

Senate Bill No. 201

(By Senators McCabe, Browning, Foster, Wells, Stollings, Klempa
and Kessler (Acting President))

[Introduced January 19, 2011; referred to the Committee on
Economic Development; and then to the Committee on Finance.]

**FISCAL
NOTE**

A BILL to amend the Code of West Virginia, 1931, as amended, by
adding thereto a new article, designated §11-13BB-1, §11-
13BB-2, §11-13BB-3, §11-13BB-4, §11-13BB-5, §11-13BB-6, §11-
13BB-7, §11-13BB-8, §11-13BB-9, §11-13BB-10, §11-13BB-11,
§11-13BB-12, §11-13BB-13 and §11-13BB-14, all relating to
authorizing a tax credit against business franchise tax,
corporate net income tax or personal income tax for eligible
expenditures incurred in placing in service a residential or
nonresidential energy-efficient building; defining terms;
establishing the amount of tax credit permitted; providing
that the tax credit is transferrable; authorizing
rulemaking; and requiring reports to be made.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended
by adding thereto a new article, designated §11-13BB-1, §11-13BB-

1 2, §11-13BB-3, §11-13BB-4, §11-13BB-5, §11-13BB-6, §11-13BB-7,
2 §11-13BB-8, §11-13BB-9, §11-13BB-10, §11-13BB-11, §11-13BB-12,
3 §11-13BB-13, and §11-13BB-14, all to read as follows:

4 **ARTICLE 13BB. ENERGY EFFICIENT BUILDING PROPERTY TAX CREDIT.**

5 **§11-13BB-1. Short title.**

6 This article may be cited as the "Energy Efficient Building
7 Act."

8 **§11-13BB-2. Legislative finding and purpose.**

9 The Legislature finds that encouraging the construction and
10 rehabilitation of energy efficient buildings is in the public
11 interest and promotes the general welfare of the people of this
12 state. It contributes to economic growth and, in time, will
13 improve environmental quality in the state by decreasing
14 discharge of pollutants from buildings, improving energy
15 efficiency and reducing greenhouse gas emissions. To accomplish
16 these ends, there is hereby enacted the energy efficient building
17 tax credit.

18 **§11-13BB-3. Definitions.**

19 (a) *General.* -- When used in this article, or in the
20 administration of this article, terms defined in subsection (b)
21 have the meanings ascribed to them by this section, unless a
22 different meaning is clearly required by the context in which the
23 term is used.

24 (b) *Terms defined.* --

1 (1) "EPA" means the United States Environmental Protection
2 Agency.

3 (2) "Designed to Earn the Energy Star®" means a designation
4 given by the EPA as part of the Energy Star® program to identify
5 plans for the construction of residential or nonresidential
6 buildings that incorporate energy-efficient details and
7 specifications typically found in Energy Star® qualified
8 buildings.

9 (3) "Eligible buildings" means energy efficient residential
10 or nonresidential building property to which the EPA has awarded
11 an Energy Star® label.

12 (4) "Eligible expenditures" means expenses incurred on or
13 after July 1, 2011, for the planning, construction or
14 rehabilitation of energy efficient residential or nonresidential
15 building property. Eligible expenditures do not include:

16 (A) Legal fees related to construction or remodeling;

17 (B) Site purchase or preparation costs;

18 (C) Interest related to construction or remodeling;

19 (D) Architectural, engineering and other professional fees
20 related to construction or remodeling; and

21 (E) Closing costs related to construction or remodeling

22 (F) Costs related to issuance, or procurement of loans, bond
23 issuances or costs of capital or related administrative expenses.

24 (5) "Eligible building plans" means plans for the
25 construction of residential or nonresidential buildings that

1 incorporate energy-efficient details and specifications typically
2 found in Energy Star® qualified buildings that have earned the
3 Designed to Earn the Energy Star® label under the Energy Star®
4 program.

5 (6) "Eligible taxpayer" means the owner of a residential or
6 commercial building property to which the EPA has awarded an
7 Energy Star® label, or the owner of building plans which have
8 earned the Designed to Earn the Energy Star® label by the Energy
9 Star® program.

10 (7) "Energy efficient residential or nonresidential
11 building" means residential or nonresidential building property:

12 (A) Which is installed on or in any building which is:

13 (i) Located in West Virginia; and

14 (ii) Within the scope of the Energy Star® performance
15 ratings system utilized in the Energy Star® program established
16 by 42 U.S.C. §6294a.

17 (B) Which is installed as part of:

18 (i) The interior lighting systems;

19 (ii) The heating, cooling, ventilation, and hot water
20 systems; or

21 (iii) The building envelope.

22 (C) To which the Administrator of the EPA has awarded an
23 Energy Star® label for energy efficient buildings and
24 manufacturing plants in accordance with the requirements and
25 procedures established by the EPA under the Energy Star® program.

1 (8) "Energy Star® label" means, in the context of buildings,
2 a designation given by the EPA as part of the Energy Star®
3 program to identify residential and nonresidential buildings that
4 meet EPA strict energy efficiency guidelines.

5 (9) "Energy Star® program" means a joint voluntary program
6 established within the United States Department of Energy and the
7 EPA to identify and promote energy-efficient products and
8 buildings in order to reduce energy consumption, improve energy
9 security, and reduce pollution through voluntary labeling of, or
10 other forms of communication about, products and buildings that
11 meet the highest energy conservation standards.

12 (10) "Energy Star® performance ratings system" means the
13 ratings system used by the EPA in the Energy Star® program for
14 buildings and manufacturing plants to award the Energy Star®
15 label.

16 (11) "Placed in service" means the eligible building is
17 placed in a condition or state of readiness and availability for
18 use as a residential or nonresidential building.

19 (12) "Tax Commissioner" means the appointed official, or his
20 or her designee, charged with administering the West Virginia
21 State Tax Department.

22 **§11-13BB-4. Amount of credit allowed.**

23 (a) *Credit allowed.* --

24 (1) Eligible taxpayers are allowed a credit against the
25 taxes imposed by articles twenty-three, twenty-four and twenty-

1 one of this chapter, in that order, for owning a residential or
2 commercial building to which the EPA has awarded an Energy Star®
3 label, or owning building plans which have earned the Designed to
4 Earn the Energy Star® label.

5 (2) Taxpayers who have taken the credit based on ownership
6 of eligible building plans must complete construction of the
7 eligible building and obtain Energy Star® certification for the
8 completed building within three years from the time the credit
9 was initially taken.

10 (A) If the building fails to obtain Energy Star®
11 certification by the end of year three, the credit allowed under
12 this article shall be redetermined and amended returns filed for
13 the first and second taxable years.

14 (B) In applying the amount of redetermined credit allowable
15 for the two preceding taxable years, the redetermined credit
16 shall first be applied to the extent it was originally applied in
17 such prior two years to business franchise taxes, then to
18 corporation net income taxes, then to personal income taxes. Any
19 additional taxes due under this chapter shall be remitted with
20 the amended returns filed with the Tax Commission, along with
21 interest, as provided in section seventeen, article ten of this
22 chapter, and a ten percent penalty.

23 (b) *Application for credit required.* --

24 (1) *Application required.* -- Notwithstanding any provision
25 of this article to the contrary, no credit is allowed or may be

1 applied under this article for any Energy Star® eligible building
2 placed in service or use or for any Designed to Earn the Energy
3 Star® building plans until the eligible taxpayer claiming the
4 credit makes written application to the Tax Commissioner for
5 allowance of credit as provided in this subsection. This
6 application shall be in the form prescribed by the Tax
7 Commissioner, and shall be filed with the Tax Commissioner no
8 later than the last day for filing the annual return, determined
9 by including any authorized extension of time for filing the
10 return, required under article twenty-one or twenty-four of this
11 chapter for the taxable year in which the property to which the
12 credit relates is placed in service or use.

13 (2) *Failure to file.* -- The failure to timely file the
14 application for credit under this section results in forfeiture
15 of fifty percent of the annual credit otherwise allowable under
16 this article. This penalty applies annually until the
17 application is filed.

18 (c) *Amount of credit allowed.*--

19 The amount of credit allowed by subsection (a) is the
20 greater of:

21 (1) One and one-half percent of eligible expenditures; or

22 (2) One dollar per square foot of the eligible building as
23 constructed or as designed and portrayed on the building plan.

24 **§11-13BB-5. Application of credit.**

25 (a) *Application of credit over ten years.* -- The amount of

1 credit allowable must be taken over a ten-year period, at the
2 rate of one tenth of the amount thereof per taxable year,
3 beginning with the taxable year in which the taxpayer places the
4 eligible building in service or use in this state: *Provided,*
5 That the taxpayer may elect to delay the beginning of the ten-
6 year period until the next succeeding taxable year after the
7 taxable year in which the taxpayer places the eligible building
8 in service or use in this state or the building plan is approved
9 to receive the Designed to Earn the Energy Star® label. This
10 election shall be made in the annual income tax return filed
11 under this chapter for the taxable year in which the eligible
12 building is first placed into service or use by the taxpayer.
13 Once made, the election cannot be revoked. In the event of a
14 failure to make a timely election to delay the beginning of the
15 credit application period, the credit shall be applied beginning
16 in the taxable year in which the taxpayer places the eligible
17 building in service or use in this state. No retroactive election
18 to delay the beginning of the credit application period shall be
19 allowed.

20 The eligible taxpayer may take the tax credit.

21 (b) *Business franchise tax.* -- The credit is first applied
22 to reduce the taxes imposed by article twenty-three of this
23 chapter for the taxable year, determined after application of the
24 credits against tax provided in section seventeen of said
25 article, but before application of any other allowable credits

1 against tax.

2 (c) *Corporation net income taxes.* -- After application of
3 subsection (b) of this section, any unused credit is next applied
4 to reduce the taxes imposed by article twenty-four of this
5 chapter for the taxable year, determined before application of
6 allowable credits against tax.

7 (d) *Personal income tax.* --

8 (1) If the eligible taxpayer is an electing small business
9 corporation (as defined in section 1361 of the United States
10 Internal Revenue Code of 1986, as amended), a partnership, a
11 limited liability company that is treated as a partnership for
12 federal income tax purposes or a sole proprietorship, then any
13 unused credit, after application of subsections (b) and (c) of
14 this section, as applicable, is allowed as a credit against the
15 taxes imposed by article twenty-one of this chapter.

16 (2) Electing small business corporations, limited liability
17 companies, partnerships and other unincorporated organizations
18 shall allocate the credit allowed by this article among its
19 members in the same manner as profits and losses are allocated
20 for the taxable year.

21 **§11-13BB-6. Limitation on use of credit.**

22 (a) *Withholding.* -- No credit is allowed under this section
23 against any employer withholding taxes imposed by article twenty-
24 one of this chapter.

25 (b) *No other tax credit authorized.* -- The credit allowed or

1 authorized under the provisions of this article shall not be
2 allowed, authorized or applied against tax if any tax credit is
3 authorized, applied for or used or applied against tax by the
4 taxpayer, or by any other person, under article thirteen-d,
5 article thirteen-e, article thirteen-q, article thirteen-r, or
6 article thirteen-s of this chapter, or any combination thereof,
7 for, or with relation to, investment in any building, or facility
8 for which credit is, or may be, allowed, authorized or applied
9 against tax under this article.

10 **§11-13BB-7. Excess credit; carryforward; carryback prohibited.**

11 (a) If the tax credit allowed under this article in any
12 taxable year exceeds the sum of the taxes enumerated in section
13 four of this article for that taxable year, the excess may be
14 applied against those taxes, in the order and manner stated in
15 section four of this article, for succeeding taxable years until
16 the earlier of the following:

17 (1) Five taxable years have elapsed; or

18 (2) The full amount of the excess tax credit is used.

19 (b) No carryback to a prior taxable year is allowed for the
20 amount of any unused portion of any annual credit allowance.

21 (c) The transfer or sale of this credit does not extend the
22 time in which the credit can be used. The carry forward period
23 for the credit that is transferred or sold begins on the date on
24 which the credit was originally allowed to be used by the
25 original taxpayer for which credit entitlement was initially

1 authorized.

2 **§11-13BB-8. Transfer or sale of credit.**

3 (a) Any tax credit issued in accordance with this article,
4 which has been issued to an eligible taxpayer, and to the extent
5 not previously claimed against the tax of the eligible taxpayer
6 or the owner of the credit, may be transferred or sold by such
7 eligible taxpayer to another West Virginia taxpayer, subject to
8 the following conditions:

9 (1) A single transfer or sale may involve one or more
10 transferees, assignees or purchasers. A transfer or sale of the
11 credits may involve multiple transfers to one or more
12 transferees, assignees or purchasers.

13 (2) Transferors and sellers shall apply to the tax
14 department for approval of any transfer, sale or assignment of
15 the tax credit. Any amount of the tax credit that has been
16 transferred or assigned shall be subject to the same limitations
17 and conditions that apply to the eligible transferor taxpayer's
18 or seller's entitlement, use and application of the credit. The
19 application for sale, transfer or assignment of the credit shall
20 include the transferor's tax credit balance prior to transfer,
21 the credit certificate number, the name of the seller, the
22 transferor's remaining tax credit balance after transfer, if any,
23 all tax identification numbers for both transferor and
24 transferee, the date of transfer, the amount transferred, a copy
25 of the credit certificate and any other information required by

1 the Tax Commissioner.

2 (3) The Tax Commissioner shall not approve the transfer or
3 assignment of a tax credit to a taxpayer if the seller or
4 transferor has an outstanding tax obligation with the State of
5 West Virginia.

6 (b) The transferee, assignee or purchaser shall apply such
7 credits as required by this article, and subject to all
8 conditions and limitations of this article.

9 (c) For purposes of this chapter, any proceeds received by
10 the eligible company or transferor for its assignment or sale of
11 the tax credits allowed pursuant to this section are exempt from
12 the West Virginia consumers sales and service tax and use tax and
13 from the corporate net income tax and personal income tax.

14 **§11-13BB-9. Credit recapture.**

15 (a) If it appears upon audit or otherwise that any taxpayer
16 has taken the credit against tax allowed under this article and
17 was not entitled to take the credit, then the credit improperly
18 taken under this article shall be recaptured.

19 (b) Amended returns shall be filed for any tax year for
20 which the credit was improperly taken. Any additional taxes due
21 under this chapter shall be remitted with the amended return or
22 returns filed with the Tax Commissioner, along with interest, as
23 provided in section seventeen, article ten of this chapter and
24 such other penalties and additions to tax as may be applicable
25 pursuant to the provisions of article ten of this chapter.

1 **§11-13BB-10. Interest; penalties; additions to tax.**

2 Notwithstanding the provisions of article ten of this
3 chapter, penalties and additions to tax imposed under article ten
4 of this chapter may be waived at the discretion of the Tax
5 Commissioner: *Provided*, That interest is not subject to waiver,
6 except in accordance with the provisions of article ten of this
7 chapter.

8 **§11-13BB-11. Statute of limitations.**

9 Notwithstanding the provisions of article ten of this
10 chapter, the statute of limitations for the issuance of an
11 assessment of tax by the Tax Commissioner shall be five years
12 from the date of filing of any tax return on which this credit
13 was taken or five years from the date of payment of any tax
14 liability, calculated pursuant to the assertion of the credit
15 allowed under this article, whichever is later.

16 **§11-13BB-12. Report on credit.**

17 (a) The Tax Commissioner shall provide to the Joint
18 Committee on Government and Finance by July 1, 2013, and on July
19 1 of each year thereafter, a report detailing the amount of
20 credit claimed pursuant to this article. The report is to
21 include the amount of credit claimed against the business
22 franchise tax, the amount of credit claimed against the corporate
23 net income tax and the amount of credit claimed against the
24 personal income tax.

1 (b) Taxpayers claiming the credit shall provide the
2 information as the Tax Commissioner may require to prepare the
3 report: *Provided*, That the information is subject to the
4 confidentiality and disclosure provisions of sections five-d and
5 five-s, article ten of this chapter.

6 **§11-13BB-13. Legislative rules.**

7 The Tax Commissioner shall propose for legislative approval
8 rules pursuant to the provisions of article three, chapter
9 twenty-nine-a of this code, as may be necessary to carry out the
10 purposes of this article.

11 **§11-13BB-14. Effective date.**

12 This article shall be effective for business franchise tax
13 years, corporate net income tax years and personal income tax
14 years beginning on or after January 1, 2011.

NOTE: The purpose of this bill is to authorize the creation of a new tax credit for eligible expenditures incurred in placing in service residential or nonresidential energy efficient building property. The bill's incentive will encourage the construction of energy efficient buildings, thereby reducing the total amount of energy consumed in the state. The bill defines terms. The bill establishes the amount of tax credit permitted and provides the tax credit to be transferrable. The bill also authorizes rulemaking. The bill further requires the Tax Commissioner to provide to the Joint Committee on Government and Finance annual reports beginning in 2013.

This article is new; therefore, strike-throughs and underscoring have been omitted.