

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

House Bill 4452

FISCAL
NOTE

BY DELEGATES MOORE, ATKINSON, HILL, HOWELL,

UPSON, ZATEZALO, WESTFALL AND STORCH

[Introduced February 7, 2018; Referred

to the Committee on Small Business,

Entrepreneurship and Economic Development then

Finance.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
 2 designated §11-13Y-3a; to amend and reenact §11-21-8 of said code; and to amend said
 3 code by adding thereto a new section, designated §11-24-5a, all relating to creating newly-
 4 established small business tax credits; providing for application of new credits against
 5 corporate net income tax and personal income tax in the amount of certain property taxes
 6 paid; providing definitions; disallowing carryover of credit; requiring certain schedules;
 7 providing effective date; providing for application of new credit against corporate net
 8 income tax and personal income tax in an amount calculated and determined so as to
 9 result in an effective rate of tax of one percent per annum on state income derived from a
 10 newly-established small business; providing limitations; establishing termination date for
 11 availability of credits; and eliminating language relating to an expired severance tax credit.

Be it enacted by the Legislature of West Virginia:

**ARTICLE 13Y. THE WEST VIRGINIA MANUFACTURING PROPERTY TAX
 ADJUSTMENT ACT; TAX CREDIT FOR NEWLY-ESTABLISHED SMALL
 BUSINESS.**

§11-13Y-3a. Eligibility of newly-established small business for tax credit.

1 (a) Credit for newly-established small business.

2 (1) There is allowed to every newly-established small business a credit against the taxes
 3 imposed under §11-24-1 et seq. or §11-21-1 et seq. of this code, as determined under this section.

4 (2) Notwithstanding the provisions of §11-13Y-4 of this code, the amount of credit allowed
 5 to the eligible newly established small business taxpayer is the amount of West Virginia ad
 6 valorem property tax paid on the value of tangible personal property of the eligible newly
 7 established small business taxpayer during the corporate net income tax year and business
 8 franchise tax year.

9 (b) Definitions. — For purposes of this section:

10 (1) "Alter ego." -- A business is an alter ego of another business or other businesses if:

11 (A) More than 20 percent of the real assets or more than 20 percent of the operating assets
12 or more than 20 percent of the tangible personal property of one business are or have been
13 transferred to the other business or businesses, or are or have been used in the operations of the
14 other business or businesses, or more than 20 percent of the real assets or more than 20 percent
15 of the operating assets or more than 20 percent of the tangible personal property of one business
16 are or have been used to collateralize or secure debts or obligations of the other business or
17 businesses;

18 (B) Ownership of the businesses is so configured that the attribution rules of either Internal
19 Revenue Code Section 267 or Internal Revenue Code Section 318 would apply to cause
20 ownership of the businesses to be attributed to the same person or entity; or

21 (C) Substantive control of the businesses is held or retained by the same person, entity,
22 or individual, directly or indirectly, or through attribution under this section.

23 (2) "Contract employee" means any contract worker, contract laborer, or any individual
24 who is employed directly or indirectly by a third-party employer for the purpose of performing work
25 for another business, company, person, or entity. The term contract employee includes
26 employees of any company, organization, or entity that itself performs work for another business,
27 company, person, or entity. The term contract employee means, but is not limited to, any individual
28 for whom an Internal Revenue Service form 1099, or any variant thereof, must be issued by a
29 business, company, person, or entity receiving the services of such individual.

30 (3) "Employee" means any individual who, under the usual common-law rules applicable
31 in determining the employer-employee relationship, has the status of an employee, or any
32 individual who, under, rules, regulations, or statutes administered by the United States Internal
33 Revenue Service has the status of an employee.

34 (4) "Employment" means that state of affairs where an individual holds the status of having
35 been hired or engaged to provide professional, occupational, or vocational services or work, for

36 remuneration, to any business, company, organization, person, or entity, including a contract
37 employer or third-party employer.

38 (5) "Full-time equivalent employees" means:

39 (A) A number which, if not a whole number shall be rounded to the next higher number,
40 the numerator of which is the total number of hours for which the employer pays wages to included
41 part-time employees and included seasonal employees during the tax year, not exceeding 2080
42 hours for any single employee, and the denominator of which is 2080.

43 (B) For purposes of this definition, seasonal employees and part-time employees shall be
44 converted into full-time equivalent employees if the part-time or seasonal employee is performing
45 job duties at least eight hours per week for at least 30 days during the tax year, without regard to
46 whether the days are consecutive or nonconsecutive. Persons who have worked less than eight
47 hours per week for at least 30 days during the tax year, shall not be included in the count of
48 employees for the purpose of applying the jobs limitation of this section, unless persons are
49 included under the provisions of paragraph (A) of this subdivision.

50 (C) Included part-time employee means an employee or contract employee performing
51 job duties at least eight hours per week, on the average, for at least 30 days during the tax year,
52 without regard to whether the days are consecutive or nonconsecutive. Persons who have worked
53 less than eight hours per week, on the average, or less than 30 days during the tax year, shall
54 not be included in the count of employees for the purpose of applying the jobs limitation of this
55 section, unless persons are included under the provisions of paragraph (E) of this subdivision.

56 (D) Included seasonal employee means an employee or contract employee performing
57 job duties at least eight hours per week, on the average, for at least 30 days during the tax year,
58 without regard to whether the days are consecutive or nonconsecutive. Persons who have worked
59 less than eight hours per week, on the average, or less than 30 days during the tax year, shall
60 not be included in the count of employees for the purpose of applying the jobs limitation of this
61 section, unless persons are included under the provisions of paragraph (E) of this subdivision.

62 (E) For purposes of this definition, any full-time or part-time or seasonal employee, and
63 any full-time or part-time or seasonal contract employee paid less than state or federal minimum
64 wage, depending on which minimum wage provision is applicable, shall be included in the count
65 of employees, or full-time equivalent employees, for the purpose of applying the jobs limitation of
66 this section, notwithstanding the fact that the employee works fewer than eight hours per month.

67 (F) For purposes of determining an eight-hour week on the average, the number of hours
68 worked in each week during which an employee or contract employee worked at least 60 minutes
69 shall be divided by the number of weeks during which an employee or contract employee worked
70 at least 60 minutes, and the result is the eight-hour week on the average used for purposes of
71 this section.

72 (6) “Newly established small business” means a small business that satisfies all of the
73 following conditions:

74 (A) The business entity first obtained a West Virginia business registration certificate less
75 than five tax years prior to the tax year for which any tax credit authorized under this section is
76 claimed;

77 (B) The business entity has not and will not be moving existing jobs into the presumptive
78 new business from any alter ego business, affiliated business, or related business;

79 (C) The business entity must not be an alter ego of, affiliate of, successor to, or related
80 entity to, another taxpayer taxable or previously taxable under any provision of this chapter, or an
81 alter ego of, affiliate of, successor to, or related entity to, another taxpayer, the income or losses
82 of which taxpayer is or was reportable or includable on a tax return filed under any provision of
83 this chapter;

84 (D) The business entity must not have caused employees or contract employees to
85 transfer from existing employment in this state with an any alter ego of, affiliate of, successor to,
86 or related entity to, the business entity;

87 (E) The business entity must not have acquired, purchased, leased, or had transferred to

88 it real property or tangible personal property, if that real property or tangible personal property
89 was previously located in this state and was previously owned or leased, as lessee, by any alter
90 ego of, affiliate of, successor to, or related entity to, the business entity; and

91 (F) The business entity must not be an alter ego of, affiliate of, successor to, or related
92 entity to, a business entity from which it has acquired real or tangible personal property that is
93 located in this state.

94 (G) This subdivision shall not be interpreted to disallow credit otherwise authorized under
95 this section for valid successor entities in accordance with §11-13Y-6 of this code.

96 (7) "Small business" means a small business as defined for purposes of §11-13Q-10 of
97 this code, and determined pursuant to application of the inflation adjustments made from time to
98 time as mandated by §11-13Q-10 of this code, having an aggregate total of fewer than 26
99 employees and contract employees, of which at least 50 percent are West Virginia domiciled,
100 West Virginia residents: *Provided*, That The restrictions set forth in §11-13Q-19(a) of this code do
101 not apply to a small business for purposes of this definition. For purposes of this definition,
102 included part-time and included seasonal employees shall be counted toward the aggregate total
103 of employees and contract employees, based upon a full-time equivalent employee calculation.

104 (8) "Third-party employer" means and includes, but is not limited to, any business,
105 company, organization, person, or entity (hereby designated the "provider business") that
106 provides or performs work for another business, company, organization, person, or entity without
107 establishing an employer-employee relationship between the provider business, company,
108 organization, person, or entity, or its employees, and the recipient business, company,
109 organization, person, or entity (hereby designated the "recipient business"), and means and
110 includes, but is not limited to, any "contract employer," "workforce management organization," or
111 "staffing organization" or any business, company, organization, person, or entity that provides
112 workers for another business, company, organization, person, or entity.

113 (c) *Application of annual credit allowance by a newly-established small business.*

114 (1) Application of credit against corporate net income tax. -- The amount of credit allowed
115 shall first be taken against the tax liabilities of the eligible newly-established small business
116 taxpayer for the current taxable year imposed by §11-24-1 et seq. of this code.

117 (2) Application of credit against personal income tax. – (A) If the newly-established small
118 business is an electing small business corporation (as defined in Section 1361 of the United
119 States Internal Revenue Code of 1986, as amended), a partnership, a limited liability company
120 that is treated as a partnership for federal income tax purposes, or a sole proprietorship, then the
121 credit authorized under this section is allowed as a credit against the taxes imposed by §11-21-1
122 et seq. of this code on the conduit or “pass-through” income of the owners, members, or partners
123 from the newly-established small business, or on income of a sole proprietor attributable to the
124 newly-established small business.

125 (B) Electing small business corporations, limited liability companies, partnerships, and
126 other unincorporated organizations shall allocate the credit allowed by this section among its
127 members in the same manner as profits and losses are allocated for the taxable year.

128 (C) If the amount of taxes due under §11-21-1 et seq. of this code (determined before
129 application of allowable credits against tax) is not solely attributable to and the direct result of
130 conduit income passed through to the personal income tax payer from the eligible newly
131 established small business taxpayer during the tax year of the electing small business
132 corporation, limited liability company, partnership, other unincorporated organization, or sole
133 proprietorship, no credit shall be allowed against taxes due under §11-21-1 et seq. of this code.

134 (D) No credit is allowed under this section against any employer withholding taxes
135 imposed by §11-21-1 et seq. of this code.

136 (d) This section and the provisions of this article shall not be interpreted to authorize
137 application of this credit to reduce the tax liability below zero. This section and the provisions of
138 this article shall not be interpreted in combination with any other provision of this code to authorize
139 application of this credit to reduce the tax liability below zero.

140 (e) Carryover credit disallowed. -- Any credit remaining after application of the credit
141 against the tax liabilities specified in this section for the current taxable year is forfeited and shall
142 not carry back to any prior taxable year and shall not carry forward to any subsequent taxable
143 year. The credit allowed under this section shall be applied after application of all other applicable
144 tax credits allowed for the taxable year against the taxes imposed by §11-24-1 et seq. and §11-
145 21-1 et seq. of this code, and after application of all other applicable tax credits allowed for the
146 taxable year against the taxes imposed by those articles.

147 (f) Annual schedule. -- For purposes of asserting the credit against tax, the taxpayer shall
148 prepare and file an annual schedule showing the amount of tax paid for the taxable year and the
149 amount of credit allowed under this section. The annual schedule shall set forth the information
150 and be in the form prescribed by the Tax Commissioner.

151 (g) Effective date. -- Notwithstanding any other provision of this article, this section shall
152 be effective for corporate net income tax years and personal income tax years beginning on or
153 after January 1, 2018.

ARTICLE 21. PERSONAL INCOME TAX.

§11-21-8. Credits against tax.

1 (a) Business and occupation tax credit. — A credit shall be allowed against the tax
2 imposed by §11-21-3 of this code equal to the amount of the liability of the taxpayer for the taxable
3 year for any tax imposed under §11-13-1 et seq. of this code: *Provided*, That the amount of such
4 business and occupation tax credit shall not exceed the portion of the tax imposed by this article
5 which is attributable to the West Virginia taxable income derived by the taxpayer for the taxable
6 year from the business or occupation with respect to which ~~said~~ the tax under §11-13-1 et seq. of
7 this code was imposed. In case the West Virginia taxable income of a taxpayer includes income
8 from a partnership, estate, trust, or a corporation electing to be taxed under subchapter S of the
9 Internal Revenue Code of 1954, as amended, a part of any tax liability of the partnership, estate,
10 trust, or corporation under §11-13-1 et seq. of this code shall be allowed to the taxpayer, in

11 computing the credit provided for by this section, in an amount proportionate to the income of
12 such partnership, estate, trust, or corporation, which is included in the taxpayer's West Virginia
13 taxable income.

14 For purposes of this section, the tax imposed under §11-13-1 *et seq.* of this code shall be
15 the amount of the liability of the taxpayer for such tax under said that article ~~thirteen~~ computed
16 without reduction for the tax credit for industrial expansion or revitalization allowed for such year.

17 ~~(b) Severance tax credit.—On and after July 1, 1987, a credit shall be allowed against the~~
18 ~~tax imposed by section three of this article equal to the amount of the liability of the taxpayer for~~
19 ~~the taxable year for any tax imposed under article thirteen-a, chapter eleven of this code:~~
20 ~~*Provided,* That the amount of such severance tax credit shall not exceed the portion of the tax~~
21 ~~imposed by this article which is attributable to the West Virginia taxable income derived by the~~
22 ~~taxpayer for the taxable year from the activities with respect to which said tax under article~~
23 ~~thirteen-a was imposed. In case the West Virginia taxable income of a taxpayer includes income~~
24 ~~from a partnership, estate, trust or a corporation electing to be taxed under subchapter S of the~~
25 ~~Internal Revenue Code of 1954, as amended, a part of any tax liability of the partnership, estate,~~
26 ~~trust or corporation under said article thirteen-a shall be allowed to the taxpayer, in computing the~~
27 ~~credit provided for by this section, in an amount proportionate to the income of such partnership,~~
28 ~~estate, trust or corporation, which is included in the taxpayer's West Virginia taxable income.~~

29 ~~(c) Expiration of credit.—The credit authorized in subsection (b) of this section shall expire~~
30 ~~and not be authorized or allowed for any taxable year beginning on or after October 1, 1990~~

31 (b)(1) Tax credit for newly-established small businesses.— In each of the first five tax
32 years of operation of a newly-established small business as defined in §11-13Y-3a of this code,
33 a credit shall be allowed against the tax imposed by this article in an amount calculated and
34 determined so as to result in an effective rate of tax of one percent per annum on the portion of
35 West Virginia taxable income attributable to income derived from such newly-established small
36 business. In case the West Virginia portion of taxable income of the newly-established small

37 business is income from a partnership, estate, trust or a corporation electing to be taxed under
38 subchapter S of the Internal Revenue Code of 1954, as amended, the credit authorized by this
39 subsection shall be the taxpayer's income derived from pass through income from such newly-
40 established small business that is included in the taxpayer's West Virginia taxable income.

41 (2) The credit authorized in this subsection shall expire and not be authorized or allowed
42 for any taxable year beginning after December 31, 2028.

ARTICLE 24. CORPORATION NET INCOME TAX.

§11-24-5a. Tax credit for newly-established small businesses.

1 (a) Tax credit for newly-established small businesses. — In each of the first five tax years
2 of operation of a newly-established small business as defined in §11-13Y-3a of this code, that is
3 taxable under this article, a credit shall be allowed against the tax imposed by this article in an
4 amount calculated and determined so as to result in an effective rate of tax of one percent per
5 annum on West Virginia taxable income. Such credit shall be applied before any other credit
6 allowable against the tax imposed under this article.

7 (b) Unless reauthorized by the West Virginia Legislature, no entitlement to any tax credit
8 under this section may be authorized or created, for tax years beginning on and after January 1,
9 2029.

10 (c) The tax credit authorized by this section for one member of a combined group may not
11 be used, in whole or in part, by another member of the combined group nor applied, in whole or
12 in part, against tax attributable to total income of the combined group, except the separately
13 determined income of the group member so entitled. No part of the credit authorized by this
14 section may be carried over to a subsequent tax year, nor carried back to a prior tax year, nor
15 transferred to any other person or entity.

NOTE: The purpose of this bill is to create a newly-established small business tax credit. It provides tax credits against Corporate Net Income Tax and Personal Income Tax in the amount of certain property taxes paid.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.