
</tr>
<tr>
<td>IT-102-1</td>
<td>Affidavit of West Virginia Income Tax Withheld by Employer</td>
</tr>
<tr>
<td>IT-103</td>
<td>Annual Reconciliation - Income Tax Reported as Withheld During Year</td>
</tr>
<tr>
<td>IT-104.1</td>
<td>Low-Income Earned Income Exclusion Election</td>
</tr>
<tr>
<td>IT-105</td>
<td>Out-Of-State Withholding Instructions</td>
</tr>
<tr>
<td>IT-105.1</td>
<td>Electronic Media Specifications W-2</td>
</tr>
<tr>
<td>IT-140</td>
<td>Personal Income Tax Forms</td>
</tr>
<tr>
<td>IT-140</td>
<td>Personal Income Tax Forms (Web fill-in version)</td>
</tr>
<tr>
<td>IT-140</td>
<td>Personal Income Tax Forms and Instructions</td>
</tr>
<tr>
<td>IT-140-ES</td>
<td>Individual Estimated Income Tax Payment: Instructions</td>
</tr>
<tr>
<td>IT-140-NRC</td>
<td>Nonresident Composite Return</td>
</tr>
<tr>
<td>IT-140-NRS</td>
<td>Special Nonresident Income Tax Return (Web fill-in version)</td>
</tr>
<tr>
<td>IT-140-V</td>
<td>Individual Income Tax Electronic Payment Voucher &amp; Instructions</td>
</tr>
<tr>
<td>IT-140-W</td>
<td>Withholding Tax Schedule</td>
</tr>
<tr>
<td>IT-141</td>
<td>Fiduciary Income Tax Return</td>
</tr>
<tr>
<td>IT-210</td>
<td>Underpayment of Estimated Tax by Individuals</td>
</tr>
<tr>
<td>IT-210</td>
<td>Underpayment of Estimated Tax by Individuals (Web fill-in version)</td>
</tr>
<tr>
<td>NRAE</td>
<td>Application for Certificate of Full or Partial Exemption</td>
</tr>
<tr>
<td>NRER</td>
<td>West Virginia State Tax Department Application for Early Refund of Withholding on Sales of Real Property by Nonresidents</td>
</tr>
<tr>
<td>NRSR</td>
<td>West Virginia State Tax Department Return of Income Tax Withholding for Nonresident Sale of Real Property</td>
</tr>
<tr>
<td>NRW-1</td>
<td>Extension of Time to File Information Returns</td>
</tr>
<tr>
<td>NRW-2</td>
<td>Statement of West Virginia Income Tax Withheld for Non-resident Individual or Organization</td>
</tr>
<tr>
<td>NRW-3</td>
<td>Information Report of 761 Non partnership Ventures</td>
</tr>
<tr>
<td>NRW-4</td>
<td>Non-resident Income Tax Agreement</td>
</tr>
<tr>
<td>OPT-1</td>
<td>Taxpayer E-File Opt Out Form</td>
</tr>
<tr>
<td>RC</td>
<td>Certification of Exemption from Withholding upon Disposition of West Virginia Real Estate Affidavit of Residence or Principal Residence</td>
</tr>
<tr>
<td>SPF 100</td>
<td>West Virginia Income/Business Franchise Tax Return -- S Corporations and Partnership (Pass-Through Entity)</td>
</tr>
<tr>
<td>WV/IT-104</td>
<td>West Virginia Employee's Withholding Exemption Certificate</td>
</tr>
<tr>
<td>WV-945-V</td>
<td>West Virginia Certificate of Nonresidence</td>
</tr>
<tr>
<td>WV-8379</td>
<td>Backup Withholding Payment Voucher</td>
</tr>
<tr>
<td>Schedules</td>
<td></td>
</tr>
<tr>
<td>Sch A</td>
<td>Nonresidents / Part-Year Residents Schedule of Income</td>
</tr>
<tr>
<td>Sch F</td>
<td>Statement of Claimant to Refund Due Deceased Taxpayer</td>
</tr>
<tr>
<td>Sch FTC-1</td>
<td>Family Tax Credit Schedule</td>
</tr>
<tr>
<td>Sch H &amp; E</td>
<td>Certification for Permanent and Total Disability and Credit for...</td>
</tr>
</tbody>
</table>

*Schedules*

Family Tax Credit Tables and Low Income / Earned Income Exclusion Worksheets

| Sch A | Nonresidents / Part-Year Residents Schedule of Income |
| Sch F | Statement of Claimant to Refund Due Deceased Taxpayer |
| Sch FTC-1 | Family Tax Credit Schedule |
| Sch H & E | Certification for Permanent and Total Disability and Credit for... |
Income Tax Paid to Another State
Sch HEPTC-1 Homestead Excess Property Tax Credit
Sch J Military Incentives Credit
Sch L Application for Extension of Time to File
Sch L Application for Extension of Time to File (Web fill-in version)
Sch M Modifications to Adjusted Gross Income
Sch UT Purchaser’s Use Tax Schedule
RECAP Tax Credit Recap Schedule
AFTC-1 Alternative-Fuel Tax Credit
AG-1 Environmental Agricultural Equipment Tax Credit
ATTC-1 Apprenticeship Training Tax Credits
CCP Capital Company Credit
CPITC-1 Commercial Patent Incentives Tax Credit
EOTC-PIT Economic Opportunity Tax Credit Claims Against Personal Income Tax
FIIA-TCS West Virginia Film Industry Investment Tax Credit
HGBITC-1 High-Growth Business Investment Tax Credit
NFA-1 Non-family Adoption Credit Schedule
NIPA-2 Neighborhood Investment Program Credit Schedule
RBIC Historic Rehabilitated Building Investment Credit
RBIC-A Residential Historic Rehabilitated Building Investment Credits
SETC Residential Solar Energy Tax Credit
SRDTC-1 Strategic Research and Development Tax Credit

¶ 406.7 Place for Filing Returns and Other Documents


Returns and other document due under the West Virginia Personal Income Tax Act by or for resident and nonresident individuals, partnerships, S corporations and resident and nonresident estates and trusts; may be electronically filed, hand delivered, or mailed to the West Virginia State Tax Department at the following addresses:

Returns and other documents may be hand delivered between the hours of 8:30 a.m. to 4:30 p.m., Monday through Friday, except legal holidays in this State, to the following address:

West Virginia State Tax Department
Tax Account Administration Division
West Virginia Revenue Center
1001 Lee Street, East
Charleston, West Virginia 25301

Applications for extension of time to file are mailed to:
West Virginia State Tax Department
Tax Account Administration Division
P.O. Box 2585
Charleston, WV 25329-2585
Declarations of estimated income tax and installment tax payments are filed electronically, or mailed to:
West Virginia State Tax Department
Tax Account Administration Division
P.O. Box 342
Charleston, WV 25322

Fiduciary income tax returns are filed electronically, or mailed to:
West Virginia State Tax Department
Tax Account Administration Division
P.O. Box 1071
Charleston, WV 25324-1071

Individual income tax electronic payment vouchers are mailed to:
West Virginia State Tax Department
Electronic Filing Office
PO Box 342
Charleston, WV 25322-0342

Nonresident real property withholding tax forms and returns are mailed to:
West Virginia State Tax Department
IAD/Withholding
PO Box 784
Charleston WV 25323-0784

Personal income tax returns claiming a refund are filed electronically, or mailed to:
West Virginia State Tax Department
PO Box 1071
Charleston, WV 25324-1071

Personal income tax returns showing a balance due are filed electronically, or mailed to:
West Virginia State Tax Department
PO Box 3694
Charleston, WV 25324-3694

Returns filed by partnerships and other pass-through entities are filed electronically, or mailed to:
West Virginia State Tax Department
Tax Account Administration Division
PO Box 11751
Charleston, WV 25339-1751
West Virginia accepts returns filed electronically through the joint federal and state electronic filing program known as ELF. Additionally, the state permits taxpayers to electronically file their tax returns using their own computers and state approved software. Electronic filing procedures are set forth in State Tax Department Publication WV-1345. See also WVCSR § 110-10D-1 et seq.

Any taxpayer that has a total annual remittance for any single tax that is equal to or greater than $50,000 for a taxable year beginning after December 31, 2012 must electronically file the annual return. This $50,000 threshold is reduced to $25,000 for taxable years beginning after December 31, 2013, and to $10,000 for taxable years beginning after December 31, 2014. See W. Va. Code § 11-10-5z(a) and WVCSR § 110-10D-9.3.a.

¶ 406.8 State Tax Department Publications

The Tax Commissioner publishes a number of informational publications, called Taxpayer Services Division (TSD) publications, regarding taxes and tax programs administered by the State Tax Department. These publications are posted at the State Tax Department’s website. A complete list of TSDs may be found in the introductory materials to this Guidebook. The following publications are relevant to the West Virginia personal income tax:

TSD 110  West Virginia Tax Credits
TSD 389  West Virginia Withholding Requirements for Sales of Real Property by Nonresidents
TSD-380  Requirements for Rehabilitated Building Investment Credit
TSD-380-A Residential Historic Rehabilitated Building Investment Credit
TSD-381  Withholding Tax Information for Employers
TSD-389  Withholding Requirements for Sales of Real Property by Nonresidents
TSD-390  Section 11-21-71a Income Tax Withholding By Partnerships, S Corporations, Estates and Trusts
TSD-391  General Information Regarding Income Tax Withholding Under § 11-21-71a for Nonresident Partners, S Corporation Shareholders, Or Beneficiaries of Estates Or Trusts
TSD-413  West Virginia Tax Tips for Senior Citizens
TSD-418  Helpful Tips on Filing Your Personal Income Tax Return
TSD-421  Registration Procedures for a Withholding Only Account
TSD-422  Income Tax Responsibilities for West Virginia Resident Shareholders of an Ohio S - Corporation
TSD-428  Filing and Remitting of Income Tax Withheld
TSD-430  Income Tax Information for Spouses of United States Military Service Members
TSD-431  My Taxes ACH Debit Payments
TSD-432  Backup Withholding from Gambling Winnings
WV-1345  Electronic filing procedures
Note: A list of all TSD publications can be found in the introductory materials to this Guidebook.

¶ 406.9 State Tax Department Rules and Regulations

Administrative regulations are called administrative rule. Rules may be interpretive, legislative or procedural. Duly promulgated legislative rules have the force and effect of law. A state agency may promulgate a legislative rule only after the Legislature has reviewed and authorized its promulgation. Under limited circumstances emergency legislative rules may be promulgated that are later reviewed by the Legislature. Upon the filing of an emergency rule or the filing of an amendment to an emergency rule by an agency, the Secretary of State is required to review the rule or the amendment and, within 42 days of the filing of the rule or amendment must issue a decision as to whether or not the emergency rule or the amendment to an emergency rule should be disapproved. The Secretary of State is required to disapprove an emergency rule or an amendment to an emergency rule if he or she determines:

(1) That the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; or

(2) That an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or

(3) That the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of W. Va. Code § 29A-3-15.

Regulations mentioned in this chapter are posted at the webpages of the Secretary of State http://www.sos.wv.gov. The regulations are located in the Administrative Law Section of the webpage, under “Search for Rules.” On the next screen select “Code of State Rules.” The agency issuing the rules mentioned in this chapter is the Tax Department. These rules include:

Abusive Tax Shelters http://WVCSR 110-10J-1 et seq.
Combined Returns (e.g. BFT & PIT) http://WVCSR 110-10K-1 et seq.
Obtaining Child Support From Income Tax Refunds http://WVCSR 93-03-1 et seq.
Payment of Taxes by Credit or Debit Card http://WVCSR 110-10B-1 et seq.
Payment of Taxes by Electronic Funds Transfer http://WVCSR 110-10F-1 et seq.
Personal Income Tax http://WVCSR 110-21-1 et seq.
Senior Citizens Credit for Property Taxes Paid http://WVCSR 110-21B-1 et seq.
Residential Solar Energy Tax Credit http://WVCSR 110-21D-1 et seq.
Use and Acceptance of Electronic Records http://WVCSR 110-10D-1 et seq.
INDEX – CHAPTER 4 – NONCORPORATE INCOME TAX

Accounting methods ¶ 401.3
Accounting periods ¶ 401.3
Administrative regulations and rules ¶ 405.8
Amended returns
   When amended return required ¶ 401.30

Basis of tax ¶ 401.2

Change of accounting methods ¶ 401.3
Change of accounting period ¶ 401.3
Change of federal taxable income
   When report of change required ¶ 401.31
Change of election ¶ 401.32
   When change made for federal income tax purposes ¶ 401.32
   Change of election of husband and wife ¶ 401.32
   Change from joint to separate returns ¶ 401.32
   Husband and wife, different states of residence ¶ 401.32
   Subject to approval by Tax Commissioner ¶ 401.32
Composite returns ¶ 401.28
Computation of tax on income of nonresident ¶ 401.20
Computation of tax of part-year resident ¶ 401.21
Credit for income taxes paid to another state ¶ 401.38
   Limitations on credit ¶ 401.38
   Special rules for Kentucky, Maryland, Ohio, Pennsylvania and Virginia ¶ 401.38

Declarations of estimated tax ¶ 401.22
   Declaration of deceased taxpayer ¶ 401.22
   Estimated tax defined ¶ 401.22
   Joint declaration of husband and wife ¶ 401.22
Domicile ¶ 401.12

Estates and trusts ¶ 403.1 through 403.14
   Charitable deduction ¶ 403.4
   Computation of tax on income of nonresident estates and trusts ¶ 403.10
   Exemption for estates and trusts ¶ 403.8
   Fiduciary adjustment ¶ 403.7, ¶ 401.18
   Alternative allocation of estate or trust items ¶ 403.18
   Fiduciary income tax returns ¶ 403.13
   General ¶ 403.1
   Lump sum distribution ¶ 403.6
   Nonresident estate defined ¶ 403.2
   Nonresident trust defined ¶ 403.2
   Qualified funeral trusts ¶ 403.14
Rate of tax ¶ 403.9
Resident estate defined ¶ 403.2
Resident trust defined ¶ 403.2
Share of nonresident estate or trust or beneficiary in West Virginia

source income ¶ 403.12, ¶ 401.18, ¶ 401.19
Distributable net income from West Virginia sources ¶ 401.19
Characters of items ¶ 401.19
Alternative methods of determining shares of distributable net income ¶ 401.19
West Virginia source income of nonresident estate or trust ¶ 403.3, ¶ 403.11
West Virginia taxable income of resident estate or trust ¶ 403.5

Estimated tax
Additions to tax for underpayments of estimated tax ¶ 401.28
Amount of underpayment ¶ 401.28
Application of additions when tax withheld on wages ¶ 401.28
Exception ¶ 401.28
Period of underpayment ¶ 401.28
Amount of payments of estimated tax ¶ 401.24

Declaration of deceased taxpayer ¶ 401.22
Declaration of estimated tax ¶ 401.22
Declaration of farmer ¶ 401.22
Declaration of husband and wife ¶ 401.22
Estimated tax defined ¶ 401.22
Filing of declaration of estimated tax ¶ 401.22
Payment of estimated tax ¶ 401.22
Return as amendment of declaration ¶ 401.22
Return as declaration ¶ 401.22
When amended declaration required ¶ 401.22

Extension of time
Automatic extension of time to file ¶ 401.35
To file declaration of estimated tax ¶ 401.35
To file annual return ¶ 401.35
To pay tax ¶ 401.36
Amount determined as deficiency ¶ 401.36
Claims in bankruptcy or receivership proceedings ¶ 401.36
Furnishing of security ¶ 401.36

West Virginia extension of time to file ¶ 401.35

Federal adjusted gross income
Federal adjusted gross income defined ¶ 401.1
Low income earned income exclusion ¶ 401.6
Modifications decreasing federal adjusted gross income ¶ 401.5
Modifications increasing federal adjusted gross income ¶ 401.4
Other modifications to federal adjusted gross income ¶ 401.7

Fiduciary adjustment
Share of resident trust beneficiary ¶ 401.18
Share of nonresident trust beneficiary ¶ 401.19
Forms and schedule ¶ 406.6

Individual income taxes ¶ 401.1 through ¶401.43
Interest and additions to tax ¶406.3
Innocent spouse relief ¶ 406.5

Low income earned income exclusion ¶ 401.6
   Eligible taxpayer ¶ 401.6
   Earned income defined ¶ 401.6
Low income family tax credit ¶ 401.42
Low income refundable credit for property taxes paid on homestead ¶ 401.40
   Low income defined ¶ 401.40
   Exception when claimant pays alternative federal minimum tax ¶ 401.40
   Exception when member of claimant’s household is not low income ¶ 401.40
   Maximum credit ¶ 401.40
Terms defined ¶ 401.40
   Assessed value
   Gross household income
   Home owner
   Homestead
   Low income
   Low income person
   Owner
   Real property taxes paid
   Senior citizen property tax relief credit
   Sixty-five years of age or older
   Tax increment
   Tax year
   Used and occupied exclusively for residential purposes

Members of armed forces
   Active duty military pay ¶ 401.8
   Combat pay ¶ 401.8
   Income from armed forces ¶ 401.8
      Income taxes of member of armed forces on death of member
         general rule ¶ 401.27
      Individuals missing in action ¶ 401.27
      Certain military or civilian employees of military
         dying from overseas injuries ¶ 401.27
   Spouse of military service member ¶ 401.8
Minimum tax ¶ 401.37
Modifications decreasing federal adjusted gross income ¶ 401.5
   Interest on federal obligations exempt from state taxation ¶ 401.5
   Interest other federal obligations included in FAGI but exempt from state tax ¶ 401.5
   Dividends to shareholders paid by RICS to extent taxable for federal income tax
      Purposes but exempt from state tax ¶ 401.5
Income included in FAGI not subject to WV income tax ¶ 401.5
Refunds or credits included in FAGI for overpayment state income taxes ¶ 401.5
West Virginia retirement benefits ¶ 401.5
Police and firemen retirement benefits ¶ 401.5
Military retirement income ¶ 401.5
Retirement income of person age 65 or older or permanently/totally disabled ¶ 401.5
Retirement or disability income of surviving spouse ¶ 401.5
Contributions to medical savings accounts ¶ 401.5
Any other income the State is prohibited from taxing ¶ 401.5
Payments to WV College Prepaid Tuition Program and Savings Program not allowed
as deduction for federal income tax purposes ¶ 401.5
Payments for long-term care insurance not allowed as deduction
for federal tax purposes ¶ 401.5
Pension benefit guaranty modification ¶ 401.5
Certain income of National Guard or Armed Forces Reserves ¶ 401.5
Certain WV turnpike tolls ¶ 401.5
Contributions qualified trust for autistic child ¶ 401.5
Modifications increasing federal adjusted gross income ¶ 401.4
Amount deducted under IRC § 199 for domestic production activities ¶ 401.4
Certain withdrawals from medical savings accounts ¶ 401.4
Certain withdrawals from IRC § 529 prepaid tuition plans ¶ 401.4
Income from obligations of other states ¶ 401.4
Income from federal obligations not exempt from state taxation ¶ 401.4
Interest to carry WV tax-exempt obligations ¶ 401.4
Lump sum distributions taxed under IRC § 402(e) ¶ 401.4
Deduction when determining FAGI not allowed for WV income tax purposes ¶ 401.4

Nonresident individuals
Nonresident individual defined ¶ 401.12
When person domiciled in State is nonresident for tax purposes ¶ 401.12
Domicile
Permanent place of abode
When person domiciled outside WV treated as resident for tax purposes ¶ 401.12
Days in and out of West Virginia
West Virginia source income of ¶ 401.18
Awards and prizes
Earned income
Estate and trust income
Income connected with State
Income from intangibles
Partnership income
S corporation income
Nonresident partner ¶ 401.15
West Virginia source income of nonresident partners ¶ 401.15
Special rules as to West Virginia sources ¶ 401.15
Alternative methods for allocating distributive share ¶ 401.15
Character of partnership items ¶ 401.15
Disregard of partnership provision when principal purposes is
tax avoidance or evasion ¶ 401.15
Nonresident shareholder of S corporation ¶ 401.17
West Virginia source income ¶ 401.17
Alternative methods of allocation of distributive share ¶ 401.17
Shareholder modification of distributive share ¶ 401.17
Character of items ¶ 401.17

Other credits against tax ¶ 401.43
Other modifications to federal adjusted gross income ¶ 401.7
Fiduciary adjustment for estate or trust income ¶ 401.7
Modification of FAGI of partnership or S corporation ¶ 401.7

Overpayments of tax ¶ 406.2
Return as claim for refund ¶ 406.2
Other claims for refund ¶ 406.2
Intercept of refunds or credits ¶ 406.2¶
Applied against other delinquent State tax ¶ 406.2
Agreement with Internal Revenue Service ¶ 406.2
Delinquent child support ¶ 406.2
Municipal cost offset program ¶ 406.2

Part-year residents
Computation of tax ¶ 401.21
West Virginia source income ¶ 401.9
Special accruals ¶ 401.9

Partnership Returns ¶ 404.1 through ¶ 404.8
Allocation and apportionment – Multistate businesses ¶ 404.5
Direct allocation of income and deductions ¶ 404.4
Exemptions and credits ¶ 404.8
Filing requirements ¶ 404.1
Modification of federal adjusted gross income ¶ 404.7
Nonresident partnership[ defined ¶ 404.03
Partnership income and deduction ¶ 404.2
Resident partnership defined ¶ 404.3
Special allocations between partners ¶ 404.6

Payment of tax ¶ 401.33
Method of paying tax ¶ 401.34
Extension of time to pay ¶ 401.36

Penalties for abusive tax shelters ¶ 406.4
Permanent place of abode ¶ 401.12

Personal exemptions ¶ 401.11
Child claimed as dependent ¶ 401.11
Individuals, resident or nonresident ¶ 401.11
Number of personal exemptions ¶ 401.11
Surviving spouse ¶ 401.11
Place for filing returns and other document ¶ 406.7
Procedure and administration ¶ 406.1 through ¶ 406.9
   Administrative regulations and rules ¶ 406.0
   Forms and schedules ¶ 406.6
   Innocent spouse relief ¶ 406.5
   Interest and additions to tax ¶ 406.3
   Procedure and administration ¶ 406.1
   State Tax Department publications ¶ 406.8
   State Tax Department rules and regulations ¶ 406.9
Publications ¶ 406.8

Rate of tax
   Single individual ¶ 401.13
   Married individuals filing joint returns ¶ 401.13
   Married individuals filing separate returns ¶ 401.13
   Estates ¶ 401.13
   Trusts ¶ 401.13
Resident individuals ¶ 401.12
   Resident individual defined ¶ 401.12
Resident partner ¶ 401.14
   Partner's modification ¶ 401.14
   Character of items of distributive share ¶ 401.14
   Disregard of partnership provision when purposes is tax avoidance/evasion ¶ 401.14
Resident shareholder of S corporation ¶ 401.16
Returns and liabilities ¶ 401.26
   Amended returns, when required ¶ 401.30
      Composite returns ¶ 401.28
   Due date of annual return ¶ 401.26
   Returns of husband and wife ¶ 401.26
   Return of decedent ¶ 401.26
   Joint return after death ¶ 401.26
   Return of individual under disability ¶ 401.26
   Return of fiduciary of estate or trust ¶ 402.13
   Return of partnership ¶ 403.1
   Return of S corporation ¶ 404.1
   Signing of returns and other document ¶ 401.29
Rules and regulations ¶ 406.9

S corporation returns ¶ 405.1 through ¶ 405.7
   Apportionment of business income and deductions ¶ 405.5, ¶ 404.5
   Corporation income and deductions ¶ 405.3
   Direct allocation of nonbusiness income and deductions ¶ 405.4
   Exemptions and credits ¶ 405.7
   Filing requirements ¶ 405.1
   Modifications of federal adjusted gross income ¶ 405.6
   Nonresident S corporation defined ¶ 405.2
Resident S corporation defined ¶ 405.2
Summary ¶ 405.1
Signing of returns and other document ¶ 401.29
   In general ¶ 401.29
   Partnerships ¶ 401.29
   S corporations ¶ 401.29
   Certifications ¶ 401.29
Senior citizens
   Property tax relief for tax years before 2012 ¶ 401.41
Senior citizens and disabled persons
   Decreasing modification to FAGI ¶ 401.5
   Tax credit for property taxes paid on homestead ¶ 401.39
      Low income defined ¶ 401.39
      Low income senior citizen or disabled person ¶ 401.39
      Exception for individuals that pay federal alternative minimum tax ¶ 401.39
      Credit for property tax paid on first $20,000 of taxable assessed value ¶ 401.39
      Property taxes paid defined ¶ 401.39
      Confidentiality exception ¶ 401.39
Spouse
   Innocent spouse relief ¶ 406.5
   Spouse of military service member ¶ 401.8
   Surviving spouse exemption ¶ 401.11
State Tax Department
   Forms and schedules ¶ 406.6
   Publications ¶ 406.8
   Rules and regulations ¶ 406.9
Tax year ¶ 401.3
West Virginia source income
   Nonresident beneficiary ¶ 401.19
   Nonresident individual ¶ 401.8
      Awards and prizes ¶ 401.8
      Earned income ¶ 401.8
      Income connected with State
      Estate or trust income ¶ 401.8
      Partnership income ¶ 401.8
      S corporation income ¶ 401.8
      Business income from multistate business activity ¶ 401.8
      Income from Armed forces ¶ 401.8
         Combat pay
         Active duty military pay
      Spouses of military service members ¶ 401.8
   Nonresident partner ¶ 401.8
   Nonresident shareholder of S corporation ¶ 401.8
West Virginia taxable income ¶ 401.10
Withholding tax

Duties of employers who withhold tax ¶ 402.2
   Payment of withheld tax ¶ 402.2
   Electronic filing of returns ¶ 402.2
   Electronic payment of tax ¶ 402.2
   Final return ¶ 402.2
   Deposit in trust ¶ 402.2
   Annual reconciliation ¶ 402.2

Employer liability for withheld tax ¶ 402.4

Employer withholding tax ¶ 402.4
   Who must withhold ¶ 402.4
   Definition of employee ¶ 402.4
   Amount of tax to withhold ¶ 402.4
   Withholding tax exemptions ¶ 402.42
   Employees exempt from West Virginia withholding ¶ 402.4
   Employees partly exempt from withholding ¶ 402.4
   Employees entirely subject to withholding ¶ 402.4

Failure of employer to withhold tax ¶ 402.5

Information statement for employees (W-2) ¶ 402.3

On certain lottery winnings ¶ 402.9
   Lottery winnings subject to withholding ¶ 402.0
   Withholding statement by recipient ¶ 402.9
   Backup withholding ¶ 402.9

   Lottery includes all games regulated by Lottery Commission
   Lottery winnings treated like employee compensation ¶ 402.9

On West Virginia source income of nonresident ¶ 402.6

Beneficiary of estates or trusts ¶ 402.6
   Partner ¶ 402.6
   Shareholder of S corporation ¶ 402.6

Sale by nonresident of real property in West Virginia ¶ 402.8
   Rate and measure of tax ¶ 402.8
   Alternative rate and measure of tax computation of tax ¶ 402.8
   Definitions ¶ 402.8
      Resident individual
      Nonresident individual
      Resident business entity
      Nonresident business entity
      Resident estate or trust
      Nonresident estate or trust
      Net proceeds

Multiple transferors ¶ 402.8
Remittance of withholding tax ¶ 402.8
Total payment form ¶ 402.8
When cash at closing is less than tax ¶ 402.8
When withholding required ¶ 402.8
When withholding not required ¶ 402.8
Residency exception
Principal residence exception
Foreclosure exception
Federal and state agency exception
FNMA, GNMA, FHLMC exception
Tax-exempt organization
Like kind exchange
Zero consideration

Withholding by real estate reporting person ¶ 402.8
CHAPTER 5

CONSUMER SALES AND SERVICE TAX AND USE TAX

By John A. Mairs

John A. Mairs is a member in the Charleston, West Virginia law firm of Jackson Kelly PLLC. Mr. Mairs practice primarily involves representation of businesses with West Virginia and local tax issues and he has frequently lectured on these topics.

Published by West Virginia Society of Certified Public Accountants
900 Lee Street, E. Suite 1201, Charleston, WV 25301
© Commerce Clearing House, Inc. © 2012 West Virginia Society of Certified Public Accountants
All Rights Reserved

Table of Contents

| ¶ 501 History of the Sales Tax and the Use Tax .......................................................... 5-2 |
| ¶ 502 Overview of the Sales Tax .................................................................................. 5-4 |
| ¶ 503 Overview of the Use Tax .................................................................................... 5-4 |
| ¶ 504 "Sale" Defined .................................................................................................... 5-5 |
| ¶ 505 "Use" Defined ..................................................................................................... 5-5 |
| ¶ 506 "Gross Proceeds," "Purchase Price" and “Sales Price” Defined......................... 5-5 |
| ¶ 507 Sales to Related Parties ................................................................................... 5-7 |
| ¶ 508 Rates of the Sales Tax ....................................................................................... 5-7 |
| ¶ 509 Rates of the Use Tax ......................................................................................... 5-7 |
| ¶ 510 Tax on Motor Vehicles .................................................................................... 5-8 |
| ¶ 511 Per Se Exemptions ............................................................................................ 5-9 |
| ¶ 512 Exemptions for Which Exemption Certificate is Required .............................. 5-17 |
| ¶ 513 Records of Using Exemption Certificates ....................................................... 5-20 |
| ¶ 514 Refundable Exemptions .................................................................................... 5-20 |
| ¶ 515 Agents and Contractors Assertion of Principal's Exemption ......................... 5-24 |
| ¶ 516 Methods for Claiming Refundable Exemptions (Refund or Credit) ................. 5-25 |
| ¶ 517 Direct Pay Permits ........................................................................................... 5-25 |
| ¶ 518 Materials Produced or Manufactured By a Contractor .................................... 5-25 |
| ¶ 519 Apportionment ................................................................................................. 5-26 |
| ¶ 520 Use Tax Exemptions ......................................................................................... 5-26 |
| ¶ 521 Credit Against the Use Tax for Sales Tax Paid to Another State ................. 5-27 |
| ¶ 522 Collection of the Sales Tax ............................................................................... 5-27 |
| ¶ 523 Collection of the Use Tax ................................................................................ 5-27 |
| ¶ 524 Bond Required of Nonresident Contractors for Payment of Use Tax ............ 5-28 |
| ¶ 525 Collection of Use Tax from Certain Out-of-State Volume Retailers ............... 5-28 |
| ¶ 526 Vendor Liability for the Sales Tax .................................................................. 5-29 |
Editor's Note: This chapter has not been updated and, therefore, may not reflect changes in the law that may have been made by the West Virginia Legislature during 2012.

¶ 501 History of the Sales Tax and the Use Tax

The West Virginia consumer sales and service tax ("Sales Tax") was first adopted in West Virginia in 1933 as a temporary tax known as the general consumer sales tax. The Sales Tax was made permanent in 1937. In order to maintain the competitiveness of in-state sellers of goods and services with vendors operating solely out-of-state, a use tax ("Use Tax") was enacted in 1951. The Sales Tax and the Use Tax are complementary laws and are construed so that a purchase from a vendor located outside of West Virginia will be subject to the Use Tax if the purchase is used in West Virginia, just as if the purchase would have been subject to the Sales Tax if it had been purchased from a vendor located in West Virginia. (W. Va. Code § 11-15-1a).

The Sales and Use Taxes were originally imposed only on sales of tangible personal property. Moreover, they were "consumer oriented," providing for broad exemptions for business and intermediate purchasers for resale. The original Sales Tax rate was 2%. Over the years, the legislature has increased the Sales and Use Tax rates several times. The current applicable tax rate is 6% on most sales, except that the tax rate is 3% on certain sales of food intended for human consumption and 5% on the sale of certain motor vehicles and on gasoline and special fuel. Beginning January 1, 2012, the rate of tax on certain sales of food is reduced to 2%.

The last comprehensive reform of the Sales and Use Taxes was made over twenty years ago by the West Virginia Tax Reform Act of 1987 ("1987 Act") which resulted in several major changes in the Sales and Use Taxes. The most significant revisions
were: (1) the inclusion of the sale of certain taxable services in the tax base; (2) the adoption of the "directly used or consumed" standard for the allowance of certain business purchase exclusions; and (3) the adoption and repeal of various other exemptions. The overall impact of the 1987 Act was to significantly broaden the tax base. Immediately following the 1987 Act, the number of exemptions from Sales and Use Taxes was 21. Today this number has expanded to at least 64. Since 2004, the Legislature has tended to enact new exemptions as new stand alone sections of Chapter 15, rather than risk opening up W. Va. Code § 11-15-9 to further amendment. The rise in the number of exemptions continues to narrow the tax base, thus making the Sales and Use Tax laws less neutral and further complicating administration and enforcement.

In 2002, the legislature enacted the Simplified Sales and Use Tax Administration Act ("Streamlined Sales Tax Act") intending to further broaden the tax base by requiring out-of-state vendors of tangible personal property, custom software and taxable services to collect and remit Sales and Use Tax on sales to West Virginia customers. In 2003, that Act was renamed the Streamlined Sales and Use Tax Administration Act ("Streamlined Sales Tax Act") and amended by incorporating the substantive conformity provisions of the Streamlined Sales and Use Tax Agreement, which is administered by the Streamlined Sales Tax Governing Board, Inc. into the Sales and Use Tax laws. West Virginia is a voting member of the Governing Board. The Streamlined Sales Tax Act has been amended every year since its enactment, except for 2007.

The purpose of the Streamlined Sales and Use Tax Agreement developed by the participating States is to simplify and modernize Sales and Use Tax administration in the member states in order to substantially reduce the burden of tax compliance. The Agreement focuses on improving Sales and Use Tax administration for all sellers and other types of commerce through the following:

- State level administration of sales and use tax collections.
- Uniformity in the state and local tax bases.
- Uniformity of major tax base definitions.
- Central, electronic registration system for all member states.
- Simplification of state and local tax rates.
- Uniform sourcing rules for all taxable transactions.
- Simplified administration of exemptions.
- Simplified tax returns.
- Simplification of tax remittances.
- Protection of consumer privacy.

The long-term goal of Governing Board is to achieve sufficient uniformity among the participating States and through the use of technology reduce the compliance burden for multistate vendors to encourage Congress to enact legislation requiring multistate vendors who do not have a physical presence in a particular state to collect that state’s
sales and use taxes, when required, from their customers. Today, there are over 7,500 state and local jurisdictions that impose sales and use taxes in some form. Frequently definitions are different and tax bases are different from jurisdiction to jurisdiction even within the same state. The Agreement requires that the tax base of a state and its political subdivision be identical and requires state-level administration of local sales taxes. Until such time as Congress acts to require certain multistate vendors to collect taxes for states in compliance with the Streamlined Sales and Use Tax Agreement, vendor compliance with those collection requirements will remain voluntary.

Numerous definitions and other provisions affecting Sales and Use Tax administration and collection are found in the Streamlined Sales Tax Act. (W. Va. Code § 11-15B-1 et seq).

The State Tax Department has on several occasions promulgated regulations interpreting the Sales and Use Tax. The last time the State Tax Department promulgated comprehensive Sales and Use Tax regulations was in 1992. These regulations are now hopelessly out of date and in many cases cannot now be relied upon.

¶ 502 Overview of the Sales Tax


The Sales Tax is imposed upon the ultimate consumer. There is a presumption that all transactions involving the sale of tangible personal property, custom software or taxable services are subject to either the Sales Tax or Use Tax unless specifically exempted by statute. Thus by definition, sales of real property or intangible property are not subject to the Sales Tax or Use Tax. (See Chapter 6 for a discussion of the West Virginia transfer tax on real property.) There are three categories of exemptions from the Sales and Service Tax: (1) per se exemptions; (2) exemptions for which an exemption certificate is required; and (3) refundable exemptions. Both the seller and the purchaser have defined responsibilities that ensure the collection of the Sales and Service Tax. Ultimately each vendor is personally liable for the collection of the tax and its remittance to the state, unless the vendor takes an exemption certificate or direct pay permit from the purchaser. (W. Va. Code §§ 11-15-3; 11-15-4a; and 11-15-6). It is the consumer, however, who ultimately bears the burden of the tax which is added to the sale price. (W. Va. Code § 11-15-10).

¶ 503 Overview of the Use Tax


The Use Tax is imposed upon the "use" of tangible personal property, custom software or taxable services in West Virginia. The Use Tax was enacted to prevent the avoidance of the Sales Tax by requiring taxpayers purchasing goods, custom software or taxable services out-of-state and using those goods, software or services in-state to pay the Use Tax on such purchases. Purchases which would be exempt from the
Sales Tax if purchased in-state are also exempt from the Use Tax. The sale of tangible personal property for delivery in West Virginia is "prima facie evidence" that such tangible personal property was sold for use in West Virginia.

¶ 504 "Sale" Defined


"Sale," "sales" or "selling," for Sales and Use Tax purposes, includes any transfer of possession or ownership of tangible personal property or custom software for a consideration, including a lease or rental, when the transfer or delivery is made in the ordinary course of the transferor's business and is made to the transferee or his or her agent for consumption or use or any other purpose. These definitions treat rentals and leases, conditional sales contracts, leases with options to purchase, and contracts where possession passes to the purchaser, but the title is retained by the vendor as security for the purchase price as sales for Sales and Use Tax purposes. (WVCSR §§ 110-15-2.15, 110-15-2.79.)

¶ 505 "Use" Defined


The Use Tax applies when the tangible personal property is delivered in West Virginia and the sale is not subject to the Sales Tax. "Use" is defined as the exercise by any person of any right or power over tangible personal property or custom software incident to the ownership, possession or enjoyment of such property, or by any transaction in which possession of or the exercise of any right or power over tangible personal property, custom software or the result of a taxable service is acquired for a consideration, including any lease, rental or conditional sale of tangible personal property or custom software or the use or enjoyment in this state of the result of a taxable service. The Use Tax is designed to include purchases, transfers or exchanges which take place outside of West Virginia and are therefore not subject to the Sales Tax, provided such transactions would otherwise be taxable under the Sales Tax had the transaction taken place within West Virginia. The value of goods produced or manufactured, which are consumed by the producer or manufacturer, may also be subject to Use Tax (see ¶ 516 below).

¶ 506 "Gross Proceeds," "Purchase Price" and “Sales Price” Defined


The computation of the Sales Tax and Use Tax are based upon the purchase price or upon the gross proceeds of sale, for persons producing or selling products or services. There is little distinction between the terms "gross proceeds" and "purchase price."

"Gross proceeds" is defined as:

5-5
[T]he amount received in money, credits, property or other consideration from sales and services within this state, without deduction on account of the cost of property sold, amounts paid for interest or discounts or other expenses whatsoever. Losses shall not be deducted, but any credit or refund made for goods returned may be deducted.

"Purchase price" is defined as:

The total amount for which property, custom software or services are sold, valued in money, whether paid in money or otherwise: Provided, that cash discounts allowed and taken on sales shall not be included.

An alternative definition of “Purchase price” contained in the Streamlined Sales Tax Act, equates the measure of tax with the definition of “Sales price” therein which includes the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, without any deduction for the following:

(i) The seller’s cost of the property sold;
(ii) The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller and any other expense of the seller; and
(iii) Charges by the seller for any services necessary to complete the sale, including delivery and installation changes.

“Sales price” does not include: discounts allowed by the seller; interest, financing and carrying charges from credit extended on the sales if separately stated and taxes imposed on the consumer. (W. Va. Code § 11-15B-2(b)(43) and (46))

Thus, the Sales Tax and Use Tax are levied based on the amounts of cash, property, credit or other property received by the vendor on a sale. However, a trade-in, which is credited against the purchase price or a rebate or discount allowed by the vendor for the item at the time the item is purchased is not included in gross proceeds. (WVCSR § 110-15-2.35.) The value of business stimulants, gifts or promotions designed to induce patronage are not considered to be discounts and do not reduce the gross proceeds. The purchase price and hence gross proceeds is also not reduced by the amount of any "term discount." Therefore, a discount allowed by the vendor to the purchaser if the total amount due is paid within a specified time does not reduce the purchase price. (WVCSR § 110-15-2.68.)

**Example:** If a credit sale provides for a 1% discount for payment received within ten days on a 30-day net credit sale, the 1% discount would not reduce the purchase
price for the purposes of the sales tax if the purchaser paid the full price within ten days.

¶ 507 Sales to Related Parties


If the gross proceeds of sales between related taxpayers are not indicative of the true value of such sales, they may be subject to revaluation to reflect the true value of the item transferred. The Commissioner may adjust and revalue the gross proceeds of sales between affiliated companies or persons to correspond to the gross proceeds of sales of similar tangible personal property, custom software or taxable services between unrelated persons under similar circumstances. (WVCSR § 110-15-9d.2.) Sales of services by one corporation, partnership or limited liability company to another corporation, partnership or limited liability company when the entities are members of the same controlled group are exempt from Sales Tax. (W. Va. Code § 11-15-9(a)(23); See ¶ 512 below).

¶ 508 Rates of the Sales Tax


The general Sales Tax rate is six cents per dollar (6%) of the purchase price. The tax rate on certain sales of food intended for human consumption is two cents per dollar (2%). (W. Va. Code §§ 11-15-3a and 3b). The tax rate on the sale of certain motor vehicles is five cents per dollar. (W. Va. Code § 11-15-3c, See ¶ 510 below). The Sales Tax is computed using a formula that multiplies the purchase price by the tax rate. The tax computation is required to be carried to the third decimal place, and the tax rounded up to the next whole cent whenever the third decimal place is greater than four and rounded down to the lower whole cent whenever the third decimal place is four or less. The vendor may elect to compute the tax due on a transaction on a per item basis or on an invoice basis provided the method used is consistently used during the reporting period.

Sales of gasoline and special fuels are subject to both to Sales Tax and Use Tax and to the Motor Fuels Excise Tax. (W. Va. Code §§ 11-15-18b and 11-14C-1 et seq.). The Motor Fuels Excise Tax consists of two components, a flat rate equal to $.205 per gallon plus a variable (Sales Tax) component equal to 5% of the average wholesale price of the fuel. (W. Va. Code §§ 11-15-18b and 11-14C-5). The Motor Fuel Excise Tax is imposed on the consumer of the fuel but is required to be paid at the time the fuel is imported into this state for delivery to the consumer or retailer or when the fuel is removed from a bulk transfer/storage system location within this state. (W. Va. Code § 11-14C-6).

¶ 509 Rates of the Use Tax
The Use Tax rate is the same as the Sales Tax rates as set forth at ¶ 508 above. The amount of Use Tax imposed on the use of any property or service is reduced by the amount of consumer sales tax lawfully paid to another state. (WVCSR § 110-15-3.3.)

¶ 510 Tax on Motor Vehicles


*Effective July 1, 2008,* sales of motor vehicles to West Virginia residents are subject to the 5% Sales Tax imposed by W. Va. Code § 11-15-3c. The sales price upon which the Sales Tax is imposed does not include that portion of the consideration for the sale represented by the exchange of other vehicles on which this tax or the Motor Vehicle Title Privilege Tax imposed by W. Va. Code § 17A-3-4 was imposed. This tax is imposed on motor vehicles purchased out-of-state by West Virginia residents.

The term “Motor vehicle” is defined in W. Va. Code § 11-15-3c and generally includes every propellable device upon which a person or property may be transported on a highway, including automobiles, buses, and recreational vehicles, such as motor boats, motor homes, all-terrain vehicles, snowmobiles and other similar vehicles which are not used primarily on the state’s highways, but which are moved occasionally on a state highway. The definition of Motor vehicles generally does not include mobile homes, modular and manufactured housing, certain commercial vehicles with a gross weight of 55,000 pounds or more and trailers with a gross weight of 2,000 pounds or more.

Exemptions from the Sales Tax on Motor vehicles include:

1. passenger vehicles offered for rent by daily passenger rental car businesses;

2. vehicles acquired by one corporation, partnership or limited liability company from an affiliated corporation, partnership or limited liability company;

3. vehicles acquired by tax exempt senior citizens service organizations;

4. vehicles acquired by active duty military personnel stationed outside of West Virginia within 9 months of their return to the state;

5. vehicles acquired by registered dealers for resale;
(6) vehicles acquired by the state, any political subdivision thereof, tax exempt volunteer fire department or tax exempt rescue or ambulance squad;

(7) vehicles acquired by an urban mass transit authority;

(8) certain vehicles owned by persons who were not residents of this state at the time the vehicle was purchased;

(9) certain registrations of exempt vehicles; and

(10) special rules apply to certain vehicle leased for more than 30 days by West Virginia residents.

The motor vehicle Sales Tax imposed pursuant to W. Va. Code § 11-15-3c, is collected by the Division of Motor Vehicles and is dedicated to the State Road Fund.

¶ 511 Per Se Exemptions


Per se exemptions are exemptions from the Sales Tax where the purchaser is not required to present an exemption certificate or a direct pay permit to avoid the collection of the tax by the seller. The Tax Commissioner has the authority to designate by rule which Sales Tax exemptions may be asserted without presentation of an exemption certificate or direct pay permit. (W. Va. Code § 11-15-9m). Transactions involving the following types of services and tangible personal property are per se exempted:

Gas, steam or water: Sales of gas, steam or water when delivered to consumers through mains or pipes are exempt; sales of bottled gas or water are not exempt.

Electricity: All sales of electricity are exempt.

Public services regulated by the PSC: Sales of services to the public if such services are regulated by the West Virginia Public Service Commission are exempt. (W. Va. Code § 11-15-8; Reg. § 110-15-8.1.3.)

Textbooks: Sales of textbooks required to be used in schools in West Virginia are exempt whether the textbooks are sold directly to the school or to students. The vendor must keep records to show that the books are required in a school and that the purchaser is a student and that the purchase is for resale.

Isolated transactions: Sales of tangible personal property which are not in the ordinary course of business of the vendor and which are isolated transactions are
exempt from tax. To be an isolated transaction, there may not be more than four such transactions in a twelve-month period by the seller. (Reg. § 110-15-2.39.)

*Delivered newspapers:* Sales of newspapers when delivered to consumers by route carriers are exempt. All other sales of newspapers are taxable.


*Day care centers:* Sales and services performed by licensed day care centers are exempt.

*Lottery tickets:* Sales of West Virginia lottery tickets and materials directly related to the lottery by licensed sales agents are exempt.

*Leases of motor vehicles:* Leases of 30 days or more of motor vehicles that are titled with the West Virginia Department of Motor Vehicles are exempt.

*Certain specific sales of food:* The following specific sales of food are exempt:

1. Food purchased or sold by public or private schools or school sponsored organizations if the food is sold to students and employees during normal school hours;

2. Food purchased or sold by public or private colleges or universities or by a student organization if the food is sold on a contract basis for a specific period at a fixed price without regard to the quantity of the food consumed;

3. Food purchased or sold by nonprofit organizations or a government agency to low income persons if the food is sold at or below cost;

4. Food sold in an occasional manner by a charitable or nonprofit organization if the sale is to obtain revenue for the activities of the organization and the revenue is so expended. Occasional sales are not more than six sales in a 12-month period. A series of sales, such as an auction, which does not last for more than 84 hours is considered one sale;
(5) Food sold by religious organizations at a gathering if the purpose of selling the food is to obtain revenue for the activities of the organization and the revenue is so expended;

(6) Food sold by volunteer fire departments and rescue squads that are exempt for federal income taxes when the purpose of the sale is to obtain revenue for the activities of the organization and the revenue is so expended; and

(7) Food sold by little leagues and other youth groups to obtain revenue for their activities and the revenue is so expended.

*Items purchased with food stamps:* Food and other items purchased with food stamps pursuant to the federal Food Stamp Program or with drafts under the West Virginia Supplemental Food Program are exempt.

*Tickets for school activities:* Sales of tickets to events sponsored directly by elementary and secondary schools located within the state are exempt.

*Advertisements:* Sales of radio and television broadcasting time for advertising and sales of space in circulars (excluding catalogs), magazines, newspapers and on billboards for advertising are exempt.

*Personal services:* The personal services rendered to a person which are not for the purpose of selling property to that person are exempt. It is necessary that there be continuous physical contact for the service to be a personal service. Personal services include barbering, massaging, nursing, shoe shining, manicuring, haircutting etc. Sales of tangible personal property by a person rendering personal services is a separate taxable transaction. (W. Va. Code § 11-15-8; WVCSR §§ 110-15-2.59, 110-15-8.1.2.)

*Professional services:* Professional services, including services rendered by physicians, attorneys, dentists, public accountants, architects, optometrists, professional engineers, registered professional nurses, veterinarians, licensed physical therapists, ophthalmologists, chiropractors, licensed real estate brokers, podiatrists, embalmers, osteopathic physicians and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts, landscape architects, registered professional court reporters, licensed social workers, licensed real estate appraisers, certified real estate appraisers licensed in accordance with W. Va. Code § 37-14-1 et seq., and licensed professional counselors, are exempt. Nonprofessional services provided by professionals are subject to the sales and service tax. (W. Va. Code § 11-15-8; WVCSR § 110-15-8.11.) Professional services by a corporation through an employee who is licensed to provide such services are also exempt unless the corporation is prohibited by West Virginia law from providing a professional service.

Whether or not a service is professional has been the source of much litigation. The person claiming a professional exemption must "clearly establish" the occupation as a
profession. For example, interior decorating is not a professional service because it lacks a general acceptance as a profession, standards of required study or specified attainments of special knowledge as distinguished from a skill. Wooddell v. Dailey, 160 W. Va. 65, 230 S.E.2d 466 (1976).

Contracting: Contracting services, including subcontracting and the services provided by a construction manager, are exempt. Contracting is defined as furnishing of labor, or both labor and materials, in the fulfillment of a written or oral contract for the construction, alteration, repair, or improvement of a new or existing building or structure or any part thereof, which results in a capital improvement to the property. Contracting also includes the removal or demolition of a building or structure or any part thereof. (W. Va. Code § 11-15-2(b)(3); WVCSR § 110-15-2.24.) If work is performed on personal property, rather than on a structure or real estate, it cannot be contracting.

Example: Work on a car by an auto mechanic along with any parts sold would be subject to the sales and service tax since the work is performed on personal property rather than real property and is not contracting.

The term "capital improvement" is defined as an improvement to a building or structure that is intended to last for at least a year without the necessity for regularly scheduled maintenance. (W. Va. Code § 11-15-2(b)(3)(C)(iv)).

In order for work to be considered contracting, it must entail a significant improvement to a structure or real estate as opposed to a minor repair. (WVCSR § 110-15-116.) A minor repair to a structure, building or real estate is not contracting since it is not considered to be a capital improvement. If a subcontractor cannot determine whether the work to be performed constitutes a capital improvement, the subcontractor may obtain a "Certificate of Capital Improvement" from the contractor, on the form provided by the State Tax Department, which will relieve the subcontractor from any obligation to collect the sales and service tax. An example of a Certificate of Capital Improvement is set forth at ¶ 537 below.

Example: Replacement of the roof of a building as well as any roofing materials installed is exempt as contracting even though done on a time and material basis since the work is on a structure and it constitutes a capital improvement.

Example: The replacement of a kitchen faucet is not contracting, since this does not result in a significant improvement to the building.

On the other hand, the remodeling of a kitchen including the replacement of the faucet is considered contracting since it is work on a building and constitutes a significant (capital) improvement thereto.

Contracting does not include work on a structure or real property if the work is part of and "incidental to the sale of tangible personal property" by a vendor in the business of
selling that property. Work is considered to be part of a sale if the installation is arranged by the seller. Installation of the following types of tangible personal property is always considered to be incidental, whether the installation is done by the merchant or a third party: wall to wall carpeting, mobile homes, window air conditioners, dishwashers, washing machines or dryers or other household appliances, drapery rods, window shades, venetian blinds, canvas awnings, freestanding commercial equipment and freestanding industrial equipment. (WVCSR § 110-15-8a.6.)

**Example:** An electrical appliance store sells a dishwasher for $600 and arranges for its installation by an independent electrical contractor for $75. The sale of the dishwasher and the service charge for its installation are subject to tax even though the installation exceeds the 5% of sales price since installation of dishwashers is always incidental to their sale.


**Services for an employer:** Services rendered by an employee to his or her employer are exempt, but services not within the scope of the employee-employer relationship and services rendered by independent contractors are not exempt. (W. Va. Code § 11-15-2(b)(18)). In determining whether an individual is an independent contractor or employee, the "right to control" standard is used. Other factors that may be considered, but are not dispositive, include: whether a worker is required to comply with instructions; whether a worker received training; whether a worker’s services are integrated into the operation of the business; whether there is a continuing work relationship; whether the hours are set by the worker himself; whether there are written reports; whether payment is by the hour, week or month; whether a worker furnishes his own tools and materials; whether a worker is subject to risk of economic loss in performing his job; whether a worker is performing jobs for more than one business at the same time; and a number of other factors. (WVCSR § 110-15-60.1 et seq.)

**Sales prohibited from taxation by law:** Sales which are prohibited from taxation by federal or state law are exempt, but the vendor must keep records to verify that a sale is to a person not subject to tax.

**Charges for room and board by fraternities and sororities to their members:** Food and rooms provided by fraternities and sororities on a fixed contract price are exempt.
Charges for transportation of passengers in interstate commerce: Sales of tickets to passengers for transportation in interstate commerce are exempt.

Casual and occasional sales by and sales to certain exempt organizations: Sales at fund raisers are exempt when of limited duration (not more than 84 hours) and no more than six are held during any 12-month period, if such fund raisers are held by one of the following types of IRC § 501(c)(3) or 501(c)(4) organizations:

1. A church or association of churches;
2. A public or private elementary or secondary school;
3. An organization which annually receives more than 50% of its support from grants, charitable contributions or membership fees;
4. An organization which has no employees and its net income from fund raisers is donated to an organization exempt under IRC § 501(c)(3) or § 501(c)(4); or
5. A youth organization such as the Boy Scouts and Girl Scouts.

Sales of tangible personal property and services to the organizations described above are exempt if used or consumed in the activities for which the organizations were formed.

Tuition charged by educational summer camps: Tuition charged for summer camps which are primarily educational is exempt. Camps which are primarily athletic or recreational are not exempt. This exemption does not extend to the sale of services and tangible personal property by an educational summer camp.

Sales of motor vehicles: The taxation of sales of motor vehicles is discussed in ¶ 510.

Charges for opening and closing burial lots: Charges for opening and closing a burial lot are exempt.

Sales of farm products and livestock: Sale of farm products by farmers (such as roadside sales) are exempt if the farmer is not otherwise engaged in retail sales and adequate records are maintained; sales of livestock at auctions or through breeder associations are exempt.

Charges for memberships in health and fitness clubs: Sales of memberships in health and fitness organizations are exempt.

Charges for babysitting services: Charges for babysitting services by an individual are exempt if they do not exceed $5,000 in any one year.
Public libraries: Sales of services by public libraries or libraries at educational institutions are exempt.

Manufacturer’s representatives: Commissions received by manufacturer’s representatives are exempt.

Opinion polls: Sales of primary opinion research services are exempt when the services are provided to clients located outside of West Virginia.

Value-added products: Sales of property and services to persons for the production of value-added products. However, this exemption may not be claimed by any one purchaser for more than five consecutive years. Value-added products include producing the following products derived from processing a raw agricultural product: Lumber into furniture, toys, etc; fruit or honey into wine; wool into fabric; hides into leather; milk into cheese; drying, canning or freezing of fruits or vegetables; raising feeder cattle; or drying, canning, cooking or freezing poultry or aquatic animals.

Music instruction and artistic performances: Music instruction by a music teacher and artistic services or performances by artists and entertainers are exempt. Sales of tickets to artistic performances are not exempt pursuant to this provision. Nude dancers or strippers are not considered to be entertainers for purposes of this exemption.

Charges by tax exempt IRC § 501(c)(3) or 501(c)(6) membership organizations: Charges by exempt membership organizations to their members for membership, newsletters, continuing education seminars, workshops, lectures, conventions and similar services. This exemption does not apply to separately stated charges for meals, lodging, entertainment or transportation, but the membership organization may elect to pay the tax on purchases for which a separate charge could apply and not charge any Sales Tax to its members.

County assessors, sheriffs, and clerks: Sales of governmental services or materials by county assessors, sheriffs and clerks in the normal course of governmental operation are exempt.

West Virginia magazines: Sales of magazines and subscriptions by the Division of Natural Resources and Division of Culture and History are exempt.

Car washes: Sales of soap to be used at car washes is exempt.

Travel agencies: Commissions received by travel agencies from out of state vendors are exempt.

Environmental evaluations: The service of providing technical evaluations for compliance with federal and state environmental standards, if performed by
environmental and industrial consultants certified by the West Virginia Department of Environmental Protection or Bureau of Public Health is exempt. This exemption includes the cost of tangible personal property use to provide the service. (W. Va. Code § 11-15-9c).

Volunteer fire departments and rescue squads: Sale of tangible personal property by volunteer fire departments and rescue squads that are exempt under IRC § 501(c)(3) and (c)(4) to obtain revenue for the functions of the organization are exempt.

Lodging franchise fees: Fees imposed by a lodging franchiser as a condition of the franchise agreement are exempt.

Flags: Sales of regulation sized United States and West Virginia flags are exempt.

Special district excise tax: Sales upon which the special district excise tax, imposed by to W. Va. Code §§ 7-22-12, 8-13B-11 or 8-38-12, is paid are exempt from the Sales Tax. (W. Va. Code § 11-15-9f).

Exemptions for certain high tech and internet business sales: In order to modernize the Sales Tax exemptions as a result of technological advances and expanded role of computers in manufacturing, internet and communications business and to encourage computer hardware and software developers to locate and expand their businesses in West Virginia, the following sales are exempt:

(1) Computer hardware and software for incorporation into a manufactured product;

(2) Computer hardware and software directly used in communication activity;

(3) Electronic data processing services;

(4) Educational software to be used in the public schools or non-profit educational institution in this state;

(5) Internet advertising;

(6) High-technology business services sold to federal, state or local governments for use in fulfilling a government contract; or

(7) Software, computers, computer hardware, servers, building materials and tangible personal property to be installed in a building or facility used in a high-technology or internet advertising business. (W. Va. Code § 11-15-9h).

Clothing and accessories sold by exempt organizations: Sales of clothing and clothing accessories by organizations exempt under IRC §§ 501(c)(3) and (c)(4) and
that have annual revenue from such sales of less than $40,000 are exempt: provided that the clothing and clothing accessories are obtained solely by donation.

¶ 512 Exemptions for Which Exemption Certificate is Required


Certain sales of tangible personal property or services are exempt from the collection of Sales Tax only if Form F0003, Certificate of Exemption is presented to the vendor at the time of the sale. The following exemptions may be asserted with an exemption certificate:

_Sales to state and federal governments:_ Sales to the state, its subdivisions and agencies and to the United States government, its subdivisions and agencies are exempt. Sales to another state, its subdivisions and agencies are exempt if that state grants a similar exemption for sales to West Virginia. If a governmental entity fails to present an exemption certificate, the books and records of the seller must show that the purchase was billed directly to such agency even though an exemption certificate was not obtained. Sales to government employees are not exempt unless billed to the government.

_Sales to churches and charitable organizations:_ Sales (except for purchases of gasoline or special fuels) to churches and bona fide charitable organizations are exempt if such services or property are directly used or consumed by the church or charitable organizations and the church or organization makes no charge whatsoever for the services they render.

_Sales of property and services for resale:_ Sales (except for purchases of gasoline or special fuels) of tangible personal property to a purchaser for resale are exempt. However, if an item is purchased for resale as part of the purchaser's business but is withdrawn from the purchaser's inventory and consumed by the purchaser, it is subject to the Use Tax at that time.

_Example:_ A wholesale office supply company may purchase office supplies and, if an exemption certificate is presented, no Sales Tax will be collected by the seller. However, if the office supply company withdraws from its inventory a portion of its supplies to use in its own office, it becomes liable for the Use Tax at that time. Also, if the office supply company purchases janitorial services or equipment repairs from a third party, these would be subject to the Sales Tax at the time of the purchase, since these are not purchased for resale.

Services which are subcontracted are not considered to be services subject to the sales and service tax. (WVCSR § 110-15-2.83.)

_Example:_ A customer takes his car to a service station to have his brakes realigned. The service station, not having the proper equipment, takes the drums to
another station which does part of the work. The service performed by the other service station is a service purchased for resale which is not subject to tax.

Charges for building materials and supplies which are purchased by a contractor to use in work on a structure or real estate are not exempt as a purchase for resale. However, since charges by the contractor to his customer for materials and labor are classified as "contracting" and are exempt (see ¶ 510 above), there is only one layer of Sales Tax on the materials purchased for contracting.

The resale exemption does not apply to purchases by private clubs of liquor and wines for resale. (W. Va. Code § 11-15-9a).

*Purchases of materials for a government contract:* For materials purchased on or after October 1, 1990, purchases of materials by a contractor are taxable if used to fulfill a written contract with the United States, the State of West Virginia, or any political subdivision thereof, for the construction or improvement of a structure or real property which will be used by the government. (W. Va. Code § 11-15-8c).

*Sales to schools:* Sales (except for purchases of gasoline or special fuels) to an in-state college or university, which is governed by the West Virginia Board of Trustees and which is exempt from federal and state income taxes, are exempt.

*Sales of mobile, modular and other manufactured homes:* The sales of mobile homes which will be utilized by the purchasers as their principal year-round residence are subject to tax at the rate of 3%. The vendor should have the purchaser execute a Certificate of Principal Use on the form provided by the State Tax Department. Activities incidental to the sale of such homes, such as the delivery of a mobile home to its site, which are not included in the sales price, are taxed at the rate of 6%. Activities which are incidental to the sale include: readying the home at its site for occupancy by hooking up utility lines; attaching the home to a foundation; underskirting the home; joining the units together; etc. Activities beyond those which are incidental to the sale of such homes generally are considered contracting activities and are exempt under the contracting exemption previously discussed. The manufacture, sale and installation of modular and manufactured housing are treated in a manner similar to the construction of conventional housing. Only the value of building supplies and materials used in the manufacture and installation of such housing are subject to the Sales and Use Taxes. The value of such building supplies and materials shall be actual cost to the manufacturer as delineated on the invoice to purchaser. If actual cost information is not available, the cost of materials shall be 60% of the cost of the modular dwelling. (W. Va. Code § 11-15-7a). In addition to the Sales Tax, a $20 fee is also imposed on all sales of factory-built homes, which is to be deposited in the West Virginia affordable Housing Trust Fund. (W. Va. Code § 11-15-4c).
Sales of propane for poultry house heating: These sales are exempt when the propane is exclusively used to heat a poultry house.

Sales to be used in agricultural production: Sales of property and services (except gasoline or special fuels) which are used in commercial agricultural production are exempt. Therefore, a farmer does not pay a tax on his purchases of feed, seed, fertilizer, repairs to farming equipment, etc. Sales of tangible personal property or services to a farmer to be used in the construction or permanent improvement of real estate are taxable.

Sales to certain exempt organizations: Purchases (except for purchases of gasoline and special fuels) by an organization exempt from federal income tax under IRC § 501(c)(3) or 501(c)(4) and having a current registration certificate issued under W. Va. Code § 11-12-1 et seq., which purchases are directly used in its charitable activity, are exempt if the organization is one of the following:

1. A church or association of churches;
2. A public or private elementary or secondary school;
3. An organization which annually receives more than 50% of its support from grants, charitable contributions or membership fees;
4. An organization which has no employees and its net income from fund raisers is donated to an organization exempt under IRC § 501(c)(3) or § 501(c)(4); or
5. A youth organizations such as the Boy Scouts and Girl Scouts.

Electronic data processing services: Sales of data processing services including key punching, sorting, rearranging, verification, data entry, etc. and providing access to computer equipment for a third party are exempt. The exemption also applies to related software. This exemption does not apply to the sale of computer hardware or software not used for processing another’s data.

Services performed within a controlled group of entities: Services performed by one corporation, partnership, or limited liability company for another corporation, partnership, or limited liability company when the entities are within the same controlled group are exempt. "Control" means direct or indirect ownership of stock or equity ownership controlling 50% or more of the total voting power of all classes of stock or equity ownership representing 50% or more of the value of the combined entities.

Aircraft repair services and tools used to provide such services: Sales of aircraft repair, remodeling and maintenance services for licensed aircraft carriers are exempt as well as sales of parts incorporated into such aircraft; the sale of tools to be directly
and exclusively used in repair, remodeling and maintenance of licensed aircraft carriers is exempt.

*Motion picture films and video arcade games:* Sales of motion picture films to exhibitors are exempt if the sale of tickets or admission charge to the film is taxable. Sales of video arcade machines or games to persons engaged in providing such games to the public for a charge upon which the Sales Tax is imposed are exempt.

¶ 513 Records of Using Exemption Certificates


The burden of proving that a sale or service was exempt from Sales Tax is on the vendor. It is presumed that all sales are subject to tax unless the vendor takes and retains an executed exemption certificate from the purchaser. Vendor is required to retain the exemption certificate for a period of three years or so long as the tax period is open for assessment or refund. The purchaser is also separately liable for Sales or Use Taxes on goods or services that it purchases. (W. Va. Code § 11-15-4b). The claiming of an exemption is strictly construed against the taxpayer. *Woodell v. Dailey,* 160 W. Va. 65, 230 S.E.2d 466 (1976).

¶ 514 Refundable Exemptions


The purchaser in the following transactions must pay Sales Tax or Use Tax to the vendor and then may apply to the Tax Commissioner for a refund or credit of the Sales Tax or Use Tax collected by a vendor, unless the purchaser provides the vendor with a copy of its West Virginia direct pay permit at the time of sale.

*Sales to be directly used in manufacturing, transportation, transmission, communication, production of natural resources, gas storage, production of electricity or public utility business:* Sales (except sales of gasoline or special fuels) to businesses engaged in manufacturing, transportation, transmission, communication, production of natural resources, gas storage, production of electricity or public utility business are exempt if the services or items purchased are "directly used or consumed" in such activities. Purchases that are not directly used or consumed in these activities are taxable.

*Example:* The sale of janitorial services to a business which manufactures chemicals is not exempt, since such services are not directly used in manufacturing. However, the sale of raw materials utilized in the chemical manufacturing process is exempt, since they are directly used in the manufacturing process.

One does not have to be a "producer" liable for the severance tax to be considered in the business of producing a natural resource. A contract miner is not ordinarily subject to the severance tax since he is not the producer of the mineral, but his
purchase of materials directly used in mining would be exempt from the sales tax since he is engaged in the business of the production of natural resources.

**Definition of "production of natural resources":** Production of natural resources includes exploring, developing, severing, extracting, reducing to possession, loading for shipment, shipment, sale, reclamation, waste disposal, and environmental activities associated with the production of natural resources. Production of natural resources also includes certain limited construction activities relating to the construction of ventilation structures, mine shafts, slopes, boreholes, dewatering structures and associated facilities. One does not have to be a "producer" liable for the severance tax to be considered in the business of producing a natural resource. A contract miner, who is not subject to severance tax is, nevertheless considered to be engaged in the production of natural resources. However, a contractor who works on a facility used in the production of natural resources is not considered to be engaged in production, unless engaged in fabricating structures that are specifically exempt.

**Directly used or consumed:** Sales of property or services to persons engaged in the foregoing businesses are exempt only if the services, machinery, supplies and materials are directly used or consumed in the exempt business activity. West Virginia has adopted a broad construction of the direct use standard by adopting the integrated plant rule of direct use. The integrated plant rule focuses on the necessity of the item to the manufacturing process, its physical and causal relationship to the finished product and whether the item is part of the exempt machinery as to form an integrated and synchronized system.

Generally, in West Virginia, activities and operations which constitute an integral and essential part of such activities and not those which are incidental, convenient or remote are exempt. Examples of uses of property or services which are not directly used or consumed are: heating and illumination of office buildings; janitorial or general cleaning services; personal comfort of personnel; production planning; scheduling of work; inventory control; marketing; general management; supervision; finance; training; accounting and administration; or any other activity incidental or convenient rather than an integral and essential part of such activities. (W. Va. Code § 11-15-2(b)(5); WVCSR § 10-15-2.9.)

**Sales to nationally chartered fraternal and social organizations:** Sales (except sales of gasoline or special fuels) to nationally chartered fraternal or social organizations are exempt if the purchases are for the sole purpose of free distribution in public welfare or relief work.

**Sales to volunteer fire departments:** A refundable exemption exists for sales of firefighting and station house equipment to volunteer fire departments are exempt.

**Sales of building materials to charities:** A refundable exemption exist for sales of building materials to an organization exempt from federal income tax under IRC §
501(c)(3) or (4) are exempt if such materials are incorporated into a building which is to be operated by the organization as permanent low income housing, transitional housing, emergency homeless shelter, domestic violence shelter or emergency youth shelter.

Sales to charities which make no charge for their services: A refundable exemption exist for sales (except sales of gasoline or special fuels) to charities which make no charge for their services are exempt if the items or services sold are directly used or consumed by such organization in the charitable activity.

Highway projects: A refundable exemption exists for sales of construction and maintenance materials acquired by a second party for use in a state highway project are exempt. However, in lieu of issuing a refund or credit to the person that paid the tax, the Tax Department will pay the refund to the Division of Highways for deposit into the State Road Fund.

Research and development expenditures: A refundable exemption exists for sales of tangible personal property and services directly used or consumed in research and development activities are exempt. Research and development is defined as systematic scientific, engineering or technological study and investigation in a field of knowledge in the physical, computer or software sciences, for the purpose of increasing scientific knowledge which may lead to the development of new or enhanced products. Research and development includes, but is not limited to, design, refinement and testing of prototypes of new or improved products or manufacturing processes before commercial sales have begun. (W. Va. Code § 11-15-9b).

New or Expanded Warehouse or Distribution Facility:

W. Va. Code § 11-15-9n(b) authorizes a refundable exemption from Sales Tax for qualified purchases of computers and computer software, primary materials handling equipment, racking and racking systems, and components thereof, building materials and tangible personal property installed into or directly used or consumed in the construction, addition, alteration or improvement of a qualified, new or expanded warehouse or distribution facility, provided that the taxpayer’s investment in the new or expanded facility is at least $50 million and the facility creates at least three hundred full-time equivalent West Virginia jobs. The exemption created herein is limited to purchases made during an “Expansion Period”, which is a period of time beginning one year prior to the start of the construction or expansion of the qualified, new or expanded warehouse or distribution facility, and ending one year after the substantial completion of the construction or expansion of the facility.

To qualify for the exemption, the taxpayer is required to submit to the Tax Commissioner an application for certification of the exemption, with a plan describing the investment to be made. The application for certification of the exemption and the plan must be filed on or before the start of the construction or expansion of the facility.
proposed facility. If the taxpayer fails to timely file the application for certification of the exemption, on or before the start of the construction or expansion, the exemption will not be available for any purchases that were made prior to the filing date of the application and no refund will be issued for any such purchase.

*W. Va. Code § 11-15-8d(b)*, which otherwise limits the right of a contractor to assert a Sales Tax exemption on behalf of its principal, has been amended to allow contractors to assert the refundable exemption under Section 11-15-9n. Purchases of gasoline and special fuel are not exempt pursuant to this section.

*W. Va. Code § 11-15-9n(e)* provides additional restrictions on taxpayers claiming this exemption.

1. Over the counter sales restrictions.

A taxpayer will be disqualified from using the exemption available under Section 11-15-9n if within 10 years after the end of the Expansion Period, over the counter sales are made, in any one calendar year, from a qualified warehouse or distribution facility which in the aggregate, exceed 5% of the total revenues of the warehouse or distribution facility during the same calendar year. In such a situation, the taxpayer will be subject to assessment for any tax, penalty or interest that would otherwise have been due had the exemption never been applied. This over the counter sales restriction will not apply to any year subsequent to the end of the tenth year after the end of the expansion period.

2. Fabrication and Assembly Restriction.

If during any calendar year within ten years after the end of the Expansion Period, the building or facility for which qualification for exemption was originally established, is used for manufacturing, fabrication or assembly of tangible personal property, the taxpayer will be disqualified from receiving the exemption. The taxpayer will be subject to assessment for any tax, penalty or interest that would otherwise have been due had the exemption never been applied. This restriction against manufacturing, fabrication and assembly will not apply to any year subsequent to the tenth year after the end of the Expansion Period.


“Qualified, new or expanded warehouse or distribution facility” does not include a building or facility where the average monthly full time employment (including full time equivalent employees) for each calendar year at the facility is less than 300 West Virginia domiciled, West Virginia residents. If during any calendar year within 10 years after the end of the Expansion Period, the average monthly full time employment at the building or facility for which qualification for exemption was originally established, is fewer than 300 qualified West Virginia employees, then the taxpayer will be
disqualified from receiving the exemption. The taxpayer shall be subject to assessment for any tax, penalty or interest that would otherwise have been due had the exemption never been applied. This restriction against having fewer than 300 qualified West Virginia employees shall not apply to any year subsequent to the tenth year after the end of the Expansion Period.

Any statute of limitations set forth in Article 11-10-1 et seq., for assessment of any tax, penalty or interest provided for above shall not close until 5 years subsequent to the end of the first calendar year in which prohibited over-the-counter sales or manufacturing occurred or in which the average monthly full time employment at the facility fell to less than 300 qualified West Virginia employees.

¶ 515 Agents and Contractors Assertion of Principal’s Exemption


As a general rule, an agent cannot assert an exemption to the Sales and Use Tax to which his principal is entitled. This provision was intended to eliminate the practice of contractors purchasing materials as agent to be used on a job because the business having the contracting done could have asserted an exemption if it purchased the materials. As a result, manufacturers, natural resource producers, public utilities and other businesses, exempt from Sales Tax, pursuant to W. Va. Code § 11-15-9(b)(2), began to avoid the requirement that their contractors pay the Sales Tax on construction contracts by separately purchasing the materials themselves and hiring the contractor to provide only the labor required to complete the work on the contract.

The Legislature recognized the futility of requiring exempt taxpayers to specifically structure their transactions to avoid the Sales Tax. Effective July 1, 2007, the Legislature revised W. Va. Code § 11-15-8d to now allow contractors to purchase services, machinery, supplies and materials to be directly used or consumed in a construction contract for a principal entitled to claim the refundable exemption provided by W. Va. Code § 11-15-9(b)(2), exempt from Sales Tax. Effective July 1, 2011, contractors engaged in construction, alteration, repair or improvement of a new or existing natural gas compressor station or gas transmission line having a diameter of twenty inches or more are entitled to assert this exemption. Contractors may also assert the exemption provided by W. Va. Code § 11-15-9n, for new or expanded warehouse or distribution facilities. The exemption is asserted by the contractor, by giving their vendors a copy of their principal’s direct pay permit, which the principal provides to the contractor by giving the contractor Form CST-286, Special Contractors Exempt Purchase Certificate. Contractor will be required to file Form CST-210, Direct Pay Consumers Sales and Use Tax Returns with the Tax Commissioner to assert this exemption. (See: Administrative Notice 2007-19)

The sales tax is not imposed upon purchases made by an employee, partner or corporate officer; provided that the purchase is invoiced and paid by the employer, partnership, corporation or unincorporated organization.

5-24
¶ 516 Methods for Claiming Refundable Exemptions (Refund or Credit)


Generally, refundable exemptions are asserted on the sales tax return by a purchaser who has obtained a direct pay permit (see ¶ 517 below). When a direct pay permit is not used and the vendor collects the Sales Tax or Use Tax from a purchaser within one of the refundable exemption categories, the purchaser may file a claim for a refund or credit with the State Tax Department. The amount of the tax may then either be refunded or applied as a credit against other taxes due or payable. (Reg. § 110-15-9a.) The taxes which can be offset by a credit, in the order in which the credit must be applied are: consumer sales tax due with direct pay return, use tax with direct pay return, consumer sales tax collections, use tax collections, business and occupation tax, carrier income tax, tax, severance income tax, telecommunications tax, corporation net income tax, estimated personal income tax, business franchise tax and personal income tax. (WVCSR § 110-15-9a.5.2.) The time limitation for filing a claim for refund is three years from the due date of the return or two years after the tax is paid. The time limitation for filing a claim for a credit is one year after payment of the tax by the purchaser to the vendor. (WVCSR §§ 110-15-9a.7, 110-15-9a.8.)

¶ 517 Direct Pay Permits


Certain purchasers may present a direct pay permit in lieu of paying the Sales Tax or Use Tax to the vendor. A direct pay permit is obtained from the Tax Commissioner. The holder of a direct pay permit is required to retain records of purchases; as is a vendor who sells to a purchaser who presents a direct pay permit. (WVCSR §110-15-14.2.1.) The permit holder then asserts any refundable exemption on the next direct pay permit return. Any purchaser entitled to claim one of the refundable exemptions described in ¶ 513 above may apply for a direct pay permit by filing Form CST-250, Consumers Sales and Use Tax Application for Direct Pay Permit. Taxpayers purchasing items using a direct pay permit are required to periodically file Form CST-210, Direct Pay Consumers Sales and Use Tax Returns with the Tax Commissioner.

A direct pay permit may not be used to purchase food or as a substitute for an exemption certificate. (WVCSR § 110-15-9c.) An example of an application for a direct pay permit is set forth at ¶ 541 below.

¶ 518 Materials Produced or Manufactured By a Contractor


Materials purchased for use or consumption in contracting are generally taxable to the contractor. Similarly, materials produced or manufactured by contractors and then used in fulfilling a construction contract are also subject to Sales Tax. The tax is on the gross value of the natural resource produced or manufactured product used or consumed by the contractor, so that the contractor is treated as, if these were
purchased. If a contractor enters into a separate arm's length contract for the sale of the materials he produces or manufactures, the gross value of such materials will not be subject to tax, but presumably the contractor will be required to collect the Sales Tax from the purchaser unless the sale is otherwise exempt. When the contractor produces or manufactures a product on the job site, it is considered to be part of his contracting activity, and the gross value of the product is not subject to tax; the value of the raw materials used in the contracting activity is taxable and the purchase is not exempt as materials used or consumed in manufacturing or the production of natural resources (see ¶ 513 above). (WVCSR § 110-15-112.) Since the regulations were issued, the law has changed so that now, contractors can (in some circumstances) use their principal's direct pay permits to avoid paying the tax on materials purchased for contracts with taxpayers who are exempt from Sales Tax under W. Va. Code § 11-15-9(b)(2). (See ¶ 514 above). In such cases the change in the law supersedes the regulations and such purchases are exempt.

**Example 1:** An asphalt company enters into a contract for the paving of a shopping mall and moves its portable asphalt plant to the job site. The asphalt mix which the company purchases and uses in its plant is taxable since it is material used in a contracting activity but the gross value of the asphalt produced is not taxable.

**Example 2:** An asphalt company enters into a contract for the paving of a small parking lot and manufactures the asphalt at its plant which it then ships to the job site. The asphalt company is not taxed on the materials which it used or consumes in its manufacturing activity since this is a refundable exemption. The asphalt company is taxed on the gross value on the asphalt used in performing its contract.

**Example 3:** An asphalt company sells asphalt to other contractors who use the asphalt in the performance of their contracts. These sales are taxable, but the materials purchased by the asphalt company which are used in producing asphalt are exempt since they are materials directly used or consumed in a manufacturing activity.

¶ 519 Apportionment


Persons engaged in exempt and nonexempt transactions or persons who use goods or services for exempt and nonexempt purposes are required to make an apportionment between exempt and nonexempt purchases and uses. Similarly, a business which as a consumer has both exempt and nonexempt business enterprises must apportion between each business enterprise. Any method of apportionment may be used as long as it is reasonable. If a business fails to keep records sufficient to justify its apportionment, all its transactions will be subject to tax. (WVCSR § 110-15-9d.)

¶ 520 Use Tax Exemptions

All the tangible personal property and taxable services which are exempt from imposition of the Sales Tax are also exempt from the Use Tax. The methods for claiming exemptions are the same as those for claiming sales and service tax exemptions. (WVCSR §§ 110-15-9a, 110-15-9c.) If the Sales Tax has been imposed and paid on tangible personal property or taxable services, then the property or service is not taxable under the Use Tax. Also not subject to the Use Tax are: property of a nonresident temporarily in West Virginia; property or services not taxable under the Sales Tax (for instance, professional services of a certified public accountant in Ohio for a West Virginia resident are not subject to the Use Tax); purchases by county and municipal governments and "some use of equipment" owned by the federal government. (WVCSR § 11045-9.5.) If a person moves his residence or a business moves its operations into West Virginia, no Use Tax is imposed on the tangible personal property moved as part of such business or residence if the property was purchased at least six months before being brought into West Virginia. (WVCSR § 110-15-9.7.)

¶ 521 Credit Against the Use Tax for Sales Tax Paid to Another State


A credit may be applied against the Use Tax for any Sales Tax properly paid to another state. No credit, however, may be claimed for sales taxes paid to a political subdivision of another state.

¶ 522 Collection of the Sales Tax


The Sales Tax is intended to be passed onto or paid by the consumer who purchases the property or service. After the vendor or retailer collects the tax, he retains the collected funds in trust until he is required to remit the tax. The tax due is considered a debt owed to the state. On cash sales, the tax is due at the consummation of the sale. On credit sales, the vendor must remit the tax due on the return filed for the month in which the credit sale occurred. On conditional sales, where possession is delivered to the buyer and title is retained by the seller, the tax must be collected within 30 days of the transfer of possession. (WVCSR § 110-15-4.4.1.) If the sale is a lease, the sales and service tax is to be computed and collected upon each rental payment. Where the lessee exercises an option to purchase the property leased, the tax must be collected on the remaining portion of the sale price. (WVCSR § 110-15-4.4.2.)

¶ 523 Collection of the Use Tax


An out-of-state retailer engaging in business in West Virginia (meaning a retailer with an office or other place of business, subsidiary or agent in West Virginia) is required to collect the Use Tax on sales of tangible personal property, custom software and services for delivery into West Virginia which is intended for use in West Virginia. An out-of-state
The retailer may also collect a certificate of exemption or direct pay permit in lieu of the tax. (WVCSR § 110-15-4.3.) Each retailer engaging in business in West Virginia is required to submit to the Tax Commissioner a list of the agents operating in West Virginia and any places of business located in West Virginia. A permit issued to a retailer to collect the Use Tax may be cancelled or revoked for failure to comply with the West Virginia law. (WVCSR § 110-15-16.)

§ 524 Bond Required of Nonresident Contractors for the Payment of the Use Tax


Every nonresident contractor who is to perform a contract within the state must register with the State Tax Commissioner and deposit into the Contractor’s Use Tax Fund an amount equal to 6% of the total amount the contractor will receive for performance of his contract. This amount will be held until completion of the contract and the determination of the Use Tax due from such contractor. In lieu of a cash deposit, a contractor may provide a corporate surety bond in form and amount which the Commissioner deems sufficient to guarantee the payment of any Use Tax the contractor may owe on contract. If a foreign contractor has a number of contracts in the state, the Commissioner may allow a contractor to post an umbrella corporate surety bond in an amount and form which the Commissioner deems sufficient. (WVCSR § 110-15-8b.) Purchases made out-of-state and used in-state by nonresident contractors are subject to the Use Tax. If a nonresident contractor brings machinery, materials, supplies or equipment into the state for the performance of a job, he must pay Use Tax on such assets. To compute the purchase price subject to tax, the purchase price is apportioned according to the proportion of the useful life of the equipment that it is "used" in the state. "Used in the state" includes the time that the property is present in the state. (WVCSR § 110-15-110.)

§ 525 Collection of Use Tax from Certain Out-of-State Volume Retailers


Mail order houses are generally not "doing business" in West Virginia under the general definition. However, such foreign retailers are considered to be "doing business" in the state and must collect the Use Tax if a retailer engages in any of the following activities within West Virginia:

1. Soliciting orders by television shopping network or orders taken by mail or phone where such shopping system is broadcast by an in-state cable network;
(2) Soliciting orders by television or radio broadcasts or by printed material where such broadcasts or printing is done within the state and intended primarily for residents of the state (advertising in radio, television and newspapers located in the state is presumed to be primarily directed at in-state residents);

(3) Soliciting orders by mail if such solicitations are "substantial and reoccurring" and if the retailer benefits from any banking, financial, debt collection, telecommunication or marketing activities occurring in this state or from an authorized installation, servicing or repair facility in the state (whether such facility is operated by the retailer, a related or unrelated party);

(4) If an out-of-state retailer sells products in West Virginia and has a franchisee or licensee in this State under the retailer's trade name, the franchisee or licensee may be required to collect the tax; and

(5) A retailer who contracts with an in-state cable television network and solicits orders by means of such cable network.

To assure constitutionality, all of the above activities are subject to the proviso that the retailer must have a "physical presence in this state in the form of employees, officers, agents, or sales outlets in this state, or any other presence that provides the necessary minimum contacts for a constitutionally sufficient nexus for a state to require such a retailer to collect and remit use taxes."

¶ 526 Vendor Liability for the Sales Tax


If a vendor or retailer fails to collect and remit the Sales Tax, he is personally liable and subject to penalties, except that persons entitled to a credit for taxes paid on purchases may apply the credit against the amount of tax collected. (WVCSR §§ 110-15-4.5, 110-15-5.2.) The vendor has the burden of showing that the tax should not have been collected on a transaction, unless the vendor in good faith takes from the purchaser a direct pay permit or exemption certificate. (WVCSR § 110-15-6.1.) There is a presumption that a sale is taxable if the vendor is unable to produce a direct pay permit or exemption certificate. (WVCSR § 110-15-6.)

¶ 527 Consumer Liability for the Sales Tax


A purchaser is personally liable for payment of the Sales Tax. The Tax Commissioner may make an assessment against the purchaser, but the vendor may be relieved of liability only upon notification in writing to the Commissioner of a purchaser's refusal to pay the Sales Tax or failure to sign or present a proper direct pay permit or exemption certificate. (WVCSR § 110-15-4.8.)
§ 528 Liability for the Use Tax


The user of tangible personal property, custom software or taxable services in this state is liable for the Use Tax and is responsible for paying the tax. Liability is not extinguished until the tax is paid. (WVCSR § 110-15-6.1.1.) The purchaser or user can avoid tax liability by producing a receipt which shows the tax was paid or by presenting evidence that the purchase was exempt. A retailer who collects the Use Tax is liable for the amount collected and the retailer has the burden of proving that a sale was not taxable. If a retailer is required to collect the Use Tax and fails to do so, the retailer is personally liable for the uncollected tax. (WVCSR § 110-15-6.)

§ 529 General Transaction Sourcing Rules


West Virginia has adopted the sourcing rules of the Streamlined Sales Tax Agreement. For Sales and Use Tax purposes retail sales of tangible personal property, custom software and taxable services (hereinafter sometimes collectively referred to as “Product”) are sourced as follows:

1. When the Product is received by purchaser at seller’s business location, it is sourced to that location;

2. When the Product is not received by purchaser at seller’s business location, it is sourced where received by purchaser or purchaser’s representative;

3. When subsections (1) and (2) above do not apply, the sale is sourced to purchaser’s address; and

4. When none of the previous subsections apply, the sale is sourced to the location from which the Product shipped.

For purposes of these sourcing rules, the terms “Receive” and “Receipt” mean: taking possession of tangible personal property; making first use of services and taking possession or making first use of computer software or digital goods. These terms do not include possession by a shipping company on behalf or purchaser. The general sourcing rules apply to vendors for use in determining where to source the sale of a Product. They do not affect purchasers obligation to remit Use Tax and do not apply to telecommunication services.

Leases or rentals of tangible personal property, other than vehicles or transportation equipment, which require periodic rent payments, are sourced to the primary property location of the leased property at the time of each payment. Leases or rentals that do not require periodic rent payments are sourced according to the rules applicable to sales. Leases or rentals of motor vehicles, trailers, semi-trailers and
aircraft that do not qualify as transportation equipment are sourced to the primary location of the leased property if the lease requires periodic payments or at the point of delivery to lessee, if the lease does not required periodic lease payments. Leases of transportation equipment are sourced the same as retail sales. Transportation equipment is defined as: a) locomotives and rail cars; b) trucks and truck-tractors with a gross vehicle weight of over ten thousand pounds, trailers, semitrailers and buses; and c) aircraft, licensed and used to carry persons or property in interstate commerce.

Telecommunication services are generally sourced to the place of customer’s primary use. Prepaid phone cards and prepaid wireless services are generally sourced to the location the sale. (W. Va. Code § 11-15B-19).

¶ 530 Sale of Entire Business


The successor in business of a person who sells out his business or stock of goods or who ceases doing business is liable for the payment of any Sales or Use Tax, plus any penalties and interest. (WVCSR § 110-15-4.9.) The purchase or acquisition of a business or substantially all of its assets gives *rise* to successor liability whether the consideration is money, property, assumption of liabilities or cancellation of indebtedness. (WVCSR §§ 110-15-4.9.1, 110-15-4.9.2.) Successor liability does not attach to sales or transfers pursuant to assignments for the benefit of creditors, to deeds of trusts, security interests, or certain liens unless the previous owner receives money. (WVCSR § 110-15-4.9.6.) The purchaser of a business may retain a portion of the purchase price to absolve the tax liability or obtain a certificate from the Tax Department that no Sales or Use Tax is due. (WVCSR § 110-15-4.9.7.)

¶ 531 Sales Tax or Use Tax Cannot Be Assumed by Vendor


It is unlawful for a vendor or retailer to advertise or represent to the public or any particular purchaser that the vendor or retailer will assume or absorb any part or all of the Sales or Use Tax. (WVCSR § 110-15-4.6.) Any person found guilty of absorbing or assuming any part of a tax required to be collected is guilty of a misdemeanor and will be fined not less than $100 nor more than $1,000 or imprisoned in the county jail for not more than six months or both. (WVCR § 110-154.6.) The regulations recognize that under some circumstances, it is not practical for the vendor to add the Sales Tax to the purchase price, in which case the tax may be added to the purchase price: provided, that proper signage is posted to notify customers that the tax is included in the purchase price.

¶ 532 Gasoline and Special Fuel

Sales of gasoline and special fuels in West Virginia are subject to the Motor Fuels Excise Tax (see ¶ 1005, chapter 10 of this Guidebook) which consist of a flat rate component of 20.5¢ per gallon, imposed by W. Va. Code § 11-14C-5, plus a variable rate component imposed by W. Va. Code §§ 11-15-18b or 11-15A-13a. The variable rate component is imposed at the rate of 5% of the greater of the statewide average wholesale price of the gasoline of special fuel, exclusive of excise tax, as determined by the Tax Commissioner, or of 97¢ per gallon. Sales Tax is imposed at the wholesale level when fuel is sold and delivered in West Virginia by a distributor or importer, unless it is delivered to another distributor for resale within West Virginia. Gasoline or special fuel contained in motor carriers or in construction equipment, mining equipment, track maintenance equipment or similar; equipment brought into West Virginia is subject to use tax, with credit allowed for Sales Tax paid to another state. Gasoline and special fuel upon which Sales or Use Taxes have been paid are not subject to tax.

¶ 533 Sales Tax Returns


A vendor liable for the Sales Tax is required to file a return before the 20th day of each month for monies collected during the preceding month. The return is required to show the business’s total gross proceeds, gross proceeds on which the tax is based, the amount of liability and any further information necessary to the computation and collection of the tax. The requirement that monthly returns be filed may be changed by agreement with the Tax Commissioner. If the tax liability does not exceed an average monthly amount of $250, the taxpayer may file quarterly returns. An annual return must also be submitted presenting the same information as required on the monthly returns.

¶ 534 Use Tax Returns


Effective July 1, 2008, the filing of combined Sales Tax and Use Tax returns has been required. A retailer liable to collect the Use Tax is required to file returns showing the same information as and on the same schedule as set forth in § 532 above.

¶ 535 Maintenance of Records


The records of taxable sales and exchanges under the Sales Tax and the Use Tax must be maintained for at least three years or so long as the records are applicable to an assessment or refund if that is longer. (WVCSR § 110-15-14.1.1.) Separate records must be maintained where a vendor is engaged in taxable and nontaxable businesses. Failure to do so will result in a tax on the entire gross proceeds of the business. (WVCSR § 110-15-14.1.2.) Nonresidents doing business in West Virginia are required to maintain records of the Sales Tax collected, and retailers required to collect the Use Tax must account for their computation and collection. (WVCSR §§ 110-15-14.1.4, 110-15-14.2.) A retailer engaged in business in West Virginia cannot remove the
records from West Virginia. A nonresident retailer or foreign corporation not doing business in West Virginia is required to make the records available to the Commissioner for examination in West Virginia or pay the traveling expenses of the Commissioner’s representatives to the out-of-state place of business to examine the records. (WVCSR §§ 110-15-14.1.4, 110-15-14.2.2.2.)

¶ 536 Officer’s Liability and Penalties


Officers of a corporation or association are personally, jointly and severally liable for nonpayment of the Sales Tax and any penalties, interest or additions. (WVCSR § 110-15-17.1.)

¶ 537 Procedure and Administration


The West Virginia Tax Procedure and Administration Act discussed in Chapter 9 of this Guidebook applies to the consumers sales and use taxes.

¶ 538 Miscellaneous Examples of the Sales Tax and the Use Tax


The regulations set forth a number of examples illustrating how various sales of properties and services are taxed. A summary of these examples follows:

Services excepted from tax: The following services are not subject to tax: contracting services, professional services, personal services, services by an employee for his employer, public utility services, and services purchased for resale.

Advertising agencies: Sales of advertising services are generally taxable. Materials and services purchased for use in providing advertising services may also be taxable unless some specific exemption applies to such purchases.

Auctioneers and auctions: The commissions earned by an auctioneer are subject to tax. Auctions are generally exempt as isolated transactions if conducted on the premises of the owner of the property auctioned.

Banking: Banks are generally exempt from tax on services rendered to their customers since they constitute professional services, consideration for the extension of credit, charges related to the transfer of intangible property, or electronic data processing services for others. The following is a complete list of the property or services for which a bank must collect Sales Tax, unless the purchaser is exempt: charges for real estate management, payments received for rental of safety deposit boxes, fees for the collection of notes and accounts of others, sales of promotional items, sales of checkbooks and similar items, and charges for research and copying.

5-33
Beauty and barber shops: Barber and beauty shop operators are rendering a personal service which is exempt.

Boat and aircraft dealers: Sales of boats not subject to the motor vehicle title tax are taxable. Sales of aircraft also are taxable.

Bookkeeping: A person who performs general bookkeeping and accounting services but who is not a certified public accountant is subject to tax on charges for his services.

Coin-operated machines, vending machines: Sales of tangible personal property or services through the use of coin-operated machines are subject to tax. The person who has control of the machine is responsible for paying the tax.

Collection agencies: Fees earned by a collection agency are taxable without deduction for any amounts paid to other agencies which assisted them.

Commodity brokers: The commissions earned from commodity brokering are subject to tax.

Consultants: Consultants are required to collect a tax on their fees charged unless the consultants are rendering a professional service such as doctors, lawyers, etc.

Containers, wrapping and shipping materials: The sale of boxes, wrapping, packaging materials, etc. to a vendor who uses such material in packing items for sale to customers is exempt as a purchase for resale. Sales of returnable containers are taxable if title does not pass to the purchaser of the material or liquid in the container.

Country clubs: Dues for a membership alone are not taxable but dues which are for services by a club are taxable. A safe harbor has been created and the Sales Tax is payable on 40% of the dues paid to a country club unless the club can prove to the Tax Commissioner that a lesser percentage is justified in the particular circumstances. (See, W.Va. Adm. Notice 91-16.)

Delivery charges: Separately stated delivery charges are subject to tax unless provided by a common carrier subject to regulation by the Public Service Commission.

Dentists, dental laboratories, optometrists and opticians: Services by dentists and optometrists are professional services and are exempt.

Employee meals: Meals served by employers as part of an employee's wages are not taxable.

Exterminators: Exterminators are considered to be rendering a service subject to tax.
Farm equipment: Sales to farmers of farm equipment are exempt if used for the commercial production of an agricultural product. Production of agricultural products ceases when the product has been transported to the sales point.

Florists: Sales by florists are taxable.

Funeral directors: Services by funeral directors directly relating to the disposition of the body of the deceased are professional services which are exempt. The sales of caskets, vaults, and other services and material not directly relating to the body of the deceased are taxable.

Gasoline distributors: Distributors of gas and special fuels are subject to tax upon sale of their products unless the purchaser is exempt.

Hospitals: Hospitals are considered to provide a professional service and are, therefore, exempt. Also, meals, drugs, and other items given to patients as part of a hospital's services are exempt, since they are part of the hospital's professional service. Hospitals are taxable on their purchases consumed in providing their services as these are not considered to be purchased for resale.

Hotels, motels, and rooming houses: Renting of rooms in hotels, motels, and rooming houses is subject to tax unless as a permanent place of abode for at least 30 consecutive days.

Insurance agencies: Insurance is an intangible and a tax is not imposed on sales of insurance by insurance agencies.

Interior decorating: Persons performing interior decorating are subject to tax on their charges.

Jewelry, furniture, hardware, dry goods and apparel stores: Sales by jewelry, furniture, hardware, dry goods and apparel stores are subject to tax. Customer trade-ins must be credited against the purchase price.

Laundries, Laundromats, dry-cleaning: Persons engaged in the operation of laundries, dry-cleaning and related activities are rendering a service subject to tax.

Masseuses: Masseuses are considered to be rendering a personal service which is exempt.

Motor vehicle dealers: Repair services and sales of parts are subject to Sales and Use Tax. Accessories purchased after obtaining title and possession of a car are also taxable.
Newspapers and magazines: The sale of newspapers and magazines is taxable unless delivered by route carrier. Purchases directly used in the printing and sale of newspapers and magazines are exempt since the business is considered to be a manufacturing activity.

Nursing and convalescent homes: Persons who operate nursing and convalescent homes may be rendering a personal service which is exempt from tax.

Parking: Rental of parking spaces is subject to tax.

Photographers and film developers: Persons taking photographs who develop their own film are engaged in a manufacturing activity. Their purchases are exempt only to the extent that they are directly used in such manufacturing activity.

Places of amusement: Sales by places of amusement are taxable.

Prescription and other drugs: Sales of prescription drugs and insulin to consumers for medical purposes are exempt from tax. Sales of non-prescription drugs are subject to tax. Drugs sold to hospitals and other health care providers for professional use are exempt.

Printers: Printers are considered to be manufacturers and their sales are taxable. Goods and services purchased for direct use in printing are exempt.

Private music instruction, flight instruction and dance instruction: Private instruction by a certified music teacher is considered to be a professional service and is exempt. Flight instruction also is considered to be a professional service and therefore exempt. Dance instruction is not considered a professional service and is subject to tax.

Private schools: Private schools not otherwise exempt are considered to be rendering a professional service and their fees are exempt.

Radio and television broadcasting stations: Sales of radio and television broadcasting time as well as advertising services rendered therewith to prepare such ads are exempt. Purchases directly used in the communication activity are likewise exempt.

Real estate brokers: Licensed real estate brokers are exempt from paying a tax on their commissions since they are considered to be professionals.

Repairs to tangible personal property: The services of persons engaged in the business of repairing tangible personal property are subject to tax.
Restaurants and bars: All sales of food and beverages and cover charges made by bars and restaurants are subject to tax. All purchases made by restaurants and bars are subject to tax unless they are purchases for resale.

Royalties: Royalty payments with respect to mineral interests are not subject to tax.

Sales by state and local government: State governmental units which render services that are in competition with businesses are required to collect the tax from the consumers. Also, governmental units which sell personal property to consumers must collect the tax thereon unless otherwise exempt.

Sales to persons rendering personal services: Sales to persons rendering personal services such as barbers, beauticians, etc. are subject to tax if used in providing their services, but are exempt if resold to customers in a separate transaction which is subject to tax.

Service stations: Persons operating a gasoline service station are generally taxable on the services they render.

Sight-seeing trips, plane and boat rides: Fees charged for sight-seeing trips, plane and boat rides in West Virginia are subject to tax unless regulated by the Public Services Commission or unless for tourism or pleasure.

Store coupons: Since a store is reimbursed by the manufacturer for the amount of any manufacturers' coupons, the tax is computed on the gross sales price without any deduction for the coupon.

Summer camps, camping: Fees charged by non-educational summer camps are subject to Sales and Use Tax as is the leasing of space for a trailer or camper. Fees charged by educational summer camps are exempt.

Tanning salons: Charges made by tanning salons are taxable.

Trading stamps, coupons and meal tickets: The exchange of goods for trading stamps, coupons, etc. is considered the sale of these goods and the seller shall collect the tax. The sale of a meal ticket is not taxable. However, tax is due when the meal ticket is redeemed.

Trailer parks: Rental spaces for trailers in a trailer park are subject to tax if leased for less than 30 days.

Travel agencies: A travel agency's commissions for arranging reservations are subject to tax. A travel agency that arranges group or package tours is taxable on the
gross profit realized on such group package or tour. However, commissions received by travel agents from out-of-state vendors are exempt. (W. Va. Code § 11-15-9(a)(45)

**Warranties**: Warranties sold separately are subject to tax.

**Well servicing**: Well servicing, including tangible personal property consumed in such activity, constitutes a service on which a tax must be collected.

## § 539 Local Sales and Use Taxes


Effective July 1, 2005, certain municipalities in the state that do not impose a municipal business and occupation tax or which repeal their existing business and occupation tax, are authorized to impose an Alternative Municipal Sales and Use Tax at a rate not to exceed 1%, to be collected on transactions occurring within the corporate boundary of the municipality.

The transactions upon which the municipal sales and use taxes imposed pursuant to Chapter 8, Article 13C are collected are identical to the tax base of the state Sales Tax imposed pursuant to Chapter 11, Article 15. All exemptions from the state Sales Tax also apply to the alternative municipal sales and use tax. All municipal sales and use taxes are required to be collected by the State Tax Department which distributes the proceeds to the municipality imposing the tax.

In addition, “Qualified Municipalities” are authorized to impose a Pension Relief Municipal Sales and Use Tax at a rate not to exceed 1%, without having to repeal their existing business and occupation tax. For purposes of this tax, the term Qualified Municipality includes a municipality where the weighted average of the percentages to which its policeman’s and fireman’s pension relief funds are fully funded is 3 percent or less. In addition, the municipality must present to the Legislature’s, Joint Committee on Government and Finance a plan to remove the unfunded liabilities in its policeman and fireman pension and relief plans. The proceeds from a Pension Relief Municipal Sales and Use Tax must be dedicated to reducing the unfunded liabilities in the municipality’s pension and relief plans.

To date, only one municipality in West Virginia has enacted an Alternative Municipal Sales and Use Tax. Effective October 1, 2011, the Town of Williamstown created a 1% sales and use tax. No municipalities have enacted a Pension Reduction Municipal Sales and Use Tax.

The City of Huntington has also attempted to exact a municipal sales and use tax pursuant to the municipal home rule powers granted in *W.Va. Code* § 8-1-5a. The Huntington municipal sales and use tax does not comply with the municipal sales and use tax provisions of Chapter 8, Article 13C. As of December 15, 2011, the Huntington
tax, has been challenged in the Kanawha County Circuit Court and has not become effective pending the outcome of that case.

§ 540 Sales Tax And Use Tax Forms

At the time of publication of this chapter, the following Sale Tax and Use Tax forms were available at the Tax Commissioner’s website at: http://www.wva.state.wv.us/wvtax/salesAndUseTaxForms.aspx

<table>
<thead>
<tr>
<th>Form</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CST-AF1</td>
<td>Affidavit for an Individual Filing a Claim of Refund for Consumers Sales and Service Tax or Use Tax</td>
</tr>
<tr>
<td>CST-AF2</td>
<td>Affidavit for a Business Filing a Claim of Refund for Consumers Sales and Service Tax or Use Tax</td>
</tr>
<tr>
<td>CST-200</td>
<td>Consumers Sales and Service Tax Return - For filing periods prior to July 1, 2008</td>
</tr>
<tr>
<td>CST-200 CU</td>
<td>Combined Sales and Use Tax Return - For filing periods on or after July 1, 2008</td>
</tr>
<tr>
<td>CST-210</td>
<td>Direct Pay Consumers Sales and Use Tax Return</td>
</tr>
<tr>
<td>CST-220</td>
<td>Use Tax Return - For filing periods prior to July 1, 2008</td>
</tr>
<tr>
<td>CST-240</td>
<td>Claim for Refund or Credit for Sales or Use Tax Paid on Exempt Purchases</td>
</tr>
<tr>
<td>CST-250</td>
<td>Consumers Sales and Use Tax Application for Direct Pay Permit</td>
</tr>
<tr>
<td>CST-270</td>
<td>Liquor / Wine Distribution Return</td>
</tr>
<tr>
<td>CST-281</td>
<td>Factory Built Homes Certificate of Principal Use - Relates to TSD-315</td>
</tr>
<tr>
<td>CST-282</td>
<td>Nonresident Contractors Consumer Sales and Service Tax and Use Tax Bond</td>
</tr>
<tr>
<td>CST-283</td>
<td>Nonresident Contractor Consumer Sales and Service Tax and Use Tax Cash Bond</td>
</tr>
<tr>
<td>CST-284</td>
<td>Tangible Personal Property Listing For Non-Resident Contractor</td>
</tr>
<tr>
<td>CST-285</td>
<td>Consumers Sales and Service Tax and Use Tax Flood Exemption Certificate Provided by Executive Order 10-09 Additional flood information</td>
</tr>
<tr>
<td>CST-286</td>
<td>Special Contractors Exempt Purchases Certificate Administrative Notice 2007-19</td>
</tr>
<tr>
<td>CST-290</td>
<td>Consumers Sales and Use Tax Certificate of Capital Improvement</td>
</tr>
<tr>
<td>F0003</td>
<td>Certificate of Exemption - New form: Replaces WV-2c-280. Instructions</td>
</tr>
<tr>
<td>F0006</td>
<td>Certificate of Compliance</td>
</tr>
</tbody>
</table>
Advertisements
   exemption ¶ 511

Advertising agencies
   in general ¶ 538

Agricultural production, sales for use in
   exemption ¶ 512

Aircraft dealers
   in general ¶ 538

Amusements
   in general ¶ 538

Auctions
   in general ¶ 538

Banks
   in general ¶ 538

Beauty and barber shops
   in general ¶ 538

Bonds
   performance, non-resident contractors ¶ 524

Bookkeeping
   in general ¶ 538

Broadcasting stations
   in general ¶ 538

Bulk sales
   entire business ¶ 530

Burial lots
   exemption ¶ 511

Car wash
   exemption ¶ 511
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Camping</td>
<td>538</td>
</tr>
<tr>
<td>Charitable organizations, sales to</td>
<td>512</td>
</tr>
<tr>
<td>exemption</td>
<td></td>
</tr>
<tr>
<td>Churches, sales to</td>
<td>512</td>
</tr>
<tr>
<td>exemption</td>
<td></td>
</tr>
<tr>
<td>Coin-operated machines</td>
<td>538</td>
</tr>
<tr>
<td>in general</td>
<td></td>
</tr>
<tr>
<td>Collection agencies</td>
<td>538</td>
</tr>
<tr>
<td>in general</td>
<td></td>
</tr>
<tr>
<td>Collection of tax</td>
<td>522-524</td>
</tr>
<tr>
<td>in general</td>
<td></td>
</tr>
<tr>
<td>out-of-state volume retailers</td>
<td>525</td>
</tr>
<tr>
<td>Consultants</td>
<td>538</td>
</tr>
<tr>
<td>in general</td>
<td></td>
</tr>
<tr>
<td>Consumer liability</td>
<td>527</td>
</tr>
<tr>
<td>in general</td>
<td></td>
</tr>
<tr>
<td>Containers</td>
<td>538</td>
</tr>
<tr>
<td>in general</td>
<td></td>
</tr>
<tr>
<td>Contracting</td>
<td>538</td>
</tr>
<tr>
<td>exemption</td>
<td>511</td>
</tr>
<tr>
<td>Day care centers</td>
<td>511</td>
</tr>
<tr>
<td>exemption</td>
<td></td>
</tr>
<tr>
<td>Delivery charges</td>
<td>538</td>
</tr>
<tr>
<td>in general</td>
<td></td>
</tr>
<tr>
<td>Distribution Facility Exemption</td>
<td>514</td>
</tr>
<tr>
<td>Distributors, gasoline</td>
<td>538</td>
</tr>
<tr>
<td>in general</td>
<td></td>
</tr>
<tr>
<td>motor fuels</td>
<td>532</td>
</tr>
<tr>
<td>Drugs</td>
<td>538</td>
</tr>
<tr>
<td>in general</td>
<td></td>
</tr>
</tbody>
</table>
Electricity
exemption ¶ 511

Electronic data processing services
exemption ¶ 512
high technology business ¶ 511

Environmental evaluations
exemption ¶ 511

Exempt organizations
in general ¶ 511 - ¶ 512

Exemption certificates
in general ¶ 512
record-keeping requirements ¶ 513

Exemptions
in general ¶ 511-514
assertion by agent ¶ 515
exempt sales with exemption certificate ¶ 512
per se exemptions ¶ 511
refundable exemptions ¶ 514
refundable exemptions - method for claiming refund ¶ 516
use tax exemptions ¶ 520

Exterminators
in general ¶ 538

Farm equipment
in general ¶ 538

Federal government, sales to
exemption ¶ 512

Florists
in general ¶ 538

Food
exemption ¶ 511-512

Food stamps, items purchased with
exemption ¶ 511
Forms
   sales tax ¶ 540

Fraternities and sororities
   charges for room and board to members exemption ¶ 511

Funeral directors
   in general ¶ 538

Gas
   natural, exemption ¶ 511

Gasoline
   in general ¶ 532

Gasoline distributors
   in general ¶ 538
   motor fuels ¶ 532

General Transaction Sourcing Rules
   in general ¶ 529

Gross Proceeds
   defined ¶ 506

High technology business
   exemption ¶ 511

Hospitals
   in general ¶ 538

Hotels
   in general ¶ 538

Insurance agencies
   in general ¶ 538

Interior decorating
   in general ¶ 538

Internet business
   exemption ¶ 511

Interstate transportation
   charges for transportation of passengers exemption ¶ 511
Isolated transactions
exemption ¶ 511
sale of business ¶ 530

Laundries
in general ¶ 538

Liability for tax
in general ¶ 526 – 529
consumer liability ¶ 527
corporate officers ¶ 536
vendor liability ¶ 526

Livestock
exemption ¶ 511

Local Sales and Use Taxes ¶ 539

Lodging franchise fees
exemption ¶ 511

Lottery tickets
exemption ¶ 511

Magazines
in general ¶ 538
West Virginia ¶ 511

Masseuses
in general ¶ 538

Materials used in contracting and manufacturing
exemption ¶ 518
purchases by contractors ¶ 511

Meal tickets
in general ¶ 538

Meals served to employees
in general ¶ 538

Mobile homes
exclusion from taxable gross proceeds ¶ 512
not subject to tax on motor vehicles ¶ 510
Motion pictures
exemptions ¶ 512

Motor vehicles
leases
exemption ¶ 510

Motor vehicles
sales
exemption ¶ 510

Music instruction, private
in general ¶ 538

Natural gas
exemption ¶ 511

Newspapers
in general ¶ 538

Newspapers, delivered
exemption ¶ 511

Nursing homes
in general ¶ 538

Opticians
in general ¶ 538

Optometrists
in general ¶ 538
professional services ¶ 511

Parking
in general ¶ 538

Payment of tax
in general ¶ 533 - 534
direct pay permits ¶ 517

Personal services
exemption ¶ 511
sales for use in performing ¶ 538

Photographers
in general ¶ 538
Physical therapy services
  in general ¶ 511

Physicians
  in general ¶ 511

Prescription drugs
  exemption ¶ 511; ¶ 538

Professional services
  exemption ¶ 511

Propane for poultry house heating
  exemption ¶ 512

Public services
  exemption ¶ 511

Purchase price
  defined ¶ 506

Real estate brokers
  in general ¶ 538

Record keeping
  in general ¶ 535

Refunds
  refundable exemptions - method for claiming refund ¶ 516

Repairs
  in general ¶ 538

Restaurants
  in general ¶ 538

Returns
  sales and use tax forms ¶ 540
  sales and service tax returns ¶ 533
  use tax returns ¶ 534

Sale
  defined ¶ 504
Sales and use tax

absorption of tax by vendor prohibited ¶ 531
administration ¶ 537
apportionment of purchase price
  exempt and nonexempt transactions ¶ 519
bulk sales ¶ 530
collection of tax ¶ 522-524
credits against tax
  sales tax paid to another state ¶ 521
direct pay permit ¶ 517
examples – specific businesses ¶ 538
exemption certificates record-keeping requirements ¶ 513
exemptions
  advertisements ¶ 511
  agricultural production, sales for use in ¶ 512
  aircraft repair services, sales of ¶ 512
  assertion by agent ¶ 515
  burial lots ¶ 511
  businesses subject to business and occupation tax,
    sales to ¶ 514
  car wash soap ¶ 511
  certificate
    exemption ¶ 512-513
  charitable organization, sales to ¶ 512
  charitable organization, sales by ¶ 514
  churches, sales to ¶ 512
  contracting ¶ 511
  day care centers ¶ 511
  electricity ¶ 511
  electronic data processing services ¶ 512
  environmental evaluations ¶ 511
  exempt sales with exemption certificate ¶ 512-513
  farm products ¶ 511
  federal government, sales to ¶ 512
  flags ¶ 511
  food ¶ 511-512
  forms ¶ 539
  fraternities, sales to ¶ 514
  gas ¶ 511
  government contract purchases ¶ 512
  high technology businesses ¶ 512
  internet business ¶ 511
  isolated transactions ¶ 511
  items purchased with food stamps ¶ 511
  livestock ¶ 511
lodging franchise fees ¶511
lottery tickets ¶511
management information service facilities ¶514
materials used in production of natural resources ¶514
materials used in transmissions or communications ¶514
materials used in transportation ¶514
mobile homes ¶512
motion pictures ¶512
motor vehicle leases ¶510
newspapers, delivered ¶511
per se exemptions ¶511
personal services ¶511
prescription drugs ¶511
private schools ¶538
professional services ¶511
propane for poultry house heating ¶512
public services ¶511
refundable exemptions ¶514
refundable exemptions - method for claiming refund ¶516
sales for resale ¶512
sales where law prohibits taxation ¶511
schools, sales to ¶512
services for an employer ¶511
social organizations, sales to ¶514
special district excise tax ¶511
state government, sales to ¶512
steam ¶511
taxable services, sales for use in ¶538
textbooks ¶511
tickets for school activities ¶511
tuition charges by educational summer camps ¶511
use tax exemptions ¶520
vehicles subject to privilege tax ¶511
video machines ¶512
volunteer fire departments, sales to ¶514
warehouse and distribution facility ¶514
water ¶511
“gross proceeds” defined ¶506
history ¶501
in general ¶502 - ¶503
liability for tax ¶526 – 529
consumer liability ¶527
corporate officers ¶536
vendor liability ¶526
motor fuel ¶532
nonresident contractors ¶ 524
corporate surety bond ¶ 524
payment of tax ¶ 517
direct pay permits ¶ 517
“purchase price” defined ¶ 506
rate of tax ¶ 508 - ¶ 509
record-keeping requirements ¶ 535
research and development credit application of ¶ 512
returns and reports
sales and service tax returns ¶ 533
specimen returns ¶ 540
use tax returns ¶ 534
“sale” defined ¶ 504
sale of entire business ¶ 530
“sales price” defined ¶ 506
sales to nonresidents ¶ 529
sales to related parties ¶ 507
“use” defined ¶ 505

Sales for resale
exemption
sales and use tax ¶ 512

Sales price
defined ¶ 506

Sales where law prohibits taxation
exemption ¶ 511

School activities
exemption ¶ 511

Schools, private
in general ¶ 538

Schools, sales to
exemption ¶ 512

Service stations
in general ¶ 538

Services for an employer
exemption ¶ 511
Services, personal
exemption ¶ 511

Services, professional
exemption ¶ 511

Shipping materials
exemption ¶ 538

Sight-seeing trips
in general ¶ 538

Social organizations, sales to
exemption ¶ 514

Special district excise tax
exemption ¶ 511

State and local government, sales by
exemption ¶ 538

State government, sales to
exemption ¶ 512

Steam
exemption ¶ 511

Tanning salons
exemption ¶ 538

Textbooks
exemption ¶ 511

Trading stamps
in general ¶ 538

Trailer parks
in general ¶ 538

Travel agencies
in general ¶ 538

Use
defined ¶ 505
Use tax  see sales and use tax supra

Vehicles subject to privilege tax
   in general  ¶ 510

Vending machines
   in general  ¶ 538

Vendor liability
   in general  ¶ 526

Video machines
   in general  ¶ 512

Volunteer fire departments, sales to
   exemption  ¶ 514

Warehouse  ¶ 514
   exemption

Warranties
   in general  ¶ 538

Water
   exemption  ¶ 511

Well servicing
   in general  ¶ 538
CHAPTER 6
PROPERTY TAX

By Herschel H. Rose III and Steven R. Broadwater

Mr. Rose and Mr. Broadwater are engaged in the private practice of law in Charleston, West Virginia, with a focus on property tax appeals. Mr. Rose was West Virginia State Tax Commissioner when the state reappraisal for property taxes was structured and has spoken frequently on this subject. Rose Law Office is the West Virginia member of the American Property Tax Counsel

Published by West Virginia Society of Certified Public Accountants
900 Lee Street, E. Suite 1201, Charleston, WV 25301
© Commerce Clearing House, Inc. © 2012 West Virginia Society of Certified Public Accountants
All Rights Reserved

Table of Contents

| ¶ 601 Introduction......................................................................................................... | 6-2 |
| ¶ 602 Property Subject to Tax...................................................................................... | 6-2 |
| ¶ 603 Exemptions--In General...................................................................................... | 6-3 |
| ¶ 604 Special Methods of Valuation............................................................................. | 6-7 |
| ¶ 605 Exemptions--Strictly Construed.......................................................................... | 6-8 |
| ¶ 606 Classification and Rates.................................................................................. | 6-8 |
| ¶ 607 Assessment --In General ................................................................................ | 6-10 |
| ¶ 608 Assessment--Residential, Farm Property And Managed Timberland.................... | 6-12 |
| ¶ 609 Assessment--Real Property............................................................................... | 6-12 |
| ¶ 610 Assessment--Personal Property....................................................................... | 6-13 |
| ¶ 611 Assessment-- Public Utility Property .............................................................. | 6-13 |
| ¶ 612 Valuation--Public Utility Property ................................................................... | 6-14 |
| ¶ 613 Valuation--Coal.............................................................................................. | 6-15 |
| ¶ 614 Valuation--Producing and Reserve Oil and Natural Gas Properties .................. | 6-17 |
| ¶ 615 Valuation--Timberland.................................................................................... | 6-20 |
| ¶ 616 Valuation--Other Active Natural Resources..................................................... | 6-21 |
| ¶ 617 Valuation--Commercial and Industrial Real Property ....................................... | 6-23 |
| ¶ 618 Valuation--Commercial and Industrial Personal Property .................................. | 6-26 |
| ¶ 619 Valuation--Unsold Lots Contained in a Recorded Plan or Plat ............................ | 6-27 |
| ¶ 620 Valuation--Vehicles, Watercraft and Aircraft.................................................. | 6-28 |
| ¶ 621 Return of Property .......................................................................................... | 6-29 |
| ¶ 622 Procedure for Contesting Tax........................................................................... | 6-30 |
| ¶ 623 Senate Bill 401 ............................................................................................... | 6-35 |
| ¶ 624 Constitutional Issue Remaining after SB 401 .................................................... | 6-39 |
| ¶ 625 Payment of Tax .............................................................................................. | 6-39 |
| ¶ 626 Lien for Tax .................................................................................................... | 6-40 |
| ¶ 627 Specimen Return–Business Property Return–STC 12:32C .................................... | 6-41 |
¶ 601 Introduction

Background: The property tax in West Virginia is imposed on all real and tangible personal property situated in the state on the first day of July of each year. Certain types of property are exempted from property taxation by the West Virginia Constitution. Other types are exempted by general statute.

With the exception of industrial, natural resource and public utility property, property is valued by the elected assessor of each county. The resulting taxes are collected by the county sheriff. The State Tax Commissioner has oversight authority of the appraisal process. The property tax is a local tax with the revenues divided among the county board of education, county government, and, if the property is located within the corporate limits of a municipality, the city government. Less than one percent (1%) of the property tax revenues are spent by state government.

Except for industrial, natural resource and public utility property, all real and personal property are reappraised by the county assessors according to plans approved by the Property Valuation Training and Procedures Commission. Industrial and natural resource properties are reappraised by the Tax Commissioner and public utility properties are reappraised and assessed by the State Board of Public Works

Each property in the State must be reappraised at least every three years; as the revised values generated by the reappraisals are placed on the property books of the counties, all of the levy rates in each county must be adjusted to offset the effect of the increase in property assessments so that total property taxes in any year do not exceed 101% of the previous year’s taxes. New construction is not included in that calculation.

¶ 602 Property Subject to Tax


The West Virginia Constitution provides that “... all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law.” Consequently, all real and tangible personal property that has acquired a tax status for purposes of ad valorem taxation and not specifically exempted from taxation by provisions of the West Virginia Constitution or West Virginia Code is subject to the property tax. Intangible personal property is exempt by the provisions of W. Va. Code § 11-1C-1b.

However, in Ohio Cellular RSA Ltd. Partnership v. Board of Public Works of State of W.Va., 198 W.Va. 416, 481 S.E.2d 722 (1996), the Supreme Court of Appeals held that in very limited circumstances, some types of property are not subject to taxation because they do not fit within the definitions of either real or personal property.
¶ 603 Exemptions--In General


A number of specific types of property are exempted from property taxation by the state Constitution and by statutes implementing those constitutional provisions. While some of the exemptions are absolute, most of the exemptions are conditioned on either the use to which the property is put or on the exclusive ownership of the property by the exempt entity. Property owned by the United States, for example, is absolutely exempt, except where Congress requires payments in lieu of taxes, while property belonging to the State of West Virginia is exempt only when it is exclusively owned by the state. Still less generous is the exemption afforded property owned by a municipality which must not only be exclusively owned by the municipality but must also be used for a public purpose. The following types of property are exempt from taxation:

**Exemption for elderly and disabled:** An exemption from _ad valorem_ property taxes shall be allowed for the first $20,000 of assessed value of a homestead that is used and occupied by the owner thereof exclusively for residential purposes, when such owner is sixty-five years of age or older or is certified as being permanently and totally disabled. The owner must have been a resident (domiciled in the state for more than six months of the calendar year) for more than two consecutive years preceding the taxable year. However, when a resident of West Virginia establishes residency out of state and subsequently returns and reestablishes residency in the state within a period of five years, such resident may file a claim for the exemption if he was a resident for any two years out of the ten immediately preceding years. Proof of residency may be either a voter's registration card or a motor vehicle registration. If an owner receives a homestead exemption in another state, the owner is ineligible for the exemption. (W. Va. Code § 11-6B-3).

Note: _Deferments or tax credits:_ The Senior Citizen property Tax Deferment Act (W. Va. Code §§ 11-6I-1 _et seq._), which limited the effect of increases in appraised value on a homestead that qualified for the homestead exemption beginning July 1, 2008, was repealed by the W. Va. Legislature in the 2011 Regular Session, and the alternative low income property tax increment refundable credit provided by that Act was eliminated for tax years beginning January 1, 2012. W. Va. Code § 11-21-24(b)(4).

Effective June 8, 2011, “low income” taxpayers that are eligible for the homestead exemption as described above may now claim a credit against personal income taxes for the amount paid in property taxes on the first $20,000 of taxable value for tax years 2007 and after ($10,000 for tax years 2003-2006). A claim for refund must be filed within three years of the due date of the personal income tax return. “Low income” means a federal adjusted gross income for the taxable year that is less than or equal to 150% of the federal poverty guideline, based on the number of individuals living in the homestead. However, for any tax year beginning in 2009, any taxpayer subject to the federal alternative minimum tax may not claim a credit under this section. Beginning in 2012, the amount of this credit must be calculated before that provided by W. Va. Code § 11-21-23 (see below) (W. Va. Code § 11-21-21).
Also effective June 8, 2011, for tax years 2008 and later, any “low income” homeowner living in his her homestead is granted a refundable credit against personal income taxes for the amount of real property taxes paid in excess of four percent of gross household income. For tax year 2012 and thereafter, taxpayers must deduct the credit allowed by W. Va. Code § 11-21-21 from the tax paid before determining whether and by how much the taxes paid exceeds the four percent threshold. Before tax year 2012, a taxpayer can benefit under either this section or W. Va. Code § 11-21-21 but not both. However, for any tax year beginning in 2009, any taxpayer subject to the federal alternative minimum tax may not claim a credit under this section. The maximum credit is $1000. (W. Va. Code § 11-21-23).

Property used for charitable purposes: Property used for charitable purposes and not leased for profit, including property held by nonprofit corporations, is exempt. W. Va. Code § 11-3-9; Appalachian Emergency Medical Services, Inc. v. State Tax Commissioner, 218 W. Va. 550, 625 S.E. 2nd 312 (2005)

Farm equipment, produce and livestock: The personal property, including livestock, employed exclusively in agriculture (as defined in the section) and the products of agriculture while owned by the producers as defined in the section, may be exempted from taxation. (W. Va. Const. Art. X, § 1.) All property held for use in the subsistence of livestock at the commencement of the assessment year is exempt. Personal property, including vehicles that qualify for a farm use exemption certificate pursuant to W. Va. Code § 17a-3-2 and livestock employed exclusively in agriculture is exempt if such personal property is used on a farm or in farming operation that annually produces for sale agricultural products. (W. Va. Const. Art. X, § 1, W. Va. Code § 11-3-9.)

In Pilgrim’s Pride Corp. v. Morris, 228 W. Va. 596, 723 S.E.2d 642, 643 (2011), the Court held that a poultry manufacturer who contracts with independent farmers to provide the facilities and labor to raise its chickens to maturity is not entitled to rely upon the exemption from ad valorem taxation provided in W. Va. Code § 11–3–9(a)(28) (2008) for farms or farm operations because it does not qualify as a producer of agricultural products under W. Va. Code § 11–5–3 (2008), and that a taxpayer who seeks relief from ad valorem taxation pursuant to the subsistence of livestock exemption under W., Va. Code § 11–3–9(a)(21) (2008) must be able to demonstrate that the personal property for which the exemption is sought and the subject livestock are both in the present physical possession of the taxpayer. Public property: Public property is exempt and includes:

1. Property belonging to the United States, other than property permitted by the United States to be taxed under state law. (W. Va. Code § 11-3-9.)

2. Property belonging exclusively to the state. (W. Va. Code § 11-3-9.)

3. Property belonging exclusively to any county, district, city, village or town in this state, and used for public purposes. (W. Va. Code § 11-3-9.)
(4) Fire fighting equipment, property used exclusively for the maintenance thereof and property for the meeting of fire companies. (W. Va. Code § 11-3-9.)

(5) Property acquired by a county commission or a municipality to be leased, sold or otherwise disposed of according to the provisions of the Industrial Development and Commercial Development Bond Act, W. Va. Code § 13-2c-1 et seq., is exempt from property taxation as public property so long as the property is owned by the county or municipality. When, however, the county or municipality leases an interest in that property to a private concern for a for-profit enterprise, the leasehold interest is taxable. (In Re Maier, 173 W.Va. 641, 319 S.E.2d 410 (1984)).

(6) Municipal waterworks and electric power systems, when acquired or improved pursuant to the provisions of W. Va. Code § 8-19-1 et seq., are exempt from property taxation. Property used for the public purposes of distributing water or providing sewer service by a duly chartered nonprofit corporation when the property is not held, leased out or used for profit. (W. Va. Code § 11-3-9.)

(7) Property used for area economic development purposes by nonprofit corporations when the property is not leased out for profit. (W. Va. Code § 11-3-9.)

(8) Property located in this state, belonging to a city, town, village, county or other political subdivision of another state, and used for public purposes. (W. Va. Code § 11-3-9.)

(9) Property which is used for the public purpose of distributing electricity, water or natural gas or providing sewer service when the property is owned by a duly chartered nonprofit corporation and the property is not held, leased out or used for profit. (W. Va. Code § 11-3-9(a)(13).)

Church property: Property used exclusively for divine worship, parsonages, and the household goods and furniture pertaining thereto is exempt. Mortgages, bonds and other evidence of indebtedness in the hands of bona fide owners and holders thereafter issued and sold by churches and religious societies for the purpose of securing money to be used in the erection of church buildings used exclusively for divine worship, or for the purpose of paying indebtedness thereon are also exempt. (W. Va. Code § 11-3-9.)

Cemeteries: Cemeteries are exempted without regard to their use. Thus, undeveloped and unsold portions of a cemetery held in reserve for interment purposes until the additional space is needed for burial lots are exempt from taxation under the Constitution and state statutes. However, the reserve of land must be held in good faith and must be not disproportionate to the population of the community to be served. While a cemetery owned and operated by a private corporation is exempt from taxation, the exemption does not extend to furniture and equipment used for corporate purposes. (W. Va. Const. Art. X, § 1, W. Va. Code § 11-3-9, In re Northview Services, Inc., 183 W.Va. 683, 398 S.E.2d 165 (1990).
Property used for educational purposes: Property belonging to, or held in trust for, universities, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture is exempt. Any public or private nonprofit foundation or corporation which receives contributions exclusively for educational purposes of a college or university is also exempt, as are and public and family libraries. (W. Va. Code § 11-3-9.)

Property used for health care: Property belonging to any public institution for the education for the deaf, mute or blind, or any hospital not leased for profit is exempt, as is a house of refuge, a lunatic or orphan asylum, or home for children or for the aged, friendless or infirm if not conducted for private profit. (W. Va. Code § 11-3-9.)

Household goods: Household goods and personal effects of the household are exempt unless used or held for profit. “Household goods” means only personal property and household goods commonly found within the house and items used to care for the house and its surrounding property “Personal effects” means only articles and items of personal property commonly worn on or about the human body, or carried by a person (W. Va. Const. Art. X, § la, W. Va. Code § 11-3-9.) Dead victuals laid away for family use are exempt.


Property owned by benevolent associations: All property belonging to benevolent associations not conducted for private profit. (W. Va. Code § 11-3-9.)

Intangible Personal Property: Intangible personal property, e.g., money, stocks, bonds and accounts receivable, etc., is no longer subject to ad valorem taxation. (W. Va. Code § 11-1C-1b.)

Tangible personal property in interstate commerce: Tangible personal property which is moving in interstate commerce through or over the territory of West Virginia, or which was consigned from a point of origin outside the state to a warehouse, public or private, within the state for storage in transit to a final destination outside the state, whether specified when transportation begins or afterwards, but in any case specified timely for exempt-status determination purposes. While in the warehouse, the personal property can be assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled, or repackaged for delivery out of state without losing the exemption, unless such activity results in a new or different product, article, substance or commodity, or one of different utility. This exemption is provided by W. Va. Const. Art. X, § 1c (known as the Freeport Amendment) as implemented by W. Va. Code §§ 11-5-13 and 11-5-13a. The latter section provides that “Goods which have been moved to a warehouse or storage facility, at which no substantial alteration takes place, to await shipment to a destination outside this state are exempt from ad valorem property tax.”
While W. Va. Code 11-5-13a(a) provides that “It is the intent of the Legislature that the provisions of this section are to be liberally construed in favor of a person claiming exemption from tax pursuant to section one-c, article ten of the West Virginia constitution, this section and section thirteen of this article”, the Tax Commissioner has historically been reluctant to grant this exemption. Thus, in *Feroleto Steel Company, Inc. v. Oughton*, 2012 WL 4465559 (Sept. 25, 2012), the Tax Commissioner took the position that the act of cutting steel coils into narrower widths created a product of “different utility”, since the wide coils had a variety of uses, but the narrow coils that were cut to very precise measurements were suited to only one use by the single customer for whom they were destined. The Supreme Court of Appeals, however, ruled that the Tax Commissioner’s interpretation would render the statutory language “which says ‘[s]uch property shall not be deprived of such exemption because while in the warehouse the personal property is ... cut ... unless such activity results in a ... product ... of different utility’” meaningless, since “if the cutting of the steel coils in the instant case results in a product of new or different utility, under what circumstances would cutting property not so result?” The Court also emphasized that exemption of the inventory of steel coils from *ad valorem* property taxation is consistent with the intent in establishing the exemption that the applicable statute to be liberally construed in favor of a person claiming exemption from tax. The Court did note, however, that the composition of the steel was not changed during the cutting process. Nevertheless, this decision can be viewed at least as putting some teeth in the legislative directive that the Freeport Amendment be liberally interpreted as granting exemption from taxation.

The Tax Commissioner generally interprets these sections as providing an exemption for finished goods that are bound for out of state destinations, but as not exempting work in progress or raw materials. However, the amount of property tax paid on manufacturing inventory that is not exempt is now allowed as a credit against franchise taxes and corporate net income taxes (W. Va. Code § 11-13Y-1 et seq.). See ¶ 303, chapter 3 of this Guidebook.

Personal property of inventories of natural resources, however, are not exempt from property taxation unless required by federal law. (W. Va. Const. Art. X, § lc.)

¶ 604 Special Methods of Valuation

All taxable property must be assessed at sixty percent (60%) of its value, which is to be ascertained as directed by law. W. Va. Const. Art. X. §§ 1 and 1b. In general, value means market value. However, special methods of valuation are provided for the following properties:

Managed timberland (W. Va. Code §§ 11-1C-11 and 11-1C-11a)

Owner occupied residential property (W. Va. Code § 11-3-1);

Farms used, occupied and cultivated by their owners or bona fide tenants (W. Va. Code § 11-3-1);
Pollution Abatement Equipment (W. Va. Code § 11-6A-1);

Dealer Vehicle Inventory (W. Va. Code § 11-6C-1);

Specialized manufacturing production property (W. Va. Code § 11-6E-1);

Qualified Capital Additions to Manufacturing Facilities, which now include natural gas processing plants (W. Va. Code § 11-6F-1);

Oil and Gas Drilling Rigs (W. Va. Code § 11-1C-11c)


Automobiles (W. Va. Code § 17A-3-3a); and

Motorboats (W. Va. Code § 20-7-12a)

Airplanes and helicopters owned or leased by commercial airlines or private carriers (W. Va. Code § 11-6H-1 et seq.)

Certain specialized high-technology property (servers, defined as computers or devices on a network that manages network resources) directly used in a high-technology business or in an internet advertising business, and the value of tangible personal property directly used in a high-technology business or in an internet advertising business (W. Va. Code § 11-6J-1 et seq. The terms “high technology business” and “Internet advertising business” are defined in W. Va. Code § 11-15-9h.)

¶ 605 Exemptions--Strictly Construed

In all claims for property tax exemption, the constitutional and statutory provisions exempting property from taxation are strictly construed. It is incumbent upon the person who claims exemption from property tax to show that such property clearly falls within the terms of the exemption. Any doubt arising as to the exemption is resolved against the one claiming it. (In Re Maier, 173 W.Va. 641, 319 S.E.2d 410 (1984); Pilgrim’s Pride Corp. v. Morris, 228 W. Va. 596, 723 S.E.2d 642, 643 (2011))

¶ 606 Classification and Rates


The tax rates or levies applied to assessed values are capped under a classification scheme added to the West Virginia Constitution in 1932.
Class I property consists of certain agricultural personal property and intangible personal property and may be subject to a regular levy rate no greater than one-half of one percent (0.5%) of assessed value.

Class II property is residential property and farms having a maximum regular levy rate no greater than one percent (1%) of assessed value.

Class III property includes all other property not included in Class I or II and which is located outside of a municipality and may be taxed at no more than one and one-half (1.5%) for the regular levy.

Class IV property includes all other property not included in Class I or II and which is located inside of a municipality and may be taxed at no more than two percent (2%) for the regular levy.

Levy rates: The levy rate applied to the assessed value of property is a composite of the levy rate set by each levying body in the county with jurisdiction to tax that property. Each levying body makes its levy estimate, or sets the proposed levy rate, annually between March 7 and March 28. (W. Va. Code § 11-8-9.) The levying bodies reconvene on the third Tuesday in April to finalize the levy rates. (W. Va. Code §§ 11-8-10a, 11-8-12a, and 11-8-14a). If the annual appraisal, triennial reappraisal or general valuation of property produces an increase of 1% or more in the total projected property tax revenues, the regular levy rate must be reduced proportionately as between the county commission and the municipalities for all classes of property from the forthcoming year so the regular levy rate produces no more than 101% of the previous year's projected property tax revenues for counties and municipalities. (See, W. Va. Code § 11-8-6e). The levy rate for the support of the boards of education is set by the West Virginia legislature with a similar provision limiting aggregate taxes to 102% of the previous year's total. In both instances, total property tax revenues can be increased up to 110% following a public hearing. New construction is not included in calculating the increases. (See, W. Va. Code § 11-8-6f.)

<table>
<thead>
<tr>
<th>Taxing Authority</th>
<th>Class I</th>
<th>Class II</th>
<th>Class III</th>
<th>Class IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>0.25</td>
<td>0.50</td>
<td>1.00</td>
<td>1.00</td>
</tr>
<tr>
<td>County</td>
<td>14.30</td>
<td>28.60</td>
<td>57.20</td>
<td>57.20</td>
</tr>
<tr>
<td>Schools</td>
<td>22.95</td>
<td>45.90</td>
<td>91.80</td>
<td>91.80</td>
</tr>
<tr>
<td>Municipal</td>
<td>12.50</td>
<td>25.00</td>
<td>50.00</td>
<td>50.00</td>
</tr>
<tr>
<td></td>
<td>50.00</td>
<td>100.00</td>
<td>150.00</td>
<td>200.00</td>
</tr>
</tbody>
</table>

Excess levies: The levy rates can be increased by referendum to impose special or excess levies. If proposed by a municipality or a county, these special levies can increase the share of that levying body’s maximum regular levy rate by up to 50% and remain in effect for up to five years. (W. Va. Const. Art. X, §§ 1, and 11.) If proposed by a board of education, the special levy can increase that levying body’s maximum regular
levy rate by up to 100% and can remain in effect for up to five years. (W. Va. Constitution Art. X, § 10.) If approved by referendum, an additional bond levy may be imposed to service the bonded indebtedness of local governments. (W. Va. Const. Art. X, §§ 8 and 10.) Excess levies and general obligation bond levies of counties and municipalities must be approved by at least 60% of those voting for and against the levy. (W. Va. Const. Art. X, §§ 1 and 8). Board of education excess levies and general obligation bond levies require a majority approval of those voting on the question. (W. Va. Const. Art. X, § 10). (The excess levy rates are those specified in the excess levy ballot, unless the ballot allows them to be reduced in accordance with the excess levy ballot provision. (W. Va. Code § 11-8-6g(a).)

Statewide, the average tax rates per $100 of assessed valuation for the tax year ending December 31, 2008 (fiscal year ending June 30, 2009) are as shown in the following table.

**Average Actual 2008 Property Tax Rates**

*Rates are given in dollars per $100 of assessed valuation*

<table>
<thead>
<tr>
<th>Average</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Class I</td>
<td>$0.00</td>
</tr>
<tr>
<td>Class II</td>
<td>1.16</td>
</tr>
<tr>
<td>Class III</td>
<td>2.16</td>
</tr>
<tr>
<td>Class IV</td>
<td>2.85</td>
</tr>
</tbody>
</table>

Statewide, the average rate for all property was $1.88 per $100 of assessed valuation.

¶ 607 Assessment – In General


Generally, property taxation in West Virginia is to be equal and uniform throughout the state, and all property, both real and personal, is to be taxed in proportion to its value to be ascertained as directed by law. (W. Va. Const. Art. X, § 1.) The term "values" as used in the Constitution means “worth in money” of pieces of property, which is its market value. *(In re Tax Assessments Against Oneida Coal Co., 178 W.Va. 485, 360 S.E. 2d 560 (1987), rev'd on other grounds sub nom., Allegheny Pittsburgh Coal Co. v. County Commission of Webster Co., W.Va., 488 U.S. 336 (1989)).* All property is to be assessed annually at its true and actual value. The true and actual value of property, both real and personal, is the price for which the property would be sold if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale. (W. Va. Code § 11-3-1.) The foregoing law provides county assessors little practical guidance to use when determining the value of property that has not been sold recently.
The county assessors appraise all property, except industrial, natural resource and public utility property, at fair market value using the procedures and methodologies established by the Property Valuation Training and Procedures Commission and the valuation system established by the State Tax Commissioner. The assessors may use as an aid to valuation any information available on the character and values of such property.

Methods: The appraisals of the assessors and the Tax Commissioner are to be conducted pursuant to a reappraisal plan approved by the Property Valuation Training and Procedures Commission. See W. Va. Code § 11-1C-1 et seq. Appraisals of all property are on a three-year cycle. All assessors appraise the real and personal property which they are responsible for valuing at fair market value except for the special valuation provided for farmlands and managed timberland. Industrial and natural resource properties are appraised by the Tax Commissioner. The Tax Commissioner forwards each industrial and natural resource property appraisal to the county assessor of the county in which that property is located and the assessor will take 60% of each such appraisal as the assessed value in the land book or the personal property book. If the assessor does not accept the appraisal provided by the Tax Commissioner, the assessor must show just cause and a plan by which a different appraisal will be conducted to the Property Valuation Training and Procedures Commission. Public utility properties continue to be appraised and assessed by the State Board of Public Works.

Assessment date: All property is assessed as of July 1 of each year. From July 1 until January 30, the assessor conducts a canvass of all property to ascertain the true and actual value of the property.

Classification: In addition to the duty to assess property, the assessor also makes the initial determination as to the proper classification of property and whether a particular property is exempt from or otherwise not subject to property taxation. (W. Va. Code § 11-3-24a.)

Uniformity: The Constitution requires, generally, that taxation be equal and uniform throughout the state, except as otherwise permitted or required by the Constitution. All property must be taxed in proportion to its value.

In a decision involving Webster County's assessment of coal lands based on a recent purchase price, the United States Supreme Court held that the county assessor's intentional systematic underassessment of other comparable properties violated the taxpayers' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. A recent arms-length purchase price may be used for assessment purposes, and a general adjustment may be utilized as a transitional substitute for an individual reappraisal of other properties which were not recently sold. However, a general adjustment, to satisfy equal protection requirements, must be such that the differences in proportion between assessments of a class of property are equalized over a short period of time. The Court also held that the injured taxpayers were not limited in remedy to seeking to have the assessments of undervalued

Assessment ratio: All property is assessed at sixty percent (60%) of its appraised value, which is determined as provided by law. (W. Va. Const. art. X § 1b).

¶ 608 Assessment--Residential, Farm Property And Managed Timberland

Law: W. Va. Code §§ 11-IC-5 and 11-3-1

For three types of real property, the term “true and actual value” has a modified statutory definition. The true and actual value of residential property is arrived at by giving primary, but not exclusive, consideration to the fair and reasonable amount of income which the same might be expected to earn, under normal conditions in the locality wherein situated, if rented. The true and actual value of all owner or tenant occupied farms is arrived at according to the fair and reasonable value of the property for the purpose for which it is actually used regardless of what the value of the property would be if used for some other purpose, with consideration given to the fair and reasonable income which the same might be expected to earn under normal conditions in the locality wherein situated. The value of managed timberland is arrived at so that all such property is valued in the same manner no matter where it is situated in the state; valuation is based on its use and productive potential as managed timberland. Timberland which does not qualify as managed timberland is valued at market value, except that farm woodlots are valued as part of the farm.

¶ 609 Assessment--Real Property


Subject to exemptions, all tangible property, both real and personal, is taxed in proportion to its value which is ascertained as directed by law. A separate leasehold interest is taxable if it has a separate and independent value from the freehold, although under ordinary conditions the freehold estate will not be reduced in value by virtue of the leasehold nor will the leasehold have any ascertainable market value. (Great A&P Tea Co. v. Davis, 167 W. Va. 53, 278 S.E. 2d 352 (1981).) Separate interests in property, such as mineral interest, which have been severed from the fee are separately assessed and taxed. (W. Va. Code § 11-4-9.)

In assessing the value of buildings and structures, the assessor determines the value of fixtures and machinery and includes it in the value of the building in which it is located unless the machinery and fixtures are owned by some person other than the owner of the building. In that case, the machinery and fixtures will be assessed as personal property to their owner. (W. Va. Code § 11-3-7.)

Should the assessed value of a taxpayer’s real property increase in any year by more than 10%, or $1,000, whichever is the greater, the assessor must send the owner
a “Notice of Increase in Assessment” not later than January 15th of the tax year, unless there is a general increase in the entire valuation of one or more districts, in which case the notice may be given by publication of a Class II legal advertisement. (W. Va. Code § 11-3-2a.)

¶ 610 Assessment--Personal Property


Tangible personal property that has been located in this state for a period of time and has been used in the state and is located in the state on July 1 acquires tax situs in West Virginia and may be assessed, even though the property is removed before the tax is due or even before it has actually been assessed. (George F. Hazelwood Co. v. Pitsenbarger, 149 W.Va. 485, 141 S.E. 2d 314 (1965).)

All tangible personal property, unless exempt, belonging to persons residing in this state, whether such property be in or out of the state, unless the property actually in another state is subject to and actually taxed in the other state, and all personal property, unless exempt, in the state although owned by persons residing out of the state is subject to property taxation in West Virginia. (W. Va. Code § 11-5-1.)

¶ 611 Assessment-- Public Utility Property


The State Tax Commissioner provides tentative assessments based on fair market value of operating property of public service corporations to be used as a guide by the Board of Public Works in establishing final assessed values for property tax purposes. In this regard, the Tax Commissioner uses the “unit rule” where applicable and furnishes tentative valuation estimates for the Board's consideration. The “unit rule” is an appraisal of an integrated property as a whole system without any reference to the values of its component parts.

Public service businesses include airlines, bus lines, railroads, railroad car lines, express and freight companies, pipeline companies, electric power companies generating, transmitting or distributing electricity, including hydroelectric companies, telegraph and telephone companies; gas companies, water companies, and any other business that is a public service business. This chapter uses the terms public service business and public utility interchangeably.

Operating property is a utility’s property used for purposes immediately connected with providing the respective utility service. The Tax Commissioner's understanding of this definition is consistent with that used by regulatory bodies in constructing the utility rate base for rate making purposes. Accordingly, the Tax Commissioner gives primary consideration to whether properties are included in an utility operating property classification as reflected in the applicable uniform system of accounts when deciding issues as to whether property is operating or non-operating property. For example, to determine what constitutes operating property for an electric utility, the Tax
Commissioner will look to the Federal Energy Regulatory Commission’s Uniform System Accounts Prescribed for Electrical Utilities. For state regulated utilities, the Tax Commissioner will look to the appropriate system of accounts of the West Virginia Public Service Commission.

Non-operating property of public service corporations is assessed by the assessor of the county in which the non-operating property of public service corporations is located.

¶ 612 Valuation--Public Utility Property

Law: WVCSR § 110-1M-1 et seq.

Methodologies: While the rule provides for the use of the cost, income and market value methods of valuation, for-profit public service corporations are primarily valued using the income approach.

Tax returns: Public utility property tax returns must be filed no later than May 1 of each year, although on good cause shown, the State Tax Commissioner may grant an extension of the filing deadline. Based upon these returns of public utilities to the Board of Public Works and other relevant information, the Tax Commissioner makes tentative assessments and provides them to the Board of Public Works on or before September 15 of each year. By October 1, the Board assesses and fixes the true and actual value of all public utility property. By law, the assessed value of public utility property is sixty percent (60%) of its appraised value. An appeal from the decision of the Board may be taken to the circuit court of the county in which the property assessed is located.

The State Auditor apportions the assessed values to the counties where the utility property is situated according to the method the auditor deems appropriate and then applies the appropriate levy rate set by the local levying bodies to determine the tax due from public utilities.

Valuation of interstate commercial motor vehicles: Interstate motor carrier operating property includes each power unit used as an interstate commercial motor vehicle registered under a proportional registration agreement. The cost approach is used to determine the appraised value of an interstate commercial motor vehicle. The gross capital cost of the interstate commercial motor vehicle is multiplied by percentage factor representing the remainder of the vehicle’s value after depreciation.

The Tax Commissioner annually provides the depreciation schedules used to the West Virginia Commissioner of Motor Vehicles for use in assessing power units subject to proportional registration agreements. The property assessment and tax collection upon interstate power units occurs at the time of registration under the International Registration Plan (IRP). IRP is a method of registering fleets of vehicles that travel in two or more member jurisdictions. All states (except Alaska and Hawaii), Washington D.C., and all Canadian provinces (except Northwestern Territories, Nunavut and Yukon) are members of the plan. Registration through IRP is required for vehicles that are used
for transporting persons or property, travel in two or more IRP jurisdictions (including West Virginia), and:

(1) Have a registered gross vehicle weight or actual weight in excess of 26,000 pounds (property carrying vehicle); or

(2) Are power units with three (3) or more axles regardless of weight, including buses; or

(3) Are used in combination and the actual weight of the combination exceeds 26,000 pounds.

For each interstate truck, road tractor and power unit registered under a proportional registration agreement, the appraised value is multiplied by an apportionment factor, the numerator of which represents a total fleet miles driven in the most recent taxable year in West Virginia and the denominator of which represents the total fleet miles driven in the most recent tax year everywhere. The mileage amounts are those reported to the West Virginia Division of Motor Vehicles.

¶ 613 Valuation--Coal

Law: W. Va. Code § 11-1C-10; WVCSR § 110-1I-1 et seq.

The Tax Commissioner is required to make and maintain accurate values for all natural resource properties including coal. The methodology for valuing coal properties is set forth in rules that were approved for promulgation by the West Virginia Legislature. Under the rules, coal property ownership is classified into the following four categories for valuation purposes:

(1) **Active**: Active mining property refers to a mind of coal property or portion of a property involved in a mining operation. Each and every bed of coal being mined in a permitted mining operation is a separate active mining property.

    The value of active mining property is the sum of the value of active acres and reserves that are included in the active mining property. In no case may the value per active acre on a coal bed be less than the applicable present value per acre on the coal bed. Unmineable, mined-out and barren acres are not included in active mining property.

    The valuation formula applicable to an active mining property is based on the actual market to which the coal from the bed is currently being sold, whether it is metallurgical and/or steam. Factors used for the valuation formula include the coal thickness, 1800 tons per acre foot, the clean coal recovery rate, the coal royalty rate, whether the coal is underground or surface, the coal market, a net present value multiplier, and the mine life in years. The factors are different for steam coal and metallurgical coal.
(2) **Reserves:** Reserve coal property means any property for which coal rights are part of the owned estate and which is not part of an active mining property. Reserve coal is valued according to a reserve coal valuation model. The minimum valuation placed on reserves may never be less since five dollars ($5.00) per acre. Any unmineable, mined-out or barren coal is valued as part of the reserve coal property.

The base market location value is the starting point of evaluating a reserve coal. The base market location value for location is determined by multiplying the coal price per million BTU for location by the royalty rate for the location. The current market location value is then tabulated for each coalbed by multiplying the base market location value by a BTU and sulfur adjustment factor for each coalbed at location. The present value of 1 BTU of each coalbed at a location is then calculated by multiplying the current market location value by one millionth and then multiplying the resulting product by a standard midyear present worth factor calculation.

(3) **Unmineable:** Unmineable coal is coal which is not in a mineable coal bed. It is valued under one of the following circumstances:

- Properties in which each and every coal bed is unmineable or where each bed is partially unmineable and the remaining portion is mined out, are valued at a rate of five dollars ($5.00) per deed acre, and
- Properties in which an acre or more of unmineable coal coexists with mineable coal in any bed, are valued at a rate of five dollars ($5.00) times the amount of unmineable acreage in the bed containing the least amount of unmineable acreage.

(4) **Mined out coal properties:** A mined out coal bed is a bed of coal, or any portion of the bed, which has been depleted by prior mining operations and from which no additional coal is recoverable by generally accepted mining practices and suitable equipment, unless there is evidence to the contrary. Mined out coal property is valued under one of the following circumstances:

- Properties in which each and every coalbed is completely mined out, are valued at the rate of one dollar ($1.00) per deed acre;
- Properties in which an acre or more of mined out coal coexist with mineable coal in the bed are valued at a rate of one dollar ($1.00) times the amount of mined out acreage in a bed containing the least amount of mined out acreage.

(5) **Barren:** Barren coal properties means fee/mineral/coal properties where the coal rights are owned but the coal was never deposited and/or has been subsequently removed by erosion. Barren coal properties are valued under one of the following circumstances:

- Properties in which each and every coalbed is completely barren are valued at the rate of one dollar ($1.00) per deed acre; and
Properties in which an acre or more of barren coal coexists with mineable in any bed, are valued at a rate of one dollar ($1.00) times the amount of barren acreage in the bed containing the least amount of barren acreage.

Leasehold interests: Generally, the values attributed to coal property are attributed to the owner of the coal property. Where the property is subject to a lease requiring the owner to permit the mining of the coal at a royalty rate substantially below current market value, the owner may petition the Tax Commissioner to attribute a portion of the value of the coal to the leaseholder.

Where coal rights are part of a fee estate in which the surface has qualified as an active farm, the coal will not be valued if no royalties are derived from the coal. Only where the annual wholesale value of farm commodities or products is less than 50% of the usual gross income from all uses of the property will the applicable coal values be added to the surface farm use values.

Property reports: On or before May 1 of each year\(^1\), the producer is required to file an Annual Appraisal Report for Production of Coal with the Tax Commissioner with acknowledgement to the coal owners and the county assessors of the counties in which the mine is located. On or before August 16th of each year, the coal owner of any property that is part of a permitted mining operation under lease is required to file an Annual Appraisal Return for Reserve Mineral Properties with the Tax Commissioner. Owners of other coal properties may file an Annual Appraisal Return for Reserve Mineral Properties, on or before September 16th, with the Tax Commissioner; otherwise the properties are valued using the best available information. (WVCSR § 110-1I-4.9 (2006). Note: SB 401, in effect beginning with tax year 2012, changes the due date of the return from owners of coal property from August 1 to May 1 preceding the July 1 assessment date and adds an informal review process.

\(\S\) 614 Valuation—Producing and Reserve Oil and Natural Gas Properties

Law: W. Va. Code § 11-1C-10; CSR § 110-1J-1 et seq.

The State Tax Commissioner is required to make and maintain accurate values for all natural resource properties including oil and natural gas. The methodology for valuing these properties is set forth in rules that were approved for promulgation by the West Virginia Legislature.

Oil or natural gas is one of several estates in real property which may be owned either separately or in conjunction with other estates. If oil or natural gas is owned as a separate estate, either absolute, as a leasehold, or in conjunction with other estates, West Virginia property tax law requires that ownership be listed, valued and taxed in proportion to its value to be ascertained as directed by law. If oil or natural gas is owned in conjunction with other estates, the value of the oil or natural gas is included in the

\(^{1}\) SB 401 changed the due date of this report from August 1 to May 1 for assessment years beginning on and after July 1, 2011.
Oil and natural gas properties are divided into several categories:

(1) **Natural gas-producing property:** Natural gas-producing property is property from which natural gas has been produced or extracted at any time during the calendar year preceding the July 1 assessment date. Natural gas producing property includes the interest or interests underlying an area of up to one hundred and twenty five (125) acres of surface per well for property with active wells on the parcel. All acreage of the natural gas producing property in excess of one hundred twenty five (125) acres per well, is valued at the non-producing rate per acre.

(2) **Oil-producing property:** Oil-producing property is property from which oil has been produced or extracted at any time during the calendar year preceding the July 1 assessment date. Oil-producing property includes the interest or interests underlying an area of up to 40 acres of surface per well with one (1) or more active wells on the parcel. All acreage of an oil-producing property in excess of 40 acres per well is valued at the non-producing rate per acre.

**Valuation:** The value of oil and/or natural gas producing property is determined through the process of applying a yield capitalization model to the net receipts (gross receipts less royalties paid less operating expenses) for the working interest in a yield capitalization model applied to the gross royalty payments for their royalty interest. Where ownership is split through a lease or royalty arrangement, different values are determined for the working interest and the royalty interest. If the well produced for less than 12 months during the first calendar year of production, or during the first calendar year of production after being shut-in during the previous calendar year, the gross receipts and royalties are annualized prior to the process of applying a yield capitalization rate. WVCSR § 110-1J-4.1.

(3) **Non-producing, shut-in wells:** A non-performing or shut-in well is a well which due to the producer’s decisions, market reasons and/or product performance, was non-productive during the entire most recent calendar year preceding the July 1 assessment date. WVCSR § 110-1J-3.12.

**Valuation:** The value per acre of non-producing acreage, which includes shut-in wells, equals the discounted annual lease payment per acre. A valuation schedule for non-producing properties is determined annually by the Tax Commissioner for each district within the county, where data is available. The Tax Commissioner annually conducts a review of oil and/or natural gas lease agreements transacted at arms length in all 55 counties to determine the average annual delay rental lease payment per acre, and lease term. The per-acre value for non-producing property is the sum of the projected annual income stream from delay rental during the lease term discounted in each year by a capitalization rate. The valuation of one dollar ($1.00) per acre is used
where property is located in those areas of the state were drilling activity/production have not been established and the property is presumed to be barren. WVCSR § 110-1J-4.7.

(4) Barren oil/gas property: Barren oil and natural gas properties are those fee and mineral parcels in West Virginia where data suggest that the presence of oil and natural gas is very unlikely WVCSR § 110-1J-3.2.

Valuation: Barren oil and natural gas areas (fee accounts) are valued at one dollar ($1.00) per deed acre. WVCSR § 110-1J-4.9.

(5) Plugged or abandoned acreage: Plugged or abandoned acreage is valued to the oil or gas owner at the nominal rate of one dollar ($1.00) per acre. This category includes any plugged or abandoned acreage up to one hundred and twenty five (125) acres per natural gas well and up to forty (40) acres per oil well.

(6) Valuation of wells producing both oil and natural gas: The valuation of wells that produce both oil and natural gas is determined according to the methods described in the Tax Commissioner's legislative rule. These values are then summed to result in the overall value of the oil and/or natural gas producing acreage.

(7) Valuation of industrial use wells: Wells used for industrial purposes only are valued based on the actual most recent calendar year preceding the July 1 appraisal date MCF usage times the average West Virginia spot price for that calendar year determined by the “Natural Gas Monthly,” published by the US Department of Energy, Energy Information Administration. WVCSR § 110-1J-4.6.4

(8) Valuation of storage well areas: Storage well areas have a value equal to the discounted annual lease payment per acre that is applied to the reserve oil and gas acreage within the county. The minimum value applied to the acres will not be less than five dollars ($5.00) per deed acre. The value does not include inventories of natural gas stored within. These natural gas storage inventories are assessed separately to the inventory owner. WVCSR § 110-1J-4.11.

(9) Farm properties: The oil and gas rights that are part of the “fee” estate where the use of the surface qualified for farm use appraisal are valued in accordance with the Tax Commissioner's rule on the valuation of farmland and structures situated thereon for ad valorem property tax purposes, WVCSR § 110-1A. See, CSR § 110-1J-4.13.

(10) Valuation of the producer's personal property at non-producing or shut -in wells: The valuation of the producer's personal property that is part of a non-producing or shut-in wells appraisal will be assigned to the producer at the same value applied to home use only wells. WVCSR § 110-1J-4.16.
(11) **Valuation of pre-production/permit leaseholds**: Chattel real accounts (personal property) for pre-production/permit leaseholds are valued by the county assessor. WVCSR § 110-1J-4.17.

(12) **Valuation of producing flat-rate royalty accounts**: The appraised value of a producing flat-rate royalty is determined using a level terminal income series rather than the declining terminal income series. WVCSR § 110-1J-4.18.

(13) **Valuation of coal bed methane wells**: The Tax Commissioner currently applies the same methodology to the valuation of coal bed methane wells as he does to natural gas wells. The propriety of that approach is in litigation.

Property reports: On or before August 1 of each year, the producer must file the West Virginia Oil and Gas Producer/Operator Return with the State Tax Commissioner, with acknowledgment to the county assessors in counties where the oil and natural gas properties are located. (CRS § 110-1J-4.14.) Note: SB 401, in effect for assessment years beginning on or after July 1, 2011 does not change this date.

¶ 615 Valuation--Timberland

*Law:* W. Va. Code §§ 11-1C-.10, 11-1C-.11, 11-1C-11a, and 11-1C-.11b; WVCSR § 110-1H-1 *et seq.*

The State Tax Commissioner is required to make and maintain accurate values for all natural resource properties including managed timberland. The methodology for valuing these properties is set forth in rules that were approved for promulgation by the West Virginia Legislature.

Any person who owns timberland comprising ten (10) or more contiguous acres may qualify for certification as managed timberland for property tax purposes. W. Va. Code § 11-1C-11a.

In order to qualify for dedication as managed timberland for property tax purposes, the owner must annually certify in writing to the division of forestry, that the property meets the definition of managed timberland and contracts to manage the property according to a plan that will maintain the property as managed timberland. In addition, each owner certification must state that forest management practices will be conducted in accordance with approved practices from the publication of “Best Management Practices for Forestry.” W. Va. Code § 11-1C-10 (b)(1).

Timberland certified by the division of forestry as managed timberland is valued as managed timberland and it is managed under a cooperative contract with the division of forestry if the certification has not been surrendered by the owner of the property or revoked by the director of the division of forestry.

Property certified as managed timberland which prior to certification was properly classified as class II (residential property) may not be reclassified as class III or class IV.
for property taxation merely because the property has been certified as managed timberland unless there is some other event or change in use of the property that disqualifies it from being treated as class II property.

The appraised value of managed timberland is determined on the basis of the potential of the land to produce future income according to its use and productive potential. Potential for future net income is discounted to its present value utilizing a discounted cash flow; this is the appraised value. The ability of a stand of timber to produce wood products for sale or use depends primarily on the quality of the soil and certain topographical and climate features which can be expressed as a site index. Site index is the principal criterion influencing the appraised value of managed timberland. These factors are reviewed annually by the Tax Commissioner for necessary updating of the method described in order to properly reflect future changes in the values of managed timberland. WVCSR § 110-1H-2.1.

¶ 616 Valuation--Other Active Natural Resources

Law: W. Va. Code § 11-1C-10; WVCSR § 110-1K-1 et seq.

The State Tax Commissioner is also required to make and maintain accurate values for all other natural resource properties. The methodology for valuing these properties is set forth in rules that were approved for promulgation by the West Virginia Legislature.

Natural resources, such as limestone, fireclay, dolomite, sandstone, shale, sand and gravel, and salt are some of the several estates in real property. Other natural resources which are not currently being actively mined such as lead and zinc, manganese, iron ore, radioactive materials and oil shale, are valued according to the Tax Commissioner's rule when such interests are separate from the fee interest or are being leased and/or actively mined.

These natural resources are divided into five categories:

(1) Active: “Active mining property” means a mineable natural resource on a parcel or portion of a parcel involved in the mining operation, as defined by the Tax Commissioner's rule and permitted by the West Virginia Office of Miner's Health, Safety and Training/Office of Mining and Reclamation. Each and every mineable natural resources is considered a separate active mining property

Valuation: The value of active mining property is the value per active acre multiplied by the amount of active acres. In no case may the active mining property be valued at less than its value as reserve property. The valuation per active acre is arrived at by application of a valuation formula for active mining property based on the actual quantity of resource produced and sold. Factors used in the formula are: resource thickness in feet; tons per acre foot; clean resource recovery rates; royalty rate; net present value multiplier; and mine life in years. WVCSR § 110-1K-4.1.4.
The maximum active mining portion for each natural resource is fifteen (15) years multiplied by the annual acres mined, except for salt. The active mining portion around each salt production well is a maximum of thirty-five (35) acres. After a well's first year production, active mining property is derived by subtracting acres mined from the thirty-five (35) acres. If the available mineable acreage is less than fifteen (15) years or thirty-five (35) acres, respectively, the total available acreage will be considered for designation as “Active Mining Property” WVCSR § 110-1K.-4.1.2 g, h.

(2) Reserves: Reserves means the natural resource acres or portion of those acres, which: contain the mineable natural resources; are within a permitted mining property; and, are not within the active mining portion of the property.

Valuation: Reserve valuation rates for limestone, sandstone, clay and shale, sand and gravel, and salt are determined annually by the Tax Commissioner after review of recorded willing seller-willing buyer natural resource, production-specific, property sales that have occurred in the state of West Virginia during at least five calendar years prior to the July 1 appraisal date, through inspection of other appropriate information, and from quantitative data that might reflect current market values.

(3) Unmineable: An unmineable natural resources is a natural resource which is so situated that it may not be mined using generally accepted mining practices and suitable equipment.

Valuation: An unmineable natural resource subject to this rule is valued at one dollar ($1.00) per acre.

(4) Mined-out: Mined out means a natural resource, or any portion thereof, determined to be depleted by prior mining operations.

Valuation: Mined out properties are valued at one dollar ($1.00) per acre.

(5) Barren: Barren means fee or mineral properties where other natural resource rights are owned, a specific natural resource may never have been deposited or may have been subsequently removed by erosion.

Valuation: A barren natural resource subject to this rule is valued at one dollar ($1.00) per acre.

Resources part of active farm property: The natural resource rights that are part of the “fee” estate where the use of the surface has qualified for farm use appraisal is valued in accordance with the Tax Commissioner's rule on valuation of farmland and structures situate there on for ad valorem property tax purposes. WVCSR § 110-1 K-4.8.

Property reports: On or before September 1 of each year, the producer must file an Annual Appraisal Report for Production of Other Minded Minerals with the Tax Commissioner with acknowledgment to the natural resource owners and the county.
assessors in the counties where the mines are located. On or before September 16 of each year, the natural resource owner of a property that is part of a permitted mining operation must file an Annual Appraisal Return for Reserve Mineral Properties with the Tax Commissioner. Owners of natural resource properties may file an Annual Appraisal Return for Reserve Mineral Properties, on or before September 16, with the Tax Commissioner; otherwise the properties are valued using the best available information. (WVCSR §110-1K-4.9.) Note: SB 401, in effect for assessment years beginning on or after July 1, 2011 changes the due date of this return from August 1 to May 1 preceding the July 1 assessment date and adds an informal review process.

¶ 617 Valuation--Commercial and industrial Real Property

*Law:* W. Va. Code §§ 11-1C-7 and 11-1C-10; WVCSR § 110-1P-1 et seq.

The county assessor determines the appraised value of commercial real property in accordance with rules approved by the West Virginia Legislature for promulgation by the State Tax Commissioner and pursuant to a plan approved by the Property Valuation Training and Procedures Commission. The Tax Commissioner determines the appraised value of industrial property and provides that value to the county assessor. W. Va. Code § 11-1C-10. The Tax Commissioner’s rules (WVCSR 110-1P-1 et seq.) provide rules for valuing both commercial and industrial real property.

*Valuation generally:* The appraised value (market value) of commercial and industrial real property is the price for which the property would sell if it was sold to a willing buyer by a willing seller and in an arms-length transaction without either the buyer or the seller being under any compulsion to buy or sell. In determining appraised value, primary consideration is given to the trends of price paid for like or similar property in the area or locality wherein such property is situated. Additionally, for purposes of appraisal of any tract or parcel of real property used for commercial or industrial purposes, including chattels real, the appraisal must consider the following factors:

1. Location of such property;
2. Its site characteristics;
3. The ease of alienation thereof, considering the state of its title, the number of owners thereof, and the extent to which the same may be the subject of either dominant or servient easements;
4. The quantity of size of the property and the impact which its sale may have upon surrounding property;
5. If purchased within the previous eight years, the purchase price thereof and the date of each such purchase;
6. Recent sale of, or other transactions involving, comparable property;
(7) The value of such property to its owner;

(8) The condition of such property;

(9) The income, if any, which the property actually produces and has produced within the next proceeding three (3) years; and

(10) Any commonly accepted method of ascertaining the market value of any such property, including techniques and methods peculiar to any particular species of property if such technique or method is used uniformly and applied to all property of like species.

Improvements to the land and improvements on the land are considered in the appraisal process. WVCSR § 110-1P-2.1.2

Improvements to the land are land improvements, the value of which is included in the value of land. Some examples of these improvements include privately owned drainage systems, driveways, walks, etc.

Improvements on the land or buildings and structures are valued separate and apart from the land.

In addition to improvements, other important considerations affecting the value of land, excluding farmland, are:

(1) Location,

(2) Size,

(3) Shade,

(4) Topography,

(5) Accessibility,

(6) Present use,

(7) Highest and best use,

(8) Easements,

(9) Zoning,

(10) Availability of utility

(11) Income imputed to land, and
(12) Supply and demand for land of a particular type.

Each of these factors should be considered in the appraisal of the specific parcel. Some, however, may be given more weight than others.

Commercial real property and personal property is valued by the assessor of the county in which the commercial property is located as provided in W. Va. Code § 11-1C-5, while industrial real and personal property is valued by the Tax Commissioner as provided in W. Va. Code § 11-1C-10. Industrial property means real and personal property integrated as a functioning unit intended for the assembly, processing and manufacturing of finished or partially finished products.

In determining an estimate of the fair market value of industrial and commercial real properties, the Tax Commissioner and the county assessor will consider and use where applicable, three generally accepted approaches to value: cost, income, and market data.

For purposes of valuing active and residual industrial and commercial land in West Virginia, valuing sites are separated into four broad categories: heavy industrial sites, light industrial or commercial sites, industrial parks, and mine sites. These sites are further classified when appropriate into active and residual portions. These classifications are considered when applying and establishing the valuation method to the industrial and/or commercial properties.

“Active industrial or commercial land” means that portion of land used for industrial and commercial purposes.

“Commercial property” means income producing real property used primarily but not exclusively for the sale of goods or services, including but not limited to offices, warehouses, retail stores, apartment buildings, restaurants and hotels.

“Economic obsolescence” means a loss in value of property arising from “outside forces” such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships.

“Economic rent” means the rental amount which a space or property would attain in the open market at the time of appraisal, whether it is lower, higher or the same as the actual contract rent.

“Freehold estate” means in the estate in land or other real property, of uncertain duration; that is, either of inheritance or which may possibly last for the life of a tenet at the least. For the estate to be freehold it must possess two characteristics: immobility and indeterminate duration.
Note: SB 401, in effect for assessment years beginning on or after July 1, 2011, changes the due date of this return from October 1 to August 1 and adds an informal review process.

¶ 618 Valuation--Commercial and Industrial Personal Property

Law: W. Va. Code §§ 11-1C-7 and 11-1C-10; WVCSR § 110-1P-1 et seq.

This rule provides methodologies for appraising commercial and industrial furniture, fixtures, machinery, equipment, inventory, material and supplies. The appraisal of commercial furniture, fixtures, machinery, equipment, inventory, material and supplies is performed by the local assessor. The appraisal of industrial furniture, fixtures, machinery, equipment, inventory, material and supplies is performed by the State Tax Commissioner.

Situs: The situs of commercial and industrial furniture, fixtures, machinery and, equipment, inventory, material flies depends upon an analysis of the residence of the owner, and the location of the personal property and whether the personal property is subject to property taxation by another state and is taxed by the state. All commercial and industrial personal property belonging to persons or corporations residing in West Virginia, whether such property is in or out of the state, is taxable as personal property in West Virginia, unless the property is actually and permanently located in another state and is actually taxed as personal property in the other state. All commercial and industrial personal property located within this state, though owned by persons or corporations residing in another state, is taxable as personal property in West Virginia.

Methodologies: The cost, income and market approaches to valuation may be employed. Once generated, the various estimates of value are considered in arriving at a final value estimate. However, of the three approaches to value, the cost approach is most consistently applied to machinery, equipment, furniture, fixtures, and leasehold improvements because of the availability of data. The market approach is used less frequently, principally due to a lack of meaningful sales. The income approach is not normally used because of the difficulty in estimating future net benefits to be derived except in the case of certain kinds of leased equipment.

Depreciation: Physical deterioration, economic obsolescence and functional obsolescence are to be considered in valuing commercial and industrial personal property. However, historically, the Tax Commissioner has only considered economic obsolescence when requested to do so by the property owner.

In Century Aluminum of West Virginia, Inc. v. Jackson County Com’n, 229 W.Va. 215, 728 S.E.2d 99 (May 29, 2012), the Supreme Court of Appeals examined and approved the Tax Commissioner’s treatment of functional and economic obsolescence for industrial personal property. In this case, the Court approved the Tax Commissioner’s arbitrary rule that the allowance for obsolescence for machinery and equipment that is no longer in service can’t exceed 50% of its in-service value. The Tax Commissioner’s justification for this rule is that the value of the equipment by the
income approach would be $0 (since it’s not in service), so averaging that with the value by the cost approach would yield only a 50% reduction in value.

This reasoning ignores the fact that the objective of valuing property by the income approach is the same as that by the cost approach: the determination of the true and actual or fair market value of the property. If one uses two different rulers to measure the length of the same object and comes up with two wildly different lengths, it’s likely that there’s something wrong with one of the rulers. If one uses the income approach and the cost approach and gets two very different values, one or both of those approaches is coming up with the wrong answer. Here, it’s obvious which one is wrong - the value cost approach before deduction of economic obsolescence is simply NOT representative of the value of the equipment. One must deduct economic obsolescence in order to correctly determine the value by the cost approach, and only after that is done would it be meaningful to compare or average the result by cost approach with the value by the income approach.

Ultimately, Century Aluminum is yet one more in a depressingly long line of cases in which the Supreme Court rubber stamps the Tax Commissioner’s actions, based at least in part on an imperfect grasp of generally accepted appraisal practices.

Appraisal manual: Frequently encountered commercial and industrial personal properties common to numerous businesses within the taxing district are valued using current appraisal guidelines furnished by the Tax Commissioner to local assessors.

Note: SB 401, in effect for assessment years beginning on or after July 1, 2011, changes the due date of the return from October 1 to August 1 and adds an informal review process.

¶ 619 Valuation--Unsold Lots Contained in a Recorded Plan or Plat

Law: W. Va. Code § 11-3-1b; WVCSR § 110-4-1 et seq.

The recording of a plat or a plan or the designation of proposed land use by a county or municipal planning authority may not be used by an assessor as the basis for assessment except as specifically provided in this rule.

When a lot or parcel within the recorded plan or plat is sold, or developed and used for a residential, commercial or industrial purpose, the assessor or the State Tax Commissioner will revalue the sold lot at market value, or based upon its actual use. The remaining lots within the recorded plan may not be revalued by the assessor or Tax Commissioner based solely on the sales of the other lots in the plan.

To value the remaining lots in a plan, the assessor or Tax Commissioner first determines the percentage of completion of improvements or infrastructure development that is in place as of the assessment date each year. The assessor or the Tax Commissioner must then obtain data reflecting the most probable selling price of comparable lots. The most probable selling price of comparable lots is then multiplied
by the percentage of completion of improvements and infrastructure to yield the appraisal value of the remaining lots. In the absence of the availability of data reflecting the selling price of comparable lots, the total is costs or a percentage of expanded costs associated with the development of the potential use as designated in the recorded plan is added to the raw land value yielding the value of the remaining lots.

¶ 620 Valuation—Vehicles, Watercraft and Aircraft

Law: W. Va. Code §§ 11-1C-5, 17A-3-3a and 20-7-12a; WVCSR § 110-1N-1 et seq.

Automobiles: Automobiles are appraised by local assessors, based on a schedule of automobile values compiled by the State Tax Commissioner, which is based upon the lowest value shown in a nationally accepted used car guide. The assessor is to use the schedule to determine assessed value of all motor vehicles by applying a sixty percent (60%) factor to the lowest values indicated in the Tax Commissioner's schedule. Older motor vehicles excluded from the Tax Commissioner schedule because of age have their last appraised value appreciated by ten percent (10%) per year until the value of the motor vehicle reaches two hundred ($200). Thereafter, the appraised value remains at two hundred dollars ($200) for so long as the vehicle is owned by the taxpayer.

Trucks, recreational vehicles, motorcycles, mopeds and other vehicles: The local assessor uses a current appraisal guide published by a recognized authority, directed by the Tax Commissioner for the month of July of the current assessment year to ascertain the appraised value of these vehicles, based on the lowest values in the subject guide. Older vehicles not covered by the guides are valued by having their last appraised value depreciated by ten percent (10%) per year until the value reaches two hundred dollars ($200). Thereafter, the appraised value remains at two hundred dollars ($200) for so long as the vehicle is owned by the taxpayer.

Watercraft: The Tax Commissioner directs the purchase of a nationally recognized comprehensive price listing service for watercraft as the basis for appraised value. The Tax Commissioner supplies this listing to each county assessor for use in determining the appraised value of watercraft. Older watercraft that are not included in the schedule because of age are valued in the same manner as older automobiles for which there is no schedule.

Aircraft: Annually the Tax Commissioner directs county assessors to use an aircraft appraisal guide published by a nationally recognized authority. The county assessor determines the appraised value of special radio equipment and radar and other avionic equipment purchased and installed in the aircraft. The total appraised value of the aircraft is based on the retail value of both the aircraft and its navigational equipment. However, airplanes and helicopters owned or leased by commercial airlines or private carriers are now valued at their salvage value, which is defined as the lower of fair market salvage value or five percent of the original cost of the property (W. Va. Code § 11-6H-1 et seq.)
¶ 621 Return of Property

*Law:* W. Va. Code §§ 11-3-2, 11-3-3a, 11-3-12, 11-3-14, 11-3-15, 11-3-15a, and 11-6-1.

*Individuals:* Noncorporate property owners are to list the real and personal property owned by them and provide the list to the assessor along with the owner's estimate of the worth of the personal property. Any person holding real or personal property in a representative or fiduciary capacity must return that property to the assessor on such forms as are provided by the assessor and must include the owner's value for both real and personal property. Returns must be filed by September 1 each year.

*Corporations:* Corporations are required to file a verified property tax return with the assessor between July 1 and September 1 of each year in the county in which the corporation's principal office or chief place of business in the state is located or, if its principal office or chief place of business is located outside of West Virginia, in the county in which the property subject to taxation is located. These returns must include the fair market value for both real and tangible personal property.

*Non-corporate businesses:* Any unincorporated firm or individual in any taxable trade or business, except the business of agriculture, must annually, between July 1 and September 1 make a verified, written report as of the first day of the assessment year to the assessor. These returns must include the fair market value for both real and tangible personal property.

*Single-member limited liability companies:* For assessment years beginning on or after July 1, 2011, the property of a single-member limited liability company is reported by the owner of that company.

*Utilities:* By the first day of May of each year, each public utility must file a return with the Board of Public Works covering the preceding calendar year.

*Improvements:* Where real property, subject to payment of property taxes, is improved so that the value of that property is increased by more than $1,000, the property owner must give notice of the improvement to the assessor within 60 days on forms provided by the assessor. This notice must provide the following information:

(1) A statement that improvements are being or have been made;

(2) The location or address of the property;

(3) The name of the owner or owners of the property.

Any report filed by any mine, mill factory or other industrial establishment with the assessor before June 15 which discloses with certainty any construction or improvements made during the preceding 12 months complies with this requirement.
Also, providing the assessor with a copy of any building permit issued by any county or city satisfies this requirement.

**Penalty for failure to return property:** Failure to list and return property for taxation carries a possible penalty of $25 to $100 and the forfeiture of any remedies provided by law for the correction of any assessment made by the assessor or the Board of Public Works together with a forfeiture equal to 1% of the property not returned for taxation. Each failure to make a return is a separate offense but the total forfeiture for cumulative failures to return a property may not exceed 5% of the property not returned. The forfeiture may be enforced for any such failure occurring in any year not exceeding five years immediately prior to the time the same is discovered. (W. Va. Code § 11-3-10.) In addition to these penalties, at least one county takes the position that the assessor or prosecuting attorney may file a request with the County Commission for correction of the prior erroneous assessments. (W. Va. Code § 11-3-27.) It is not clear for how many previous years the request can be made.

When a tract of land, under lease for coal, oil, gas, limestone or other mineral or timber, is sold by the state as forfeited, after having become delinquent for the nonpayment of taxes and purchased by the state at the sheriff's sale, such lease is not extinguished by the delinquency and forfeiture where the lease was separately assessed to the owner thereof as personalty and the taxes thereon were paid for the year of the delinquency of the land. (*State v. Black Band Coal Co.*, 113 W.Va. 872, 169 S.E. 614 (1933).) Conversely, even though a severance of the mineral or timber has occurred, if the separately owned mineral or timber has not been separately assessed but the entire estate has been assessed to the surface owner, the delinquency and forfeiture of the estate charged to the surface owner carries with it the mineral and timber. (*State v. Black Band Coal Co.*, supra at 615.)

¶ 622 Procedure for Contesting Tax

**Law:** W. Va. Code §§ 11-3-24, 11-3-24a, 11-3-25, 11-3-27, 11-6-12 and 11-6-12a.

There are two types of objections that can be raised as to property taxes: objections as to the value of the property (valuation disputes), and objections as to whether or not certain property is taxable or has been properly classified (taxability disputes). There are separate and distinct procedures specified by statute for each type of dispute. Additionally, the procedures are different depending upon whether the property was assessed by the county assessor or by the Board of Public Works. The following discussion pertains to property assessed by the county assessor.

**Valuation disputes:** During February, the county commission, the county governing body, meets as a Board of Equalization and Review to review and equalize assessments made by the assessor. The Board must meet no later than the first day of February, must not adjourn for longer than three days at a time until this work is completed, and cannot remain in session for a longer period than twenty-eight days, and cannot adjourn *sine die* before the fifteenth day of February. As a practical matter,
most if not all county commissions require taxpayers who dispute the value of their property to meet with and attempt to resolve the dispute with the assessor.

Any unresolved dispute with the assessor over valuation of property must be presented to the Board of Equalization and Review by the property owner before the Board adjourns sine die. Any person, whether having property interest in the property assessed or not, who is aggrieved by any assessment has standing to appeal that assessment. Tug Valley Recovery Center, Inc. v. Mingo County Commission, 164 W.Va. 94, 101, 261 S.E. 2d 165, 170 (1979). Failure to protest an assessment to the Board of Equalization and Review is a waiver of the protest for that year.

Hearings on valuation disputes before a Board of Equalization and Review are informal, and do not demand extensive due process procedures. The formal rules of evidence are not applicable. In re Tax Assessments Against Pocahontas Land Co., 172 W.Va. 53, 303 S.E.2d 691 (1983). “The burden upon the taxpayer to demonstrate error with respect to the State's valuation is heavy in these adjudicative proceedings: ‘It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear.’ In challenging a tax valuation, '[t]he burden [of proof] clearly falls upon ... [the taxpayer] to demonstrate through clear and convincing evidence that the tax assessments were erroneous.' In Re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. 250, 539 S.E.2d 757 (2000) (internal citations omitted).

Two due process issues with this appeals process have been raised repeatedly in the Supreme Court of Appeals. In In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, 223 W.Va. 14, 672 S.E.2d 150 (2008), the Court held that it was not unconstitutional for the county commission sitting as a board of equalization and review to act as the first level adjudicative tribunal to hear these appeals, and upheld the imposition of the clear and convincing burden of proof on the taxpayer. This holding was quickly reaffirmed in Bayer MaterialsScience LLC et al. v. State Tax Commissioner, et al., 223 W.Va. 38, 672 S.E.2d 174 (2008).

In Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252 (2009), the United States Supreme Court appeared to directly contradict the West Virginia Supreme Court’s portrayal in Foster that “[w]hen faced with cases questioning the impartiality of a hearing tribunal, the Supreme Court of the United States generally has found a hearing tribunal to be partial when there exists a direct pecuniary interest in the outcome of the litigation. However, when no such pecuniary interest is present, the Supreme Court of the United States typically has found the tribunal to satisfy the requirements of due process.” See In Re: Tax Assessment of Foster Foundation’s Woodlands Retirement Community, 223 W. Va. at 24, 672 S.E.2d at 160. Nevertheless, in Mountain America, LLC v. Huffman, 224 W.Va. 669, 687 S.E.2d 768 (2009), cert. denied 130 S.Ct. 2377 (Apr 26, 2010) without even mentioning the holding in Caperton decided almost six months earlier, the West Virginia Supreme Court reaffirmed its decisions in Foster that W. Va. Code § 11-3-24 is facially constitutional as to whether the county commission
may impartially sit as the board of equalization and review. The Mountain America court also rejected several other challenges to the overall process by which taxpayers are required to protest property tax assessments, including what the taxpayer described as “the cumulative effect of multiple prejudicial aspects of West Virginia’s property tax appeals system”, which, according to the taxpayer, “weighs heavily against the ‘appearance of justice’ required under the Due Process Clause”.

On several occasions since the decisions in Bayer MaterialScience and Foster were released, the Court has also reaffirmed that the clear and convincing standard of proof is applicable in hearings before a county commission sitting as a board of equalization and review in valuation appeals. See, e.g. Tax Assessment Against Purple Turtle, LLC v. Gooden, 223 W.Va. 755, 679 S.E.2d 587 (2009); Stone Brooke Limited Partnership v. Sisinni, Assessor, et. al., etc., 224 W.Va. 691, 688 S.E.2d 300 (2009), and Mountain America, LLC v. Huffman. In each of those cases, however, Justice Benjamin reaffirmed his belief that there is no justification for applying a higher standard of proof on the taxpayer than applies to the taxing authorities. W. Va. Code § 11-3-25(e) now contains this rather cryptic provision: “[a]ll persons applying for relief to the circuit court under this section shall be governed by the same presumptions, burdens and standards of proof as established by law for taxpayers applying for such relief”. While this language seems to indicate that the Legislature could explicitly define the applicable presumptions, burdens, and standards of proof, it is unclear why that didn’t happen.

Upon receiving an adverse determination before the county commission, a taxpayer has a statutory right to judicial review before the circuit court (trial court of record) of the county in which the property is located as provided by W. Va. Code § 11-3-25 (2010). In the American Bituminous case, the Supreme Court also addressed the standard of review for this appeal: “The statute provides little in the way of guidance as to the scope of judicial review, although it does expressly limit review to the record made before the county commission. Given this limitation, we have previously indicated that review before the circuit court is confined to determining whether the challenged property valuation is supported by substantial evidence or otherwise in contravention of any regulation, statute, or constitutional provision. As this Court’s previous cases suggest, and as we have recognized in other contexts involving taxation, judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A” (internal citations omitted).

The appeal must be heard by the circuit court only upon the record made before the Board of Equalization and Review or Board of Assessment Appeals, if there was an appearance by or on behalf of the owner before the Board or if actual notice, certified by the commission, was given to the owner. Otherwise, the appeal is heard de novo by the circuit court. In Shenandoah Sales & Service, Inc. v. Assessor of Jefferson County, 228 W.Va. 762724 S.E.2d 733 (2012), language in W. Va. Code § 11-3-25(b) that permitted the appeal to be taken by the taxpayer or by “his or her agent or attorney” was unconstitutional insofar as it permitted a non-lawyer agent to file an appeal in circuit court constituted a legislative encroachment on the Supreme Court’s exclusive authority.
W. Va. Code § 11-3-25(b) requires that “the party desiring to take an appeal shall have the evidence taken at the hearing of the application before either board, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the board, certified by the county clerk and transmitted to the circuit court as provided in section four, article three, chapter fifty-eight of this code, except that, any other provision of this code notwithstanding, the evidence shall be certified and transmitted within thirty days after the petition for appeal is filed with the court or judge, in vacation” (emphasis added). The Supreme Court has has held that, under previous versions of this statute, that both the petition for appeal and the original record before the Board must be filed within the time prescribed by the statute” and that the circuit court must refuse to hear the appeal if the petitioner fails to file the original record within this time period. Rawl Sales & Processing Co. v. County Com’n of Mingo County, 191 W.Va. 127, 443 S.E.2d 595 (1994). Note that it is common for a Board to make an audio recording of its proceedings, and it may be possible for a court reporter to make a transcript from that audio recording. Another alternative, of course, and the better practice, is for a court reporter to attend the hearing and transcribe the proceedings. In any event, time is of the essence.

In Stone Brooke Ltd. Partnership v. Sisinni, the Supreme Court imposed a requirement that a circuit court produce written findings of fact and conclusions of law when it hears a valuation appeal for commercial property from a county commission sitting as a board of equalization and review. In that case, the Supreme Court of Appeals directed that

to ensure that this Court has a complete record from which to review future appeals of ad valorem tax assessments of commercial real property, we hold that when a circuit court reviews an appraisal of commercial real property made for ad valorem taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer’s consideration of the required appraisal factors set forth in W.V.C.S.R. §§ 110-1P-2.1.1 to 2.1.4 (1991).

These are the same factors listed in ¶ 617 above. While taxpayers are still required to prove that the taxing authority’s value is not accurate by clear and convincing evidence, once that is done, the burden of production falls upon the taxing authority to prove that his assessment is accurate; in the case of commercial or industrial property, the taxing authority must also show that it properly evaluated each and every factor listed in the Tax Commissioner’s legislative rules. In re Tax Assessments Against Pocahontas Land Co., 172 W.Va. 53, 61, 303 S.E.2d 691, 699 (1983); see also Stone Brooke, supra, 224 W.Va. at 701, 688 S.E.2d at 310.

Subsequent appeals: In a second Mountain America case, the Supreme Court of Appeals ruled that “[t]he judgment of a circuit court rendered in a statutory proceeding
brought by a taxpayer for the purpose of testing the validity of an *ad valorem* property tax is not *res adjudicata* of the same questions raised by the same taxpayer in a like proceeding for the purpose of testing the validity of a similar tax for a subsequent year, the demand for the tax in the subsequent year being a different demand from that for the former.” *Mountain America, LLC v. Huffman*, Nos. 11–1057, 11–1058, 2012 WL 5193383 (October 19, 2012). That outcome seems only fair: a taxpayer who has an issue for a particular year must file separate appeals for subsequent years while the original appeal is litigated, and a taxpayer who bears that expense shouldn’t have the appeals for subsequent years barred once the first is finally resolved. However, Justice Ketchum filed a troubling dissenting opinion indicating that he believes that subsequent appeals should be barred under both the doctrines of *res adjudicata* and collateral estoppel.

Classification or taxability disputes: W. Va. Code § 11-3-24a requires a taxpayer who is dissatisfied with how his property has been classified or who disputes whether it is taxable can object in writing to the assessor at any time after property is returned for taxation and up to and including the time the property books are before the Board of Equalization and Review. The assessor must either sustain the objection and make the proper corrections or explain, in writing if requested, why the objection was not sustained. The assessor may, and if the taxpayer so requests, shall certify the question to the State Tax Commissioner for instruction as to how the property must be treated. If the objection is certified to the Tax Commissioner, the taxpayer and the assessor must supply verified descriptions of the property and other facts, either jointly or separately. The Tax Commissioner has the authority to pursue any inquiry and procure any information which may be necessary for the disposition of the issue.

The Tax Commissioner must instruct the assessor no later than February 28th as to how the property is to be treated, and this determination is binding on the Assessor. Either the assessor or the taxpayer may seek review of the Tax Commissioner’s decision, which is commonly referred to as a “Property Tax Ruling” or a “Taxability Ruling.” The statute now provides an explicit deadline of 30 days after notice of the Tax Commissioner’s ruling is received. As was true for a valuation appeal, W. Va. Code § 11-3-25 governs the rules for the appeal of a classification or taxability appeal. That section, however, provides one significant difference between the two types of appeals. An appeal of a classification or taxability dispute is heard *de novo* by the circuit court.

**Appeal to the Supreme Court:** If the assessed value of the property is fifty thousand dollars ($50,000) or more, either party to the circuit court valuation appeal may appeal the circuit court’s decision to the West Virginia Supreme Court of Appeals. Either party to a circuit court classification or taxability appeal may appeal the circuit court’s decision to the West Virginia Supreme Court of Appeals regardless of the amount in issue.

**Wrong entry in tax books:** Any taxpayer, or the prosecuting attorney or Tax Commissioner on behalf of the state, county and districts, claiming to be aggrieved by any entry in the property books of the county, including entries with respect to classification and taxability of property, may apply for relief to the county commission of
the county in which such books are made out. W. Va. Code § 11-3-27 provides that in order to grant the application for relief, the county commission must make two findings:

(1) The entry must be one “resulting from a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment,” and

(2) The request must be made “within one year from the time the property books are delivered to the sheriff or within one year from the time the clerical error or mistake is discovered or reasonably could have been discovered.”

In *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.*, 223 W.Va. 146, 672 S.E.2d 282 (2008), the Court held that a *de novo* review in certiorari of a county commission’s decision in an exoneration case by a circuit court did not violate the separation of powers provision in the West Virginia Constitution and held that, as is true in valuation appeals, the taxpayer bears the burden of proving by clear and convincing evidence that he is entitled to his requested exoneration. The Court also held that, while the terms “unintentional,” “inadvertent,” “negligent” and “poor judgment” are synonymous when not given specific definitions, “the ‘duty of care’ element of negligence found in [West Virginia’s] tort cases should be used to distinguish an unintentional or inadvertent act from that of a negligent act or exercise of poor judgment” and that “relief under the statute may not be granted if it is shown that a taxpayer breached its duty of care.”

¶ 623 Senate Bill 401

In the 2010 Regular Session, the Legislature enacted SB 401 (Chapter 185, Acts, Regular Session, 2010). While this legislation makes some incremental improvements to the property tax appeals process, it unfortunately does nothing to correct the glaring due process issues with the first level tribunal and the standard of proof. The county commission remains as the tribunal designated to hear first level appeals, and, the “clear and convincing” standard of proof remains impermissibly high.

Nevertheless, SB 401 eliminates some of the aspects of the property tax appeals system that inhibit a taxpayer’s ability to mount an effective appeal and undoubtedly makes the overall process less unfair to taxpayers generally. Beginning with tax year 2012 (assessment date July 1, 2011), taxpayers will required to file returns earlier in the year (generally September 1, except owners or operators of industrial property, oil-producing property and natural gas-producing property must file by August 1, and owners or operators of other natural resource property must file by May 1 preceding the July 1 assessment date. The penalties for failure to file remain in place; in addition, it is now a misdemeanor for “[a]ny owner, operator or producer, whether a natural person, limited liability company, corporation, partnership, joint venture or other enterprise” to “willfully fails to make a return within thirty days from the day it is herein required.” Upon conviction, the business may be fined $100 for each month the failure continues.
The most stringent penalty, however, has been somewhat relaxed. Under the prior version of W. Va. Code § 11-3-10, a taxpayer that failed to file a return, refused to answer or falsely answered a question posed by an assessor or the Tax Commissioner, or that failed to deliver any statement required by law was denied all remedy provided by law for the correction of any assessment. In other words, a taxpayer who fails to file a property tax return has no way to protest the assessor or Tax Commissioner’s assessed value, no matter what is turns out to be. Under the new version of that statute, that harsh sanction can still be enforced, but only after the assessor or the Tax Commissioner “notified such person, firm or corporation in writing that this penalty will be asserted and the requested information is not provided within fifteen days of the date of receipt of the notice.”

If the assessor increases the value of a taxpayer’s property, the taxpayer will now receive a notice of the increase earlier in the year, which will provide slightly more time in which to decide whether to protest the assessment and to prepare for the protest. Even before the required notice is issued, however, the Code now explicitly provides that at any time after the required returns have been filed, a taxpayer may “apply to the assessor of the county in which the property was situated on the assessment date for information about the classification, taxability or valuation of the property for property tax purposes for the tax year following the July 1 assessment date.” There was no similar provision under the previous Code; a taxpayer’s only recourse was to file a FOIA request to obtain the data prior to the date the property books were completed and delivered to the county commission.

For valuation issues, a taxpayer whose property is appraised by the Assessor who applies to the Assessor for information, who is dissatisfied with the Assessor’s response, and who receives a notice of increase for real property or business personal property may (but is not required) to use a new informal review process wherein the taxpayer files a Petition for Review by the Assessor. For either type of property, the taxpayer must provide the taxpayer’s opinion of the true and actual value of the property and must support that value with “substantial information.” For business personal property, the term “substantial information” is not defined; for real property, it means identifying which of the three approaches to value (cost approach, income approach, or market data approach) the taxpayer used to value the property, together with specified information for each approach. This Petition must be filed within five days of the after the date the taxpayer receives the notice of increased assessment under W. Va. Code § 11-3-2a or W. Va. Code § 11-3-15b or the notice of increased value for real property was published as a Class II-0 legal advertisement as provided in that section. The Assessor must meet with the taxpayer if the taxpayer so requests and must respond in writing by February 10.

If the Assessor grants the requested relief, the taxpayer may not further appeal the Assessor’s decision. If the taxpayer and the Assessor reach a negotiated settlement, neither may appeal. However, if the assessor denies the taxpayer’s petition in whole or in part, or if the assessor does not respond by Feb. 10, or if the taxpayer elects to forgo
the informal Petition for Review process, the taxpayer may file a protest with the county commission.

There is a corresponding process by which a taxpayer who receives a Notice of Tentative Assessment from the Tax Commissioner for property appraised by him can informally petition the Tax Commissioner requesting a review of the tentative appraisal. In addition, the assessor where the property is located also receives a copy of the tentative appraisal and can request this informal review. The Tax Commissioner must meet with the taxpayer if the taxpayer requests a meeting and must rule on the request by January 15. If the Tax Commissioner agrees with the petition the tentative appraisal is modified accordingly. However, whether or not the Tax Commissioner grants the relief requested, the taxpayer may still appeal to the county commission.

The process for protesting an assessment to a county commission has been changed in several respects. While a board of equalization and review can still adjourn sine die “anytime after February 15” but “not later than the last day of February of the tax year,” a taxpayer who desires to file a protest with the Board can do so on or before February 20, even if the Board has already adjourned sine die prior to that date. The protest must be filed in writing and must identify “the amount of the assessed value the taxpayer believes to be in controversy and state[] generally the taxpayer’s reason or reasons for filing the protest.”

In perhaps the most significant change to the property tax appeals process, the taxpayer can elect to have its protest heard by the county commission sitting as a board of assessment appeals in October, rather than by the county commission sitting as a board of equalization and review in February. This election may be made either when the written protest is filed or in writing filed on or before the day on which the appeal is to be heard by the board of equalization and review. Moreover, upon request of any party, the board of assessment appeals may, on or before October 1, develop a discovery schedule for the exchange of information between the taxpayer and the assessor and, in matters involving industrial property or natural resources property, the Tax Commissioner. This eight month delay and the opportunity for discovery will give the taxpayer a much better opportunity to prepare the appeal. The board of assessment appeals adjourns sine die by October 31 unless “the board, by majority vote, agrees to extend the term if necessary to afford the parties due process and to complete its work.”

The board of assessment appeals may assign the appeal to a hearing examiner for the taking of evidence if the hearing examiner is mutually agreed to by the parties to the appeal. Theoretically, this provision means the parties could agree to appoint someone knowledgeable in both appraisal techniques as well as the law to hear property tax appeals.

Whether the protest is heard by the county commission sitting as a Board of Equalization and Review in February or as a Board of Assessment Appeals in October, the taxpayer may appeal either board’s decision to the circuit court of the county in which the property books are made out. If the protest was heard by the Board of
Equalization and Review, the application for relief must be filed “at any time up to thirty
days after the adjournment of the board,” if the protest was heard by the Board of
Assessment Appeals, the application for relief must be filed “at anytime up to thirty days
after the order of the board of assessment appeals is served on the parties.” Either the
taxpayer or the State (represented by the Prosecuting Attorney or the Tax
Commissioner) may apply for relief to the circuit court.

As was true in the old version of the Code, the applicant for relief is still responsible
for having a transcript prepared of the hearing before either board. That transcript,
together with the complete record, as certified by the Clerk of the County Commission,
containing “all papers, motions, documents, evidence and records as were before the
board,” must be filed with the circuit court. The time frame, however, for filing the record
and the transcript has been enlarged. Under the old version, the record had to be filed
within the same time as the application had to be filed; that is, “at any time up to thirty
days after the adjournment of the board.” Under the new version, the evidence shall be
certified and transmitted within thirty days “after the petition for appeal is filed with the
court or judge, in vacation.”

As was true in the old version, if the taxpayer appeared before the board, or
received actual notice of the increase, then the circuit court determines the appeal only
from the evidence contained in the record made before the Board. However, in another
significant change in the new version, if the circuit court determines that the record
made before the board is inadequate, either because (1) the parties had insufficient
time to present evidence at the hearing before the board to make a proper record, (2)
the parties received insufficient notice of changes in the assessed value of the property
and the reason or reasons for the changes to make a proper record at the hearing
before the board, (3) of irregularities in the procedures followed at the hearing before
the board, or (4) for any other reason not involving the negligence of the party alleging
that the record is inadequate, the court may remand the appeal back to the county
commission of the county in which the property is located, even after the county
commission has adjourned sine die as a board of equalization and review or a board of
assessment appeals for the tax year in which the appeal arose, for the purpose of
developing an adequate record upon which the appeal can be decided. The county
commission must conduct a hearing in the remanded matter within 90 days of circuit
court’s order.

If the appeal is conducted on the record, it now must be briefed, argued, and
submitted to the court within eight months of having been filed, and the court must issue
its decision within ninety days after the last brief was filed. The new Code also confirms
that this is a post-deprivation appeals process. Taxpayer must pay disputed taxes and
not let taxes fall delinquent; if they do, the circuit court must dismiss the appeal unless
taxes due are paid within 20 days of second half taxes becoming delinquent. If the final
result of the circuit court’s decision is that the taxpayer overpaid his taxes, the county
shall pay interest at the rate established in W. Va. Code §§ 11-10-17 and 11-10-17a for
overpayments of taxes collected by the Tax Commissioner. The interest is computed
from the date the overpayment was received by the sheriff to the date of the refund
check or the date the credit is actually taken against taxes that become due after the
order of the court becomes final.

¶ 624 Constitutional Issue Remaining after SB 401

The most serious constitutional issue remaining after the enactment of SB 401 is the
fact that, whether it sits as a Board of Equalization and Review or a Board of
Assessment Appeals, the county commission still serves as the first level adjudicative
tribunal. Although the county commission serving as a Board of Assessment Appeals is
now permitted to appoint an independent hearing examiner with relevant experience
and expertise to hear and fairly determine the outcome of appeals, a county
commission that is determined to protect the county’s fisc isn’t going to agree to a
hearing examiner if it has any doubt whatsoever as to the outcome of the appeal; rather,
the county commission will simply to continue to hear and deny all appeals. All of the
other changes made by the Legislature aren’t going to change the inevitable outcome of
protests heard by a county commission so motivated.

Taxpayers have every right to be frustrated by the requirement to have their appeals
heard by an obviously biased tribunal. That frustration can only be more acute following
the decision in Rissler v. Jefferson County Bd. of Zoning Appeals, 225 W.Va. 346, 693
S.E.2d 321 (2010). There, the Supreme Court of Appeals repeatedly cited Caperton,
Concrete Pipe, Ward, and Tumey, and demonstrated that they fully understood that due
process demands an unbiased tribunal. The Court decided that two members of the
Jefferson County Board of Zoning Appeals should have been disqualified from the
Board’s consideration of a dispute over an application for a conditional use permit
(CUP) that would enable it to build a new subdivision in a rural portion of Jefferson
County.

Also, despite Justice Benjamin’s repeated reaffirmations that there is no justification
for applying a higher standard of proof on the taxpayer than applies to the taxing
authorities, W. Va. Code § 11-3-25(e) now provides that “[a]ll persons applying for relief
to the circuit court under this section shall be governed by the same presumptions,
burdens and standards of proof as established by law for taxpayers applying for such
relief.” In other words, the Legislature explicitly assured county officials that their unfair
advantage in the applicable presumptions and standards of proof will continue
unchanged.

In Rissler, the Court insisted that even the appearance of an impropriety be avoided.
That case undoubtedly is consistent with the letter and spirit of the holdings of the
United States Supreme Court, and commendably recognizes that justice demands that
litigants feel that they have received a fair trial before a fair tribunal, regardless of the
outcome of their case. How, then, is it possible to square the holding in Rissler with the
holdings in Foster, Bayer MaterialScience, and Mountain America?

¶ 625 Payment of Tax

Property taxes are collected by the sheriff of the county and are payable in two installments. The first installment is due on September 1 of the tax year. The second installment is due on March 1 of the following year. Prepayment discounts of 2\(\frac{1}{2}\)% and delinquent payment interest of nine percent (9%) per annum are applicable.

The sheriff may, with the consent of the county commission, contract with one or more banks doing business in the county to receive property tax payments.

*Public utilities*: The auditor collects the property tax from the public utility and deposits it in the State Treasury, which, in turn, pays the appropriate sums to the sheriff of each county where the public utility is located.

¶ 626 Lien for Tax


A lien for taxes assessed and interest and other charges attaches to real property on July 1st for taxes payable for the ensuing fiscal year, unless the taxes are assessed on operating public utility property. W. Va. Code § 11A-1-2. A lien for taxes on public service business property attached on December 31st following commencement of the July 1st assessment year. W. Va. Code § 11-6-23.

Although there is no lien denominated as such on personal property after assessment, the sheriff may distrain for delinquent taxes any goods and chattels belonging to the person assessed and the goods and chattels may be distrained even though they have been transferred to another person (W. Va. Code §§ 11A-2-3 and 11A-2-5; *George F. Hazelwood v. Pitsenbarger*, supra, at ¶ 610).

Additionally, if a business is delinquent in paying personal property taxes for a calendar year, the Tax Commissioner may suspend the business registration certificate of the business until they are paid, as provided in W. Va. Code § 11-12-5(b).
THIS RETURN IS TO BE FILED AS SOON AS POSSIBLE AFTER JULY 1, BUT NO LATER THAN OCTOBER 1. IF YOU ARE THE OWNER OF INDUSTRIAL BUSINESS PROPERTY YOU NEED NOT COMPLETE THIS FORM. CONTACT THE PROPERTY TAX DIVISION OF THE DEPARTMENT OF TAX AND REVENUE CONCERNING FORM STC 12:32I FOR INDUSTRIAL PROPERTY.

The following is a complete and accurate report of all property owned by the undersigned at this location on July 1, ____________.

This business is in the County of _______________________; District of: ___________________; Town/City of: ______________.

BASIC BUSINESS INFORMATION

(P11) BUSINESS NAME AND MAILING ADDRESS (P51) AGENT OR PREPARER’S NAME AND ADDRESS

NAME ________________________________________________________________ NAME ____________________________________________

ADDRESS ____________________________________________________________ ADDRESS ______________________________________

CITY _________________________________________________________________ CITY _________________________________________

STATE _________________________________ ZIP CODE ____________________ STATE ____________________________ ZIP CODE ___________

PHONE ( ) ______________________ EXTENSION ____________ PHONE ( ) ___________________ EXTENSION _________

Federal Employers Identification Number (FEIN) REQUIRED: ___________________________________________ PLACE WHERE RECORDS ARE KEPT _______________________

BUSINESS REGISTRATION ACCOUNT ID: _________________________________

PRIMARY OWNER NAME AND ADDRESS (IF NOT SAME AS MAILING ADDRESS) PHONE ( ) ________________

NAME _______________________________________________________________

ADDRESS ____________________________________________________________

CITY _________________________________________________________________

STATE _________________________________ ZIP CODE ____________________

PHONE ( ) ___________________ EXTENSION _____________ STATE _____________________________ ZIP CODE ___________

Return is to be filed by all non-utility businesses; incorporated and unincorporated, except Railroad, Telegraph and Express Companies, Telephone Companies, Pipe Line, Car Line Companies and other Public Utility Companies. The Law provides that every incorporated or unincorporated Company, foreign or Domestic liable to taxation shall make a report of his property, in writing, to the Assessor whether called upon by the assessor or not. West Virginia Code Chapter 11, Article 3, Section 12, and Chapter 11, Article 3, Section 15 as amended. PERSONAL PROPERTY NOT OWNED - If you have possession, charge or control of any personal property as executor, administrator, guardian, committee, trustee, receiver, bailee, agent, attorney or in any representative or fiduciary capacity, you must file a separate report with the assessor. Banks, Realtors, Property Managers or others in charge of leasing or renting real estate are required to make a complete list of all furniture, fixtures and other personal property and an itemized list of the items.

REPORT OF PROPERTY YOU LEASE FROM OTHERS

This space is provided for the reporting of property “in charge of but not owned by” the entity completing this form (as Agent, Bailee, Lessee or other representative capacity) such as, but not limited to, leased machinery, business or data processing equipment, vending machines, etc. Indicate the name and address of owner, the property leased, the gross annual rent, estimated value. Attach additional sheets if needed.

<table>
<thead>
<tr>
<th>NAME, ADDRESS AND TELEPHONE NUMBER OF PROPERTY OWNER</th>
<th>TYPE OF PROPERTY</th>
<th>GROSS ANNUAL RENT</th>
<th>ESTIMATED VALUE</th>
<th>ASSESSOR'S USE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

6-41
REAL ESTATE

List Real Estate situated in this county as required. The value estimate is your opinion of market value as of July 1, this year.

ITEM 1 - DESCRIPTION SHOWN ON SURFACE MINERAL. In QUANTITY OWNER’S OWNER’S TOTAL OWNER’S ASSESSOR’S LAND BOOKS OR TAX STATEMENTS Only (?) Only (?) FEE (?) IN ACRES VALUE LAND VALUE BLDGS VALUE USE

ITEM 2 - If you have added or deleted buildings (if deleted, identify as such) whereby the value of the real property has been altered by more than $1,000 since last return, describe the improvement or deletion and the location. Owner’s value should reflect both material and labor. If work is in progress on July 1 of this year, then report on Schedule E.

DESCRIPTION OF IMPROVEMENT OR DELETION LOCATION OWNER’S VALUE ASSESSOR’S USE

(Buildings on Leased Land)

Building permanently fixed or intended for permanent fixture to land which is not owned by entity which owns the building(s). The lease must be a contract which transfers all or part of the right to use of the land, exclusion and disposition from owner to tenant in exchange for a promise to pay rent.

NAME AND ADDRESS OF LAND OWNER OWNER’S VALUE BUILDING ASSESSOR’S USE

Note: Other leasehold improvements, to be reported on SCHEDULE A, are improvements and/or additions exclusive of buildings, to leased property which have been made by the lessee.

Schedule A

MACHINERY, EQUIPMENT, FURNITURE AND LEASEHOLD IMPROVEMENTS

(PP 13 or PP17)

Enter all property owned with the acquisition cost by year installed. Begin with the current year and each previous year, as required. Acquisition cost, including the cost of machinery, equipment, furniture and fixtures intended for rent or lease, is defined as 100 percent of the cost new as shown by books and records and is to include freight, installation charges, trade-ins, federal tax allowances and credit. If equipment was purchased in one year and installed in the following year, the full cost is reportable in the year installed. PROPERTY OWNED AND STILL IN USE BUT WHICH HAS BEEN FULLY DEPRECIATED OR WRITTEN OFF BUT STILL IN POSSESSION BY THE TAXPAYER MUST BE REPORTED. Machinery and Equipment which has been fully depreciated and is no longer in use as part of a production process should be reported in “Schedule F.” Property which is intended for rent or lease must be reported at 100 percent of acquisition cost regardless of period of rent. IF LEASEHOLD IMPROVEMENTS ARE REPORTED, PLEASE INCLUDE A BRIEF DESCRIPTION OF THE ITEMS TO ASSURE THEY ARE NOT VALUED AS PART OF THE REAL PROPERTY.

<table>
<thead>
<tr>
<th>YEAR PURCHASED</th>
<th>ACQUISITION COST</th>
<th>MACHINERY &amp; EQUIPMENT</th>
<th>ACQUISITION COST</th>
<th>FURNITURE &amp; FIXTURES</th>
</tr>
</thead>
<tbody>
<tr>
<td>CURRENT YR. 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PREVIOUS YR. 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PREVIOUS YR. 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PREVIOUS YR. 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PREVIOUS YR. 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PREVIOUS YR. 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PREVIOUS YR. 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PREVIOUS YR. 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PREVIOUS YR. 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PREVIOUS YR. 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

6-42
West Virginia Code Chapter 11, Article 6J provides that the value of servers and tangible personal property directly used in a high-technology field of interest advertising business shall be its salvage value. The term “High-technology business” and “Internet advertising business” are defined in West Virginia Code §11-15-9h. In order to be eligible to receive salvage valuation treatment, the primary business activity of the company must be High-technology or Internet advertising. If you have reported equipment on “Schedule A” which you believe to qualify, please enter the dollar value of the property at 100% acquisition cost.

Acquisition Cost: $____________________ Owner’s Value: $ ___________________ Assessor’s Use: __________________________________

SCHEDULE B
(INVENTORY, CONSIGNED INVENTORY, PARTS, SUPPLIES)

Taxpayer is to report all consigned goods, all inventory and merchandise, including parts, for resale; and all supplies and parts held for owner’s use, in warehouse or in storage. Dealers of new and used motor vehicles, motorcycles, RV’s, trailers, mobile homes and manufactured homes are to complete and attach the Vehicle Dealers Inventory Worksheet in lieu of Schedule B.

DESCRIPTION
COST OF INVENTORY AS OF JULY 1
INVENTORIES CONSIGNED TO YOU
PARTS HELD FOR OWNER’S USE
The Warehouse Freeport Tax Amendment of 1986 provided that, “Personal property which is moving in interstate commerce through or over the State of West Virginia, or which was consigned to a warehouse, public or private, within the State from outside the State for storage in transit to a final destination outside the State, whether specified when transportation begins or afterward, shall be exempt from ad valorem taxation. Provided, that property shall be deprived of such exemption if a new or a different product is created. Personal property of inventories of natural resources held for the manufacturing and sale of energy.” If you have reported assets on “Schedule B” which you believe are exempt under the Freeport Amendment, enter the dollar value of the assets at 100 percent of acquisition cost.

**MACHINERY & TOOLS IN PROCESS OF INSTALLATION**

(PP13 or PP17)

Machinery or tools purchased but not yet installed are reported here.

<table>
<thead>
<tr>
<th>DESCRIPTION OF PROPERTY</th>
<th>ACQUISITION COST</th>
<th>OWNER’S VALUE</th>
<th>ASSESSOR’S USE</th>
</tr>
</thead>
</table>

**SCHEDULE D**

(PP13 or PP17)

All other property not reported on other schedules of this return should be listed here. Other personal property may include business libraries, reference books, storage buildings, furniture and fixtures in process, etc. If you need additional space, please attach a list with acquisition date, acquisition cost and owner’s value.

<table>
<thead>
<tr>
<th>DESCRIPTION OF PROPERTY</th>
<th>ACQUISITION DATE</th>
<th>ACQUISITION COST</th>
<th>OWNER’S VALUE</th>
<th>ASSESSOR’S USE</th>
</tr>
</thead>
</table>

**TOOLS IN PROCESS OF INSTALLATION OR CONSTRUCTION**

**SCHEDULE E**

(PP16), TRAILERS, BOATS, AIRCRAFT (PP13 or PP17) & MOBILE HOMES (CA12, CA24 & PP13)

(Provide Additional Copies for Each Location)

Property Location: ____________________________________________________________________________________________________

<table>
<thead>
<tr>
<th>TYPE</th>
<th>MAKE</th>
<th>MODEL</th>
<th>YEAR</th>
<th>MOBILE HOME DIMENSIONS OR VEHICLE ID Number</th>
<th>TRUCK GROSS VEHICLE WGT</th>
<th>ACQ. DATE</th>
<th>ACQ. COST</th>
<th>OWNER’S VALUE</th>
<th>ASSSESSOR’S USE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

West Virginia Code Chapter 11, Article 6H provides that the value of special aircraft property shall be its salvage value. Special aircraft property is defined to be “all aircraft owned or leased by commercial airlines or private carriers.” Private carrier means “any firm, partnership, joint venture, joint stock company, any public or private corporation, cooperative, trust, business trust or any other group or combination acting as a unit that is engaged in a primary business other than commercial air transportation that operates an aircraft for the transportation of employees or others for business purposes.” If you have reported aircraft on “Schedule H” which you believe to be special aircraft property, enter the dollar value of the aircraft at 100 percent of acquisition cost.

Acquisition Cost $_______________________ Owner’s Value $_______________________ Assessor’s Use _______________________________
SCHEDULE E
(PP13 or PP17)

INCOMPLETE CONSTRUCTION

Material costs for these buildings, additions or improvements which are incomplete and hence have not been assessed as real property must be reported here. A rider must be attached to this statement showing the address of such buildings by year of construction.

<table>
<thead>
<tr>
<th>DESCRIPTION OF PROPERTY</th>
<th>ACQUISITION COST</th>
<th>OWNER’S VALUE</th>
<th>ASSESSOR’S USE</th>
</tr>
</thead>
<tbody>
<tr>
<td>BUILDINGS, ADDITIONS, OR IMPROVEMENTS NOT FINISHED AT MATERIAL COST</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

SCHEDULE F
(PP13 or PP17)

SALVAGE VALUE MACHINERY AND EQUIPMENT

This is machinery and equipment which has been fully depreciated and is no longer used as part of a production process. Do not report these items on “Schedule A”. If you need additional space, please attach a list with acquisition date, acquisition cost and owner’s value.

<table>
<thead>
<tr>
<th>DESCRIPTION OF PROPERTY</th>
<th>ACQUISITION DATE</th>
<th>ACQUISITION COST</th>
<th>OWNER’S VALUE</th>
<th>ASSESSOR’S USE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

POLLUTION CONTROL FACILITIES
(PP13 or PP17)

If required, provide additional copies for each location. List all pollution control facilities installed after July 1, 1973 and approved by either the Office of Water Resources or the Office of Air Quality, both of the Division of Environmental Protection, as a pollution control facility. If the pollution control facility is not on the pre-approved pollution equipment list, a letter from either the Office of Water Resources or the Office of Air Quality, as the case may be, must accompany this form.

<table>
<thead>
<tr>
<th>LOCATION OF PROPERTY</th>
<th>DESCRIPTION OF PROPERTY</th>
<th>YEAR INSTALLED</th>
<th>ACQUISITION COST</th>
<th>ASSESSOR’S USE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

OTHER INFORMATION REQUIRED WITH THIS RETURN

Type of Business Entity (Check One): Corporation ☐ Partnership ☐ Sole Proprietor ☐ Other:

Description of Business Activity:

Enter Federal Employers Identification Number (FEIN) REQUIRED:

Business Registration Account ID:

Please insert North American Industry Classification System Code (NAICS), if known:

DEPRECIATION SCHEDULE Attached? Yes ☐ No ☐ (Explain)

BALANCE SHEET Attached? Yes ☐ No ☐ (Explain)

In lieu of a balance sheet, a Profit or Loss Statement (Schedule C) from your Federal Income Tax Return may be submitted. Failure to attach these items will be grounds upon which the County Assessor may reject this return. If you need forms or assistance, contact the County Assessor.

I, ________________________________________, (president, treasurer, manager, owner or other title) ________________________, do affirm that the information on this return, to the best of my knowledge and judgment, is true in all respects; that it contains a statement of all the real estate and personal property, including credits and investments belonging to the business; that the value affixed to such property is, in my opinion, its true and actual value, by which I mean the price at which it would sell if voluntarily offered for sale on such terms as are usually employed in selling such property, and not the price which might be realized at a forced or auction sale; and said business has not, to my knowledge, during the sixty-day period immediately prior to the first day of the assessment year converted any of its assets into nontaxable securities or notes or other evidence of indebtedness for the purpose of evading the assessment of taxes thereon.

Signed ___________________________ Title ___________________________ Date ______/_____/____
APPENDIX A. Calendar for Assessment/Collection of 2013 Property Taxes.

All real and tangible personal property, except exempt property, is assessed annually, as of the first day of July, for ad valorem property taxes levied for the next property tax year, which is the next ensuing calendar year after the July 1st assessment day. The county sheriff mails property tax tickets or statements to property owners beginning July 15th of the property tax year for which the taxes are levied. These taxes are payable in two installments. The first-half installment payment is due September 1st of the property tax year and becomes delinquent if not paid before October 1st of that year. The second-half installment payment is due March 1st of the next calendar year and becomes delinquent if not paid before April 1st of that year. A 2.5% discount is allowed when property taxes are paid on or before the date they become due. Interest at the rate of 9% per annum applies to taxes paid after they become delinquent.

Operating real and personal property of public service businesses is assessed annually by the Board of Public Works for the next property tax year. Taxes levied are collected by the State Auditor and apportioned among the levying bodies in which the operating property is located.

The following illustrates the property tax cycle for property assessed by the county assessor or Board of Public Works for 2012 property taxes:

May 1, 2012 On or before May 1st each year, public service businesses must file property tax returns with the Board of Public Works, covering their operations during preceding calendar year.

On or before May 1st owners and operators of actively mined coal property or other minerals, except natural gas, oil and managed timber, must file reports with Tax Commissioner.

July 1, 2012 Property is assessed as of this day for 2013 property taxes.

August 1, 2012 On or before August 1st, owners of producing and reserve oil and natural gas properties and owners of industrial real and tangible personal property must file property reports with Tax Commissioner.

September 1, 2012 After the July 1st assessment day and on or before September 1st, corporations and unincorporated business include sole proprietors must file annual reports with county assessor. This includes public service businesses that own nonoperating real and tangible personal property.

However, unincorporated businesses and sole proprietors engaged in the business of agriculture are not required to file the report required by W. Va. Code § 11-3-15. Corporations engaged in the business of

---

2 First-half taxes on public service businesses become delinquent if not paid before September 1, 2013. Second-half public service business taxes become delinquent March 1, 2014.

3 This change is new for the July 1, 2011 assessment year.

4 Ibid.
agriculture are required to file the report required by §11-3-12, which is due September 1st.

September 15, 2012  On or before September 15th each calendar year, the Tax Commissioner must furnish to the Board of Public Works tentative assessed values of the operating property of each public service business.

October 1, 2012  On or before October 1st each year, individuals who receive a property tax report form from the county assessor must complete the form and return it to the assessor.

October 15, 2012  By October 15th, the Tax Commissioner must issue notices of tentative appraised values to owners of industrial property and to owners of natural resource real property, except for owners of oil, natural gas or managed timberland property.

November 15, 2012  On or before November 15th, owners of industrial tangible property and owners of natural resource real property, except for oil, natural gas and managed timberland, may seek informal review of the tentative appraised values by filing a petition for informal review with the Commissioner and serving a copy on county assessor. County assessors may also seek informal review of these tentative appraised values.

December 1, 2012  Last day for Tax Commissioner to complete appraisals of oil, natural gas and managed timberland properties.

December 15, 2012  Tax Commissioner must finalize appraised values of property appraised by his office and furnish values to county assessors.

December 31, 2012  Lien for 2012 property taxes attaches to operating property of public service business.

January 15, 2013  By this date, county assessors must mail notices of increases in assessed values to real property owners, when the increase in assessed value exceeds $1,000 or is greater than 10% of last year’s assessed value, whichever amount is greater. This notice is not required when there is a general increase in the tax district and notice is given by publication.

By this date, county assessors must mail notice of increase in the assessed value of a business’s tangible personal property, when the aggregate increase is 10% greater or the increase is more than $100,000, whichever is greater.
By this date, the Tax Commissioner must complete his review of the petitions for informal review filed with his office by owners of industrial property and by owners of natural resource real property, and notify the owner and the county assessor of any changes.

January 20, 2013  Within 5 days of receiving notice from the assessor of an increased in the assessed value of real property or business tangible personal property, the owner may file a petition for informal review with the county assessor. Generally, if notice is mailed January 15th, the 5th day will likely be January 20th. After the petition is filed, the assessor’s office may meet with the owner and must meet if owner requests a meeting.

January 31, 2013  County assessors must complete land and personal property tax books and deliver them to the county commission, which begins meeting as a board of equalization and review on or before February 1, 2013.

February 1, 2013  County commissions must begin meeting as boards of equalization and review by February 1st each year.

February 10, 2013  When a petition for informal review is filed, the assessor must rule on the petition by February 10, 2013.

February 16, 2013  Boards of equalization and review may adjourn sine die if they have completed their work anytime after February 15th.

February 20, 2013  Last day to notify boards of equalization and review of owner’s decision to protest. If Board has adjourned sine die, the notice of protest is filed with county clerk. (In this case, the hearing is held in October.)

While the board of equalization and review is still in session, a property owner desiring to protest the assessed value may notify the board that the owner elects to have the matter hear in October.

February 29, 2013  Boards of equalization and review must complete their work and adjourn sine die by the last day of February.

Last day for Tax Commissioner to issue taxability and classification rulings under W. Va. Code § 11-3-24a. Appeal may now be taken within 30 days after receipt of the written ruling rather than within 30 days after adjournment sine die of the board of equalization and review.

March 3, 2013  County assessors must provide levying bodies and State Department of Education with the aggregate assessed value of all real and personal property in each class of property for tax year 2013.

March 7, 2013  Local levying bodies begin meeting to set their budgets for the next fiscal year. Work must be completed by March 28, 2013.
April 15, 2013

County commissions, county boards of education and municipal governing bodies meet on the third Tuesday in April to set property tax levy rates for the current property tax year. The levy rates are then certified to the county assessor and to the State Auditor. However, the regular levy rate of boards of education is actually set by the West Virginia Legislature.

State Board of Public Works meets to fix State levy on taxable real and personal property and certifies same to each county assessor.

As soon as possible after the assessment of public service business property is completed, and the levy rates are certified to the State Auditor, the Auditor mails to each operator of a public service business a statement of all taxes and levies assessed.

June 7, 2013

After the levy rates are certified to the county assessor, the assessor applies the appropriate levy rates to the assessed values of property entered in the land and personal property books for current property tax year. The completed land and personal property books must be delivered to the county sheriff by June 7th.

July 15, 2013

County sheriff begins collecting 2013 property taxes by mailing property tax tickets or statements to owners of property listed in the land and personal property books for the current property tax year.

September 1, 2013

A 2.5% discount is allowed if first-half 2013 property taxes, or taxes for the full year, are paid on or before September 1st to the county sheriff, or to the State Auditor in the case of property assessed by the Board of Public Works.

First-half installment payments of 2013 property taxes are due September 1st.

For public service businesses, the first-half installment payment of 2012 property taxes is delinquent if not paid by September 2, 2013.

October 1, 2013

First-half installment payments of 2013 property taxes not paid by the end of September become delinquent on October 1st for all other taxpayers.

(For public service businesses, first-half 2013 property taxes are delinquent if not paid by September 1st.)

Board of Assessment Appeals begins meeting to hear protest of property owners that elected to have their protest heard in October. Board must finish it work by end of October unless it board agrees to extend the time for completion of its work.

March 1, 2014

Second-half installment payments of 2013 property taxes are due March 1st.
A 2.5% discount is allowed if second-half 2013 property taxes are paid on or before March 1st to the county sheriff, or to the State Auditor, in the case of property assessed by Board of Public Works.

For public service businesses, the second-half installment payment of 2013 property taxes is delinquent if not paid before March 2, 2014.

April 1, 2014
Second-half installment payments of 2013 property taxes not paid by the end of March become delinquent on April 1st for all other taxpayers.

(For public service businesses, second-half 2013 property taxes are delinquent if not paid by March 2nd.)

April 2014
Sheriff prepares and publishes a notice stating in effect that unpaid property taxes assessed for the 2013 property tax year (calendar year) have become delinquent and that unless paid by April 30, 2014, will be included for publication as provided in W. Va. Code §11A-2-10a.

May 1, 2014
On or before May 1st, the sheriff prepares a list of delinquent property taxes, on both real and personal property, for the preceding property tax year (calendar year), as provided in W. Va. Code §11A-2-11.

This list must be posted on the front door of the courthouse and published as a Class 1-O legal advertisement at least two weeks before the meeting of the county commission at which the list is presented for examination. W. Va. Code §11-2A-13.

June 15, 2014
On or before June 15th, the sheriff must present the list of 2013 delinquent property taxes to the county commission for examination. After review by the county commission, the sheriff may begin using remedies provided in the West Virginia Code to collect delinquent personal property taxes from those who owe the tax. W. Va. Code §11-2A-14.

July 1, 2014
On or before July 1st, the list of 2013 delinquent real property taxes must be certified to the State Auditor as provided in W. Va. Code §11A-2-15.
INDEX – CHAPTER 6 – PROPERTY TAX

appeals ¶ 622
assessment ¶ 607 – 611
  assessment date ¶ 607
  assessment ratio ¶ 607
  classification of property ¶ 607
  farm property ¶ 608
  methods of assessment ¶ 607
  managed timberland ¶ 608
  personal property ¶ 610
  public utility property ¶ 611
  real property ¶ 609
  residential property ¶ 608
  uniformity ¶ 607

calendar of assessment and collection of 2013 property taxes Appendix A

classification of property ¶ 606

exemptions
  bonds ¶ 604
  construction of exemptions ¶ 605
  exemptions from property tax ¶ 603
    cash and retirement funds
    cemeteries
    church property
    economic development property of non-profit corporations
    education property
    exemption for elderly or disabled
    farm equipment and livestock
    fire fighting equipment
    household goods
    intangible personal property
    personal effects
    property of benevolent associations
    property used for charitable purposes
    public property
      economic development property of county commissions
      local government property used for public purposes
      municipal water and electric power systems
      property of the State
      tangible personal property in stream of interstate commerce

in general ¶ 601
lien for tax ¶ 626

payment of tax ¶ 625

procedure for contesting tax ¶ 622
  classification disputes
  valuation disputes
  taxability disputes

property subject to tax ¶ 602

rates of tax ¶ 606
  excess levy rates
  levies for bonded indebtedness
  regular levy rates

returns and reports ¶ 621
  individuals
  corporations
  improvements to real property
  non-corporate businesses
  penalty for failure to return property
  specimen business property return ¶ 627

senior citizen tax deferment or credit ¶ 603

special method of valuation ¶ 604
  airplanes and helicopters
  automobiles
  certain specialized high-technology property
  farms
  dealer vehicle inventory
  interstate motor carriers registered under proportional registration agreement
  managed timberland
  motor boats
  owner occupied residential property
  pollution abatement equipment
  qualified capital additions to manufacturing facilities
  specialized manufacturing equipment
  vehicles registered under International Registration Plan

valuation ¶ 612
  coal ¶ 613
  commercial personal property ¶ 618
  commercial real property ¶ 617
  industrial personal property ¶ 618
  industrial real property ¶ 617
motor vehicles ¶ 620
oil and natural gas property ¶ 614
other active natural resources ¶ 616
public utility property ¶ 612
timberland ¶ 615
unsold lots contained in recorded plan or plat ¶ 619
vehicles, watercraft and aircraft ¶ 620
# CHAPTER 7

**SEVERANCE TAX**

By Dale W. Steager

Dale W. Steager is an attorney with Spilman Thomas & Battle, PLLC. Mr. Steager is a former general counsel to the Secretary of Revenue and to the State Tax Commissioner and has worked and lectured extensively in the area of West Virginia state and local taxation. He is a contributing author to several state and local tax publications.

Published by [West Virginia Society of Certified Public Accountants](#)

900 Lee Street, E. Suite 1201, Charleston, WV 25301

© 1993 Commerce Clearing House, Inc. © 2012 West Virginia Society of Certified Public Accountants

All Rights Reserved

<table>
<thead>
<tr>
<th>¶ 701 Introduction</th>
<th>7-2</th>
</tr>
</thead>
<tbody>
<tr>
<td>¶ 702 Persons Subject to Tax</td>
<td>7-2</td>
</tr>
<tr>
<td>¶ 703 Value Subject to Tax -- Generally</td>
<td>7-3</td>
</tr>
<tr>
<td>¶ 704 Value Subject to Tax – Timber</td>
<td>7-5</td>
</tr>
<tr>
<td>¶ 705 Value Subject to Tax – Oil and Gas</td>
<td>7-6</td>
</tr>
<tr>
<td>¶ 706 Value Subject to Tax -- Mining</td>
<td>7-7</td>
</tr>
<tr>
<td>¶ 707 Value Subject to Tax -- Limestone and Sandstone</td>
<td>7-7</td>
</tr>
<tr>
<td>¶ 708 Rates of Tax</td>
<td>7-7</td>
</tr>
<tr>
<td>¶ 709 Credits Against Tax</td>
<td>7-8</td>
</tr>
<tr>
<td>¶ 710 Minimum Severance Tax on Coal</td>
<td>7-8</td>
</tr>
<tr>
<td>¶ 711 Additional Severance Tax on Coal, Gas and Timber Producers</td>
<td>7-9</td>
</tr>
<tr>
<td>¶ 712 Special Reclamation Tax on Coal Production for Special Reclamation Fund</td>
<td>7-9</td>
</tr>
<tr>
<td>¶ 713 Special Tax on Coal Production for Mines and Minerals Operations Fund</td>
<td>7-10</td>
</tr>
<tr>
<td>¶ 714 Accounting Periods and Methods</td>
<td>7-11</td>
</tr>
<tr>
<td>¶ 715 Records</td>
<td>7-11</td>
</tr>
<tr>
<td>¶ 716 Returns and Payments of Tax</td>
<td>7-11</td>
</tr>
<tr>
<td>¶ 717 Bond</td>
<td>7-12</td>
</tr>
<tr>
<td>¶ 718 Agreement for Processor to Pay Tax</td>
<td>7-12</td>
</tr>
<tr>
<td>¶ 719 Procedure and Administration</td>
<td>7-12</td>
</tr>
<tr>
<td>¶ 720 Collection of Tax by Purchaser of Natural Gas</td>
<td>7-12</td>
</tr>
<tr>
<td>¶ 721 Reports by Persons Severing Natural Gas</td>
<td>7-13</td>
</tr>
<tr>
<td>¶ 722 Nonresidents Severing Timber</td>
<td>7-13</td>
</tr>
<tr>
<td>¶ 723 Example – Taxes on privilege of producing coal</td>
<td>7-13</td>
</tr>
<tr>
<td>¶ 724 Severance Tax Returns</td>
<td>7-15</td>
</tr>
</tbody>
</table>

INDEX – CHAPTER 7 – SEVERANCE TAX | 7-16

---

1 The author wishes to acknowledge the past contributions of G. Thomas Battle, Esq. to this chapter.
¶ 701 Introduction

The West Virginia Severance Tax Act became effective July 1, 1987. Prior to that date, producers of natural resources were subject to the business and occupation tax. The severance tax is similar to the former business and occupation tax imposed on persons engaged in the severance, extraction or production of natural resources within this State. A significant change is that (with the exception of timber products, limestone, oil and natural gas) the severance tax base now includes the value added to purchased natural resources by processing and treatment activities. The tax is imposed on all "producers" and processors of natural resources. The tax applies to all forms of natural resource production and is based on gross proceeds of sale or assigned gross values. There are eight natural resource classifications for determining the tax rate and the measure of taxable income. Natural resources include rock, stone, limestone, coal, shale, gravel, sand, clay, natural gas, oil, standing timber and all other forms of minerals. A minimum severance tax on coal was enacted in 1990. Effective December 1, 2005, additional severance taxes are imposed on the privileges of producing coal, natural gas and timber.

¶ 702 Persons Subject to Tax


Producers: The severance tax is imposed on every person exercising the privilege of engaging in West Virginia in the business of severing, extracting, reducing to possession and producing for sale or commercial use, any natural resource product. Such taxpayers are referred to as "producers" of a natural resource. Generally, a producer is one who has ownership of the natural resource immediately after it is severed or extracted. The tax also applies to certain treatment processes and to persons who purchase or import certain natural resources for the purpose of processing them within this State for sale or commercial use. The extraction of minerals which is subject to the tax includes extraction from the waste or residue of prior mining.

Contractors: Contractors producing a natural resource for others are considered to be performing a service for a producer and are not subject to the tax. In cases where there is a dispute as to who is the producer subject to the tax, the status of the parties will be determined by the substance of their relationship. In determining whether a contractor who extracts a natural resource is a producer subject to the tax, the regulations indicate that the following elements will be considered by the Tax Commissioner:

(1) Whether the contractor has an interest in the mineral in place;

(2) Whether the contractor has an economic interest in the mineral he is extracting, giving him a right to claim a depletion allowance for federal tax purposes;

(3) Whether the contractor is obligated to pay a royalty to another;
(4) Whether the contract is terminable;

(5) Whether the contractor has the exclusive right to extract the natural resource;

(6) Whether the contractor must look to the income from the sale of the natural resource for his compensation;

(7) Whether the contractor controls the natural resource after extraction; and

(8) Whether the contract contains an exclusive and mandatory sales agreement.

(WVCSR § 110-13A-4.5.)

However, it has been the position of the Tax Commissioner that a contractor who has the exclusive right to mine and an economic interest in his production is still not subject to the tax if title to the mineral is in another's name when the mineral is severed.

Co-owners: Co-owners of oil and natural gas in place, lessees and others who own part or all of oil and natural gas when it is produced (except royalty recipients in kind) are treated as a "group or combination acting as a unit." If such co-owners are engaged in producing oil or natural gas through use of the same independent contract driller's services, they are considered one taxpayer and are required to report the entire gross value on a single severance tax return notwithstanding provisions of private contracts for services or separate deposits of gross receipts. (W. Va. Code § 11-13A-5; WVCSR § 110-13A-6.1.)

Lessors: Lessors, assignees and others who receive payments, as royalties, from producers of natural resources are not deemed to be producers and, therefore, are not required to file a severance tax return. Royalties include, but are not limited to, ordinary royalties, overriding royalties, lease bonuses, delay rentals, advance royalties, minimum royalties, shut-in royalties, payments for exploration rights, and the reimbursements by the lessee of lessor's property taxes. If the owner of a working interest in an oil and gas property assigns or "farms-out" his interest to another party who assumes the obligations to develop and operate the property and to make payments to the assignor of an ordinary or overriding royalty, the party operating the property is deemed to be the producer and must report the entire gross proceeds of sale of the natural resource product for the severance tax without any deduction for the overriding royalty or any other royalty payable to others. A producer of natural resources, who is a lessee, may not deduct such royalty payments from gross value subject to the severance tax.

¶ 703 Value Subject to Tax -- Generally

Sales price: For natural resources severed and/or processed (except natural gas, oil, limestone or sandstone), the severance tax is levied on the "gross value" of the natural resource. The gross value is the amount received or receivable by the taxpayer for the sale of the resource. When natural resources are to be paid for at a future date, payment of the tax is also delayed until the time when the taxpayer recognizes gross income under the taxpayer's method of accounting. Often under a "take or pay contract," a producer may be paid for natural resources not actually severed or extracted and such amounts may offset future purchases. In such instances, the producer is not required to pay the tax on the excess payment until such amount is credited against natural resources delivered to the purchaser. (WVCSR § 110-13A-3.7.) In related party transactions, gross value is not to be less than fair market value for natural resources of similar grade and quality.

Processing in state by purchaser: When a natural resource (except natural gas, oil, and limestone) is purchased from an unrelated party outside this State for the purpose of processing and resale or consumption within this State, the taxpayer must pay the tax on the gross value added by the processing. The gross value subject to tax is the amount received or receivable after processing less the amount paid or payable to the person actually severing the natural resource. If severed natural resources are purchased for the purpose of processing and consumption, the gross value is the fair market value of processed natural resources of similar grade and quality less the amount paid or payable to the person actually severing the natural resource.

Processing in state by foreign producer: If natural resources are severed outside this State and brought into this State by a taxpayer, for the purpose of processing and sale, the gross value subject to tax is the amount received or receivable after processing, less the fair market value of the natural resource of similar grade and quality immediately preceding the processing of the natural resource. If natural resources are severed outside of this State and brought into this State by a taxpayer for the purpose of processing and consumption, the gross value is the fair market value of processed natural resources of similar grade and quality less the fair market value of the natural resource of similar grade and quality immediately preceding the processing of the natural resource.

No deduction of expenses except certain freight charges: As a general rule, gross value is not reduced by any taxes or other expenses. (W. Va. Code § 11-13A-2(6)(F).) Specifically, amounts paid to an independent contractor as remuneration for the severing, extracting, producing or processing of natural resources that the contractor has no ownership interest in cannot be deducted from gross value by the producer. (WVCSR § 110-13A-3.4.) However, producers of natural resources are permitted to deduct certain freight charges from the gross proceeds of sale to arrive at taxable value if the freight charges are paid by the producer to a common carrier, including independent haulers, for the delivery of the natural resources to a bona fide purchaser. (WVCSR § 110-13A-5.7.3.)
Additionally, if a producer agrees to deliver his natural resources in his own equipment to a purchaser for a separate fee clearly set forth on the invoice or in the contract, the regulations allow a deduction for the delivery charge in the determination of gross sale proceeds. (WVCSR § 110-13A-5.7.4.) This is a limited exception to the general rule that no deduction is permitted for expenses incurred by the producer through the use of his own equipment. (WVCSR §§ 110-13A-2.7 and 110-13A-5.7.1.) This limited exception emphasizes the form, rather than the substance, of a sale. If the producer's transportation costs are not stated separately on the invoice or in the contract, they are generally not deductible.

Transportation of natural resource products to an integrated producer/processor's facility for processing which is considered part of the extraction process is not deductible for severance tax purposes, whether transported by the producer in his own equipment or by a common carrier.

Example: Assume that coal has a value of $20 per ton at the place where production ends. If a purchaser buys the coal at the mine for that price, the producer will report the gross proceeds of sale at $20 per ton under the coal production classification. If the purchaser buys the coal delivered at $22 per ton, the producer will report the gross proceeds of sale at $22 per ton, unless the producer either pays a common carrier $2 per ton, or separately states the $2 per ton charge on the invoice, in which case the producer may deduct $2 per ton freight or delivery charges of $2 per ton from the gross sale proceeds.

However, if an integrated producer/processor pays a common carrier $2 per ton to transport coal from the mine mouth to its processing plant or loading facility for further processing and loading for shipment, considered as part of the mining process, such freight charges would not be deductible as outgoing freight charges in arriving at gross value.

¶ 704 Value Subject to Tax – Timber


The gross value of timber is the market value at the point where the tree is severed, topped and delimbed (called "bucking" in the industry), but before any further cutting is done to produce lumber. (Burruss v. Hardesty, 171 W. Va. 61, 297 S.E.2d 836 (1982).) If a sale occurs at that point, the taxable value is equal to the gross sale proceeds. In the absence of such a sale, taxable value is the sales price of similar timber, taking into consideration the cost of transporting the timber to a market. The regulations provide that a taxpayer may elect to use the following rules to determine the gross value of timber subject to the severance tax:

(1) A producer who sells his logs and timber by-products after bucking operations either where the trees were felled or at a central collection point may report 75% of the gross proceeds of sale under the tax;
(2) A producer who sells and delivers timber in the same condition as when the timber leaves the forest may report 50% of his gross proceeds of sale under the tax; and

(3) A producer who mills or otherwise manufactures timber for sale may report 25% of the gross proceeds of sale under the tax.

(WVCSR § 110-13A-5.4.2.)

¶ 705 Value Subject to Tax – Oil and Gas


The value of oil and gas (including liquid natural gas) is its value at the wellhead preceding transportation and transmission and any conversion or refining process. However, the value of oil and gas includes any separation process commonly employed to obtain marketable oil and gas. When the gas produced is not sold at the well-mouth, transportation and transmission expenses incurred by the producer before the point of sale are deducted from the gross proceeds of the sale. The regulations set forth alternative methods for valuing gas by the taxpayer which are subject to the discretion of the Tax Commissioner. (WVCSR § 110-13A-5.8.) The alternatives are as follows:

(1) Actual cost method: From the gross proceeds of the sale of natural gas, deduct the actual direct costs of transportation and transmission through the system of the producer from the well-mouth to the point of sale. This deduction must be supported with schedules and statements of cost.

(2) First sale ceiling price method: Producers subject to regulation by the Federal Energy Regulatory Commission (FERC) may use the "first sale ceiling price" as determined, adjusted and published by the FERC pursuant to Section 2(21) of the Natural Gas Act of 1978. This method applies only to the production of "new gas" as defined by that Act.

(3) Average purchase price method: The well-mouth value may be determined by the average purchase price of natural gas from the same pool or field or from the most proximate pool or field of the same quality and characteristics as the natural gas produced. The Tax Commissioner may disallow this method by establishing that the "average purchase price" does not accurately represent the current well-mouth value of the gas severed when compared to the ultimate selling price under present market conditions.

(4) Fixed percentage method: The well-mouth value of natural gas not sold at the well-mouth may be determined by a standard allowance for transportation and transmission costs in the amount of 15% of the gross proceeds from the sale of the natural gas severed and produced.
¶ 706 Value Subject to Tax -- Mining  
_Law:_ W. Va. Code §§ 11-13A-2(c)(7) and 11-13A-4(a) and (b).

_Processing considered part of mining:_ The following treatment processes applied by the producer or contract miner to natural resources mined in this State shall be considered mining and therefore subject to the severance tax:

(1) **Coal:** In the case of coal, the treatment processes include crushing, cleaning, drying, sorting, sizing, dust allaying, loading for shipment and freeze treatment. Production of coal will also include the severance, extraction and processing of gob piles, sludge ponds or other coal waste which, when processed, are sold as coal.

(2) **Minerals customarily sold in crude form:** In the case of other minerals which are customarily sold in crude form, the value added by sorting, concentrating, sintering and essentially equivalent processes to bring the mineral to shipping grade and form, and loading for shipment are subject to the tax.

(3) **Minerals not customarily sold in crude form:** In the case of other minerals which are not customarily sold in crude form, the value added by crushing, grinding and beneficiation by concentration (gravity, flotation, amalgamation or electrostatic or magnetic), cyanide process, leaching, crystallization, precipitation (but not including electrolytic deposition, roasting, thermal or electric smelting or refining), or substantially equivalent processes or combinations of processes used in the separation or extraction of the product or products from the ore or the minerals from other materials from the mine or other natural deposit is subject to the tax.

(4) **Oil shale:** The value added by extraction from the ground, crushing, loading into the retort and retorting, but not hydrogenation, refining or any other process subsequent to retorting is subject to the tax.

_Processing not considered part of mining:_ The value added by the following treatment processes are not considered "mining" and is not subject to the tax: electrolytic deposition, roasting, calcination, thermal or electric smelting, refining, polishing, fine pulverization, blending with other materials, treatment effecting a chemical change, thermal action, and molding or shaping.

¶ 707 Value Subject to Tax -- Limestone and Sandstone  

The production of limestone by quarrying or mining ends once the limestone or sandstone is severed from the earth. Limestone or sandstone, which is mined, is valued at the point it is reduced to possession at the portal. Limestone or sandstone, which is quarried, is valued at the point it is severed from the wall of the open quarry.

¶ 708 Rates of Tax  
The rates of severance tax are determined according to the classification of the resource produced and are as follows:

**TAX RATES**

*(on gross value of the natural resource subject to tax)*

<table>
<thead>
<tr>
<th>NATURAL RESOURCE CLASSIFICATION</th>
<th>Tax Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coal *</td>
<td>5.00%</td>
</tr>
<tr>
<td>When produced by underground mining methods from seams 37” to 47” thick</td>
<td>2.00%</td>
</tr>
<tr>
<td>When produced by underground mining methods from seams less than 37” thick</td>
<td>1.00%</td>
</tr>
<tr>
<td>When produced from waste and residue from prior mining</td>
<td>2.50%</td>
</tr>
<tr>
<td>Limestone or Sandstone quarried or mined</td>
<td>5.00%</td>
</tr>
<tr>
<td>Oil</td>
<td>5.00%</td>
</tr>
<tr>
<td>Natural Gas</td>
<td>5.00%</td>
</tr>
<tr>
<td>Natural gas – methane gas</td>
<td>5.00%</td>
</tr>
<tr>
<td>Sand, gravel or other mineral product not quarried or mined</td>
<td>5.00%</td>
</tr>
<tr>
<td>Timber produced before January 1, 2007</td>
<td>3.22%</td>
</tr>
<tr>
<td>Timber produced after December 31, 2006</td>
<td>1.22%</td>
</tr>
<tr>
<td>Timber produced after December 31, 2009 but before January 1, 2013</td>
<td>0%</td>
</tr>
<tr>
<td>Other Natural Resources</td>
<td>5.00%</td>
</tr>
</tbody>
</table>

* The rates for coal include the 0.35% rate imposed for the benefit of counties and municipalities.

These rates do not include the minimum severance tax on coal, see ¶ 710, the additional tax on producers of coal, gas or timber, see ¶ 711, the special reclamation tax, see ¶ 712, or the special tax on coal producers, see ¶ 713.

**¶ 709 Credits Against Tax**


*Annual credit allowance:* Each taxpayer is entitled to a credit of $41.67 per month ($500 per tax year) for each month it is subject to the severance tax imposed by W. Va. Code § 11-13A-1 *et seq.* However, nonresidents severing timber may claim this credit only on the annual return and no credit is allowed against the minimum severance tax imposed by W. Va. Code § 11-12B-3 or the additional severance taxes imposed by W. Va. Code § 11-13V-4.

*Credit for payment of minimum severance tax on coal:* The minimum severance tax imposed by W. Va. Code § 11-12B-3 is allowed as a credit against the severance tax imposed by W. Va. Code § 11-13A-3.

**¶ 710 Minimum Severance Tax on Coal**


*Rate:* There is a minimum severance tax of 50c per ton (2,000 pounds) on coal produced for sale or use including coal extracted from waste deposits.
Exemption: The minimum severance tax on coal does not apply to coal produced by underground mining methods from a seam of coal whose average thickness is 45 inches or less.

Credit against the severance tax: The minimum severance tax may be credited against 4.65% of the 5% severance tax on coal imposed by W. Va. Code § 11-13A-3. The remaining .35% of the severance tax (which is designated to go to the counties and municipalities by West Virginia statute) is not subject to credit for the minimum severance tax.

Provisions in common with the severance tax: The provisions of the minimum severance tax regarding: accounting periods, methods of accounting, annual returns, periodic installment payments of estimated tax, time and place for paying the tax, extension of time for paying the tax, place for filing returns, signing of returns, requirement of bond, records, general procedure and administration, and criminal penalties are substantially the same as for the severance tax.

Collection of tax by purchaser: If a taxpayer is delinquent in payment of the tax, the Tax Commissioner may require the first purchaser of the coal to withhold the tax due.

¶ 711 Additional Severance Tax on Coal, Gas and Timber Producers


Additional severance taxes are imposed for the privilege of producing coal, natural gas or timber after November 30, 2005. The additional severance taxes collected are deposited in the Workers' Compensation Debt Reduction Fund and will continue to be imposed until the unfunded liability of the Workers' Compensation Old Fund is paid. The rates of the additional severance taxes are as follows:

- Coal: 56 cents per ton
- Natural gas: 4.7 cents per MCF
- Timber: 2.78% of gross value

Provisions in common with the severance tax: The provisions of the additional severance taxes regarding: accounting periods, methods of accounting, annual returns, periodic installment payments of estimated tax, time and place for paying the tax, extension of time for paying the tax, place for filing returns, signing of returns, requirement of bond, records, general procedure and administration, and criminal penalties are substantially the same as for the severance tax.

General procedures and administration: The provisions of the "West Virginia Tax Procedure and Administration Act" discussed in Chapter 9 apply to the special tax.

¶ 712 Special Reclamation Tax on Coal Production for Special Reclamation Fund


Rate: A special reclamation tax equal to 14.4 cents per ton is levied of clean coal produced in West Virginia or clean coal extracted from a refuse pile or slurry pond. However, beginning July 1, 2012, the rate of this tax increases to 27.9 cents per ton. The special reclamation tax is imposed upon the same tonnage (clean coal) and is owed by the same party (the producer) as the minimum
severance tax. The tax also applies to tonnage of clean coal produced by underground mining methods from seams of coal whose average thickness is 45 inches or less.

No credit against severance tax: The special reclamation tax is in addition to all other taxes and is not allowed as a credit against the severance tax or minimum severance tax.

Provisions in common with minimum severance tax: The special reclamation tax is collected by the Tax Commissioner in the same manner and at the same time as the minimum severance tax, but the tax is not to be construed as an increase in either the severance tax or the minimum severance tax.

Special Reclamation Fund: For clean coal produced or recovered before July 1, 2012, the amount of special reclamation taxes collected is deposited into the Special Reclamation Fund. For tons produced or recovered after June 30, 2012, 12.9 cents per ton is deposited into the Special Reclamation Fund. Monies in the Special Reclamation Fund are expended in accordance with appropriations by the Legislature for the purpose of reclaiming abandoned mine sites.

Special Reclamation Water Trust Fund: Beginning July 1, 2012, 15 cents of the 27.9 cent per ton tax is deposited into the Special Reclamation Water Trust Fund and expended in accordance with appropriations by the Legislature for the purpose of meeting the water reclamation responsibilities of the State.

General procedures and administration: The provisions of the "West Virginia Tax Procedure and Administration Act" discussed in Chapter 9 apply to the special reclamation tax.

¶ 713 Special Tax on Coal Production for Mines and Minerals Operations Fund


Rate: There is a special annual tax equal to two cents per ton of coal produced in West Virginia. The special tax is imposed upon the same tonnage (clean coal) and is owed by the same party (the producer) as the minimum severance tax. The tax also applies to tonnage of clean coal produced by underground mining methods from seams of coal whose average thickness is 45 inches or less and to coal produced or recovered from the waste and residue of prior mining.

No credit against severance tax: The special tax is in addition to all other taxes and is not allowed as a credit against the severance tax or minimum severance tax.

Provisions in common with minimum severance tax: The special tax is collected by the tax commissioner in the same manner and at the same time as the minimum severance tax, but the tax is not to be construed as an increase in either the severance tax or the minimum severance tax.

Mines and Minerals Operations Fund: The special tax is deposited by the tax commissioner in the Mines and Minerals Operations Fund in the State treasury to be expended in accordance with appropriations by the Legislature for the purpose of carrying out the statutory duties relating to enforcement of environmental regulatory programs for the coal industry.
**General procedures and administration:** The provisions of the "West Virginia Tax Procedure and Administration Act" discussed in Chapter 9 apply to the special tax.

§ 714 Accounting Periods and Methods


A taxpayer's accounting period for severance tax return purposes must be the same as that used for federal income tax reporting purposes. If a taxpayer changes his tax year for federal income tax purposes, the taxpayer must conform for purposes of the severance tax and provide a copy of the authorization from the Internal Revenue Service for the change with its annual severance tax return.

The taxpayer's method of accounting for severance tax return purposes must be the same as the accounting method employed for federal income tax purposes. If the taxpayer's method of accounting is changed for federal income tax purposes, a conforming change must be made for the severance tax and a copy of the Internal Revenue Service's approval of the accounting change must be filed with the annual severance tax return.

§ 715 Records


Taxpayers must maintain appropriate records relating to the severance tax and its computation. These records must be maintained for a period at least three years subsequent to the return filing. In cases where the time for making an assessment has been extended, the record retention period is automatically extended.

§ 716 Returns and Payments of Tax


*Monthly returns:* Monthly severance tax returns are required for taxpayers with estimated tax liability of more than $1,000 per month. Each month's return is due on or before the last day of the following month, *except* the monthly return due by June 30 which is now required to be filed with the remittance on or before June 15.

*Quarterly returns:* If the monthly estimated tax is $1,000 or less, a return is due quarterly within one month after the expiration of each quarter if any tax is due.

*Annual returns:* An annual severance tax return is required by the end of the month following the close of the taxable year. The annual return is required by every taxpayer filing monthly or quarterly severance tax returns whether or not any tax is due.

*Consolidated returns:* Consolidated returns may be filed for the severance tax.
Extensions: The Tax Commissioner may, upon written request received on or prior to the due date of any return, grant a reasonable extension of time for filing the tax return, if good cause is shown. Before an extension of time for filing will be granted, a tentative tax return must be filed and any tax shown to be due paid. However, an extension of time does not extend the time for payment of the tax. The Tax Commissioner may extend the time for payment of the amount of tax shown to be due on any annual or estimate return for a reasonable period not to exceed six months from the due date of the return.

¶ 717 Bond


The Tax Commissioner may require a taxpayer to post a cash or surety bond, whenever he deems it necessary to ensure compliance with the severance tax. The bond may not be less than $500.

A nonresident person or business severing timber in this State must post a cash or surety bond before beginning to sever timber. See ¶ 722 for additional information and requirements.

¶ 718 Agreement for Processor to Pay Tax


In the case of natural resources other than natural gas, the Tax Commissioner may authorize the taxpayer processing the natural resource to report and pay the full amount of severance tax which would be due on the completed product. For example, since the owner/operator of a coal processing plant is engaged in a production activity for severance tax purposes, such owner/operator may be authorized to enter into agreements with independent producers from whom raw coal is purchased to pay the severance tax to this State on both the severance and processing activities. The owner/operator would presumably withhold the independent producer's share of the tax from the amount paid for the raw coal. The tax liability of the independent producer, however, is determined without any deduction for his share of the severance tax. The authorized agreement must be in writing, must permit the parties to terminate upon giving thirty days' written notice, and must permit the Tax Commissioner, upon written notice, to immediately terminate the agreement for failure of one of the parties to comply with the terms of the agreement.

¶ 719 Procedure and Administration


The West Virginia Tax Procedure and Administration Act discussed in Chapter 9 applies to the minimum severance tax, the severance tax, the additional severance taxes, the special reclamation tax and the special tax on coal production.

¶ 720 Collection of Tax by Purchaser of Natural Gas


Each person first purchasing natural gas after it has been produced (or after it has been produced and processed) is liable for collecting the severance tax imposed on the producer and
remitting the tax to this State. The first purchaser must report purchases of natural gas monthly, showing the quantities of natural gas purchased, the price paid, and the date of purchase on a form prescribed by the Tax Commissioner. The Tax Commissioner may require the natural gas producer to remit the severance tax if he determines that this would be more efficient and effective. Where the producer of natural gas sells to the ultimate consumer, the producer must remit the tax. (WVCSR § 110-13A-17.)

¶ 721 Reports by Persons Severing Natural Gas

On or before the last day of the month, each person severing (or severing and processing) natural gas must report to the Tax Commissioner on forms prescribed by the Commissioner, the sales of natural gas for the preceding taxable calendar month, showing the name and address of the person to whom the gas is sold, the quantity sold, the date of sale, and the sales price.

¶ 722 Nonresidents Severing Timber

Nonresident timber operators must comply with the following requirements before severing timber in this State:

(1) Obtain a business registration certificate from the State Tax Commissioner;

(2) Obtain a forestry license from the Division of Forestry of the Department of Commerce;

(3) Provide the Tax Commissioner with written notice of intent to sever the timber identified in the written notice, at least 30 days but not more than 90 days before severance begins and provide all of the information required by W. Va. Code § 19-1B-6; and

(4) Prepay with the notice the timber severance tax, or post a cash or surety bond equal to 4% of the estimated gross value of the timber to be severed, which value may not be less than stumpage value.

A nonresident timber operator is a person or company that does not have a business location in this State, or, during the three-month period preceding the date of the application for business registration is filed, did not have a permanent office or any other permanent place of business in this State for the conduct of timbering operations.

For additional information see Publication TSD-404 Timber Severance Tax Requirements for Nonresidents which is available at the State Tax Department’s webpage.

¶ 723 Example – Taxes on privilege of producing coal

FACTS: Assume that XYZ. Coal Company, a foreign corporation, leases certain coal properties, as well as a coal preparation plant in West Virginia in 2006. On October 1, 2006, XYZ Coal Company begins operating the plant and a surface mine. XYZ Coal Company enters into two
contracts for the sale of its coal.

Contract A is for the sale and delivery of 10,000 tons of severed, but not processed, coal at $10 per ton delivered to the purchaser in XYZ Coal Company’s own equipment for a stated additional delivery fee of $1 per ton.

Contract B provides for 20,000 tons of processed coal delivered to the purchaser by common carrier for a set fee of $20 per ton. The common carrier is paid $2 per ton for delivery.

Assume that XYZ Coal Company fulfills both contracts A and B in the last quarter of 2006. The computation of the gross value for the contracts for severance tax purposes is as follows:

Contract A:

\[
\begin{align*}
10,000 \text{ tons} & \times \$11.00 = \$110,000.00 \\
\text{LESS Freight Charges} & - \\
10,000 \text{ tons} & \times \$1.00 = \$10,000.00 \\
\text{Total Gross Value} & = \$100,000.00
\end{align*}
\]

Contract B:

\[
\begin{align*}
20,000 \text{ tons} & \times \$20.00 = \$400,000.00 \\
\text{LESS Freight Charges} & - \\
20,000 \text{ tons} & \times \$2.00 = \$40,000.00 \\
\text{Total Gross Value} & = \$360,000.00
\end{align*}
\]

In addition, assume XYZ Coal Company purchases 15,000 tons of raw coal produced in West Virginia at a total cost of $160,000. XYZ Coal Company then processes this raw coal in its leased West Virginia processing plant and sells the processed coal (10,000 tons) to a purchaser for $200,000. The purchaser transports the coal from the plant,

\[
\begin{align*}
\text{Gross Sales Price} & = $200,000 \\
\text{Less: Cost of Raw Coal} & - 60,000 \\
\text{Value Added} & = $40,000
\end{align*}
\]

Calculation of Annual Exemption: \(41.67 \times 3 \text{ months} = 125.00\)

The Gross Value from Contracts A and B ($100,000 + $360,000 = $460,000) and the Value Added to purchased coal ($40,000) are subject to the Severance Tax (¶ 708) at the 5% rate of tax. In addition, the tons sold under Contracts A and B are subject to the Minimum Severance Tax (¶ 710), at the rate of 75 cents per ton, the Special Reclamation Tax on Coal Production (¶ 712), at the rate of 3 cents per ton, and the Special Tax on Coal Production (¶ 713), at the rate of 2 cents per ton. XYZ Coal Company is not liable for the Minimum Severance Tax, the Special Reclamation Tax or the Special Tax on Coal Production on the purchased raw coal. The minimum severance tax paid on coal is allowed as a credit against the regular severance tax on coal. The Special Tax on Coal Production (¶ 713) is not reported on the Severance Tax Return but will be reported with the Special Reclamation Tax (¶ 712).
The additional severance tax on coal imposed by W. Va. Code § 11-13V-4 for the benefit of the Workers’ Compensation Debt Reduction Fund applies to all tons of coal sold and is computed as follows:

- Tons of clean coal produced under Contract A 10,000
- Tons of clean coal produced under Contract B 20,000
- Tons of clean coal produced from purchased raw coal 10,000
- Total tons clean coal 40,000
- Rate of additional severance tax on coal \( \times 0.56 \)
- Additional severance tax on coal $22,400

¶ 724 Severance Tax Returns

Forms for computing and reporting the various taxes discussed in this chapter are available at the State Tax Department’s website: [http://www.state.wv.us/taxdiv/](http://www.state.wv.us/taxdiv/). Click on the Forms icon located in the left column on that page. On the next page, under the heading Business Taxes, click on Gross Receipts Taxes. The following forms are available to print or download:

- WV.CSR-1 Coal Mining Assessment & Special 2 Cent Per Ton Tax
- WV/SEV-400 Severance Tax Estimate
- WV/SEV-400C Coal Severance Tax Estimate
- WV/SEV-400W Waste Coal Severance Tax Quarterly Estimate
- WV/SEV-400T Severance Tax Estimate – Timber
- WV/SEV-400V Additional Tax on Severance of Natural Resources – Monthly/Quarterly Estimated Return
- WV/SEV-401 Annual Severance Tax Return
- WV/SEV-401C Annual Coal Severance Tax Return
- WV/SEV-401T Annual Timber Severance Tax Return
- WV/SEV-401W Annual Waste Coal Severance Tax Return
- WV/SEV-401V Annual Return – Additional Tax on Severance of Natural Resources
INDEX – CHAPTER 7 – SEVERANCE TAX

accounting periods and methods ¶ 714
additional severance tax, producers of coal, gas and timber ¶ 711
administration ¶ 717
agreement for processor to pay tax ¶ 718
basis of tax ¶ 703
bonds ¶ 717
business investment and jobs expansion credit ¶ 338

coal ¶ 710 also see coal production
coal loading facility credit ¶ 326
coal production
  additional severance tax ¶ 711
  additional tax on coal for benefit of counties and municipalities ¶ 708
  example of tax computation ¶ 723
  minimum severance tax on coal ¶ 710
  special reclamation tax ¶ 712
  special tax on coal production ¶ 713
thin seam coal ¶ 708
collection of tax
  minimum severance tax by first purchaser of coal ¶ 710
  coal production ¶ 711
  purchaser of natural gas ¶ 718
credits against tax
  annual tax credit allowance ¶ 709
  credit for payment of minimum severance tax ¶ 709

forms ¶ 723

in general ¶ 701
industrial expansion and revitalization credit
  application of credit ¶ 310

minimum severance tax, producers of coal ¶ 710

nonresident producers of timber ¶ 722

payment of tax ¶ 716
  collection and remittance by purchaser of natural gas ¶ 720
  payment by processor ¶ 716
persons subject to tax ¶ 702
procedure and administration ¶ 719
processing in-state of natural resources severed outside State ¶ 703
rates of severance tax ¶ 708
  additional severance tax ¶ 711
  minimum severance tax on coal ¶ 710
  special reclamation tax ¶ 712
  special tax on coal production ¶ 713
records ¶ 715
returns and reports
  annual returns ¶ 716
  consolidated returns ¶ 716
  extension of time to file ¶ 716
  monthly returns ¶ 716
  quarterly returns ¶ 716
  natural gas, first purchaser report ¶ 721
specimen returns ¶ 724
special reclamation tax ¶ 712
special tax on coal production ¶ 713

valuation
  general rule ¶ 703
  limestone and sandstone ¶ 707
  mining ¶ 706
  oil and gas ¶ 705
  timber ¶ 704
CHAPTER 8

ESTATE TAXES

Editor’s Note: West Virginia does not impose an estate tax or an inheritance tax on estates of persons dying after December 31, 2004. There is no local death tax.

¶ 801 Introduction

The West Virginia’s estate tax applied to decedents dying after June 30, 1985, and before January 1, 2005. For decedents dying prior to July 1, 1985, the West Virginia inheritance and transfer tax applied. These taxes applied to estates of decedents who were residents of this State at the time of their death and to estates of nonresident decedents who died owning property located in this State. The West Virginia State Tax Department administered both taxes.

Estate tax: The West Virginia estate tax was imposed only on only those estates required to file a federal estate tax return that were also allowed to claim credit against their federal estate tax liability for payment of state death taxes. The amount of the West Virginia estate tax was limited to the amount of tax for which credit could be claimed on the federal estate tax return. The West Virginia tax was commonly referred to as an estate pick-up tax.

In 2001, Congress enacted The Growth and Tax Relief Reconciliation Act of 2001, Public Law 107-16. One section of this act phased out the credit then allowable against the federal estate tax for payment of state death taxes. Estates of persons dying after December 31, 2004, are not allowed any credit against their federal estate tax liabilities for payment of state death taxes, IRC § 2011(f), and such estates are not subject to the West Virginia estate tax. W. Va. Code § 11-11-39 provides that the West Virginia estate tax remains in effect until either (1) the tax is repealed by the Legislature, or (2) the federal government ceases to allow credit against its estate tax for payment of state death taxes.
CHAPTER 9
PROCEDURE AND ADMINISTRATION

By John A. Mairs

John A. Mairs is a tax partner in the Charleston, West Virginia law firm of Jackson Kelly PLLC.

Published by West Virginia Society of Certified Public Accountants
900 Lee Street, E. Suite 1201, Charleston, WV 25301
© 1993 Commerce Clearing House, Inc. © 2011 West Virginia Society of Certified Public Accountants
All Rights Reserved

Table of Contents

¶ 901 Introduction.........................................................................................................9-1
¶ 902 Overview of Tax Procedure Act........................................................................9-2
¶ 903 Statements of Administrative Positions ............................................................9-2
¶ 904 Filing Returns and Paying Taxes........................................................................9-4
¶ 905 Confidentiality and Disclosure of Information .....................................................9-6
¶ 906 Audit Selection and Procedure ...........................................................................9-8
¶ 907 Assessments ......................................................................................................9-8
¶ 908 Administrative Protest and Hearings ................................................................9-10
¶ 909 Appeals ............................................................................................................9-13
¶ 910 Refunds and Credits of Overpayments ............................................................9-18
¶ 911 Time Limitations ...............................................................................................9-19
¶ 912 Collection of Tax--In General ...........................................................................9-20
¶ 913 Collection of Tax-Liens .....................................................................................9-22
¶ 914 Collection of Tax-Levy ......................................................................................9-22
¶ 915 Interest, Additions to Tax and Penalties ............................................................9-24
¶ 916 Criminal Penalties ............................................................................................9-27
¶ 917 Specimen Documents ......................................................................................9-29
INDEX – CHAPTER 9 – TAX PROCEDURE AND ADMINISTRATION .....................9-30

Editor’s Note: This chapter has not been updated and, therefore, does not reflect changes in the law that may have been made by the West Virginia Legislature during 2012.

¶ 901 Introduction

The Tax Commissioner and State Tax Department: The West Virginia State Tax Commissioner, appointed by the governor and confirmed by the Senate, is broadly charged with the duty to enforce all state tax laws as the chief executive officer of the Department of Tax and Revenue. Created in 1904, the Tax Division (now with over 400 employees statewide collecting about $5.0 billion annually) is organized along functional
lines into the following units: Legal, Revenue, Internal Auditing, Auditing, Compliance, Property Tax, Taxpayer Services, Operations, Criminal Investigations, Information Technology, and Research and Development. The State Tax Department is under the direct supervision of the Secretary of the Department of Revenue, one of seven "Super Agencies" created in 1989. In 2004, the name of the Department of Tax and Revenue was shortened to Department of Revenue.

¶ 902 Overview of Tax Procedure Act

_Law_: W. Va. Code § 11-10-1 _et seq._

The West Virginia Tax Procedure and Administration Act of 1978 (the "Tax Procedure Act"), as substantially amended by the Legislature on a number of occasions, provides uniform rules and procedures for tax return filing, return confidentiality, payment of tax, imposition of interest, penalties and additions to tax, investigations, refunds, assessments, statutes of limitation, settlements, hearings, appeals and collection actions, which are designed to simplify and promote efficient compliance with and uniformity in the administration of the tax laws. The provisions of the Tax Procedure Act apply to the following West Virginia taxes: (1) Estate Tax; (2) Business Registration Tax; (3) Business and Occupation Tax; (4) Motor Fuels Excise Tax; (5) Motor Carrier Road Tax; (6) Consumers Sales and Service Tax; (7) Use Tax; (8) Personal Income Tax; (9) Business Franchise Tax; (10) Corporation Net Income Tax; (11) Severance. Tax; (12) Telecommunications Tax; (13) Health Care Provider Tax; (14) Tobacco Products Tax; (15) Solid Waste Assessment Fees; (16) Minimum Severance Tax on Coal; (17) Special Two Cents Per Ton Tax on Coal Production; (18) Soft Drinks Tax; (19) Beer Barrel Tax; (20) Wine Liter Tax; (21) Corporate License Tax; and (22) any other tax or fee administered under the Tax Procedure Act. The Tax Procedure Act also applies to the administration of the major West Virginia tax credit programs and to municipal sales and use taxes imposed under W. Va. Code § 8-13C-1 _et seq._

*Limits to scope of Tax Procedure Act*: Many important administrative matters (including times for return filing and recordkeeping requirements) remain unique to each individual tax. These provisions are scattered throughout the West Virginia Code. The Tax Procedure Act has no application to Real or Personal Property Taxes. Other West Virginia statutes affecting tax procedure and administration include the West Virginia Tax Crimes and Penalties Act (W. Va. Code § 11-9-1 _et seq._), the state Administrative Procedure Act (Sec. 29A-1-1 _et seq._, W.Va. Code), the state Freedom of Information Act (W. Va. Code § 29B-1-1 _et seq._) and the Uniform Declaratory Judgments Act (W. Va. Code § 55-13-1 _et seq._).

¶ 903 Statements of Administrative Positions

_Law_: W. Va. Code §§ 11-10-5 and 29A-3-1 _et seq._

*Regulations and forms*: The West Virginia tax law is primarily statutory and is codified for the most part in Chapter 11 of the West Virginia Code. The Tax Commissioner is, however, broadly empowered to administer, interpret and supplement
the tax statutes by prescribing forms and by promulgating rules and regulations, with the
force and effect of law, as provided in the State Administrative Procedures Act. The Tax
Commissioner has exercised his rulemaking power by promulgating regulations for:
Business and Occupation Tax, Severance Tax, Telecommunications Tax, Consumers
Sales and Service Tax and Use Tax, Personal Income Tax, Motor Fuel Excise Tax,
Motor Carrier Road Tax, Business Franchise Tax, and Corporation Net Income Tax,
Soft Drinks Tax, Information Disclosure, Electronic Filing, and for numerous state tax
credits, including the Industrial Expansion and Revitalization Credit and Economic
Opportunity Credit. Many of the regulations have been promulgated as Legislative
regulations, which are reviewed by the West Virginia Legislature before becoming final.
In addition, the State Tax Department has promulgated numerous regulations
applicable to the administration of Real and Personal Property Taxes, which are not
otherwise covered by the Tax Procedure Act. Regulations promulgated by the State
Tax Department, are codified in the Code of State Rules published by the Secretary of
State. (See generally Title 110 of the Code of State Rules for tax-related rules.) The
State Tax Department’s regulations are available on-line at the Secretary of State’s
website. The rules promulgated by the State Tax Department can all be accessed by
checking “search by agency” on the website’s Search screen and typing “tax” in the
search bar. We note that the consumers sales and use tax regulations, corporation net
income tax regulations, business franchise tax regulations, personal income tax
regulations and other regulations do not reflect statutory or case law changes
subsequent to the effective dates of the regulations. Accordingly, care should be
exercised before relying on any State Tax Department Regulations. In addition,
regulations do not exist for a number of taxes and tax programs.

Technical assistance advisories: The Tax Commissioner is authorized to issue
technical assistance advisories (TAA’s) to any taxpayer. TAA’s are intended to state the
Tax Commissioner’s position on the tax consequences of any transaction or event.
Similar to private letter rulings at the federal level, a TAA generally has no precedential
value, except to the taxpayer who requests the advisory, and then only for the specific
transaction discussed. Before issuing a TAA, the Tax Commissioner requires that
taxpayers specifically request a TAA and that the request be accompanied by
declaration (under penalty of perjury) by the taxpayer or by an authorized representative
of a taxpayer with knowledge of the facts. "Sanitized" versions of TAA's (in which
identifying characteristics regarding taxpayers are omitted) are filed in the Secretary of
State’s office and published in the State Register. (See, W. Va. Code § 11-10-5r.)
TAA’s are also published on the State Tax Department’s web site, at

Declaratory rulings: The Tax Commissioner is empowered (but is not required) to
issue declaratory rulings in which the Tax Commissioner applies the appropriate tax
statute and regulations to a given set of facts. Declaratory rulings are legally binding
upon the taxpayer and the Tax Commissioner unless set aside by a circuit court upon a
timely petition by an aggrieved taxpayer. Thus, a taxpayer has the right to appeal an
adverse declaratory ruling, whereas no statutory right to appeal an adverse TAA is
Informal materials: The State Tax Department provides various informal administrative materials to publicize tax developments, policies and administrative practices. For instance, the State Tax Department regularly publishes articles discussing current law and policy issues on its web site which is located at http://www.wvtax.gov/index.html. The State Tax Department also periodically issues general information releases to announce changes in tax statutes, interpretations of significant judicial decisions and clarification of administrative policies and procedures on its web site. These information releases take the form of Publications, Press Releases and Administrative Notices. Furthermore, the Tax Commissioner has traditionally responded in writing to general correspondence from taxpayers and representative groups requesting advice or clarification regarding State Tax Department’s policies.

¶ 904 Filing Returns and Paying Taxes

Law: W. Va. Code §§ 11-10-5c, 11-10-5f, 11-10-5g, 11-10-5l, 11-10-5m, 11-10-5t, 11-10-5z, 11-10-6 and 11-10-18a.

Due dates: The Tax Procedure Act did not standardize all aspects of state tax administration and compliance. Return filing and tax payment requirements and dates differ depending upon the tax imposed. Most taxes require annual returns, plus monthly or quarterly installment payments.

Timely filing and payment: A return is considered timely filed and a payment is timely made if delivered in person to the Tax Commissioner or a designated officer of the State Tax Department during normal business hours on, or before, the date it is required to be filed. If the return is filed or payment is made by mail, the date of the United States postmark is deemed the date of delivery. Where the last day for filing a tax return or making a tax payment falls on a Saturday, Sunday or legal holiday in this State, the filing and payment are considered timely if performed on the next succeeding business day. (W. Va. Code §§ 11-10-5f and 11-10-5g). For tax years beginning January 1, 2009, taxpayers who had a total annual remittance of $100,000 for any single tax return, of a tax administered under the Tax Procedures Act, filed for the preceding tax year are required for the current year to file all such tax returns electronically. (W. Va. Code § 11-10-5z). Effective for tax years beginning on or after January 1, 2011, the threshold for electronic filing has been reduced to $10,000.

Estimated tax payments: The payment of an estimated tax installment is considered payment on account of the tax imposed for the taxable year. In the case of tax payable in installments, if the taxpayer has paid more than the amount determined to be the correct amount, the overpayment is automatically credited against unpaid installments, if any, for the taxable year. Underpayment of estimated taxes may result in additions to tax. (W. Va. Code §§ 11-10-51, 11-10-5m and 11-10-18a).

Payment of trust fund taxes: Taxpayers required to collect or withhold any tax (e.g., consumers sales and service tax, vendor collected use tax, motor fuel excise tax, and employer withholding tax) and pay it over to the Tax Commissioner are deemed to hold
the amount of tax so collected or withheld in trust for the State of West Virginia. A taxpayer's failure to properly collect or withhold taxes or failure to pay over taxes collected or withheld renders that taxpayer liable for the taxes, interest, additions and penalties. A special rule in the consumers sales and service tax law imposes personal liability upon corporate officers for the corporation's failure to properly remit collected sales tax and the fact that an officer was not the officer responsible for remittance of the tax is not a defense. (W. Va. Code § 11-15-17.) The State Tax Department applies the tax penalty provisions to "responsible" officers of corporations that fail to pay over personal income tax withheld. (W. Va. Code §§ 11-10-5j, 11-10-19(a) and 11-15-17.)

In 2003, the law was amended to allow the Tax Commissioner to waive imposition of derivative tax liabilities and associated interest and penalties on one or more uncompensated members of the governing board of board of directors of a an organization that is exempt from tax under IRC § 501(c)(3). The Tax Commission may issue this waiver pursuant to rules set forth in W. Va. Code § 11-10-5x.

Method of payment: Payment of tax may be made by any commercially acceptable means that the Tax Commissioner considers appropriate. Payment is typically made by check or money order but may be made by credit card, debit card or electronic funds transfer. If a taxpayer tenders a check or money order in payment of taxes that is not duly paid, the taxpayer remains liable for the payment of the tax and for all penalties and additions. If any certified, treasurer's or cashier's check or any money order tendered for payment of taxes is not duly paid, the State also has a lien in that amount on the assets of the financial institution upon which it was drawn. (W. Va. Code § 11-10-5n).

Payments by credit card, debit card and electronic funds transfer. Payment may be made by electronic funds transfer (W. Va. Code § 11-10-5t) and by credit or debit card (American Express, Discover Card, Master Card and Visa). However, payment by credit or debit card also requires payment of a convenience charge, currently $1.00 for payments up to $40.00 and 2.5% of the payment amount for payments greater than $40.00. For tax years beginning before January 1, 2011, the Tax Commissioner may require taxpayers to pay any tax by electronic funds transfer if the amount owed for that tax for the preceding year was at least $120,000. Effective for tax years beginning on or after January 1, 2011, this threshold has been reduced to $10,000. (W. Va. Code § 11-10-5t). See: WVCSR §§ 110-10B-1 et seq. and 110-10F-1 et seq. for rules relating to payments by credit card, debit card and electronic funds transfer.

Mathematical errors: When it appears that a taxpayer made a mathematical or clerical error on a return, the Tax Commissioner may correct the error and notify the taxpayer in writing of the deficiency or overpayment of tax. The taxpayer has 15 days after receipt of notice to pay a deficiency before an assessment is issued. (W. Va. Code § 11-10-6.)

Payment not remitted: If a taxpayer files a mathematically correct return and full payment of the tax shown thereon is not made, the Tax Commissioner is required to
notify the taxpayer in writing of the amount of tax, additions to tax, penalties or interest due. The taxpayer has 15 days after receipt of such notice to make payment. (W. Va. Code § 11-10-6.)

*Failure to file; late filing:* If a taxpayer fails to file a return required by any tax administered pursuant to the Tax Procedure Act, the Tax Commissioner may make a return for the taxpayer. Late filing also tolls the statute of limitations on assessments and may subject the taxpayer to additions to tax or even criminal penalties. (W. Va. Code § 11-10-5c).

¶ 905 Confidentiality and Disclosure of Information


*Return confidentiality generally:* As a general rule, it is unlawful for any State employee to disclose any tax return information, any information concerning the personal affairs of any individual, any information concerning the business of a single firm or corporation, or to disclose the amount of income reported in any return filed with the Tax Commissioner or disclosed in any audit performed by the State Tax Department. Claims for refund, petitions for refund, petitions for reassessment (and related background material) and requests for rulings and for TAA’s are also protected by the confidentiality provisions. It is a crime for any officer, employee or agent of the State Tax Department to violate the confidentiality provisions.

*Exceptions to return confidentiality:* There are a variety of exceptions to the general rule of confidentiality. Some of the major exceptions include: (1) disclosure of confidential information among State Tax Department personnel when required in an official investigation or audit; (2) disclosure of confidential information when required in a court proceeding, in which the Tax Commissioner is a party, to determine the amount of tax due or to collect taxes due; (3) disclosure to officers or employees of any federal or state agency upon the grant of an *ex parte* order by federal district judge, federal magistrate or state circuit court judge for use in a criminal investigation or proceeding; (4) inspection of reports and returns by an officer of the United States or another state responsible for the administration of a similar tax if the other jurisdiction grants reciprocal privileges to the Tax Commissioner or West Virginia Attorney General; (5) inspection of state business and occupation tax returns by a municipality's agent; (6) disclosure to the taxpayer's designee, usually the taxpayer's attorney or certified public accountant, after taxpayer executes a waiver of confidentiality on Form WVARI-001; (7) disclosure of return information to a person having a material interest therein (*e.g.*, partners may inspect partnership returns and S corporation shareholders may inspect corporate returns); (8) disclosure of outstanding liability to a person secured by a recorded tax lien who furnishes evidence that he has or intends to obtain a right in property subject to such lien; (9) release of statistics compiled with taxpayer information; (10) disclosure of information to Consolidated Public Retirement Board for use in actions relating to whether an individual receiving disability retirement benefits is eligible to receive such benefits; and (11) release of certain taxpayer information to facilitate the enforcement of tax laws.
Freedom of information: Under the State Freedom of Information Act, all public records of a public body, including the State Tax Department, are subject to inspection by any person unless an exemption applies. The State Freedom of Information Act exempts disclosure of tax returns and return information covered by the confidentiality provisions, internal memoranda or letters received or prepared by the State Tax Department and certain information relating to the settlement agreements and compromises as provided in the law. Other public records in the custody of the Tax Commissioner are disclosable under the state Freedom of Information Act. (W. Va. Code § 29B-1-1 et seq.).

Disclosure of Certain Taxpayer Information: The Tax Commissioner is required to annually publish in the State Register the name and address of every taxpayer, and the dollar amount of credit claimed by category of any business investment and jobs expansion credit; industrial expansion, research and development projects credit; certain housing developments and management information services facilities credit; credit for reducing electric and natural gas utility rates for low income residential customers; credit for increased generation of electricity; economic opportunity credit; strategic research and development tax credit; high-growth business investment tax credit; manufacturing investment tax credit; neighborhood investment tax credit; West Virginia film industry tax credit; and the tourism development tax credit. The Tax Commissioner is required, by W. Va. Code § 11-10-5q, to publish in the State Register, certain information regarding any compromise of a pending civil tax case in which the Tax Commissioner is required to seek the written recommendation of the Attorney General and the Attorney General has not recommended acceptance of such compromise, or when the Tax Commissioner compromises any civil tax case for an amount that is more than $250,000 less than the assessment of tax owed.

The Tax Commissioner may disclose relevant return information to the prosecuting attorney for the county in which venue lies for a criminal offense when there is reasonable cause to believe that a criminal tax law has been or is being violated. The Tax Commissioner may enter into written exchange of information agreements with the Commissioners of Alcohol Beverage Control, Labor and Employment Security, the Secretary of the Department of Environmental Protection and the State Treasurer (W. Va. Code §§ 11-10-5s and 11-10-5v; WVCSR §§ 110-10-1 et seq., 110-50A-1 et seq., and 110-50B-1 et seq.).

Every January 15, the Governor is required to submit to the President of the Senate and the House of Delegates a tax expenditure report. Such reports shall be considered together to analyze all tax expenditures by describing the annual revenue loss and benefits of tax expenditure based upon information available to the Tax Commissioner. The term "tax expenditure" includes a provision in the tax laws including but not limited to exclusions, deductions, tax preferences, credits and deferrals designed to encourage certain kinds of activities or to aid taxpayers in special circumstances.
¶ 906 Audit Selection and Procedure


**Authority to audit:** The Tax Commissioner has the power to examine any books, papers, records, memoranda, inventory or equipment bearing upon the matters required to be included in the tax return to ascertain the correctness of a tax return and to make an assessment. The Auditing Division of the State Tax Department is charged by the Tax Commissioner with the exercise of this power. (W. Va. Code § 11-10-5a).

**Audit procedure:** The State Tax Department expects taxpayers to cooperate with the tax examiner, to provide the examiner with a reasonable place to work, and to knowledgeablely answer questions raised by the tax examiner during the course of the audit. The State Tax Department acknowledges that assessments are frequently issued because a tax examiner was not furnished with all material documents and/or was not provided access to the taxpayer's employees who could provide information essential to the computation of taxpayer's tax liability. In addition to examining books and records and interviewing persons (including tax preparers) who can knowledgeabley answer tax questions on behalf of the taxpayer, the tax examiner may make test checks of tax yield. Following the audit, the tax examiner will have an exit conference, explaining to the taxpayer any adjustments and the reasons why these adjustments are being proposed. The tax examiner also informs the taxpayer of how the proposed adjustments may be contested and the deadlines for filing any protests of these amounts. Following the exit conference, the auditor's adjustments are forwarded to the Chief of the Auditing Division for determination whether an assessment should be issued.

**Subpoenas:** The Tax Commissioner is empowered to issue _subpoenas_ and _subpoenas duces tecum_ in the name of the State Tax Department to compel the attendance of witnesses and the production of any records relevant in administering the tax laws. _Subpoenas_ and _subpoenas duces tecum_ must be served either by personal service or by registered or certified mail at least five days before the return date. (W. Va. Code § 11-10-5b). Motions to quash _subpoenas_ and _subpoenas duces tecum_ must be promptly filed (before the time specified for compliance) with the circuit court in the county in which the hearing will be held or where the _subpoena_ or _subpoena duces tecum_ was served.

**Pre-assessment conferences:** In addition to exit conferences with tax examiners, the State Tax Department's, Auditing Division traditionally affords taxpayers and their representatives the opportunity to informally address issues that arise during or after an audit, but before an assessment is issued. These pre-assessment conferences enable taxpayers to clarify factual misunderstandings that may arise in connection with a wide-ranging audit.

¶ 907 Assessments

Assessments generally: If the Tax Commissioner believes that any tax administered under the Tax Procedure Act has been insufficiently returned by a taxpayer, he may (with the aid of the Auditing Division) investigate and determine or estimate the tax liability and make an assessment against taxpayer. If the Tax Commissioner believes that collection of a tax will be jeopardized by delay, and such fact is stated in the notice of assessment, the Tax Commissioner may issue a jeopardy assessment. It is not uncommon for jeopardy assessments to be issued against the responsible officers of corporations that fail to pay over consumers sales and service tax collected. (W. Va. Code §§ 11-10-7(a) and 11-10-7(b)).

"Netting" audit adjustments: In the course of auditing typical business taxpayers, it is common that a number of adjustments will be made, some of which increase the taxpayer's tax liability and others which may decrease the taxpayer's liability. The increasing and decreasing adjustments are netted for each tax which is audited and the result is the amount of tax overpaid or underpaid. Thus, even if the Tax Department finds a net overpayment of tax, the taxpayer should closely examine the validity of the individual increasing or decreasing adjustments. In the case of a net overpayment for any taxable year, the taxpayer must timely file a claim for refund or credit; a refund is not automatically issued. The Tax Commissioner is authorized to combine assessments of two or more taxes into a combined single assessment. (W. Va. Code § 11-10-7d).

Notice of assessment: The Tax Commissioner must serve upon the taxpayer written notice of any assessment, amended assessment or supplemental assessment. (W. Va. Code §§ 11-10-7, 11-10-8.) The Tax Commissioner may designate those assessments, notices, statements of account or other Tax Division documents which shall be sent by personal service or United States Postal Service regular mail, or certified mail or registered mail or by any other means at the discretion of the Tax Commissioner. Any service of notice addressed by United States Postal Service regular mail is presumed to be accepted upon mailing unless proven otherwise by the taxpayer. Any service of notice by certified mail shall be valid if accepted by the taxpayer or if addressed to and mailed to the taxpayer's usual place of business or usual place of abode or last known address and accepted by any officer, partner, employee, spouse or child of the taxpayer over the age of eighteen. Any notice addressed and mailed in the above manner and accepted by any person shall be presumed to be accepted by such person unless proven otherwise by the taxpayer. (W. Va. Code § 11-10-5e). At this time, we have been advised that the position of the Tax Commissioner remains that any notice that requires taxpayer to take some affirmative action to avoid losing certain appeal rights will continue to be served by certified mail.

Amended and supplemental assessments: The Tax Commissioner may amend an assessment at any time before it becomes final if he ascertains that the original assessment is imperfect or incomplete in any material respect. The Tax Commissioner may make a supplemental assessment at any time within the period prescribed for assessment, if he ascertains the original assessment is imperfect or incomplete in any material respect. (W. Va. Code §§ 11-10-7(c) and 11-10-7(d)).
Finality of assessment: An assessment, other than a jeopardy assessment, becomes final and not subject to either administrative or judicial review unless, within 60 days after service of a notice of assessment, the taxpayer files a petition for reassessment with the West Virginia Office of Tax Appeals. A jeopardy assessment becomes final and not subject to either administrative or judicial review unless, within 20 days after service of a notice of assessment, the taxpayer (1) files a petition for reassessment with the West Virginia Office of Tax Appeals; and (2) remits the amount of security required by the Tax Commissioner.

Payment of assessment: The taxpayer may pay the assessment (other than a jeopardy assessment) within 60 days and file a claim for refund or credit within the time prescribed therefore.

¶ 908 Administrative Protest and Hearings


Petition for reassessment generally: Taxpayers may, within 60 days following receipt of a notice of assessment (20 days in the case of a notice of jeopardy assessment), file a written petition for reassessment with the Office of Tax Appeals, setting forth with particularity the items of the assessment objected to and the reasons for such objections. An Administrative Law Judge with the Office of Tax Appeals presides over the proceeding. The Office of Tax Appeals requires a petition for reassessment to contain the following: (1) a statement of the assessed liability; (2) the nature of tax; (3) the assessment period; (4) the items objected to; (5) taxpayer’s reasons for objections; (6) a prayer for relief sought; (7) selection of the site for hearing; (8) if appropriate, selection of small claims procedure; (9) signature of taxpayer or agent with knowledge of facts; and (10) an attached copy of the assessment. An original and one copy of the petition must be filed. If taxpayer is represented by an agent or counsel, a power of attorney should also be included with the petition for reassessment. Once a petition for assessment is timely filed, the assessment is subject to both administrative and judicial review. The general form for a petition for reassessment is sent out by the State Tax Department with the notice of assessment, is included in the Office of Tax Appeals procedural rules at WVCSR § 121-1-1 et seq. and can be found online at the Office of Tax Appeals web site at http://www.wvota.gov.

Petition for reassessment of jeopardy assessments: A taxpayer who has been served with a jeopardy assessment has 20 days to post security and to file a petition for reassessment before the jeopardy assessment becomes final. The Tax Commissioner can grant an extension of the time to file a petition for reassessment within the 20-day period after the jeopardy assessment, but adequate security must be posted notwithstanding the extension. (W. Va. Code § 11-10-7(b)).

Conversion to refund: A taxpayer who has timely filed a petition for reassessment may, at any time prior to the issuance of the Tax Commissioner’s administrative decision, pay the assessment under protest. The taxpayer’s petition is then treated as a
petition for refund. If payment is made after the administrative hearing has commenced, a new hearing will not be held but the records will reflect that the amount assessed was paid under protest. (W. Va. Code § 11-10-8(c)).

**Answer of Tax Commissioner:** The Tax Commissioner is required to file, with the Office of Tax Appeals, an answer to any petition for reassessment or petition for refund, as the case may be, within 45 days of receipt of a timely filed petition. (W. Va. Code § 11-10A-9(c)). The answer must succinctly state: (1) the nature of the case; (2) the facts relied upon by the Tax Commissioner; and (3) an answer to each question presented for review.

**Counsel Conferences:** Counsel for the Tax Commissioner and counsel for the petitioner are required by procedural rules of the Office of Tax Appeals to meet, normally within sixty (60) days after the petition was filed, to attempt to resolve the matters in controversy. The failure to schedule and to timely hold this required counsel conference in the manner set forth in Rule 19 may result in a default judgment against any party in default or other sanctions, as set forth in Rule 54 (WVCSR 121-1-19 and 121-1-54.)

**Representation of Parties:** The Tax Commissioner is represented by a staff attorney in the Legal Division of the State Tax Department. The taxpayer may represent himself or herself or may be represented by counsel. The rule of the West Virginia Supreme Court of Appeals defining the practice of law applies to proceedings before the Office of Tax Appeals. Accordingly, the petitioner may also be represented by an attorney licensed to practice law in West Virginia. When the petitioner is represented by an out-of-state attorney, the petitioner must also have local counsel and before the out-of-state attorney can represent the petitioner at a prehearing conference or hearing, the out-of-state lawyer will need to be admitted to practice pro hac vice. See: Rule 8.0, Rules For Admission To The Practice of Law of the West Virginia Supreme Court of Appeals. See also: WVCSR 121-1-17 (appearance and representation of parties).

**Pre-hearing conferences:** A relatively formal and important pre-hearing conference is held by the Administrative Law Judge several weeks before the date scheduled for the evidentiary hearing. (WVCSR § 121-1-49). Not less than five (5) days before the pre-hearing conference, the parties must exchange and file with the Office of Tax Appeals, a completed pre-hearing statement form which the Office of Tax Appeals attached to the notice of hearing. The failure to complete and to submit timely this pre-hearing statement form may result in a default judgment against any party in default or other sanctions. (WVCSR § 121-1-54).

**Settlement agreements and compromises:** The Tax Commissioner may compromise all or part of any tax liability if there is doubt as to liability or collectability. In all civil cases (in court) involving $15,000 or more, the Tax Commissioner must seek the written recommendation (but not necessarily the approval) of the Attorney General before entering into a compromise. The Tax Commissioner may enter into closing agreements with taxpayers relating to their tax liability. If such an agreement is entered into, it is final.
and conclusive except upon a showing of fraud, malfeasance or misrepresentation of a material fact. (W. Va. Code § 11-10-5q).

**Abatement:** The Tax Commissioner is authorized to abate an assessment which is void, voidable or assessed after the expiration of the period of limitations. The Tax Commissioner is further authorized to abate the unpaid portion of assessment of any tax which has become final if he determines that the administration and collection costs involved would not warrant collection of the amount due. (W. Va. Code § 11-10-7a).

**Administrative hearing:** The Office of Tax Appeals assigns a time and place for a hearing and notifies the parties in writing of the hearing at least 20 days in advance. A hearing must be held within 45 days from the date the Tax Commissioner’s answer is filed unless continued by order of the Office of Tax Appeals for good cause shown. (W. Va. Code § 11-10A-10).

**Hearing procedure:** The hearing before the Office of Tax Appeals is heard de novo and conducted pursuant to the provisions of the contested case procedure set forth in article 5 of the State Administrative Procedures Act, W. Va. Code § 29A-5-1 et seq., to the extent not inconsistent with the provisions of W. Va. Code § 11-10A-1 et seq. In case of conflict, the provisions of article 10A govern. The provisions of section 29A-5-5 of the State Administrative Procedures Act relating to exceptions are not applicable to hearings before the Office of Tax Appeals. (W. Va. Code § 11-10A-10(b)).

The Office of Tax Appeals is not bound by the rules of evidence as applied in civil cases in the circuit courts of this State. The Office of Tax Appeals may admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs. (W. Va. Code § 11-10A-10(c)).

All testimony shall be given under oath. (W. Va. Code § 11-10A-10(d)).

The Administrative Law Judge may ask the parties to submit for proposed findings of fact and conclusions of law prior to the issuance of a decision by the Office of Tax Appeals. (W. Va. Code § 11-10A-10(f)).

**Record of hearings:** It is essential for the taxpayer to develop a complete factual record at the administrative hearing because appeals to circuit court from an adverse administrative decision are taken upon the record established at the administrative hearing. The circuit court reviews appeals of Administrative Decisions of the Office of Tax Appeals on the record made at the administrative hearing. (W. Va. Code § 29A-5-4).

**Burden of proof:** Assessments issued by the State Tax Department are presumed to be correct and except as otherwise provided in the West Virginia Code or legislative rules, the burden of proof at the administrative hearing is upon the taxpayer to show the assessment is incorrect and contrary to law. The taxpayer also has the burden of proof at a hearing on a petition for refund. The sole exception to this general rule is the
assessment of a civil fraud penalty pursuant to W. Va. Code § 11-10-18(d), in which case the burden of proving fraud is upon the Tax Commissioner.

Record of Proceedings: Evidentiary hearings before the Office of Tax Appeals are recorded and a transcript made thereof as the Administrative Law Judge deems appropriate. Transcripts are supplied to the parties at such charges as may be fixed or approved by the Office of Tax Appeals. Transcripts duly certified by the person who reported the testimony before the Office of Tax Appeals are admissible in evidence at a later hearing.

Confidentiality: Hearings upon a petition for reassessment or petitions for refund or credit are not open to the public, and all evidence submitted at the hearing, the assessment, petition for reassessment and supporting memoranda and briefs are confidential and are exempt from disclosure under the State Freedom of Information Act, unless the taxpayer in effect waives confidentiality of the information by appealing an adverse administrative decision to circuit court. (W. Va. Code § 11-10A-10(g)).

Administrative decision: After the hearing and following briefs submitted by the parties in support of their positions, the Administrative Law Judge gives notice to the parties in writing of his or her ruling by issuing an administrative decision. The administrative decision is written like a court's opinion, including findings of fact, a discussion of law and a conclusion and must be issued within six months after the case is submitted for determination, the record is closed and all required briefs have been filed. The Office of Tax Appeals is required to release to the public administrative decisions in which the taxpayer's identity is not disclosed unless the taxpayer waives confidentiality. Decisions are published in the State Register and posted on the website maintained by the Office of Tax Appeals. Unless an appeal from the administrative decision is taken within 60 days after service on the taxpayer, the administrative decision becomes final and conclusive and is not subject to either administrative or judicial review. (W. Va. Code §§ 11-10-5d(k), 11-10A-16, 11-10A-18 and 11-10A-19)).

Small claims procedure: If the amount in dispute on any petition for reassessment does not exceed $10,000 for any one taxable year, the proceedings in the case may be conducted as a small claim, at the option of the taxpayer and agreement of the Tax Commissioner. Small claims proceedings are intended to be less formal than regular hearings. The Office of Tax Appeals is required to issue a decision with a brief summary of reasons in a small claims case. The decision is not subject to review, and will not be treated as precedent for any other case. At any time before the hearing, the taxpayer may unilaterally withdraw its election to have its case treated as a small claim. (W. Va. Code § 11-10A-11).

¶ 909 Appeals


Right of appeal: Taxpayers and the State Tax Department have the right to appeal
an adverse administrative decision by petitioning the circuit court within 60 days after being served with notice of the administrative decision. (W. Va. Code § 11-10A-19(a)).

Beginning January 1, 2008, judicial appeals from decisions of state agencies, including the Office of Tax Appeals, must follow the West Virginia Rules of Procedure of Administrative Appeals promulgated by the West Virginia Supreme Court of Appeals. A copy of these rules is available at the Court’s website: http://www.state.wv.us/wvsca/.

Venue: The appeal may be filed in the circuit court of any county: (1) in which the taxable activity was engaged; (2) where the taxpayer resides; (3) in the case of estate tax, where the will of the decedent was probated or letters of administration granted; or (4) in the circuit court of Kanawha County. (W. Va. Code § 11-10A-19(c)).

Petition for appeal: An appeal is instituted by filing a petition with the circuit court within 60 days after service of notice of an adverse administrative decision. An appeal to circuit court will not be heard if the appeal is filed after the 60-day period. (W. Va. Code § 11-10A-19(d)). In the event both the petitioner and the Tax Commissioner appeal an adverse administrative decision to different circuit courts, the appeals may be consolidated by agreement of the parties or in the circuit court of the county in which the petitioner files its petition for appeal. (W. Va. Code § 11-10A-19(c)).

The petition for appeal must be in writing and must state whether the appeal is taken on questions of law or questions of fact, or both, and set forth with particularity the items of the decision objected to along with the reason or reasons for each objection. (W. Va. Code § 11-10A-19(d)). Additionally, the petition must state the following, in the order indicated:

(1) Title of the case, as it was before the Office of Tax Appeals to the extent possible. The title shall include the names of the agency, e.g., State Tax Department, the names of the parties to the proceeding, and the administrative case number.

(2) The kind of proceeding and nature of the ruling by the Office of Tax Appeals.

(3) A concise statement of the facts of the case.

(4) The assignments of error relied upon on appeal and the manner in which they were decided by the Office of Tax Appeals.

(5) Points and authorities relied upon, a discussion of law, and the relief prayed for.

(6) A copy of the decision, order, rule or ruling from which judicial review is sought.

Docketing Statement: The Petition must be accompanied by a completed Docketing
Statement in the form required by the circuit court.

Service of Petition: The petitioner must serve a copy of the Petition and the Docketing Statement upon all parties and counsel of record who participated in the proceeding before the Office of Tax Appeals by registered or certified mail.

Proof of Service: A Petition and accompanying Docketing Statement filed in circuit court must include proof of service in the form of a Certificate of Service, as defined in the Court’s Rules. If the Petitioner obtains a Return Receipt or other delivery confirmation in connection with service of the Petition by registered or certified mail, the Return Receipt or other delivery confirmation must be filed with the office of the circuit clerk of the circuit court affixed to the certificate of service. If the Return Receipt or other delivery confirmation is not available at the time of the filing of the Petition and accompanying Docketing Statement, it must be filed with the circuit court promptly thereafter.

Response to Petition: – No response or answer to a Petition is required to be filed unless so ordered by the circuit court. When the circuit court does not order the filing of a responsive pleading, the declarations contained in the petition for judicial review are taken as denied. If a party respondent desires, a response may be filed within 15 days of service of the petition.

Appeal Bond: – The Court’s Rules provide that no appeal bond shall be required to perfect an appeal of an Office of Tax Appeals decision or final order in a contested case. (Rule 2(h) of the Court’s Rules.) However, W. Va. Code § 11-10A-19(e) requires the petitioner-taxpayer to file an appeal bond unless the appeal is of a jeopardy assessment for which a bond was previously posted. If the taxpayer appeals an administrative decision affirming an assessment, the taxpayer must file, within 90 days after the petition is filed, a cash bond or corporate surety bond with the clerk of the circuit court. The appeal bond must be conditioned upon the petitioner performing the orders of the court. The penalty of the bond may not be less than the total amount of tax, additions to tax, penalties and interest for which the taxpayer was found liable in the administrative decision of the Office of Tax Appeals. Notwithstanding the foregoing and in lieu of the bond, the Tax Commissioner, upon application of the petitioner, may upon a sufficient showing by the taxpayer, certify to the clerk of the circuit court that the assets of the taxpayer are adequate to secure performance of the orders of the court. If the tax commissioner refuses to certify that the assets of the taxpayer or other indemnification are adequate to secure performance of the orders of the court, then the taxpayer may apply to the circuit court for the certification. No bond may be required of the tax commissioner. The appeal bond requirement is jurisdictional, and failure to timely file bond will result in dismissal of the appeal with prejudice. (See Entertainment Ventures, Inc. v. Caryl, Cir. Ct., Cabell Co., No. 86-C-1342, May 8, 1987, decided under W. Va. Code § 11-10-10(c), which was superseded by W. Va. Code § 11-10A-19(e)).

Designation and Filing of Record: Upon filing of the Petition, the petitioner must designate those parts of the record deemed material to the questions presented in the
appeal, including the relevant proceedings to be transcribed, and serve notice of such designation upon all parties below. If the petitioner has not designated the entire record, the respondent(s) shall have 15 days to file a cross-designation of additional portions of the record for review. In lieu thereof, the parties may, by written stipulation, jointly designate the parts of the record to be prepared for appeal.

Within fifteen days after receipt of a copy of the petition and the complete designation of the record by the Office of Tax Appeals, or within such further time as the court may allow, the Office of Tax Appeals must transmit to such circuit court the original or a certified copy of the entire record of the proceeding under review. If the transcripts are not yet complete, the agency has 15 days after receipt of the transcripts to transmit the record to the circuit court. The Office of Tax Appeals must provide notice to all parties that the record has been transmitted to the circuit court.

The record includes a copy of the final opinion, order or decision being appealed. Unless otherwise provided by designation or stipulation of the parties, the record also includes a transcript of all testimony and all papers, motions, documents, exhibits, evidence and records as were before the Office of Tax Appeals, all Office of Tax Appeals staff memoranda submitted in connection with the case, all orders promulgated in the proceeding by the Office of Tax Appeals and a statement of matters officially noted. The papers must be arranged, as nearly as possible, in the order of the filing and entry thereof, with a table of contents or index.

The reasonable expense of preparing such record is taxed as a part of the costs of the appeal, unless otherwise provided by law. Upon order of the court, the petitioner must provide security for costs satisfactory to the court. If both parties appeal, the costs are shared equally. Unless otherwise prohibited by statute, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs involved.

Upon demand by any party to the appeal, the Office of Tax Appeals must furnish, at the cost of the party requesting same, unless such party is indigent, a copy of such record. In the event the complete record is not filed with the court within the time provided for in Rule 4, the petitioner may apply to the court to have the case docketed, and the court shall order such record filed.

Unless required to do so by statute, the parties may mutually waive the filing of a transcript or otherwise limit the record on appeal.

Briefs and Oral Argument: The circuit court may, on its own motion, or motion of any party, issue a schedule providing for submission of briefs as provided herein by any party, and may hold oral argument, or may issue a ruling on the petition and response, if any, without oral argument.

Hearing of appeal: The West Virginia Rules of Civil Procedure (WVRCP) do not
apply to appeals from administrative decisions of the Tax Commissioner. (WVRCP § 81). As mentioned above, the relevant statute and rule governing appeals is W. Va. Code § 29A-5-4 and Rule 6 of the Supreme Court of Appeals which provide that the circuit court may only consider evidence which was made part of the record in the proceeding before the Office of Tax Appeals, unless there are alleged irregularities in the procedure before the Office of Tax Appeals, not shown on the record.

In the event a party alleges irregularities in the procedure before the Office of Tax Appeals, the circuit court may hold a hearing and consider other testimony and evidence solely on that issue. A request for oral argument or an evidentiary hearing on matters not in the record below must be made by the Petitioner with the filing of the petition. Respondent may request and/or respond to Petitioner's request for oral argument or an evidentiary hearing at the time of filing a response to the petition. The court must rule on the request within thirty (30) days of the petition, and the granting thereof is at the court's discretion.

Appeals taken on questions of law or fact, or on both, are heard by the circuit court upon assignment of errors filed in the appeal or in the briefs of the appellant. Errors not argued by brief may be disregarded. The court or judge sets a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, may not be heard sooner than 10 days after the filing of the petition. Notice of the hearing must be given to the Tax Commissioner. The review is conducted by the court upon the record made before the Office of Tax Appeals, except that in cases of alleged irregularities in procedure before the Office of Tax Appeals, not shown in the record, testimony thereon may be taken before the court. The court may hear oral argument and require written briefs. (W. Va. Code § 29A-5-4). The Tax Commissioner is represented in court by the Attorney General's office.

The circuit court may reverse or affirm the order or decision of the Office of Tax Appeals or may remand the case for further proceedings. It must reverse, vacate or modify the order or decision of the Office of Tax Appeals if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedures;

(4) Affected by other error of law;

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly
unwarranted exercise of discretion. (W. Va. Code § 29A-5-4(9)).

**Appeal from circuit court:** If the taxpayer prevails before the circuit court, the Tax Commissioner must correct the assessment in accordance with the circuit court’s decision unless the Tax Commissioner files an appeal and prevails thereon. The judgment of the circuit court is final unless reversed, vacated or modified on appeal to the West Virginia Supreme Court of Appeals in accordance with the provisions of section one, article six of this chapter. (W. Va. Code § 29A-5-4(h)). An appeal of the circuit court's decision may be taken by the taxpayer or the Tax Commissioner to the West Virginia Supreme Court of Appeals. (W. Va. Code § 11-10A-19(h)). The petition for appeal to the Supreme Court of Appeals must be submitted within four months of the entry of the circuit court’s order and bond must be given within two months. (W. Va. Code §§ 29A-6-1 and 56-5-16).

Unless otherwise provided by statute, a final judgment shall be entered in an administrative appeal within six (6) months of the filing of the appeal. The court’s ruling may affirm, reverse, vacate or modify the order or decision of the Office of Tax Appeals, or remand the case with instructions to the Office of Tax Appeals for further proceedings. The judgment of the circuit court is final unless reversed, vacated or modified by the West Virginia Supreme Court of Appeals, in accordance with West Virginia Code § 29A-6-1.

¶ 910 Refunds and Credits of Overpayments


**Overpayments generally:** A taxpayer that has overpaid any tax may file a claim for refund to require the Tax Commissioner to refund the amount of overpayment or, if the taxpayer so elects, to apply the overpayment as a credit against the taxpayer's liability for other periods.

**Claims for refund or credit:** To be entitled to a refund or credit of an overpayment, the taxpayer must timely file a claim with the Tax Commissioner. With respect to personal or corporation net income taxes, a return which shows an overpayment on its face constitutes a claim for refund or credit. Generally, the Tax Commissioner determines the correctness of taxpayer’s claim and notifies taxpayer in writing of such determination. (W. Va. Code § 11-10-14(a)).

**Petition for refund or credit; hearing:** If the taxpayer is not satisfied with the Tax Commissioner's determination of his claim for refund or credit or if the Tax Commissioner has not determined the taxpayer's claim within 90 days after filing, or six months when the claim for refund or credit is for personal income tax, business franchise tax or corporation net income tax, the taxpayer may file a petition for refund or credit with the Office of Tax Appeals. No petition for refund or credit may be filed more than 60 days after the taxpayer is served with notice of denial of his claim for refund. Like a petition for reassessment, a petition for refund or credit must be filed in writing, and verified under oath by the taxpayer setting forth with particularity the items of the
determination objected to with the reasons for the objections. All hearings on petitions for refund or credit are conducted in the same manner as hearings on petitions for reassessment. (W. Va. Code § 11-10-14)

**Erroneous refund or credit:** If the Tax Commissioner believes that an erroneous refund has been made or an erroneous credit has been established, he may issue an assessment or institute a civil action to recover such amount.

*Refunds due to unconstitutionality:* If a tax is found to be unconstitutional, the Tax Commissioner may refund such taxes in installments over a period not to exceed three years from the date of the final decision entitling taxpayer to retroactive monetary relief. (W. Va. Code § 11-10-14b (e)).

¶ 911 Time Limitations

**Law:** W. Va. Code §§ 11-10-14(e), 11-10-15, 11-10-16(a)--11-10-16(c) and 11-10-16(e).

*Limitations on assessment:* All tax, additions to tax, penalties and interest to which the Tax Procedure Act applies must be assessed within three years after the date the return was filed. A return filed before the last day prescribed for filing is considered filed on the last day for filing. There are several exceptions to the three-year rule. In the case of a false or fraudulent return filed with intent to evade tax, or in the case that no return was filed, an assessment may be made at any time. In a case where taxpayer fails to disclose a listed transaction, as defined in Section 6707A of the Internal Revenue Code, the assessment period is six years. The assessment period may be extended pursuant to written agreement between the taxpayer and the Tax Commissioner. The assessment period is also extended for personal income tax or corporation net income tax if a federal income tax deficiency is finally determined. Furthermore, the filing of an amended return, application of certain loss carrybacks, adjustment of certain credits and/or bankruptcy may extend the assessment period. (W. Va. Code § 11-10-15).

*Limitations on claims for refund or credit:* In general, claims for refund must be filed within three years after the due date of the return with respect to which the tax was imposed or within two years from the date the tax was paid, whichever of such period expires later. If no return was filed by the taxpayer (as is the case with respect to consumers sales and service tax paid by a purchaser-taxpayer to a vendor), a claim for refund must be filed within two years from the time the tax was paid. The time period for claiming refunds may be extended by agreement and is extended automatically for personal income tax or corporation net income tax after a final determination of an overpayment of federal income taxes. Special rules apply for refunds of the motor fuel excise tax and the motor carrier road tax. (W. Va. Code § 11-10-14(e)).

*Limitations on collection:* A collection proceeding for an amount due under an assessment which has become final must be brought within five years after the date the assessment becomes final. A collection proceeding for an amount determined to be due as provided by law other than by the issuance of an assessment (e.g., where a taxpayer
files a return but fails to remit tax stated to be due) must be commenced within five years after the date on which the taxpayer filed the annual return. If the taxpayer files a false or fraudulent return or fails to file a return, no limitation on collection applies. Furthermore, the Tax Commissioner and a taxpayer may enter into a written agreement to extend the period within which the Tax Commissioner may institute collection proceedings. (W. Va. Code § § 11-10-16(a) and 11-10-16(e)).

¶ 912 Collection of Tax--In General

**Law:** W. Va. Code §§ 11-1D-5h, 11-10-11 and 11-10-17.

*Enforcement generally:* The Tax Commissioner is empowered to collect all taxes, additions to tax, penalties and interest imposed by the State of West Virginia. Enforcement of the collection provisions of the Tax Procedure Act in any state court is under the exclusive jurisdiction of the Tax Commissioner. The Tax Commissioner may be represented in any civil collection action by the Attorney General, the prosecuting attorney of the county in which the action is instituted or by any attorney employed by the Tax Commissioner and designated by the Attorney General as a Special Assistant Attorney General. In addition to the other remedies available for the collection of debts due West Virginia, the Tax Commissioner may proceed by foreclosure of lien or by levy and distraint. (W. Va. Code § 11-10-5h).

*Special rules regarding tax enforcement:* There are several special rules that enhance the Tax Commissioner's tax enforcement powers, possibly at the expense of the unwary. In addition to the typical powers of creating liens and levying upon property of delinquent taxpayers, the collection provisions authorize the Tax Commissioner to seek payment of delinquent tax from persons other than the "taxpayer."

*Nonresident contractors:* Every person contracting with a "nonresident contractor" is required to withhold a sufficient amount in the final settlement of the contract (not exceeding 6% of the contract price) to cover B&O tax, personal income tax or corporate net income tax owed by the contractor to the state. Amounts are to be withheld until the receipt of a certificate from the Tax Commissioner that West Virginia taxes imposed against the nonresident contractor have been paid. Failure to withhold as provided above may cause such person to become personally liable for the payment of the contractor's delinquent taxes, not to exceed 6% of the contract price. (W. Va. Code § 11-10-11(b)).

*Contracts with state or political subdivision:* State, county and municipal officers making contracts on behalf of the state or any political subdivision are required to withhold payment in the final settlement of any contract until receipt of a certificate from the Tax Commissioner stating that B&O tax, personal income tax or corporate net income tax, imposed against the contractor have been paid. A similar rule applies when municipal B&O tax applies to the subject matter of the contract. The Tax Commissioner has ruled that 10% of the contract price should be withheld on government contracts until certification is provided. The Tax Commissioner is authorized to sue a public official for $1,000 for failing to comply with this withholding requirement. (W. Va. Code § 11-10-
Ceasing business: If any person subject to a tax administered under the Tax Procedure Act sells out or ceases doing business, all tax, additions to tax, penalties and interest become due and payable immediately. Final returns and payment of all such taxes must be made within 30 days after selling out or ceasing to do business. The unpaid amount of any such tax is a lien upon the property of such person.

Successor liability: A successor in business of any person who sells his business or ceases doing business becomes personally liable for the payment of tax, additions to tax, penalties and interest unpaid after the expiration of the 30-day period. Furthermore, a predecessor’s unpaid tax becomes a lien on the successor’s property. However, if the business is purchased in an arms-length transaction and the purchaser withholds so much of the consideration for the purchase as will satisfy the liabilities which may be due until such time as the seller produces a receipt from the Tax Commissioner evidencing the payment thereof, the purchaser will not be personally liable. This broad successor liability provision must he carefully addressed with respect to the purchase or sale of any business in West Virginia. (W. Va. Code § 11-10-11(f)).

"Innocent" spouse relief from liability: Where a joint personal income tax return has been filed on which there is a substantial understatement of tax, attributable to grossly erroneous items of one spouse, the other spouse may be relieved of liability for tax if he or she establishes that, in signing the return, he or she did not know, and had no reason to know, of the substantial understatement. (W. Va. Code § 11-10-11(k)).

Offset of refunds or credits: Whenever a taxpayer has a refund or credit due to an overpayment of any tax administered under the Tax Procedure Act, the Tax Commissioner may reduce the amount of such refund or credit by the amount of any other tax owed. The converse is not true (i.e., the taxpayer does not have right to offset unless specifically authorized by statute). (W. Va. Code §§ 11-10-11(j) and 11-15-9b(c)).

Injunction: If any taxpayer fails for a period of more than 60 days to fully comply with provisions of the Tax Procedure Act, the Tax Commissioner may institute a proceeding to secure an injunction to restrain the taxpayer from doing business in West Virginia until the taxpayer has fully complied with the provisions of the Tax Procedure Act. (W. Va. Code § 11-10-11(h)).

Dissolving corporations: The Secretary of State is required to withhold the issuance of a certificate of dissolution to a corporation organized under West Virginia law or a certificate of withdrawal to a corporation organized under the laws of another state and admitted to do business in West Virginia until receipt of a certificate from the Tax Commissioner stating that all West Virginia taxes imposed against the corporation have been paid. (W. Va. Code § 11-10-11(c)).
¶ 913 Collection of Tax-Liens

*Law:* W. Va. Code §§ 11-10-11(f), 11-10-12(a)-1140-12(e), 11-10-13 and 38-10C-1.

*Liens generally:* Any tax, additions to tax, penalties or interest due and payable under the Tax Procedure Act is a debt due the state and lien upon the taxpayer's real and personal property. (W. Va. Code § 11-10-12(a)).

*Duration of lien:* Tax liens remain in effect until the liability for tax, additions to tax, penalties and interest is satisfied or become unenforceable by reason of lapse of time. (W. Va. Code § 11-10-12(b)).

*Recording of liens:* No lien in favor of the state, except a lien for property taxes, is enforceable against a purchaser of real estate or personal property without notice unless recorded in the office of the clerk of the county commission of the county where such real estate or personal property is located. An unrecorded tax "lien" is, however, effectively enforceable against a successor in business. (W. Va. Code §§ 11-10-11(f), 11-10-12(c), 38-10C-1 *et seq.*).

*Release or subordination of liens:* The Tax Commissioner may release a tax lien when the debt is paid or adequately secured by bond or other security. The Tax Commissioner may also partially release or subordinate any lien if an amount not less than the value of the state's interest in such property is paid. (W. Va. Code § 11-10-12(d)).

*Foreclosure:* The Tax Commissioner may foreclose upon tax liens recorded against any property subject to the lien by civil action in the circuit court of the county where such property is located. The court may appoint a receiver to ascertain and report all liens, claims and interests in and upon such property and the validity, amount and priority of each. After notice to all parties having any interest in the property, the court will adjudicate all remaining matters and decree a sale of such property. (W. Va. Code § 11-10-12(e)).

¶ 914 Collection of Tax-Levy

*Law:* W. Va. Code §§ 11-10-13(a), 11-10-13(e), 11-10-13(d), 11-10-13a through 11-10-13k.

*Levy and distraint generally:* If any tax administered under the Tax Procedure Act which is shown to be due on a return is not paid when required or if an assessment of such tax becomes final and the person liable to pay the tax neglects or refuses to pay the assessment within 15 days after notice and demand, the Tax Commissioner may collect the tax by levy or successive levies (including the power of distraint and seizure by any means) upon all property and rights to property belonging to the taxpayer or upon which there is a lien for payment of the tax. If the Tax Commissioner finds that the collection of the tax is in jeopardy, notice and demand for immediate payment may be given and, upon failure or refusal to pay, collection by levy is authorized without
regard to the 15-day notice. (W. Va. Code § 11-10-13(a) and (c)).

**Distress warrant:** A levy on property is made by the issuance of a distress warrant to the sheriff of the county in which the property is located or to any officer or employee of the Department of Tax and Revenue commanding such person to levy upon and sell taxpayer’s property. (W. Va. Code § 11-10-13(d)).

**Continuing levy on property and wages:** The Tax Commissioner may levy upon the salary or wages of any person owing unpaid tax. The Tax Commissioner must notify such person in writing of his intention to make such levy ten days in advance. The levy on salary or wages payable to a taxpayer is continuous from the date the levy is made until the tax liability is satisfied or becomes unenforceable by reason of lapse of time. (W. Va. Code § 11-10-13(e)).

**Property exempt from levy:** Certain types and amounts of property are statutorily exempt from levy, including but not limited to wearing apparel, furniture, personal effects, tools of the trade, annuity and pension payments, workers compensation benefits, unemployment benefits, judgments for support of minor children and a certain minimum amount of wages, salary or other income. (W. Va. Code § 11-10-13a).

**Surrender of property subject to levy:** Persons in possession of property or rights to property upon which a levy has been made must surrender such property, upon demand of the Tax Commissioner, except items subject to prior attachment, execution or levy. Refusal to surrender such property upon the demand of the Tax Commissioner will result in such person becoming personally liable to the state in an amount equal to the amount of taxes for which the levy has been made, together with costs and interest on such sum. In addition, the penalty imposed for failure to surrender property without reasonable cause is fifty percent of the amount recovered. Persons in possession of property subject to levy, who, upon demand of the Tax Commissioner, surrender such property, are discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. (W. Va. Code § 11-10-13b).

**Sale of seized property generally:** Following the seizure of property, the Tax Commissioner must give notice to the owner and publish notice of sale not less than five days prior to the date of sale. The sale is conducted by public auction or by public sale under sealed bids. The Tax Commissioner may determine the minimum price for which a property will be sold and if the minimum price is not offered, the property will be declared purchased at the minimum price by the State of West Virginia. Indivisible property owned jointly by the delinquent taxpayer and an innocent third party may be sold by the Tax Commissioner and the proceeds divided, based on the parties respective interests in the property immediately prior to the levy. (W. Va. Code § 11-10-13c).

**Perishable goods:** If the Tax Commissioner determines that any seized property is
liable to perish or become greatly reduced in value by keeping, he appraises the property and, if the owner pays an amount equal to the appraised value or gives a bond to secure payment of the appraised amount, returns it to the owner. If the owner does not pay such amount or furnish a bond, the Tax Commissioner must sell the perishable property as soon as practicable. (W. Va. Code § 11-10-13d).

Redemption of seized property: Persons whose property has been levied on have the right to pay the amount due plus the Tax Commissioner's expenses prior to sale and have the property restored. Owners of any real estate levied upon and sold are permitted to redeem the property within 180 days after the sale upon payment to the purchaser the amount paid by the purchaser, plus interest. (W. Va. Code § 11-10-13e).

Certificate of sale or deed to property: The Tax Commissioner will provide the purchaser of personal property a certificate of sale upon payment of the purchase price. In the case of any real property sold and not redeemed by the owner, the Tax Commissioner will provide the purchaser a deed. (W. Va. Code §§ 11-10-13f and 11-10-13g).

Application of proceeds of levy: Any money realized from a levy shall be applied in the following order of priority: (1) against the expenses of the levy and sale; (2) against the liability upon which the levy was made; and (3) surplus proceeds are credited or refunded to the person legally entitled thereto. (W. Va. Code § 11-10-13j).

Release of levy: The Tax Commissioner may release a levy upon all or part of any property or rights to property where he determines that such action will facilitate the collection of the liability. Such release does not operate to prevent subsequent levy. (W. Va. Code § 11-10-13k).

¶ 915 Interest, Additions to Tax and Penalties


Interest on underpayments: Interest is charged on the amount of any tax, administered under the Tax Procedure Act, which is not paid on or before the last day for payment. If a refund is made or credit established upon an erroneous claim, interest on the amount refunded or credited is charged from the date the refund was made to the date such amount is recovered. The following special rules apply to interest on underpayments: (1) interest payable to the state may be collected in the same manner as taxes (e.g., by levy and distraint); (2) no interest is imposed on interest; (3) interest is imposed on penalties and additions to tax if not paid within 15 days from the date of notice and demand therefore; (4) if notice and demand is made for payment of any tax and such tax is paid within 15 days after the date of such notice and demand, interest is not imposed for the period after the date of notice and demand; and (5) interest is not imposed on any failure to pay estimated business and occupation, severance, telecommunications, business franchise, personal or
interest on overpayments: Subject to various special rules, interest is allowed on any amount which is administratively or judicially determined to be an overpayment of tax administered under the Tax Procedure Act with the exception of the business registration tax and motor carrier road tax. Interest on overpayments only begins to accrue on the date a claim for credit or refund is filed. Within 30 days after a final determination of entitlement to refund, the Tax Commissioner will authorize a refund or establish a credit as requested by the taxpayer. No interest is payable if the Tax Commissioner authorizes a refund or establishes a credit within 90 days after the date a claim for refund is filed, except in the case of claims for refunds of personal or corporation net income taxes no interest is allowed on overpayments if the Tax Commissioner authorizes a refund or establishes a credit within six months after the date a claim for refund or credit is filed.

Rate of interest: The Tax Commissioner is required to establish interest rates for tax underpayments and overpayments based on the adjusted prime rate. These rates may not be less than eight (8) percent per annum and are determined every six months. In the case of underpayments of tax, the applicable refund interest rate is increased by one and one half percent to help fund the Office of Tax Appeals.

The interest rates are as follows:

<table>
<thead>
<tr>
<th>Date Range</th>
<th>On Underpayments</th>
<th>On Overpayments</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 1, 1989 through June 30, 1990</td>
<td>11%</td>
<td>11%</td>
</tr>
<tr>
<td>July 1, 1990 through December 31, 1991</td>
<td>10%</td>
<td>10%</td>
</tr>
<tr>
<td>January 1, 1992 through June 30, 1992</td>
<td>9%</td>
<td>9%</td>
</tr>
<tr>
<td>July 1, 1992 through December 31, 1995</td>
<td>8%</td>
<td>8%</td>
</tr>
<tr>
<td>January 1, 1996 through December 31, 1996</td>
<td>9%</td>
<td>9%</td>
</tr>
<tr>
<td>January 1, 1997 through December 31, 1997</td>
<td>8%</td>
<td>8%</td>
</tr>
<tr>
<td>January 1, 1998 through December 31, 1998</td>
<td>9%</td>
<td>9%</td>
</tr>
<tr>
<td>January 1, 1999 through June 30, 2000</td>
<td>8%</td>
<td>8%</td>
</tr>
<tr>
<td>July 1, 2000 through December 31, 2001</td>
<td>9%</td>
<td>9%</td>
</tr>
<tr>
<td>January 1, 2002 through June 30, 2002</td>
<td>8%</td>
<td>8%</td>
</tr>
<tr>
<td>July 1, 2002 through June 30, 2013</td>
<td>9.5%</td>
<td>8%</td>
</tr>
</tbody>
</table>

Additions to tax generally: Additions to tax are imposed to encourage voluntary compliance with West Virginia’s tax laws by increasing the cost of taxpayer noncompliance. There are waivable and nonwaivable additions to tax. Nonwaivable additions may be abated only if a taxpayer establishes objective facts establishing that the imposition of the addition to tax was erroneous.

Failure to file returns or pay tax: If a taxpayer fails to file a required return of any tax administered under the Tax Procedure Act on or before the due date, unless such failure is due to reasonable cause and not willful neglect, an addition to tax will be added to the amount shown as tax on the return equal to 5% of the amount of such
tax if the failure is for not more than one month, with an additional 5% for each additional month not to exceed 25% in the aggregate. If a taxpayer fails to pay the tax shown on any required return on or before the due date, unless it is shown that such failure is due to reasonable cause and not willful neglect, an addition to tax is added to the tax shown on the return equal to 0.5% of the tax if the failure is for not more than one month with an additional 0.5% for each additional month not to exceed 25% in the aggregate. Finally, if a taxpayer fails to timely pay tax that should have been shown on a tax return within 15 days after notice and demand therefore, an addition to tax of 0.5% of the amount not timely paid is assessed if the failure is for not more than one month with an additional 0.5% for each additional month such failure continues not to exceed 25% in the aggregate, unless the failure was due to reasonable cause and not due to willful neglect. Special rules limit the aggregate additions to tax assessed for failure to pay and failure to file. (W. Va. Code § 11-10-18(a)(1)).

Negligence or intentional disregard of rules and regulations: If any part of an underpayment of tax administered under the Tax Procedure Act is due to negligence or intentional disregard of the rules and regulations, an amount equal to 5% of the tax due will be added if the underpayment is for not more than one month, with an additional 5% for each additional month, not to exceed 25% in the aggregate. Additions to tax due to negligence or intentional disregard of rules and regulations are imposed only on the net amount of tax due and are imposed in lieu of any additions to tax for failure to file or pay. (W. Va. Code § 11-10-18(c)).

False or fraudulent returns: In the case of the filing of any false or fraudulent return with intent to evade tax or in the case of willful failure to file a return with the intent to evade tax, an addition to tax is added equal to 50% of the tax due. The addition to tax is added to the tax due and shall be in lieu of any additions to tax for failure to file or pay or for negligence. The burden of proving fraud, willfulness or intent to evade tax is upon the Tax Commissioner. (W. Va. Code § 11-10-18(d)).

Failure to pay estimated tax: In the case of an underpayment of estimated tax, an addition to tax in an amount determined at the rate established for paying interest under W. Va. Code §§ 11-10-17 or 11-10-17a on the amount of underpayment of estimated tax for the period of underpayment is imposed. The amount of the underpayment is defined as the excess of the amount of the installment which would be required to be paid if the estimated tax were an amount equal to 90% of the tax shown on the return for the taxable year, divided by the number of installments the taxpayer was required to make for the taxable year (or, if no return was filed, 90% of the tax for the tax year divided by the number of installment payments the taxpayer was required to make for the tax year), over the amount of any installments paid on or before the last date prescribed for payment. The period of underpayment runs from the date the installment was required to be paid to the earlier of the following dates: (1) the due date of taxpayer’s annual return; or (2) the date on which the estimated tax was
paid, and without regard to any extension of time granted for filing the return.

Failure to collect, account for and pay over tax, or attempt to defeat or evade tax: Any person required to collect, account for and pay over to the Tax Commissioner any tax administered under the Tax Procedure Act, who willfully fails to truthfully account for and pay over such tax or willfully attempts to evade or defeat such tax, is liable for a penalty equal to the total amount evaded, not collected or not accounted for and paid over. This penalty provision is applied in lieu the provisions regarding additions to tax. The 100% penalty is used by the Department of Tax and Revenue against responsible officers of corporations that fail to pay personal income tax withholdings. See W. Va. Code § 11-10-4(b), W.Va. Code (included in definition of "person" is an officer of a corporation who is under a duty to perform an act). (W. Va. Code § 11-10-19).

Fraudulent statement or failure to furnish statement to employees: Any person required under the provisions of the personal income tax law to furnish a statement to an employee who willfully furnishes a false or fraudulent statement or willfully fails to furnish a statement is subject to a penalty of $50.

Fraudulent claim for refund or credit: A penalty is imposed where a person has received a refund or credit for taxes previously paid, as a result of filing of a false or fraudulent claim for refund or credit with the intent to defraud the state. The amount of the penalty is 50% of the amount erroneously refunded or credited. The burden of proving fraud or intent to defraud is upon the Tax Commissioner. (W. Va. Code § 11-10-19(c)).

§ 916 Criminal Penalties


Powers of enforcement officers: For the purpose of enforcing the criminal provisions of the tax laws, employees of the Department of Tax and Revenue so designated by the Tax Commissioner have all lawful powers delegated to members of the state police except the power to carry firearms. The West Virginia Department of Public Safety, any county sheriff or any municipal police officer, upon request of the Tax Commissioner, are also authorized to assist in enforcing the criminal provisions of the tax code. (W. Va. Code § 11-10-5i).

Failure to file a return or pay tax: Any person who willfully fails to file a return or willfully fails to pay any tax more than 30 days after the date such tax is required to be paid by law is guilty of a misdemeanor and upon conviction thereof may be fined not less than $100 nor more than $1,000 and/or imprisoned in the county jail not more than six months. Each failure to pay tax or file a return is a separate offense and punishable accordingly. Thirty days prior to instituting criminal proceedings the Tax Commissioner must give such person written notice of any failure to pay tax or file a return. (W. Va. Code § 11-9-4).
Failure to account for or pay over another’s tax: Any person required to collect or withhold, account for and pay over any tax who willfully fails to truthfully account for and pay over such tax is guilty of a felony if the amount of tax not paid over is $1,000 or more and upon conviction thereof may be fined not less than $5,000 nor more than $25,000 or imprisoned in the penitentiary not less than one nor more than three years or in the discretion of the court, confined in the county jail not more than one year, or both fined and imprisoned. If the amount of tax not paid over is less than $1,000, the person is guilty of a misdemeanor and upon conviction thereof will he fined not less than $500 nor more than $5,000 and/or imprisoned in the county jail not more than six months. Thirty days prior to instituting a criminal proceeding under this section, the Tax Commissioner must give such person written notice of the failure to truthfully account for and pay over tax. (W. Va. Code § 11-9-5).

Failure to collect or withhold tax: Any person required to collect or withhold any tax who willfully fails to collect or withhold such tax is guilty of a misdemeanor and upon conviction thereof shall he fined not less than $100 nor more than $500 and/or imprisoned in the county jail not more than six months. (W. Va. Code § 11-9-6).

False statements to purchasers, lessees or employees relating to tax: Any person required by law to collect or withhold any tax who represents to the public or any purchaser, lessee or employee that he will absorb or assume payment of any part of such tax or that such tax is not to be considered as part of or added to the sales price or wages payable is guilty of a misdemeanor and upon conviction thereof will be fined not less than $100 nor more than $1,000 and/or imprisoned in the county jail not more than six months. (W. Va. Code § 11-9-7).

Aiding, abetting, assisting or counseling in criminal violation: Any person who knowingly aids, abets, assists, or counsels another person in the commission of a tax crime is guilty of a misdemeanor and upon conviction thereof may be fined not less than $100 nor more than $1,000 and/or imprisoned in the county jail for not more than six months. (W. Va. Code § 11-9-9).

Tax evasion: Any person who knowingly files a false or fraudulent return or any other document or willfully attempts in any other manner to evade any tax is guilty of a felony and upon conviction shall he fined not less than $1,000 nor more than $10,000 and/or imprisoned in the penitentiary not less than one nor more than three years or in the discretion of the court confined in the county jail not more than one year, or both fined and imprisoned. (W. Va. Code § 11-9-10).

Tax shelter penalties: Reportable transactions, as defined in W. Va. Code § 11-10E-5, must be listed with the State Tax Commissioner. Penalties similar to those imposed by the Internal Revenue Code are imposed for promoting tax shelters and failure to report listed transactions. (W. Va. Code § 11-10-18(f)). See also W. Va. Code § 11-10E-5 (penalty for failure to report reportable transactions), § 11-10E-6.
Engaging in business without payment of business registration tax: If any person engages in business for more than 30 days without payment of the business franchise registration tax or engages in business after expiration of the period of time for which such certificate was granted or after such certificate was revoked, such person is guilty of a misdemeanor and upon conviction thereof may be fined $100. Each day or part thereof that any violation continues is a separate offense and punishable accordingly. (W. Va. Code § 11-9-11).

Engaging in business without a business registration certificate: If any person engages in business without first obtaining a business franchise registration certificate, such person is guilty of a misdemeanor and upon conviction thereof shall be fined not less than $1,000 nor more than $10,000. (W. Va. Code § 11-9-12).

¶ 917 Specimen Documents

The following appeals forms are available from the Office of Tax Appeals at the following website: http://www.wvota.gov

Form petition for reassessment
Form petition for refund
Form for service of process
Form for subpoena and subpoena duces tecum
Power of attorney – Form WV/2845
Form for withdrawal of petition

The following forms are available from the State Tax Department at the following website: http://www.wvtax.gov

Form WV ARI-001 Authorization to release information
INDEX – CHAPTER 9 – TAX PROCEDURE AND ADMINISTRATION

Administration
  administrative protest and hearings ¶ 908
  audit selection and procedure ¶ 906
  collection of tax ¶ 912
  confidentiality ¶ 905
  disclosure ¶ 905
  estate and trust income taxes ¶ 444
  estate tax ¶ 801
  forms ¶ 903
  in general ¶ 901
  regulations ¶ 903
  sales and use tax ¶ 536
  severance taxes ¶ 717
  subpoenas ¶ 906
  Tax Procedure and Administration Act ¶ 902
  Technical assistance advisories ¶ 903

Audit selection and procedure
  in general ¶ 906

Collection of tax
  in general ¶ 912
  levy and distraint ¶ 914
  lien of tax ¶ 913
  limitations of time ¶ 911
  sales and use tax ¶ 521-523
out-of-state volume retailers ¶ 524
severance tax
coal ¶ 710
purchaser of natural gas ¶ 718
special tax on coal production ¶ 711

Deficiency of tax – see Underpayment of tax

Due dates
in general904

Evasion of tax
penalties ¶ 916

Forms
in general¶ 903

Interest
refunds ¶ 915
underpayment of tax ¶ 915

Levy and distraint
in general¶ 914

Lien for tax
in general¶ 913
property tax ¶ 624

Limitations of time
in general¶ 911

Overpayment of tax
claim for refund
petition for refund ¶ 910
statute of limitations

Penalties
business registration tax ¶ 1001
corporate license tax ¶ 1002
corporate tax on excess acreage tax ¶ 1003
failure to file a return ¶ 915; 916
failure to pay tax ¶ 916
failure to withhold tax ¶ 916
false returns ¶ 915
motor carrier road tax ¶ 1004
tax evasion ¶ 916
underpayment of tax ¶ 915
workers’ compensation tax ¶ 1010

Refunds
in general ¶ 910
limitations of time ¶ 911

Regulations
in general ¶ 903

Returns and reports - see also specific tax
confidentiality ¶ 905
disclosure ¶ 905
due dates
in general ¶ 904
forms ¶ 903
penalties
failure to file ¶ 915--916
petition for reassessment
specimen return ¶ 917
petition for refund ¶

Subpoenas
in general ¶ 906

Tax liens – see Lien for tax, supra

Tax Procedure and Administration Act
in general ¶ 902

Technical Assistance Advisories
in general ¶ 903

Underpayment of tax
interest ¶ 915
penalties ¶ 915
CHAPTER 10

MISCELLANEOUS TAXES

By C. Page Hamrick

C. Page Hamrick is engaged in the private practice of law in Charleston, West Virginia. Mr. Hamrick, a Certified Public Accountant, has served as special counsel to the legislature for tax legislation and as special counsel to the State Tax Department in some of its major tax cases.

Table of Contents

<table>
<thead>
<tr>
<th>¶ 1001 Business Registration Tax</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>¶ 1002 Corporate Tax On Excess Acreage</td>
<td>10-1</td>
</tr>
<tr>
<td>¶ 1003 Corporate License Tax</td>
<td>10-4</td>
</tr>
<tr>
<td>¶ 1004 Motor Carrier Road Tax</td>
<td>10-4</td>
</tr>
<tr>
<td>¶ 1005 Motor Fuel Excise Tax</td>
<td>10-5</td>
</tr>
<tr>
<td>¶ 1006 Telecommunications Tax</td>
<td>10-6</td>
</tr>
<tr>
<td>¶ 1007 Business And Occupation Tax - Tax On Utilities</td>
<td>10-8</td>
</tr>
<tr>
<td>¶ 1008 Business And Occupation Tax - Tax On Natural Gas Storage</td>
<td>10-9</td>
</tr>
<tr>
<td>¶ 1009 Business And Occupation Tax - Electricity</td>
<td>10-9</td>
</tr>
<tr>
<td>¶ 1010 Tobacco Excise Taxes</td>
<td>10-10</td>
</tr>
<tr>
<td>¶ 1011 Soft Drinks Excise Tax</td>
<td>10-11</td>
</tr>
<tr>
<td>¶ 1012 Excise Tax On Transfer Of Real Property</td>
<td>10-13</td>
</tr>
<tr>
<td>¶ 1013 Health Care Provider Taxes</td>
<td>10-15</td>
</tr>
<tr>
<td>¶ 1014 Severance and Business Privilege Tax</td>
<td>10-17</td>
</tr>
<tr>
<td>¶ 1015 Unemployment Compensation Tax</td>
<td>10-18</td>
</tr>
<tr>
<td>¶ 1016 Municipal Taxes</td>
<td>10-19</td>
</tr>
<tr>
<td>INDEX – CHAPTER 10 – MISCELLANEOUS TAXES</td>
<td>10-27</td>
</tr>
</tbody>
</table>

¶ 1001 Business Registration Tax

Law: W. Va. Code § 11-12-1 et seq.

Taxpayers subject to tax: Every person engaging in or prosecuting any business activity in the State of West Virginia must first obtain a Business Registration Certificate from the State Tax Commissioner and pay the Business Registration Tax.

A certificate must be obtained for each fixed location from which property or services are offered for sale or lease to the public or at which customer accounts may be opened, closed or serviced. A separate certificate is required for each location from
which coin-operated machines are available to the public, but not for each machine. A business which sells tangible personal property or services from vehicles needs a certificate for each fixed location and must carry a copy of the certificate in each vehicle.

A transient vendor must carry and publicly display the certificate when doing business in this State, and must post a $500 bond with the Tax Commissioner to ensure payment of taxes.

Contractors must keep a copy of the business registration certificate available at every construction site in this State until the work at such site is completed.

**Exemptions from registration and payment of tax:** Persons engaging in business activities in this State who are not required to collect or withhold a tax administered under the Tax Procedures and Administration Act, who do not claim an exemption from the sales or use tax, and whose gross income is $4,000 or less during the tax year preceding the year of registration are exempt from registration. Additionally, organizations which qualify for exemption from federal income taxes under IRC § 501, political subdivisions of this State, the United States and its agencies, persons engaged in agriculture and farming, and foreign retailers who are not engaging in business in this State, are exempt from payment of the tax. However, businesses exempt from payment of the tax must still register and obtain a registration certificate if doing business in this State.

**Registration certificates:** Upon receipt of an application, registration certificates are issued for a period of up to twenty-four months beginning with the first day of July of the fiscal year of the State during for which the certificate is issued. However, a business registration certificate issued on or after July 1, 2010, will be valid until the business ceases doing business or the certificate is suspended, revoked or canceled by the State Tax Commissioner. The Commissioner may cancel or refuse to issue a new business registration certificate for failure to comply with State tax laws, including failure to pay local property taxes on business tangible personal property. Certificates must be posted in a conspicuous position in the place of business. Contractors must post a copy of the certificate at every construction site in this State.

Changes in the name of the person or change of location, or address, or changes in ownership of the business or changes in real parties of interest are considered a cessation of the business and require a new certificate. Changes of partners or members of firms or officers of a corporation do not require a new certificate.

Persons selling cigarettes, other tobacco products or cigarette wrappers at wholesale or retail, must additionally obtain a license to sell cigarettes or other tobacco products or cigarette wrappers.

Transient vendors, collection agencies, employment agencies and persons selling drug paraphernalia must comply with their respective registration provision before
beginning business in this State and these businesses must obtain a separate business registration certificate for any other business operation conducted on site

*Rate of tax and due date*: The business registration tax is $30 per certificate. The certificate issued to a business is permanent unless the business changes its location or changes its name or until it is suspended, revoked or cancelled by the Tax Commissioner. The tax is payable with the initial registration. New businesses are required to obtain a business registration certificate before commencing business.

An initial "Sparkler and Novelty Registration Fee" of $15 is charged all businesses selling sparklers and novelties. If a business sells sparklers and novelties from multiple locations, each location must be registered a $15 registration fee paid for each location.

Municipalities now have two options for issuing business licenses. A municipality may require a municipal license for business activities in the municipality and may impose a reasonable tax that cannot exceed the amount of the State license tax. Alternatively, the municipality may enact an ordinance creating an annual General Municipal Business license for municipal purposes and assess a tax that may not exceed $20 per license, except where a business license tax or fee is established elsewhere in the West Virginia Code.

**Penalties**: If a person engages in or prosecutes any business activity in this State before applying for a business registration certificate, or continues doing business in this State without timely renewing the certificate, the person is subject to a money penalty equal to $50 per month for each month, or fraction thereof, the failure continues, except that when the failure is to renew a certificate, the penalty may not exceed $50. (W. Va. Code § 11-12-9). This penalty is in addition to interest other additions to tax discusses in chapter 9.

**Cancellation or suspension of certificate**: The State Tax Commissioner may cancel or suspend a business registration certificate if a registrant files a false or fraudulent application, willfully refuses or neglects to file a tax return, willfully refuse or neglects to pay any tax, additions to tax, penalties or interest, when due, neglects to pay over any tax withheld from any person or held in trust for the State, abuses an exemption from sales or use tax, fails to pay use tax on taxable purchases for use in business, or fails to either pay the tax or give a properly executed exemption certificate to a vendor, or fails to pay in full delinquent personal property taxes owed for the calendar year. The State Tax Commissioner may revoke, cancel or suspend a business registration certificate when informed by a county sheriff that personal property taxes owed by the business are delinquent. Additionally, the Tax Commissioner may revoke, suspend, or refuse to issue or renew a business registration certificate for any business determined to be an alter ego, nominee or instrumentality of a business whose business registration certificate has been revoked or suspended. Rules have been established for such determinations. (W. Va. Code § 11-12-5.)
Procedure: The West Virginia Tax Procedure and Administration Act discussed in chapter 9 of this Guidebook applies to this tax.

¶ 1002 Corporate Tax On Excess Acreage


Taxpayers subject to tax: Corporations authorized to hold or holding more than 10,000 acres of land in this State are required to pay the corporate tax on excess acreage. The Attorney General has given an opinion that leasehold interests are not included within the meaning of land for purposes of the statute. (46 Op.Atty.Gen. 413 (1956)). A corporation created under West Virginia law is required to state in its agreement for incorporation and a foreign corporation applying for authority to transact business in this State is required state in its agreement or application the number of acres it desires to hold. Thereafter, if the corporation desires to hold additional acres it must apply to the Secretary of State for authorization to hold the additional acres.

Rate of tax: The tax is 5 cents per acre owned over 10,000 acres. The tax is paid to the Secretary of State when the agreement for incorporation or application for authority to do business is filed with the Secretary of State. Thereafter, the tax is paid with an application by the corporation to hold additional acreage. The application must be signed by the President, attested by the Secretary and under the corporate seal of the corporation. The Secretary of State then issues a certificate to the corporation showing the acreage the corporation is authorized to hold.

Assignment of authority to hold excess acreage: A corporation that paid this tax may assign, without further payment by the assignee of the tax, its license or authority to hold lands in excess of 10,000 acres provided the assignee is a corporation organized solely to conduct the same general business and with the same stock ownership as the original licensee and the assignment is accompanied by a conveyance and transfer to the assignee corporation of all the lands and other assets of the original licensee. The assignment must be filed with the Secretary of State who, upon being satisfied that the assignee corporation has conformed to the preceding requirements, will issue a certificate authorizing the assignee corporation to hold the same number of acres the original licensee was authorized to hold.

Penalties: A corporation which fails to pay the tax is liable for a fine of from $25 to $500, a penalty of 10% of the amount of the tax due.

¶ 1003 Corporate License Tax

Law: W. Va. Code § 11-12C-1 et seq.

The corporate license tax was repealed for license years beginning on and after July 1, 2008.

¶ 1004 Motor Carrier Road Tax

Introduction: The Motor Carrier Road Tax is closely related to the Motor Fuel Excise Tax.

Taxpayers subject to tax: The Motor Carrier Road Tax is imposed on motor carriers, which are defined as any vehicle having two axles and a gross vehicle weight exceeding 26,000 pounds, or having 3 or more axles regardless of weight, except recreational vehicles. The tax is paid on each gallon of motor fuel used in motor carrier operations in the State.

Rate and basis of tax: The tax is the same rate as the Motor Fuel Excise Tax discussed at ¶ 1005.

Exemptions: Motor carriers operated by any agency of the federal and state governments, or political subdivisions, and school buses.

Registration fee: Non-International Fuel Tax Agreement vehicles pay a registration fee of $5. A West Virginia identification marker is required on each vehicle.

Procedure: The West Virginia Tax Procedure and Administration Act discussed in chapter 9 of this Guidebook applies to this tax.

¶ 1005 Motor Fuel Excise Tax


Taxpayers subject to tax: Persons importing motor fuel into the State.

Rate and basis of tax: The Motor Fuel Excise Tax is a combination of a flat rate of 20.5 cents per gallon, plus a variable rate per gallon. The variable component is based on the average wholesale price of gasoline and special fuel as determined by the State Tax Commissioner on or before the first day of December each year and for 2011 is 12.9 cents per gallon. In no event may the variable rate be less than 4.85 cents per gallon. Any change in rate is effective each January 1. The aggregate motor fuel excise tax rate is:

- January 1, 2012 – December 31, 2012: 33.4 cents per gallon
- January 1, 2013 – December 31, 2013: 34.7 cents per gallon

The tax is imposed at the time motor fuel is imported into the State, other than by bulk transfer and is measured by invoiced gallons received outside the State at a refinery, terminal or bulk plant for delivery into West Virginia. The tax does not apply to motor fuel imported into the State in the fuel tank of a motor vehicle, but the Motor Carrier Road Tax may still apply.
Exemptions: The following sales of motor fuel are exempt from the flat rate component of the tax: motor fuel exported to another state, aviation fuel, dyed special fuel, and propane. Refundable exemptions are available for the following purchasers: the U.S. Government, any county or municipal governmental agency, county boards of education, urban mass transportation authorities, civil defense or emergency service programs. Refunds are permitted for taxes paid on motor fuel: exported to another state or nation; consumed in stationary off-highway turbine engines, used for heating, used in boilers, used as a dry cleaning solvent or commercial or industrial solvent, used as lubricants, ingredients or components of any manufactured product or compound; used in commercial watercraft or locomotives; purchased in quantities of 25 gallons or more and used in engines not operated on State highways. Motor fuel exported from the State to another state or nation is exempt per se from the variable component of the tax, provided that the destination state tax is collected.

Procedure: The West Virginia Tax Procedure and Administration Act discussed in chapter 9 of this Guidebook applies to this tax.

¶ 1006 Telecommunications Tax


Introduction: Local exchange carriers engaged in telecommunications business were subject to the Telecommunications Tax on their monopolistic services until the tax was repealed effective March 7, 2012. At the time of its repeal, the tax was not a significant generator of State tax revenues because most, if not all, telecommunication services had been determined by the West Virginia Public Service Commission to be competitive services.

Rate of tax: 4% of gross income attributable to services not subject to competition, determined by the Public Service Commission of West Virginia.

Taxpayers subject to tax: The Telecommunications Tax is imposed on every business selling or furnishing telegraph, telephone or other telecommunications services within West Virginia, except those provided by municipalities or other political subdivisions of the State.

The term “telecommunications” includes all telephone, radio, light, light wave, radio telephone, telegraph or means of communication, whether used for voice communication, computer data transmission, or other encoded symbolic information transfers, but does not include commercial broadcast radio, television, cable television, or amateur or citizen's band radio.

Income subject to tax: All gross income of communications carriers from local communications services is subject to the tax. This amount includes gross income from the provision of local exchange or long distance or data communications services beginning or ending entirely within West Virginia.
Gross income does not include income from network access, billing or similar services provided to end users, other telephone companies or communications carriers. Gross income does not include gross income from the provision of commodities or services which have been determined by the Public Service Commission (PSC) of West Virginia to be subject to competition. Prior to December 31 of each calendar year, the PSC is required to submit to the Tax Commissioner a listing of those commodities or services which the PSC has determined to be subject to competition. The listing is a conclusive determination for the purposes of defining gross income under the telecommunications tax.

**Apportionment:** Gross revenues derived from one point of business in this State (i.e. business either beginning or ending in West Virginia) is apportioned to this State in the same proportion that the length of such company’s telecommunications pathways, weighted by the number of channels such pathways are capable of carrying in West Virginia, bears to the total length of such company’s communications pathways, weighted by the number of channels such pathways are capable of carrying, located everywhere in the United States, its territories, and possessions. (See 11-13B-3(d), W.Va. Code).

“Communications channel” means the smallest discrete circuit or other means whereby a message, conversation, data set or signal may be communicated, which cannot be subdivided without destroying or diminishing its capacity to carry such communications. “Communications pathway” means any conduit, wire, cable, microwave signal path, radio signal path or other pathway over which telecommunications can be carried. The length of the communications pathway of satellite repeater facilities or other satellite communications facilities is deemed to be the shortest distance over the surface of the earth between the point on the earth from which signals are sent to the satellite and the point on the earth from which signals are received from the satellite.

**Credits:** Taxpayers subject to the Telecommunications Tax may apply the West Virginia Sales tax credit and the Use tax credit for payment of Sales and Use taxes on purchases, against the Telecommunications tax liability.

**Returns:** Annual returns are due one month after the end of the taxable year. Extensions for filing may be granted upon request. Taxable years and method of accounting are the same as for federal income tax purposes. Changes are to be reported by filing a copy of the Internal Revenue Service authorization for such changes with the annual return.

**Payment of tax:** For taxpayers whose monthly estimated tax liability exceeds $1,000, the Telecommunications tax is due and payable in monthly installments on or before the last day of the month following the month in which the tax accrues, except that the June installment is due June 15. A monthly estimated return is filed along with the tax payment. For tax liabilities of less than $1,000 or per month, the tax is payable in quarterly installments on or before the last day of the fourth, seventh, and tenth months.
of the taxable year. A quarterly estimated tax return is filed along with the tax payment, with the balance due with the annual return. The Tax Commissioner may extend the time for payment for a reasonable period, not to exceed six months, and may extend the time for payment of a deficiency for a period not to exceed 18 months.

Procedure: The West Virginia Tax Procedure and Administration Act discussed in chapter 9 applies to the tax.

¶ 1007 Business And Occupation Tax - Tax On Utilities


Taxpayers subject to tax: The business and occupation tax on utilities (W. Va. Code § 11-13-2d) is levied as an annual privilege tax on taxpayers engaged in public service or utility businesses, except railroad, express, pipeline, telephone and telegraph companies, water carriers, motor carriers. Taxpayers engaged in the business of generating or producing electric power, are taxed under W. Va. Code § 11-13-2o. The business of rendering gas storage services is subject to tax (W. Va. Code § 11-13-2e). Gas includes natural and artificial gas.

Rates of tax on utility gross receipts:

(1) Street and interurban and electric railways are taxed at 1.4%.

(2) Water companies are taxed at 4.4%, except for municipally owned water plants.

(3) Natural gas companies are taxed at 4.29%, except that the sale of natural gas is exempt to the extent that the natural gas is separately metered and is gas from which the purchaser derives hydrogen and carbon monoxide for use in the manufacture of chemicals in the State and the benefit of the exemption is passed on to the purchaser of the natural gas.

(4) Toll bridges are taxed at 4.29%.

(5) All other public service or utility businesses are taxed at 2.86%.

The all other public service business classification does not apply to electric power generation, transmission or distribution businesses, which are taxed under W. Va. Code § 11-13-2o or cable television companies (W. Va. Code § 24D-1-27).

Basis of tax for utilities: The measure of the tax does not include gross income derived from commerce between West Virginia and other states or between West Virginia and other countries. The gross income of the taxpayer from any other activity is taxed under the appropriate section of the West Virginia Code, so only income from business as a utility is subject to the business and occupation tax.
Returns and payment of tax: For taxpayers whose monthly estimated tax liability exceeds $1,000, the business and occupation tax is due and payable in monthly installments on or before the last day of the month following the month in which the tax accrues, except that the May installment is due June 15. A monthly estimated return is filed along with the tax payment. For tax liabilities of less than $1,000 or per month, the tax is payable in quarterly installments on or before the last day of the fourth, seventh, and tenth months of the taxable year. Where the tax does not exceed $200 per year, annual returns and payment within one month of the year-end are required.

Procedure: The West Virginia Tax Procedure and Administration Act discussed in chapter 9 of this Guidebook applies to this tax.

¶ 1008 Business And Occupation Tax - Tax On Natural Gas Storage


Taxpayers subject to tax: Every taxpayer engaged in storing natural gas in reservoirs which are first used for storage after March 1, 1989, is subject to the business and occupation tax on natural gas storage.

Rate of tax: The tax is five cents per dekatherm (generally 1,000 cubic feet) of natural gas injected into or removed from a storage field in West Virginia.

Basis of tax: The dekatherms of gas withdrawn and injected are netted on a monthly basis and the net dekatherms are subject to the tax. The Natural Gas Industry Jobs Retention Credit is available against the gas storage tax liability.

Returns and payment of tax: Returns are due monthly or quarterly on the 20th day of the month following the month or quarter in which the tax accrues.

Procedure: The West Virginia Tax Procedure and Administration Act discussed in chapter 9 of this Guidebook applies to this tax.

¶ 1009 Business And Occupation Tax - Electricity


Taxpayers subject to tax: Taxpayers who generate or produce electricity for sale, profit or commercial use, either directly or through the activity of others, or in the business of selling electricity to consumers, or in both businesses are subject to the business and occupation tax on the business of generating or producing or selling electricity.

Rate of tax: Generators or producers of electricity pay tax at the rate of $22.78 multiplied by the taxable generating capacity of each generating unit in this State owned or leased by the taxpayer, subject to reductions for units which have installed a flue gas desulfurization system. For taxable periods beginning on and after July 1, 2008, the
taxable generating capacity of generating units utilizing a turbine primarily generated by wind is equal to 12.5% of the official capability of the unit.

Taxpayers who sell electricity to consumers in this State which is not generated or produced in this State are taxed at 19/100 of one cent ($0.0019) times the kilowatt hours of electricity sold, except that the rate is 5/100 of one cent ($0.0005) if sold to manufacturing facilities where the demand exceeds 200,000 kilowatts per year.

_Returns and payment of tax:_ For taxpayers whose monthly estimated tax liability exceeds $1,000, the business and occupation tax is due and payable in monthly installments on or before the last day of the month following the month in which the tax accrues, except that the May installment is due June 15. A monthly estimated return is filed along with the tax payment. For tax liabilities of less than $1,000 or per month, the tax is payable in quarterly installments on or before the last day of the fourth, seventh, and tenth months of the taxable year. Where the tax does not exceed $200 per year, annual returns and payment within one month of the year-end are required.

_Procedure:_ The West Virginia Tax Procedure and Administration Act discussed in chapter 9 of this Guidebook applies to this tax.

¶ 1010 Tobacco Excise Taxes

_Law:_ W. Va. Code §§ 11-17-1 et seq.

_Introduction:_ Cigarettes and other tobacco products are taxed under the tobacco products excise tax. The cigarette excise tax was imposed in 1947. The tax on other tobacco products took effect in 2002.

_Cigarettes_

_Rate of tax:_ Cigarettes are taxed at the rate of 55 cents on each twenty cigarettes and, on the sale of each fraction of twenty, at the same fractional part of 55 cents. Only one sale of the same article can be used in computing the amount of Cigarette Tax due.

_Definition of Cigarette:_ The law provides a two-part definition of the term "cigarette". One part is narrow; the other is broad. The narrow part of the definition reads "any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any ingredient, the wrapping or cover of which consists of paper or any substance or material except tobacco (is a cigarette)". The broad part of the definition reads "any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packing and labeling is likely to be offered to, or purchased by, consumers as a cigarette (is a cigarette)."

_Tax Indicia:_ Revenue indicia, which are tax stamps, must be affixed to the bottom of each package of cigarettes sold and may only be purchased by (1) wholesalers who buy unstamped cigarettes directly from manufactures, and (2) vending machines
operators who, when they purchase cigarettes directly from manufacturers, are considered wholesalers even though they sell cigarettes at retail.

The stamp must be affixed to the bottom of the cellophane wrapper of every individual cigarette package or similar container before the cigarettes can be delivered for resale to other wholesalers, jobbers or retailers. Stamps are purchased from the State Tax Commissioner or from certain West Virginia banks or trust companies that the State Tax Commissioner has authorized to sell cigarette revenue indicia. The statute authorizes a discount of 4 percent from the face value of the indicia as a commission for affixing the stamps or impressions onto cigarette packages. Prepayment of this tax is possible when wholesalers are authorized by the State Tax Commissioner to use a metering device in affixing revenue indicia. The State Tax Commissioner may authorize wholesalers who file an appropriate surety bond to make conditional credit purchases of cigarette indicia.

*Other Tobacco Products*

*Rate of Tax:* Tobacco products other than cigarettes are taxed at the rate of 7 percent of the wholesale price.

*Wholesale Price* defined: “Wholesale price” is the gross invoice price, including all federal excise taxes, at which the tobacco products are sold to distributors or wholesalers. “Wholesale price” excludes all trade discounts and other reductions in the manufacturer’s price.

*Method of collecting tax:* This tax does not use tax stamps or other indicia to evidence payment of the tax. Tax is collected using the inventory method of taxation. No discount allowed for the monthly remittance of the excise tax on other tobacco products.

*Procedure:* The West Virginia Tax Procedure and Administration Act discussed in chapter 9 applies to this tax.

¶ 1011 Soft Drinks Excise Tax


*Introduction:* The soft drinks tax is an excise tax levied upon the sale, use, handling or distribution of bottled soft drinks, syrups and powder bases prepared for mixing soft drinks whether manufactured within or outside West Virginia. It is levied to provide revenue for the construction, maintenance and operation of the four-year school of medicine, dentistry and nursing at West Virginia University.

The term "bottled soft drinks" is includes almost any soft drink-type of beverage provided in any type of container. However, fluid milk to which no flavoring has been added and natural undiluted fruit and vegetable juices are specifically exempt, as are
coffees and tea to which no flavoring or sweetener has been added. The term "soft drink syrups and powders" is also interpreted quite broadly.

Payment of tax: The tax is paid through purchase of tax stamps or tax crowns by manufacturers, distributors, wholesale or retail dealers or any other person who is the original consignee of such soft drinks, syrups and powders and who brings such products into the State for the purposes described above. Crowns are tax symbols that are permanently applied by manufacturers to bottle caps, can lids, cartons or labels. The tax may be paid by invoice method in lieu of affixing stamps on certain grocery-type products, such as powders, ades, and punches, by remitting gross tax due. The tax shall not be collected more than once on any bottled soft drink, soft drinks syrup or powder manufactured, sold or distributed in the State of West Virginia.

Rate of tax: The rates of the tax are as follows:

On bottled soft drinks
  1 cent on each 16.9 fluid ounces of any fraction of that amount, or
  1 cent on each ½-liter or any fraction of that amount;
On soft drinks syrup
  80 cents on each gallon and, on each fractional part of a gallon, the same fractional part of 80 cents, or
  84 cents on each 4 liters and, on any fractional part of 4 liters, the same fractional part of 84 cents;
On dry mixture used for making soft drinks
  1 cent on each ounce or any fraction of that amount,
  1 cent on each 28.35 grams or any fraction of that amount.

Bond: Manufacturers and distributors of soft drinks are required to furnish an appropriate bond to insure their compliance with regulations.

Tax stamps or crowns: Persons who wish to buy tax stamps or crowns can do so only after authorization has been given by the State Tax Commissioner. Although the Commissioner may authorize any sheriff or any West Virginia bank or trust company to sell soft drinks tax stamps, no such authorization has been given. Consequently, the Commissioner is the only source of tax stamps.

Soft drinks tax must be paid in advance when the stamps are bought. Stamp discounts from the face value of the stamps are as follows:
  on sales under $25, no discount;
  on sales from $25 but less than $50, 5%, and
  on sales of $50 or more, 10%.

When crowns are bought, payment of tax may be made either in advance or on credit bound by the terms on appropriate surety bond. Both cash and credit buyers of tax crowns are granted a discount of 12.5 percent from the face value of the crowns. When either the stamps or crown discount is taken, no claim can be made for a tax
refund because of the breakage or destruction of stamped or crowned containers, because of the spoilage of the product, or because of the loss or destruction of the tax stamps or crowns. However, if any of the tax stamps or crowns on soft drinks, soft drink powders or soft drink syrups on which a tax has been paid are destroyed by fire, lightning or flood or if any soft drinks, syrups or powders upon which the tax has been paid are exported from the State or are required to be destroyed pursuant to federal or State order, the taxpayer may file a claim for refund for an amount equal to the amount of tax actually paid for such stamps or crowns. This claim for refund must be filed within 180 days of the date the tax stamps or crowns were destroyed or the soft drink product upon which the tax was paid was destroyed or exported from the State.

Procedure: The West Virginia Tax Procedure and Administration Act discussed in chapter 9 of this Guidebook applies to this tax.

¶ 1012 Excise Tax On Transfer Of Real Property


Introduction: West Virginia imposes excise taxes on the transfer of real property. There are three taxes, which are paid to the county clerk when the deed transferring the property is recorded. The State tax is $1.10 per $500 of value (or fraction thereof) of the property transferred. The county tax is generally a like amount. In counties that adopted a farmland preservation plan, and additional tax of $1.10 per $500 of value (or fraction thereof) of the property transferred. There are limited exceptions to these taxes.

Rate of tax: The rate of the State tax is $1.10 for each $500 (or fraction thereof) of the value of the transferred property. The Legislature has also imposed a county excise tax on the transfer of real property. The county tax is $0.55 for each $500 (or fraction thereof) of the value of the transferred property. Each county commission may increased the rate of the county excise tax to $1.10 for each $500 (or fraction thereof) of the value of the transferred property. Almost all county commissions have increased the county excise tax. (See W. Va. Code § 11-22-2.) Consequently the real estate transfer tax collected by the county clerk in most counties is $2.20 per $500 of value. Some counties have elected to impose an additional tax for farmland preservation. See discussion infra.

Measure of tax: "Value," which is the measure of tax means in the case of any document not a gift, the amount of the full actual consideration for the document, paid or to be paid, including the amount of any lien or liens assumed. In the case of a gift, or any other document without consideration, the actual monetary value of the property conveyed or transferred. In the event any document includes real property or any interest in real property lying outside the State of West Virginia or includes personal property, value is the proportion of the consideration paid in case of the transfer for consideration, or the proportion of the true and actual value in case of a gift, which the actual value of the real property located in West Virginia bears to the total actual value of all the property, real or personal, transferred by the document. The value is required
to be stated in the declaration of consideration or value provided for in section 11-22-6. See W. Va. Code § 11-22-2(8).

When tax is due: Tax is due when the document transferring title to real property is presented to the county clerk for recording. The grantor is primarily liable for payment of the tax. However, the grantee becomes liable for payment of the tax when it is not paid by the grantor.

Exemptions: The recordation of some documents transferring real property is not subject to the excise tax on the transfer of real property. See W. Va. Code § 11-22-1(4) (defining “document” and excluding from its meaning certain transfers resulting in their being exempt from tax). Transfers exempt from tax include and are limited to the following:

(1) The transfer of ownership of real property by operation of law, e.g., real property is jointly owned by two individuals with right of survivorship. Upon the death of one of the owners, the survivor owns the interest in the property possessed by the decedent at the time of his or her death.

(2) The document transfers ownership of real property that has a value of $100 or less.

(3) The document transfers of ownership of real property through a testamentary or inter vivos trust.

(4) The document transfers ownership of real property through a deed of partition.

(5) The transfer of ownership of real property is by deed(s) made pursuant to mergers of corporations, limited liability companies, partnerships, or limited partnerships.

(6) The transfer of ownership of real property is made by deeds pursuant to conversions to limited liability companies from corporations, partnerships, limited partnerships or trusts.

(7) The document transfers ownership of real property made by deed from a subsidiary corporation to its parent corporation for no consideration, other than the cancellation or surrender of the subsidiary’s stock.

(8) The document is a lease of real property.

(9) The document transfers real property between husband and wife.
(10) The document transfers real property between parent and child or transfers between parent and child and his or her spouse, without consideration.

(11) The document transfers of real property between grandparent and grandchild or transfers between grandparent and grandchild and his or her spouse, without consideration.

(12) The document transfers real property without consideration between a principal and straw party for any purpose.

(13) The document is a gift of real property to or transfers real property from or between voluntary charitable or educational associations or trustees of voluntary charitable or educational associations and like nonprofit corporations having the same or similar purposes.

(14) The document transfers real property by quitclaim or corrective deed without consideration.

(15) The document transfers real property to or from the United States.

(16) The document transfers real property to or from the State of West Virginia.

(17) The document transfers real property to or from any instrumentalities, agencies or political subdivisions of the United State or the State of West Virginia when the transfer is by gift, dedication, deed or condemnation proceeding.

(18) The document is a mortgage or deed of trust given as security for a debt.

**Additional Tax – Farmland Preservation:** In addition to the transfer taxes impose in W. Va. Code § 11-22-2, article 22, chapter 11 of the Code, county commissions that have created a farmland protection program are authorized in W. Va. Code § 8A-12-21 to impose an additional county excise tax on the privilege of transferring title to real property. This additional tax may not exceed $1.10 per $500 of value (or fraction thereof). In counties that have exercised this option, the combined taxes on the privilege of transferring title to real property may be $3.30 per $500 of value or fraction thereof:

- $1.10 State tax
- .55 County regular tax
- .55 County additional tax
- $1.10 County additional tax for farmland preservation

**1013 Health Care Provider Taxes**

**Introduction:** The health care provider taxes are imposed on the provision of sixteen different types of health care services in West Virginia. In 2001, legislation was enacted phasing-out the tax on certain service over a 10-year period. Net collections of tax are deposited in the Medicaid State Share Fund and used to draw matching federal dollars.

**Measure of tax:** The health care provider taxes are measured by the application of a rate to the gross receipts received from providing the particular health care services. Gross receipts include all payments, in cash or in kind, from patients, third-party providers and others for the services rendered, including retroactive adjustments under reimbursement agreements with third-party providers. No expenses may be deducted. Gross receipts that are not related to providing of health care services (i.e., fees received by health care providers for providing expert testimony) and charitable donations are not subject to the health care provider taxes.

**Deductions:** The following deductions can be made from gross receipts before the calculation of the tax:

1. Accrual-based taxpayers may deduct bad debts from their gross receipts to the extent that the amount of the bad debt was included previously in gross receipts upon which the Health Care Provider Taxes were paid.

2. Accrual-based taxpayers, except nursing homes, can reduce gross receipts by the amount of their contractual allowances to the extent included in the amount of gross receipts upon which taxes were previously paid. Contractual allowances are the differences between revenue or gross receipts at established rates and the amounts realized from third party providers under contractual agreements.

**Rates of tax:** The following is a list of health care services and their respective tax rates for periods beginning on and after July 1, 2010:

<table>
<thead>
<tr>
<th>Service</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ambulatory Surgical Centers</td>
<td>1.75%</td>
</tr>
<tr>
<td>Chiropractic Services</td>
<td>0%</td>
</tr>
<tr>
<td>Dental Services</td>
<td>0%</td>
</tr>
<tr>
<td>Emergency Ambulance Services</td>
<td>0%</td>
</tr>
<tr>
<td>Independent Laboratory or X-ray Services</td>
<td>5.00%</td>
</tr>
<tr>
<td>Inpatient Hospital Services</td>
<td>2.50%</td>
</tr>
<tr>
<td>Intermediate Care Facility Services</td>
<td></td>
</tr>
<tr>
<td>for the Mentally Retarded</td>
<td>5.50%</td>
</tr>
<tr>
<td>Nursing Facilities (other than IMCFMR)</td>
<td>5.505%</td>
</tr>
<tr>
<td>Nursing Services</td>
<td>0%</td>
</tr>
<tr>
<td>Opticians’ Services</td>
<td>0%</td>
</tr>
<tr>
<td>Optometric Services</td>
<td>0%</td>
</tr>
<tr>
<td>Outpatient Hospital Services</td>
<td>2.50%</td>
</tr>
<tr>
<td>Physicians’ Services (including Psychiatrists and Ophthalmologists)</td>
<td>0%</td>
</tr>
</tbody>
</table>
In addition to the healthcare provider tax imposed on providers of inpatient and outpatient hospital services at the rate of 2.5%, the acute care hospital tax is imposed on certain eligible acute care hospitals at the rate of 0.88% on the gross receipts received or receivable by the eligible acute care hospital that provides inpatient or outpatient hospital services in the State of West Virginia through a Medicaid upper payment limit program. This tax expires June 30, 2013 unless it is extended by the Legislature. (W. Va. Code § 11-27-38).

Returns: Taxpayers that owe more than an average of $50 a month are required to file monthly estimated tax returns and pay in equal installment at least eleven-twelfths of the tax due for their taxable year. Monthly estimate returns and payments are due the fifteenth day of the month following the month for which the tax accrued. All taxpayers are required to file an annual return. The taxable year is the same as the taxpayer’s taxable year for federal income tax purposes. Annual returns are due the last day of the month following the end of the taxable year.

Providers of behavioral health service: See ¶ 1013, below.

Procedures: The Tax Procedure and Administration Act discussed in chapter 9 of this Guidebook applies to this tax.

¶ 1014 Severance and Business Privilege Tax


Taxable services: “Behavioral health services” is defined in W Va. Code §11-13A-2(d) as “services provided for the care and treatment of persons with mental illness, mental retardation, developmental disabilities or alcohol or drug abuse problems in an inpatient, residential or outpatient setting, including, but not limited to, habilitative or rehabilitative interventions or services and cooking, cleaning, laundry and personal hygiene services provided for such care.

Measure of tax: The measure of tax is gross receipts of the provider from providing behavioral health services. However, gross receipts that are included in the provider’s measure of a health care provider tax under W. Va. Code § 11-27-1 et seq., are not also included in the measure of tax under W. Va. Code § 11-13A-3.

¶ Accounting Periods and Methods

A taxpayer’s accounting period for severance tax return purposes must be the same as that used for federal income tax reporting purposes. If a taxpayer changes his tax year for federal income tax purposes, the taxpayer must conform for purposes of the severance tax and provide a copy of the authorization from the Internal Revenue Service for the change with its annual severance tax
The taxpayer's method of accounting for severance tax return purposes must be the same as the accounting method employed for federal income tax purposes. If the taxpayer's method of accounting is changed for federal income tax purposes, a conforming change must be made for the severance tax and a copy of the Internal Revenue Service's approval of the accounting change must be filed with the annual severance tax return.

**Returns and payment of tax**

*Monthly returns:* Monthly severance tax returns are required for taxpayers with estimated tax liability of more than $1,000 per month. Each month's return is due on or before the last day of the following month, except the monthly return due by June 30 which is now required to be filed with the remittance on or before June 15.

*Quarterly returns:* If the monthly estimated tax is $1,000 or less, a return is due quarterly within one month after the expiration of each quarter if any tax is due.

*Annual returns:* An annual tax return must be filed by the last day of the month following the close of the taxable year. The annual return is required by every taxpayer filing monthly or quarterly severance tax returns whether or not any tax is due.

*Procedures:* The Tax Procedure and Administration Act discussed in chapter 9 applies to this tax.

¶ 1015 Unemployment Compensation Tax


*Introduction:* The West Virginia Unemployment Compensation tax was originally enacted in 1936 and has been substantially revised throughout its legislative history. The law is administered by WorkForce West Virginia, Division of Employment Service.

*Employers subject to the tax:* Employers subject to the West Virginia Unemployment Compensation tax include any employer liable under the Federal Unemployment Tax Act, any employer who pays wages of $1,500 or more in any calendar quarter in the current or preceding year; any employer who employed at least one individual (not necessarily the same person) for some portion of a day in each of 20 different calendar weeks, whether or not consecutive, in either the current or preceding calendar year; state and local governmental agencies; nonprofit educational institutions; or any employer of agricultural labor if wages of $20,000 or more were paid in any calendar quarter or which employed 10 or more individuals in each of 20 different calendar weeks. There are numerous other specific provisions and exclusions applicable to particular employers. Employers not covered may elect to become covered for at least two years.
**Wages subject to tax:** “Wages” means all remuneration for personal services, commissions and bonuses. Wages in excess of $8,000 for each individual employee, and payments on account of retirement, sickness or accident disability, medical expenses, or death are not considered wages. Gratuities customarily received by an individual in the course of employment from persons other than the employer are treated as wages as long as such gratuities are at least $20 per month and are required to be reported to the employer by the employee. Beginning April 11, 2009, wages in excess of $12,000 are exempt from the unemployment tax and the measure of the tax is the wages paid to the employee or $12,000, whichever is less. When the moneys in the unemployment fund reach $220 million on February 15 of any year, the threshold wage is thereafter reduced to $9,000. W. Va. Code § 21A-1A-28(d) as amended by SB 246.

**Rate of tax:** For the first 36 months that an employer is subject to the tax, the rate is 2.7% of the first $8,000 of each employee’s wages paid during the calendar year, except that beginning April 11, 2009, the tax is computed on the first $12,000 of wages until such time as that threshold automatically reduces to $9,000. For foreign corporations or entities engaged in the construction trade, the rate is 7.5%. After 36 months the rate is adjusted, based on the experience ratings of the employer and the assets of the fund. The agency maintains a separate account for each employer to which contributions in excess of 0.4% are credited and against which unemployment benefits paid out are debited. Employers are classified in accordance with their actual experience as of July 1 of each year. If an employer fails to file returns the rate increases to 7.5%. If benefits paid out exceed contributions by an amount in excess of 5% of their average annual payroll, employers pay at the rate of 5.5%, and if the deficit is from 5% to 10%, the rate is 6.5%, and if the deficit is over 10%, the rate is 7.5%. Once a debit balance is established, the rate applies for the entire year.

**Returns:** The tax return is due quarterly and the tax is to be paid with the required return. Past due payments bear interest at the rate of 1% per month.

### 1016 Municipal Taxes


**Introduction:** The West Virginia Constitution gives home rule authority to all municipalities. However the extent of a municipalities authority is limited to those powers expressly delegate to them by the Legislature and to those implied powers that are implied from the powers expressly delegates. The result is that municipalities have limited taxing authority, when compared to municipalities in other state. (W. Va. Const. Art. VI, § 39.)

Municipalities have plenary power and authority to levy taxes on real and personal property and may levy special assessments or other benefit taxes, and may levy the following taxes, explained in detail.

1. **Hotel occupancy tax**  
   **Law:** W. Va. Code §§ 7-18-1 *et seq.*
**Imposition of tax:** Counties and municipalities may impose a privilege tax upon the occupancy of hotel rooms within the taxing jurisdiction. The tax is imposed upon the consumer and collected by the hotel operator as part of the charge for a room. It is not imposed upon persons who occupy a room for 30 or more consecutive days or on hotel rooms occupied by a government employee when the charge for the room is billed directly to government agency employer.

**Rate of tax:** The municipality may set the rate from 3% to 6% of the consideration paid for use of the hotel room, not including the West Virginia consumer sales and service tax, charges for meals, valet service, room service, telephone service or other such charges.

“Hotel” is defined as any facility or building, whether publicly or privately owned, including a governmental owned facility, in which the public may, for a consideration, obtain sleeping accommodations. The term includes boarding houses, condominiums, hotels, motels, inns, courts, lodges, cabins and tourist homes, parks and governmentally owned parks. Hospitals, sanitariums, extended care facilities, nursing homes, or universities or college housing units (except for sleeping accommodations for nonstudents), any facility providing fewer than three hotel rooms, and tent, trailer or camper campsites, are not considered hotels and are not subject to the tax. The rental of a banquet room, meeting room, or other rooms not primarily used for sleeping accommodations is not considered to be rental of a hotel room and not subject to the tax. Hotel room occupancy billed directly to the federal or state government, or state agencies, is exempt.

2. **Property taxes**


While municipalities have plenary power and authority to levy taxes on real and personal property, W. Va. Code § 8-13-1, the actual power and authority is fairly limited. Municipalities have no authority to determine the value of any property for property tax purposes. The assessed value of all property except public utility property is determined by the assessor of the county in which the municipality is located. Under the West Virginia Constitution, property is assessed at 60 percent of its value. The methods of valuing property are prescribed by the Legislature. The Constitution divides all property into four classes and caps the maximum property tax levy rate that may be imposed on each class of property. W. Va. Const. Art. X, § 1. These maximum rates are allocated by the Legislature among county boards of education, county commissions, municipalities and the State. For discussion of the classes of property, the levy rates, excess levies and general obligation bond levies see ¶ 606, supra. The municipal regular levy rate on owner occupied residential property may not exceed 25 cents per $100 of assessed value. The municipal regular levy rate on all other tangible property in may not exceed 50 cents per $100 of assessed value. Municipalities may impose voter approved excess levies and general obligation bond levies. However, municipal excess levies may not be greater than 50 percent of the regular levy and must be approved by at least 60 percent of those voting on the question every five years. General obligation
bond levies must be also be approved by at least 60 percent of those voting on the question. General obligation bonds may not be issued for more than 34 years and the aggregate amount of general obligation bonds issued by a municipality may not exceed five percent of the value of all taxable property in the municipality. (W. Va. Const. Art. X, § 8.)

3. **Municipal license taxes**  

   A municipality may impose a reasonable tax on anything for which a State license is currently required. Municipalities may also impose a license tax on any activity that was subject to a State license tax imposed by W. Va. Code § 11-12-1 *et seq.* prior to their repeal, or the chain store license tax imposed by W. Va. Code § 11-13A-1 *et seq.* prior to its repeal. The rate of these license taxes may not exceed the State rate in effect on January 1, 1970. (W. Va. Code § 11-12-4.)

4. **Business and occupation or privilege taxes**  

   Any business or occupation on which the State imposed its business and occupation tax prior to July 1, 1987 may be subject to a similar municipal business and occupation or privilege tax if engaged in business within the corporate limits of a municipality. Approximately half of West Virginia’s 234 municipalities impose a business and occupation tax.

   **Measure of tax:** The measure of tax is gross proceeds of sales, gross income or gross value of production depending upon the classification of the activity being taxed.

   **Tax rates:** The rates of tax may not exceed the rate formerly imposed by the State, exclusive of surtaxes, in effect on January 1, 1959. (W. Va. Code § 11-13-25.) Additionally, municipalities may impose their business and occupation tax on banks and other financial business at a rate not to exceed one percent of gross income, on the privilege of generating electricity under a tax similar to that in W. Va. Code § 11-13-2m at a rate not to exceed 0.30%, on the privilege of providing health maintenance organization services at a rate not to exceed 0.50% of gross income received from providing health care to Medicaid recipients, individuals covered by the Public Employees Insurance Agency and other federal programs. Additionally, beginning July 1, 2007, municipalities may tax the unrelated business income, determined under IRC § 511, of corporations and organizations otherwise exempt from business and occupation tax under the applicable classification of the municipal business and occupation tax. The maximum rates of tax are as follows:

   **Classifications**  
   Production of natural resources (§11-13-2a)  
   Coal  
   Sand & gravel (not mined or quarried)  

   **Maximum Rates**  
   1%  
   3%
| Activity                                                                 | Rate  
|-------------------------------------------------------------------------|-------
| Oil, blast furnace slag                                                  | 3%    
| Natural gas in excess of $5,000                                          | 6%    
| Limestone or sandstone quarried or mined                                 | 1.5%  
| Timber                                                                   | 1.5%  
| Other natural resource products                                          | 2%    
| Manufacturing (§11-13-2b)                                                | 0.30% 
| Business of selling tangible property (§11-13-2c)                        |       
| Retailers                                                                | 0.50% 
| Wholesalers                                                              | 0.15% 
| Public service or utility business (§11-13-2d)                          |       
| Electric light and power companies (sales & demand charges, domestic purposes & commercial lighting) | 4%   
| Electric light and power companies (all other sales and demand charges) | 3%    
| Water companies                                                          | 4%    
| Natural gas companies                                                    | 3%    
| Toll bridges                                                             | 3%    
| All other taxable public service or utility business                     | 2%    
| Contracting (§ 11-13-2e)                                                | 2%    
| Amusements (§ 11-13-2g)                                                 | 0.50% 
| Service business or calling (§ 11-13-2h)                                | 1%    
| Rentals and royalties, etc (§ 11-13-2i)                                 | 1%    
| Small loan and industrial loan businesses (§11-13-2j)                   | 1%    
| Banking and other financial business (§ 11-13-2k)                       | 1%    
| Electric power generation (§ 11-13-2m)                                  | 0.30% 
| Health maintenance organizations                                        | 0.50% 

**Exemptions:** A municipality may not impose its business and occupation or privilege tax on any activity that was exempt from the state's business and occupation tax under the provisions of W. Va. Code § 11-13-3 prior to July 1, 1987. Exemption is determined without regard to any annual or monthly monetary exemption also specified that section. (W. Va. Code § 8-13-5(d).)

**Apportionment:** Whenever a business activity is carried on in two or more municipalities, the gross income taxable by each municipality is determined by regulations of the State Tax Commissioner, since the same gross income may not be taxed two or more municipalities. Gross income from retail and wholesale sales and on service businesses not taxed by any other municipality may be taxed by a municipality from which the activity is directed or in which the principal office of the taxpayer is located.

**Tax credits:** A municipality imposing a business and occupation tax has the authority to offer tax credits against such tax as incentives for new and expanding businesses located within the corporate limits of the municipality.
Procedures: The municipal ordinance imposing a business and occupation or privilege tax must provide procedures for the assessment and collection of the that are similar to those procedures in State business and occupation tax law on June 30, 1978, or to those procedures in the West Virginia Tax Procedure and Administration Act, W. Va. Code § 11-10-1 et seq. Additionally, the ordinance must conform to provisions in those laws as they relate to waiver of penalties and additions to tax.

5. Public utilities tax


Municipalities have the power to levy excise taxes on services and tangible personal property provided by utilities within their corporate limits. The tax rate may not exceed 2% of the gross amount of each periodic statement rendered to such purchasers or consumers by the public utility. The public utilities collect the tax and account to the municipalities for the taxes collected.

6. Amusement taxes


Municipalities have the power to levy amusement or admission taxes upon any public amusement or entertainment conducted within the corporate limits for profit or gain. The maximum tax rate is 2% and is levied upon the purchaser and added to the price of admission.

7. Tax on purchases of intoxicating liquors and private club fees


Municipalities have the power to levy a tax upon purchases of intoxicating liquors within the corporate limits from a retail liquor store licensed by the Alcohol Beverage Control Commissioner, from any person licensed to sell wine at retail and from distributors licensed to sell or distribute wine. The maximum tax rate is 5%, which is added to the purchase price. The taxes are collected by the Tax Commissioner, remitted to the State Treasurer and distributed quarterly to the municipalities. Additionally, municipalities may collect a fee from private liquor club licensees, not to exceed the state license fee.

8. License tax on horse and dog racing


Municipalities have the power to levy a daily license tax upon the operator of a horse or dog racetrack located within the municipality. The tax may not exceed the state daily license tax. The tax is not applicable to any fair, horse show, agricultural or livestock exposition at which horse or dog racing is conducted for not more than six days. West Virginia has four tracks licensed to operate horse or dog races.

9. Motor vehicle operator's tax

A municipality has the power to levy an annual motor vehicle operator’s license tax not to exceed $2. The tax applies only to inhabitants of the municipality.

10. Domestic animal tax

A municipality has the power to levy an annual license tax upon the privilege of keeping domestic animals within the corporate limits.

11. User fees

A municipality has the power to levy a reasonable user fee for furnishing police and fire protection, street maintenance, sewerage and garbage and other city services. Several West Virginia cities, including Charleston and Huntington, impose a user fee of $1.00 or $2.00 per week on persons employed within the municipality. The fee is withheld from wages and paid by the employer to the municipality, on a quarterly basis, with the tax return required by the municipality.

12. Pension relief municipal occupation tax

Each qualifying municipality has the plenary power and authority to impose, by ordinance, a pension relief municipal occupational tax on taxable employees. A "qualifying municipality" is any municipality:

(1) In which the weighted average of the percentages to which its policemen's and firemen's pension and relief funds are fully funded is three percent or less on the date of adoption of the ordinance imposing the tax; and

(2) That has satisfied the following requirements:

   (a) The municipality wishing to impose the tax must presents to the Legislature’s Joint Committee on Government and Finance a plan to remove the unfunded liabilities of its policemen's and firemen's pension funds and the necessary changes in West Virginia law have been enacted to allow for implementation of the municipal plan; and

   (b) No cost-of-living increases or other benefit increases, and no new benefits, may be granted to or received by any member or beneficiary of a policemen's and firemen's pension and relief funds of a municipality during any period that the municipality imposes a pension relief municipal occupational tax, a pension relief municipal sales and service tax, the pension relief municipal use tax or any combination thereof authorized under this chapter.
Any pension relief municipal occupational tax imposed must meet the following requirements:

(1) The tax must be imposed at a rate of one percent or less;

(2) The tax must be imposed at a uniform rate; and

(3) The tax rate must be applied only to salaries, wages, commissions and other earned income of taxable employees that would be included in federal adjusted gross income for the year. The tax rate may not be applied to other forms of income including, but not limited to, intangible income and net profit from a business.

Each employer with a taxable employee, during each pay period, must withhold from the taxable employee's salary the amount of the tax as computed by applying the appropriate tax rate to the taxable employee's salary during that pay period and remit the withholdings to the appropriate municipal taxing authority.

As of December 31, 2012, no West Virginia municipality imposes a pension relief occupation tax.

13. Pension relief municipal sales and use tax  
   **Law:** W. Va. Code §§ 8-13C-4(a) and 8-13C-5(a)

   Each qualifying municipality has the plenary power and authority to impose, by ordinance, a pension relief sales tax and a pension relief use tax. The rate of tax may not exceed one percent of price of the good or service purchases and used within the municipality that was not subject to the municipal sales and service tax. To prevent double taxation, credit is allowed for any sales tax lawfully paid to another municipality. Exemptions from tax must conform with the State exemptions from tax. The tax must be collected by the State Tax Commissioner on behalf of the municipality. Currently, no municipality imposes this tax.

   **Law:** W. Va. Code § 8-13C-4 and 8-13C-5.

   Every municipality may impose a sales and use tax beginning July 1, 2008. The rate of tax may not exceed one percent of price of the good or service purchases or used within the municipality that was not subject to a municipal sales and service tax. To prevent double taxation, credit is allowed for any sales tax lawfully paid to another municipality. The tax bases and exemptions from tax must conform to the State tax base and the State exemptions from tax. The tax must be collected by the State Tax Commissioner and at the same time that the State tax is collected.

   In order to impose an alternative tax, the municipality must repeal its business and occupation taxes. As mentioned earlier in this chapter, approximately half of the 234 municipalities in West Virginia impose a business and occupation tax. In many
instances the business and occupation tax raises more revenue than could be raised with a one percent sales and use tax.

Beginning October 1, 2011, Williamstown, West Virginia imposes a 1% sales and use tax that is collected by the State Tax Commissioner.

15. *Pilot program to increase powers of municipal self-government.*
   Law: W. Va. Code § 8-1-5a

Huntington, West Virginia, has also adopted a one percent sales and use tax that vendors collected and remit to the State Tax Commissioner along with the State sales and use taxes. Imposition of this local sale and use tax was authorized by the Municipal Home Rule Board established in W. Va. Code § 8-1-5a.
INDEX – CHAPTER 10 -- MISCELLANEOUS TAXES

business and occupation tax – tax on electricity ¶ 1009
  rate of tax
  returns and payment of tax
  procedure
  taxpayers subject to tax

business and occupation tax – tax on natural gas storage ¶ 1008
  basis of tax
  procedure
  rate of tax
  returns and payment of tax
  taxpayers subject to tax

business and occupation tax – tax on utilities ¶ 1007
  basis of tax for utilities
  procedure
  rates of tax on utility gross receipts
  returns and payment of tax
  taxpayers subject to tax

business registration tax ¶1001
  change in name of business, location or ownership
  collection agencies
  employment agencies
  exemptions from registration and payment of tax
  penalties
  persons subject to tax
  persons selling cigarettes
  procedure
  rate of tax; due date
  registration certificates
  sellers of cigarettes, cigarette wrappers or other tobacco products
  sellers of drug paraphernalia
  sparkler an novelty registration fee
  transient vendors

corporate license tax ¶ 1003

corporate tax on excess acreage ¶1002
  assignment of authority to hold excess acres
  penalties
  rate of tax
taxpayers subject to tax

excise tax on transfers of real property ¶ 1012
  exemptions
  introduction
  measure of tax
  rate of tax
    state tax
    county tax
    additional county tax
    additional county tax for farmland preservation
  when tax is due

health care provider taxes ¶ 1013
  deductions
  introduction
  measure of tax
  procedures
  rates of tax

motor carrier road tax ¶ 1004
  exemptions
  introduction
  procedure
  rate and basis of tax
  registration fee
  taxpayers subject to tax

motor fuel excise tax ¶ 1005
  exemptions
  introduction
  procedure
  rate and basis of tax
  taxpayers subject to tax

municipal taxes ¶ 1016
  alternative municipal sales and use taxes
  amusement tax
  business and occupation or privilege taxes
  domestic animal tax
  hotel occupancy tax
  license tax on horse and dog racing
  motor vehicle operator’s tax
  municipal license taxes
  pension relief municipal occupation tax
  pension relief municipal sales and use tax
property tax
public utilities tax
tax on purchases of intoxicating liquors and private club fees
user fees

severance and business privilege tax - behavioral health service providers ¶ 1014
accounting periods and methods
measure of tax
procedures
returns and payment of tax
  monthly returns
  quarterly returns
  annual returns
taxable services

soft drinks excise tax ¶ 1011
bond
“bottled soft drink” defined
introduction
payment of tax
procedure
rate of tax
tax stamps or crowns

telecommunications tax ¶ 1006
apportionment
“communications channel" defined
credits
income subject to tax
introduction
payment of tax
procedure
rate of tax
returns
taxpayers subject to tax

tobacco products excise tax ¶ 1010
“cigarette” defined
introduction
method of collecting tax on other tobacco products
rate of tax
  on cigarettes
  on other tobacco products
tax indicia
“wholesale price” defined
unemployment compensation tax ¶ 1016
employers subject to tax
introduction
rate of tax
returns
wages subject to tax
CHAPTER 11

UNCLAIMED PROPERTY

By Dale W. Steager

Dale W. Steager is an attorney with Spilman Thomas & Battle, PLLC. Mr. Steager is a former general counsel to the Secretary of Revenue and to the State Tax Commissioner and has worked and lectured extensively in the area of West Virginia state and local taxation. He is a contributing author to several state and local tax publications.

Published by West Virginia Society of Certified Public Accountants
900 Lee Street, E. Suite 1201, Charleston, WV 25301
© 1993 Commerce Clearinghouse, Inc. © 2012 West Virginia Society of Certified Public Accountants
All Rights Reserved

Table of Contents

| ¶ 1101 Introduction .......................................................... | 11-2 |
| ¶ 1102 Presumptions of Abandonment .................................. | 11-4 |
| ¶ 1103 Contents of safe deposit box or other safekeeping depository | 11-7 |
| ¶ 1104 Rules for taking custody of unclaimed property .......... | 11-7 |
| ¶ 1105 Dormancy charge .................................................. | 11-8 |
| ¶ 1106 Burden of proof as to property evidenced by record of check or draft | 11-9 |
| ¶ 1107 Report of abandoned property ................................ | 11-9 |
| ¶ 1108 Payment or delivery of abandoned property ................ | 11-10 |
| ¶ 1109 Notice and publication of lists of abandoned property ... | 11-11 |
| ¶ 1110 Custody by State Treasurer; recovery by holder; defense of holder | 11-11 |
| ¶ 1111 Crediting of dividends, interest and increments to owner’s account | 11-13 |
| ¶ 1112 Public sale of abandoned property .......................... | 11-13 |
| ¶ 1113 Deposit of funds .................................................. | 11-14 |
| ¶ 1115 Filing claim with State Treasurer; handling of claims by Treasurer | 11-16 |
| ¶ 1116 Action to establish claim ........................................ | 11-16 |
| ¶ 1117 Election to take payment or delivery ....................... | 11-16 |
| ¶ 1118 Destruction or disposition of property having no substantial commercial value; immunity from liability | 11-17 |
| ¶ 1119 Periods of limitation ............................................ | 11-17 |
| ¶ 1120 Requests for reports and examination of records .......... | 11-17 |
| ¶ 1121 Retention of records ............................................ | 11-19 |
| ¶ 1122 Enforcement ....................................................... | 11-19 |
| ¶ 1123 Interstate agreements and cooperation; joint and reciprocal actions with other states | 11-19 |
| ¶ 1124 Interest and penalties ........................................... | 11-20 |
| ¶ 1125 Records of abandoned property .............................. | 11-20 |
| ¶ 1126 Foreign transactions ............................................. | 11-21 |
| ¶ 1127 Uniformity of application and construction ................ | 11-21 |
Editor’s Note: Some may ask why a chapter on unclaimed property is included in this Guidebook to West Virginia Taxes when the unclaimed property laws do not impose a tax. This chapter is included for a number of reasons. First, nationally, billions of dollars are being held by the states, including West Virginia, under their respective unclaimed property laws for the benefit of the owners of the abandoned property. This chapter is a means of educating owners of abandoned property of their rights and the process by they may claim the abandoned property they own. Second, the UPA imposes record keeping and reporting obligations on businesses that hold unclaimed property. Small business owners may not be aware of their duties under these laws or realize that unless they timely and accurately report to the state administrator the unclaimed property they are holding the 10-year statute of limitations does not apply to examinations by the state administrator for compliance with those laws. Third, West Virginia’s unclaimed property laws also apply to business-to-business transactions that result in unclaimed property. This is not true under the unclaimed property laws of all states, however. Fourth, West Virginia businesses that do business with out-of-state consumers and out-of-state business may have reporting obligations to both the West Virginia State Treasurer as well as to administrators of unclaimed property laws of other states, when the last known address of a customer for whom they hold unclaimed property is in another state. Fifth, a business that fails to comply with its duties and obligations under the UPA can be subject to significant penalties, which increase if the failure is willful or the reports filed were fraudulent.

¶ 1101 Introduction

Regulations: WVCSR § 112-5-1 et seq.

West Virginia adopted the Uniform Unclaimed Property Act (hereinafter “the Act” or “UPA”) in 1997. It is based on The Uniform Unclaimed Property Act that was approved by the National Conference of Commissioners on Uniform State Laws in 1995.

The UPA is administer by the State Treasurer. A copy of the Act, regulations and various forms used by businesses to report unclaimed property and by owners to claim such property are available at the Treasure’s website, http://www.wvsto.com.

Property subject to the UPA includes tangible personal property described in ¶ 1103, infra, and fixed and certain interests in intangible personal property that are held, issued or owed in the course of a holder’s business, or by a government, governmental subdivision, agency or instrumentality, and all income or increments therefrom.

A “holder” is a person obligated to hold for the account of, or deliver or pay to, the owner of property that is subject to the UPA. However, this definition of holder is broad

---

1 While the West Virginia UPA includes a 10-year statute of limitations, the unclaimed property laws of some state do not include a statute of limitations.
enough so that more than one party may be deemed to be the holder. An example of where there can be multiple holders is where a business uses a third party administrator to administer its rebate program. If the rebate is not claimed, it appears that both the business and the agent may have a reporting obligation and that records of both may be examined for compliance with the UPA. See ¶ 1120, infra.

In general, “owner” means a person who has a legal or equitable interest in property subject to the UPA or that person's legal representative. “Owner” includes a depositor in the case of a deposit, a beneficiary in the case of a trust other than a deposit in trust, and a creditor, claimant or payee in the case of other property.

Fixed and certain interests in intangible personal property subject to the UPA include intangible property that is referred to as or is evidenced by:

(1) Money, a check, draft, warrant for payment issued by the state of West Virginia, deposit, interest or dividend;

(2) Credit balance, customer’s overpayment, gift certificate, security deposit, refund, credit memorandum, unpaid wage, unused ticket, mineral proceeds or unidentified remittance;

(3) Stock or other evidence of ownership of an interest in a business association or financial organization;

(4) A bond, debenture, note or other evidence of indebtedness;

(5) Money deposited to redeem stocks, bonds, coupons or other securities or to make distributions;

(6) An amount due and payable under the terms of an annuity or insurance policy, including policies providing life insurance, property and casualty insurance, workers' compensation insurance, or health and disability insurance; and

(7) An amount distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance or similar benefits.

“Mineral proceeds” as used in item (2), above, means amounts payable for the extraction, production or sale of minerals, or, upon the abandonment of those payments, all payments that become payable thereafter. The term includes amounts payable:

(1) For the acquisition and retention of a mineral lease, including bonuses, royalties, compensatory royalties, shut-in royalties, minimum royalties and delay rentals;
(2) For the extraction, production or sale of minerals, including net revenue interests, royalties, overriding royalties, extraction payments and production payments; and

(3) Under an agreement or option, including a joint operating agreement, unit agreement, pooling agreement and farm-out agreement.

Other terms used in the UPA are defined in W. Va. Code § 36-8-1 and WVCSR § 112-5-2.

The State Treasurer is authorized to promulgate rules and regulations in accordance with the State Administrative Procedures Act, W. Va. Code § 29A-1-1 et seq., to implement, administer and enforce the UPA.

¶ 1102 Presumptions of Abandonment

Regulation: WVCSR § 112-5-3

Property is presumed to be abandoned if it is unclaimed by the apparent owner during the time set forth below for the particular specie of property:

(1) Traveler's check, **fifteen years** after issuance;

(2) Money order, **seven years** after issuance;

(3) Stock or other equity interest in a business association or financial organization, including a security entitlement under article eight of the uniform commercial code, **five years** after the earlier of: (i) the date of the most recent dividend, stock split or other distribution unclaimed by the apparent owner; or (ii) the date of the second mailing of a statement of account or other notification or communication that was returned as undeliverable or after the holder discontinued mailings, notifications or communications to the apparent owner;

(4) Debt of a business association or financial organization, other than a bearer bond or an original issue discount bond, **five years** after the date of the most recent interest payment unclaimed by the apparent owner;

(5) A noninterest bearing demand, savings or time deposit, including a deposit that is automatically renewable, **five years** after the earlier of maturity or the date of the last indication by the owner of interest in the property; an interest bearing demand, savings or time deposit including a deposit that is automatically renewable, seven years after the earlier of maturity or the date of the last indication by the owner of interest in the property. A deposit that is automatically renewable is deemed matured for purposes of this section upon its initial date of maturity, unless the owner has consented to a renewal at or about the time of the renewal and the consent is in writing or is evidenced by a memorandum or other record on file with the holder;
(6) Money or credits owed to a customer as a result of a retail business transaction, **three years** after the obligation accrued;

(7) Gift certificate, **three years** after the 31st day of December of the year in which the certificate was sold, but if redeemable in merchandise only, the amount abandoned is deemed to be 60% of the certificate’s face value;

(8) Amount owed by an insurer on a life or endowment insurance policy or an annuity that has matured or terminated, **three years** after the obligation to pay arose or, in the case of a policy or annuity payable upon proof of death, **three years** after the insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve is based;

(9) Property distributable by a business association or financial organization in a course of dissolution, **one year** after the property becomes distributable;

(10) Property received by a court as proceeds of a class action, and not distributed pursuant to the judgment, **one year** after the distribution date;

(11) Property held by a court, government, governmental subdivision, agency or instrumentality, **one year** after the property becomes distributable;

(12) Wages or other compensation for personal services, **one year** after the compensation becomes payable;

(13) Deposit or refund owed to a subscriber by a utility, **two years** after the deposit or refund becomes payable;

(14) Property in an individual retirement account, defined benefit plan or other account or plan that is qualified for tax deferral under the income tax laws of the United States, **three years** after the earliest of the date of the distribution or attempted distribution of the property, the date of the required distribution as stated in the plan or trust agreement governing the plan, or the date, if determinable by the holder, specified in the income tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty;

(15) Warrants for payment issued by the state of West Virginia which have not been presented for payment, within **six months** of the date of issuance;²

---
² This includes state tax refunds. Although information about tax refunds is generally confidential under W. Va. Code § 11-10-5d, a specific exception to confidentiality is provided in W. Va. Code § 11-10-5v, which requires the Tax Commissioner to disclose to the State Treasurer the name, last known address and social security number, or federal employer identification number, as applicable, of persons or businesses, including joint or combined filers, to which tax refund checks have been issued by this state, which checks have gone unclaimed or uncashed for a period of more than six months after the issuance date of the check. Additionally, if the information is included in a tax division database, the Tax Commissioner must disclose to the State Treasurer the date, check number, warrant number, transaction
(16) All funds held by a fiduciary, including the West Virginia Municipal Bond Commission, for the payment of a note, bond, debenture or other evidence or indebtedness, five years after the principal maturity date, or if such note, bond, debenture or evidence of indebtedness is called for redemption on an earlier date, then the redemption date, such premium or redemption date to also be applicable to all interest and premium, if any, attributable to such note, bond, debenture or other evidence of indebtedness; and

(17) All other property, five years after the owner's right to demand the property or after the obligation to pay or distribute the property arises, whichever first occurs.

At the time an interest is presumed abandoned, any other property right accrued or accruing to the owner as a result of that interest, and not previously presumed abandoned, is also presumed to be abandoned.

Property is unclaimed if, during the applicable period set forth above, the apparent owner has not communicated in writing, or by other means reflected in a contemporaneous record prepared by or on behalf of the holder, with the holder concerning the property or the account in which the property is held, and the owner has not otherwise indicated an interest in the property. A communication with an owner by a person other than the holder or its representative who has not in writing identified the property to the owner is not an indication of interest in the property by the owner.

An indication of an owner's interest in property includes:

(1) The presentment of a check or other instrument of payment of a dividend or other distribution made with respect to an account or underlying stock or other interest in a business association or financial organization or, in the case of a distribution made by electronic or similar means, evidence that the distribution has been received;

(2) Owner-directed activity in the account in which the property is held, including a direction by the owner to increase, decrease or change the amount or type of property held in the account;

(3) The making of a deposit to or withdrawal from a bank account; and

(4) The payment of a premium with respect to a property interest in an insurance policy; but the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from maturing or terminating if the insured has died or the insured or the beneficiary of the policy has

identification number, invoice number, and amount of any such unclaimed or uncashed refund check, and the Tax Commissioner's confirmation or denial of confirmation, as applicable, that the tax refund is currently due and payable to the payee or payees to whom the unclaimed or uncashed check was originally issued.
otherwise become entitled to the proceeds before the depletion of the cash surrender value of a policy by the application of those provisions.

Property is payable or distributable for purposes of the UPA notwithstanding the owner's failure to make demand or present an instrument or document otherwise required to obtain payment.

Observation: When applying the preceding presumptions and determining the state to which the abandoned property should be reported, see ¶ 1105, infra, the holder should keep in mind that Congress may have enacted legislation directly impacting the treatment of unclaimed property. Some examples of where federal law impacts state unclaimed property laws include, but are not limited to:

1. 12 U.S.C. § 2501 et seq. (disposition of abandoned money orders and travelers checks), providing that the state of purchase, as shown in the books and records of the financial organization or business association shall be entitled exclusively to escheat or take custody of the sum payable on such abandoned instruments;

2. 12 U.S.C. § 24 (National Bank Act) and 12 U.S.C. § 1461 et seq. (Home Owners Loan Act) allowing national thrifts to issue gift cards with dormancy/service fees and expiration dates preempting state laws prohibiting dormancy/service fees and expiration dates on this type of gift care; and

3. The Employee Retirement Income Security Act of 1974 (ERISA), although the scope of preemption is still subject to debate.

¶ 1103 Contents of safe deposit box or other safekeeping depository

Regulation: WVCSR § 112-5-4.

Tangible personal property held in a safe deposit box or other safekeeping depository in this State in the ordinary course of the holder's business and proceeds resulting from the sale of the property permitted by other law, are presumed abandoned if the property remains unclaimed by the owner for more than five years after expiration of the lease or rental period on the box or other depository.

¶ 1104 Rules for taking custody of unclaimed property


Except as otherwise provided in the UPA or by other law of this State, property that is presumed abandoned, whether located in this or another state, is subject to the custody of this State if:

1. The last known address of the apparent owner, as shown on the records of the holder, is in this State;
(2) The records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in this State;

(3) The records of the holder do not reflect the last known address of the apparent owner and it is established that:

   (i) The last known address of the person entitled to the property is in this State; or

   (ii) The holder is domiciled in this State or is a government or governmental subdivision, agency or instrumentality of this State and has not previously paid or delivered the property to the state of the last known address of the apparent owner or other person entitled to the property;

(4) The last known address of the apparent owner, as shown on the records of the holder, is in a state that does not provide for the escheat or custodial taking of the property and the holder is domiciled in this State or is a government or governmental subdivision, agency or instrumentality of this State;

(5) The last known address of the apparent owner, as shown on the records of the holder, is in a foreign country and the holder is domiciled in this State or is a government or governmental subdivision, agency or instrumentality of this State;

(6) The transaction out of which the property arose occurred in this State, the holder is domiciled in a state that does not provide for the escheat or custodial taking of the property, and the last known address of the apparent owner or other person entitled to the property is unknown or is in a state that does not provide for the escheat or custodial taking of the property; or

(7) The property is a traveler's check or money order purchased in this State, or the issuer of the traveler's check or money order has its principal place of business in this State and the issuer's records show that the instrument was purchased in a state that does not provide for the escheat or custodial taking of the property, or do not show the state in which the instrument was purchased.

¶ 1105 Dormancy charge


Regulation: WVCSR § 112-5-5.

A holder may deduct from property presumed abandoned a charge imposed by reason of the owner's failure to claim the property within a specified time only if there is a valid and enforceable written contract between the holder and the owner under which the holder may impose the charge and the holder regularly imposes the charge, which is not regularly reversed or otherwise canceled. The amount of the deduction is limited to an amount that is not unconscionable.
¶ 1106 Burden of proof as to property evidenced by record of check or draft

Regulation: WVCSR § 112-5-6.

A record of the issuance of a check, draft or similar instrument is *prima facie* evidence of an obligation. In claiming property from a holder who is also the issuer, the State Treasurer’s burden of proof as to the existence and amount of the property and its abandonment is satisfied by showing issuance of the instrument and passage of the requisite period of abandonment. Defenses of payment, satisfaction, discharge and want of consideration are affirmative defenses that must be established by the holder.

¶ 1107 Report of abandoned property

Regulation: WVCSR § 112-5-6.

A holder of property that is presumed to be abandoned must make a report to the State Treasurer concerning the property. This report must be verified and must contain the following information:

1. A description of the property;

2. Except with respect to a traveler’s check or money order, the name, if known, and last known address, if any, and the social security number or taxpayer identification number, if readily ascertainable, of the apparent owner of property having a value of $50 or more;

3. An aggregated amount of items valued under $50 each;

4. In the case of an amount of $50 or more held or owing under an annuity or a life or endowment insurance policy, the full name and last known address of the annuitant or insured and of the beneficiary;

5. In the case of property held in a safe deposit box or other safekeeping depository, an indication of the place where it is held and where it may be inspected by the State Treasurer, and any amounts owing to the holder;

6. The date, if any, on which the property became payable, demandable or returnable, and the date of the last transaction with the apparent owner with respect to the property; and

7. Other information that the State Treasurer by regulation prescribes as necessary for the administration of the UPA.

If a holder of property presumed abandoned is a successor to another person who previously held the property for the apparent owner or the holder has changed its name while holding the property, the holder must file with the report its former names, if any, and the known names and addresses of all previous holders of the property.
This report must be filed before November 1st of each year and cover the twelve months immediately preceding the July 1st of that year. However, a report with respect to a life insurance company must be filed before May 1st each year covering the preceding calendar year.

The holder of property presumed abandoned must send written notice to the apparent owner, not more than 120 days or less than 60 days before filing the report, stating that the holder is in possession of property subject to the UPA, if:

(1) The holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate;

(2) The claim of the apparent owner is not barred by a statute of limitations; and

(3) The value of the property is $50 or more.

Before the date for filing the report, the holder of property presumed abandoned may ask the State Treasurer to extend the time for filing the report. The Treasurer may grant the request where good cause is shown warranting the extension. The holder, upon receipt of the extension, may make an interim payment on the amount the holder estimates will ultimately be due, which terminates the accrual of additional interest on the amount paid.

The holder of property presumed to be abandoned must file with the report an affidavit stating that the holder has complied with the notice requirements of W. Va. Code § 36-8-7(e).

¶ 1108 Payment or delivery of abandoned property


Regulation: WVCSR § 112-5-7.

Except for property held in a safe deposit box or other safekeeping depository, upon filing the report discussed in ¶ 1107, supra, the holder of the property presumed to be abandoned must pay, deliver or cause to be paid or delivered to the State Treasurer the property described in the report as unclaimed. However, if the property is an automatically renewable deposit, and a penalty or forfeiture in the payment of interest would result, the time for compliance is extended until a penalty or forfeiture would no longer result. Property held in a safe deposit box or other safekeeping depository may not be delivered to the State Treasurer until 120 days after filing the report described in ¶ 1107, supra.

If the property reported to the State Treasurer is a security or security entitlement under article eight of the Uniform Commercial Code, see W. Va. Code § 46-8-1 et seq., the State Treasurer is an appropriate person to make an indorsement, instruction or entitlement order on behalf of the apparent owner to invoke the duty of the issuer or its
transfer agent or the securities intermediary to transfer or dispose of the security or the security entitlement in accordance with article eight of the Uniform Commercial Code.

If the holder of property reported to the State Treasurer is the issuer of a certificated security, the Treasurer has the right to obtain a replacement certificate pursuant to W. Va. Code § 46-8-408, but an indemnity bond is not required.

An issuer, the holder, and any transfer agent or other person acting pursuant to the instructions of and on behalf of the issuer or holder in accordance with W. Va. Code § 36-8-8 is not liable to the apparent owner and must be indemnified against claims of any person as provided in W. Va. Code § 36-8-10. See ¶ 1110, infra.

¶ 1109 Notice and publication of lists of abandoned property


Regulation: WVCSR § 112-5-8.

The State Treasurer is required to publish a notice not later than November 13th each of abandoned property paid or delivered to the Treasurer during the preceding calendar year. This notice must be published in a newspaper of general circulation in the county of this State in which is located the last known address of any person named in the notice. If a holder does not report an address for the apparent owner, or the address is outside this State, the notice must be published in the county in which the holder has its principal place of business within this State or another county that the Treasurer reasonably selects. The advertisement must be in a form that, in the judgment of the Treasurer, is likely to attract the attention of the apparent owner of the unclaimed property. The notice must contain:

(1) The name of each person appearing to be the owner of the property, as set forth in the report filed by the holder;

(2) The last known address or location of each person appearing to be the owner of the property, if an address or location is set forth in the report filed by the holder;

(3) A statement explaining that property of the owner is presumed to be abandoned and has been taken into the protective custody of the State Treasurer; and

(4) A statement that information about the property and its return to the owner is available to a person having a legal or beneficial interest in the property, upon written request filed with the State Treasurer.

The State Treasurer is not required to advertise the name and address or location of an owner of property having a total value less than $50 or information concerning a traveler’s check, money order or similar instrument.

¶ 1110 Custody by State Treasurer; recovery by holder; defense of holder

Regulation: WVCSR § 112-5-9.

Payment or delivery is made in “good faith” to the State Treasurer if:

(1) Payment or delivery was made in a reasonable attempt to comply with the UPA;

(2) The holder was not then in breach of a fiduciary obligation with respect to the property and had a reasonable basis for believing, based on the facts then known, that the property was presumed abandoned. However, no fiduciary may be deemed to be in breach of a fiduciary obligation for purposes of W. Va. Code § 36-8-10 by virtue of paying or delivering property to the State Treasurer prior to the expiration of the period for holding unclaimed or abandoned property contained in the instrument under which such fiduciary is acting; and

(3) There is no showing that the records under which the payment or delivery was made did not meet reasonable commercial standards of practice.

Upon payment or delivery of property to the State Treasurer, the Treasurer assumes custody and responsibility for the safekeeping of the property. A holder who pays or delivers property to the State Treasurer in good faith is relieved of all liability arising thereafter with respect to the property.

A holder who has paid money to the State Treasurer pursuant to the UPA may subsequently make payment to a person reasonably appearing to the holder to be entitled to payment. Upon a filing by the holder of proof of payment and proof that the payee was entitled to the payment, the State Treasurer must promptly reimburse the holder for the payment without imposing a fee or other charge. If reimbursement is sought for a payment made on a negotiable instrument, including a traveler's check or money order, the holder must be reimbursed upon filing proof that the instrument was duly presented and that payment was made to a person who reasonably appeared to be entitled to payment. The holder must be reimbursed for payment made even if the payment was made to a person whose claim was barred under W. Va. Code § 36-8-19(a), see ¶1119, infra.

A holder who has delivered property other than money to the State Treasurer pursuant to the UPA may reclaim the property if it is still in the possession of the State Treasurer, without paying any fee or other charge, upon filing proof that the apparent owner has claimed the property from the holder. The State Treasurer may accept a holder's affidavit as sufficient proof of the holder's right to recover the property.

If a holder pays or delivers property to the State Treasurer in good faith and thereafter another person claims the property from the holder or another state claims the money or property under its laws relating to escheat or abandoned or unclaimed property, the State Treasurer, upon written notice of the claim, must defend the holder against the claim and indemnify the holder against any liability on the claim resulting from payment or delivery of the property to the State Treasurer.
Property removed from a safe deposit box or other safekeeping depository is received by the State Treasurer subject to the holder’s right to be reimbursed for the cost of the opening and to any valid lien or contract providing for the holder to be reimbursed for unpaid rent or storage charges. The State Treasurer must reimburse the holder out of the proceeds remaining after deducting the expense incurred by the Treasurer in selling the property.

¶ 1111 Crediting of dividends, interest and increments to owner’s account


If property other than money is delivered under the UPA to the State Treasurer, the owner is entitled to receive from the Treasurer any income or gain realized or accruing on the property at or before liquidation or conversion of the property into money subject to the following rules:

1. If the property was an interest bearing demand, savings or time deposit, including a deposit that is automatically renewable, the State Treasurer must pay interest at a rate of 4% per year or any lesser rate the property earned at the time the property was delivered to the Treasurer.

2. If the property is any property other than an interest bearing demand, savings or time deposit, the State Treasurer must pay the owner 4% per year on the market value of the property at the time it was delivered to the Treasurer or any lesser annualized rate of income or gain the property earned from the time the property was delivered to the Treasurer to the time the owner established a claim to the property.

3. In no event may the State Treasurer be required to pay the owner any income or gain realized or accruing on the property after the third anniversary of the delivery of the property to the Treasurer.

Nothing in W. Va. Code § 36-8-11 may be construed to entitle an owner to interest on property which did not realize or accrue income or gain at the time it was delivered to the State Treasurer.

¶ 1112 Public sale of abandoned property


Within three years after the receipt of abandoned property, the State Treasurer must sell it to the highest bidder at public sale at a location in the State which in the judgment of the Treasurer affords the most favorable market for the property, except as otherwise provided in W. Va. Code § 36-8-12. The State Treasurer may decline the highest bid and reoffer the property for sale if the Treasurer considers the bid to be insufficient. The Treasurer need not offer the property for sale if the Treasurer considers that the probable cost of sale will exceed the proceeds of the sale. A sale of abandoned property must be preceded by a single publication of notice of the sale, at least three
weeks before sale, in a newspaper of general circulation in the county in which the
property is to be sold.

Securities listed on an established stock exchange must be sold at prices prevailing
on the exchange at the time of sale. Other securities may be sold over the counter at
prices prevailing at the time of sale or by any reasonable method selected by the State
Treasurer. If securities are sold by the Treasurer before the expiration of three years
after their delivery to the Treasurer, a person making a claim under the UPA before the
end of the three-year period is entitled to the proceeds of the sale of the securities less
any deduction for expenses of sale. A person making a claim under the UPA after the
expiration of the three-year period is entitled to receive the securities delivered to the
State Treasurer by the holder, if they still remain in the custody of the Treasurer, or the
net proceeds received from sale, and is not entitled to receive any appreciation in the
value of the property occurring after delivery to the State Treasurer, except in a case of
intentional misconduct or malfeasance by the State Treasurer.

A purchaser of property at a sale conducted by the State Treasurer pursuant the
UPA takes the property free of all claims of the owner or previous holder and of all
persons claiming through or under them. The State Treasurer is required to execute all
documents necessary to complete the transfer of ownership.

1113 Deposit of funds


The State Treasurer must record the name and last known address of each person
appearing from the holders reports to be entitled to the property and the name and last
known address of each insured person or annuitant and beneficiary and with respect to
each policy or annuity listed in the report of an insurance company, its number, the
name of the company and the amount due.

The State Treasurer is required to deposit all funds received pursuant to the UPA in
the Unclaimed Property Fund, including the proceeds from the sale of abandoned
property. In addition to paying claims of unclaimed property duly allowed, the State
Treasurer may deduct the following expenses from the Unclaimed Property Fund:

(1) Expenses of the sale of abandoned property;

(2) Expenses incurred in returning the property to owners, including without
    limitation the costs of mailing and publication to locate owners;

(3) Reasonable service charge; and

(4) Expenses incurred in examining records of holders of property and in
    collecting the property from those holders.
The State Treasurer may invest the Unclaimed Property Trust Fund with the West Virginia Board of Treasury Investments. All earnings accrue to the Fund and are available for expenditure in accordance with the UPA. After deducting the expenses specified above and maintaining a sum of money from which to pay claims duly allowed, the State Treasurer must transfer the remaining moneys in the Unclaimed Property Fund to the Unclaimed Property Trust Fund.

On or before December 15th each year, the State Treasurer must transfer the sum of $1 million from the Unclaimed Property Trust Fund to the Prepaid Tuition Trust Escrow Fund, until the actuary certifies there are sufficient funds to pay out all contracts. After transferring this money, the State Treasurer is required to annually transfer moneys remaining in the Unclaimed Property Trust Fund to the State’s General Revenue Fund.

§ 1114 Claim of another state to recover property


Regulation: WVCSR § 112-5-10.

After property has been paid or delivered under the UPA to the State Treasurer, another state may recover the property from the Treasurer if:

(1) The property was paid or delivered to the custody of this State because the records of the holder did not reflect a last known location of the apparent owner within the borders of the other state and the other state establishes that the apparent owner or other person entitled to the property was last known to be located within the borders of that state and under the laws of that state the property has escheated or become subject to a claim of abandonment by that state;

(2) The property was paid or delivered to the custody of this State because the laws of the other state did not provide for the escheat or custodial taking of the property, and under the laws of that state subsequently enacted the property has escheated or become subject to a claim of abandonment by that state;

(3) The records of the holder were erroneous in that they did not accurately identify the owner of the property and the last known location of the owner within the borders of another state and under the laws of that state the property has escheated or become subject to a claim of abandonment by that state;

(4) The property was subjected to custody by this State under W. Va. Code § 36-8-4(6) and under the laws of the state of domicile of the holder the property has escheated or become subject to a claim of abandonment by that state; or

(5) The property is a sum payable on a traveler’s check, money order or similar instrument that was purchased in the other state and delivered into the custody of this State under W. Va. Code § 36-8-4(7) and under the laws of the other state the property has escheated or become subject to a claim of abandonment by that state.
A claim of another state to recover escheated or abandoned property must be presented in a form prescribed by the State Treasurer, who must decide the claim within 90 days after it is presented. The State Treasurer must allow the claim when he or she determines that the other state is entitled to the abandoned property.

Before recovering property, the other state must agree in writing to indemnify this State and its officers and employees against any liability on a claim to the property.

¶ 1115 Filing claim with State Treasurer; handling of claims by Treasurer


*Regulation:* WVCSR § 112-5-10.

A person, excluding another state, claiming property paid or delivered to the State Treasurer may file a claim on a form prescribed by the Treasurer and verified by the claimant.

Within 90 days after a claim is filed, the State Treasurer must allow or deny the claim and give written notice of the decision to the claimant. If the claim is denied, the Treasurer must inform the claimant of the reasons for the denial and specify what additional evidence is required before the claim will be allowed. The claimant may then file a new claim with the State Treasurer, or institute a civil action as provided in ¶ 1116.

Within 30 days after a claim is allowed, the property or the net proceeds of a sale of the property must be delivered or paid by the State Treasurer to the claimant.

¶ 1116 Action to establish claim


A person aggrieved by a decision of the State Treasurer, or whose claim has not been acted upon within 90 days after its filing, may institute a civil action to establish the claim in the circuit court of Kanawha County, naming the State Treasurer as a defendant. The UPA does not provide for administrative review before filing suit. However, if the aggrieved person establishes the claim in an action against the Treasurer, the court may award the claimant reasonable attorney’s fees.

¶ 1117 Election to take payment or delivery


The State Treasurer may decline to receive property reported under the UPA when the State Treasurer considers the property to have a value less than the expenses of notice and sale. See ¶ 1109 and ¶ 1112, supra.

A holder, with the written consent of the State Treasurer and upon conditions and terms prescribed by the Treasurer, may report and deliver property before the property is presumed abandoned. Property so delivered must be held by the State Treasurer and is not presumed abandoned until it otherwise would be presumed abandoned under the UPA. See ¶ 1102, supra.
¶ 1118 Destruction or disposition of property having no substantial commercial value; immunity from liability


Regulation: WVCSR § 112-5-11.

If the State Treasurer determines after investigation that property delivered under the UPA has no substantial commercial value, the State Treasurer may destroy or otherwise dispose of the property at any time. An action or proceeding may not be maintained against the State or any officer or against the holder for or on account of an act of the State Treasurer under W. Va. Code § 36-8-18, except for intentional misconduct or malfeasance.

¶ 1119 Periods of limitation


Regulation: WVCSR § 112-5-12.

The expiration of a period of limitation on the owner's right to receive or recover property, whether specified by contract, statute or court order, does not preclude the property from being presumed abandoned or affect a duty to file a report or to pay or deliver or transfer property to the State Treasurer as required by the UPA.

An action or proceeding may not be maintained by the State Treasurer to enforce the UPA in regard to the reporting, delivery or payment of property more than 10 years after the holder specifically identified the property in a report filed with the State Treasurer or gave express notice to the State Treasurer of a dispute regarding the property. In the absence of such a report or other express notice, the period of limitation is tolled. The period of limitation is also tolled by the filing of a report that is fraudulent.

¶ 1120 Requests for reports and examination of records


Regulation: WVCSR § 112-5-13.

The State Treasurer, or his or her designated agent, may require a person who has not filed a report, or a person who the State Treasurer believes has filed an inaccurate, incomplete or false report, to file a verified report in a form specified by the State Treasurer. The report must state whether the person is holding property reportable under the UPA, describe property not previously reported or as to which the State Treasurer has made inquiry and specifically identify and state the amounts of property that may be in issue.

The State Treasurer, or his or her designated agent, at reasonable times and upon reasonable notice, may examine the records of any person to determine whether the person has complied with the UPA. The State Treasurer may conduct the examination even if the person believes it is not in possession of any property that must be reported, paid or delivered under the UPA. The State Treasurer may contract with any other person to conduct the examination on behalf of the State Treasurer. However, this
authority may not be construed to grant the State Treasurer the right to examine the records of a national banking association to an extent greater than permitted by applicable federal law, nor may the records of any bank chartered or incorporated under the laws of any state to be subject to examination to an extent greater than the examination permitted of the records of a national banking association under applicable federal law.

The State Treasurer, or his or her agent, at reasonable times may examine the records of an agent, including a dividend disbursing agent or transfer agent, of a business association or financial association that is the holder of property presumed abandoned if the State Treasurer, or his or her agent, has given the notice required by W. Va. Code § 36-8-20(b) to both the business association or organization and the agent at least 90 days before the examination.

Documents and working papers obtained or compiled by the State Treasurer, or his or her agents, employees or designated representatives, in the course of conducting an examination are confidential and are not public records. However, the documents and papers may be:

(1) Used by the State Treasurer or the Treasurer’s attorney in the course of an action to collect unclaimed property or otherwise enforce the UPA;

(2) Used in joint examinations conducted with or pursuant to an agreement with another state, the federal government or any other governmental subdivision, agency or instrumentality;

(3) Produced pursuant to subpoena or court order; or

(4) Disclosed to the abandoned property office of another state for that state’s use in circumstances equivalent to those described in this subdivision, if the other state is bound to keep the documents and papers confidential.

If an examination of the records of a person results in the disclosure of property reportable under the UPA, the State Treasurer may assess the cost of the examination against the holder at the rate of $200 a day for each examiner, or a greater amount that is reasonable and was incurred, but the assessment may not exceed the value of the property found to be reportable. The cost of an examination may be assessed only against the business association or financial organization.

If a holder does not maintain the records required by W. Va. Code § 36-8-21 and the records of the holder available for the periods subject to the UPA are insufficient to permit the preparation of a report, the State Treasurer may require the holder to report and pay to the State Treasurer the amount the Treasurer reasonably estimates, on the basis of any available records of the holder or by any other reasonable method of estimation, should have been but was not reported.
Observation: Neither the UPA nor regulations promulgated by the State Treasurer address whether statistical sampling or other estimation techniques may be used in an examination of the holder's compliance with the UPA when the holder has sufficient records for the period subject to examination. An argument can be made that when sufficient records exist, statistical sampling and other estimation techniques may not be used to determine the accuracy of the reports filed.

¶ 1121 Retention of records


In general, a holder required to file a report under the UPA must maintain records containing the information required to be included in the report for 10 years after the report is filed, unless a shorter period is provided by regulation of the State Treasurer.

Exception: A business association or financial organization that sells, issues or provides to others for sale or issue in this state, traveler's checks, money orders or similar instruments other than third-party bank checks, on which the business association or financial organization is directly liable, must maintain a record of the instruments while they remain outstanding, indicating the state and date of issue, for three years after the holder files the report.

¶ 1122 Enforcement


The State Treasurer may maintain an action in this or another state to enforce the UPA. The court may award reasonable attorney fees to the prevailing party.

¶ 1123 Interstate agreements and cooperation; joint and reciprocal actions with other states


The State Treasurer may enter into an agreement with another state to exchange information relating to abandoned property or its possible existence. The agreement may permit the other state, or another person acting on behalf of a state, to examine records as authorized in W. Va. Code § 36-8-20. The State Treasurer may by regulation require the reporting of information needed to enable compliance with an interstate agreement and prescribe the form of the report.

The State Treasurer may join with another state to seek enforcement of the UPA against any person who is or may be holding property reportable under the UPA.

At the request of another state, the State Treasurer's attorney may maintain an action on behalf of the other state to enforce, in this State, the unclaimed property laws of the other state against a holder of property subject to escheat or a claim of abandonment by the other state, if the other state has agreed to pay expenses incurred by the Attorney General in maintaining the action.
The State Treasurer may request that the attorney general of another state or another attorney commence an action in the other state on behalf of the State Treasurer. The Treasurer may retain any other attorney to commence an action in this State on behalf of the State Treasurer. This State must pay all expenses, including attorney's fees, incurred in maintaining the action. With the State Treasurer's approval, the expenses and attorney's fees may be paid from money received under the UPA. The State Treasurer may agree to pay expenses and attorney's fees based, in whole or in part, on a percentage of the value of any property recovered in the action. Any expenses or attorney's fees so paid may not be deducted from the amount that is subject to the claim by the owner under the UPA.

¶ 1124 Interest and penalties


A holder who fails to report, pay or deliver property within the time prescribed by the UPA must pay to the State Treasurer interest at the annual rate of 12% on the value of the property, from the date the property should have been reported, paid or delivered to the date the property is reported, paid or delivered to the State Treasurer.

In general, a holder who fails to report, pay or deliver property within the time prescribed by the UPA, or fails to perform other duties imposed by the UPA, must pay to the State Treasurer, in addition to 12% interest as provided in preceding paragraph, a civil penalty of $200 for each day the report, payment or delivery is withheld, or the duty is not performed, up to a maximum penalty of $5,000.

Exception for willful failure. A holder who willfully fails to report, pay or deliver property within the time prescribed by the UPA, or who willfully fails to perform other duties imposed by the UPA, must pay to the State Treasurer, in addition to 12% interest, a civil penalty of $1,000 for each day the report, payment or delivery is withheld, or the duty is not performed, up to a maximum penalty of $20,000, plus 25% of the value of any property that should have been but was not reported.

Exception for fraudulent report. A holder who makes a fraudulent report must pay to the State Treasurer, in addition to 12% interest, a civil penalty of $1,000 for each day from the date a report under the UPA was due, up to a maximum penalty of $25,000, plus 25% of the value of any property that should have been but was not reported.

The State Treasurer for good cause shown may waive, in whole or in part, the 12% interest and civil penalties. The Treasurer must waive the civil penalties if the holder acted in good faith and without negligence. Neither the UPA nor the State Treasurer's regulations provide guidance on what constitutes, or does not constitute, good cause, good faith or negligence.

¶ 1125 Records of abandoned property

Records of abandoned property kept by the State Treasurer are available for inspection and copying only by an owner of such property as to the particular property he or she owns, or by his or her personal representative, next of kin, attorney at law or such person entitled to inherit from the owner conducting a legal audit thereof. These records are exempt from disclosure under the State Freedom of Information Act, W. Va. Code § 29B-1-1 et seq.

¶ 1126 Foreign transactions

   The UPA does not apply to property held, due and owing in a foreign country and arising out of a foreign transaction.

¶ 1127 Uniformity of application and construction

   The UPA is to be applied and construed to effectuate its general purpose to make uniform the law with respect to unclaimed property among states enacting it.
INDEX – CHAPTER 11 – UNCLAIMED PROPERTY

Abandonment, presumptions of ¶ 1102

Action to establish claim ¶ 1116

Applicability of Act
  Foreign transactions ¶ 1126
    In general ¶ 1126
    Property subject to custody by Treasurer ¶ 1104

Appeal to circuit court ¶ 1116

Application and construction of Act ¶ 1127

Audits of holders and agents ¶ 1120
  Cost of examination ¶ 1120
  Notice of audit ¶ 1120
  Estimate of unclaimed property ¶ 1120

Burden of proof, checks and drafts ¶ 1106

Claim for abandoned property
  Action against State Treasurer ¶ 1116
  Appeal ¶ 1116
  Claim of another state ¶ 1114
  Decision by State Treasurer ¶ 1115
  Filing with State Treasurer ¶ 1115
  Handling of claims ¶ 1115

Contracts
  Dormancy charge ¶ 1105

Construction and application of Act ¶ 1127

Cost of examination ¶ 1120

Crediting of earnings to owner’s account ¶ 1111

Custody by State ¶ 1110

Earnings from property
  Credit to owner ¶ 1111

Defense of holder against subsequent claim ¶ 1110
Defenses

Affirmative defenses ¶ 1106
Defenses of holder ¶ 1110
Negotiable instruments ¶ 1106

Definitions

Holder ¶ 1101
Intangible property ¶ 1101
Property ¶ 1101
Owner ¶ 1101
Other terms and definitions ¶ 1101

Delivery of abandoned property ¶ 1108
Priority to property presumed to be abandoned ¶ 1117

Deposit of funds received by State Treasurer ¶ 1113

Destruction or disposition of property ¶ 1118

Dormancy charge ¶ 1105

Earnings on property ¶ 1111

Effect of limitations period ¶ 1119

Election of Treasurer to take payment or delivery ¶ 1117

Enforcement of Act ¶ 1122

Examination of records ¶ 1120

Failure to report, pay or deliver property ¶ 1124

Filing of claim to recover property with State Treasurer ¶ 1115

Foreign transactions ¶ 1126

Funds received under Article to be deposited ¶ 1113

Good faith payment or delivery ¶ 1110

Holder, defined ¶ 1101

Intangible property ¶ 1101

Interest and penalties ¶ 1124
Interstate agreements and cooperation ¶ 1123

Joint and reciprocal actions with other states ¶ 1123

Lists of abandoned property
  Notice and publication ¶ 1109

Mineral proceeds, defined ¶ 1101

Negotiable instruments
  Evidence of obligation ¶ 1106

Notice of abandoned property ¶ 1109

Owner, defined ¶ 1101

Payment of abandoned property ¶ 1108

Penalties and interest ¶ 1124

Periods of limitation ¶ 1119

Presumptions of abandonment ¶ 1102

Property, defined ¶ 1101

Public sale of abandoned property ¶ 1112

Publication of lists of abandoned property ¶ 1109

Reciprocity
  With other states to recover property ¶ 1114
  Other states ¶ 1123

Records
  Abandoned property ¶ 1125
  Confidentiality ¶ 1120
  Examination by Treasurer ¶ 1120
  Exemption from State Freedom of Information Act ¶ 1125
  Public inspection ¶ 1125
  Requirement to keep ¶ 1121
  Retention period ¶ 1121

Recovery by holder ¶ 1110
Reports
  Report of abandoned property ¶ 1107
  Report to be verified ¶ 1120

Request to examine records ¶ 1120

Request for reports ¶ 1120

Retentions of records ¶ 1121

Rules and regulations ¶ 1101

Rules for taking custody of abandoned property ¶ 1104

Safe deposit boxes
  Contents of ¶ 1103
  Cost of opening ¶ 1110
  Delivery of contents ¶ 1108

Sale of abandoned property
  Notice and publication of sale ¶ 1112
  Cost of sale ¶ 1112

Statute of limitations ¶ 1119

Unclaimed property fund ¶ 1113

Unclaimed property trust fund ¶ 1113

Uniformity of application and construction ¶ 1129