

# WEST VIRGINIA LEGISLATURE

## 2023 REGULAR SESSION

Introduced

### Senate Bill 151

By Senators Oliverio, Nelson, Martin, Trump, and

Maroney

[Introduced January 12, 2023; referred  
to the Committee on Finance]

FISCAL  
NOTE

1 A BILL to amend and reenact §11-21-3 of the Code of West Virginia, 1931, as amended; to amend  
 2 said code by adding thereto a new section, designated §11-21-3a; and to amend and  
 3 reenact §11-21-20 of said code, all relating to levying a tax on a pass-through entity's  
 4 income apportioned to West Virginia for pass-through entities that elect to pay West  
 5 Virginia income tax at the entity level; and authorizing a refundable income tax credit for an  
 6 owner for such tax paid.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 16. PERSONAL INCOME TAX.**

**§11-21-3. Imposition of tax; persons subject to tax.**

1 (a) *Imposition of tax.* — A tax determined in accordance with the rates hereinafter set forth  
 2 in this article is hereby imposed for each taxable year on the West Virginia taxable income of every  
 3 individual, estate, electing pass through entity and trust.

4 (b) *Partners and partnerships.* — A partnership or other pass through entity as such shall  
 5 not be subject to tax under this article, unless the partnership or other pass-through entity elects to  
 6 be subject to the tax levied under this section for a taxable year pursuant to §11-21-3a of this code.  
 7 Persons carrying on business as partners or owners of another type of pass-through entity shall be  
 8 liable for tax under this article only in their separate or individual capacities, unless the partnership  
 9 or other pass-through entity elects to be subject to the tax levied under this section for a taxable  
 10 year pursuant to §11-21-3a of this code. However, partnerships and other pass-through entities  
 11 are subject to the tax imposed by this article to the extent they elect to pay additional West Virginia  
 12 income taxes owed that are attributable to final federal partnership audit adjustments under §11-  
 13 21A-3 of this code.

14 (c) *Associations taxable as corporations.* — An association, trust or other unincorporated  
 15 organization which is taxable as a corporation for federal income tax purposes, shall not be subject  
 16 to tax under this article.

17 (d) *Exempt trusts and organizations.* — A trust or other unincorporated organization which

18 by reason of its purposes or activities is exempt from federal income tax shall be exempt from tax  
 19 under this article (regardless of whether subject to federal income tax on unrelated business  
 20 taxable income).

21 (e) *Cross references.* — For definitions of West Virginia taxable income of:

22 (1) Resident individual, see §11-21-11 of this code.

23 (2) Resident estate or trust, see §11-21-18 of this code.

24 (3) Nonresident individual, see §11-21-30 of this code.

25 (4) Nonresident estate or trust, see §11-21-38 of this code.

26 (f) *Effective date.* — This section as amended in 2019 shall apply to taxable years  
 27 beginning on and after January 1, 2018.

**§11-21-3a. Imposition of tax; persons subject to tax.**

1 (a) *Definitions.* As used in this section, the following terms have the following meanings.  
 2 Any term used in this section that is not defined in this section has the same meaning as when  
 3 used elsewhere in this article. Any term undefined in this article has the same meaning as when  
 4 used in a comparable context in the laws of the United States relating to income taxes, in  
 5 accordance with §11-21-9 of this code, unless a different meaning is clearly required.

6 (b) "Electing pass-through entity" means a qualifying pass-through entity that elects to be  
 7 subject to the tax levied under this article for a taxable year.

8 (c) "Owner" means a person that is a partner, member, shareholder, or investor in an  
 9 electing pass-through entity for any portion of the taxable year.

10 (d) "Income" means the sum of owners' distributive shares of the income, gain, expense, or  
 11 loss of an electing pass-through entity for the taxable year, as reported for federal income tax  
 12 purposes.

13 (e) "Tax Commissioner" means the Tax Commissioner of the State of West Virginia or his  
 14 or her delegate, as provided in §11-1-1 of this code.

15 (f) "Pass-through entity" means any partnership or other business entity that is not subject

16 to tax under §11-24-1 et seq. of this code, imposing tax on C corporations or other entities taxable  
17 as a corporation.

18 (g) "Entity" means any person that is not an individual.

19 (h) A pass-through entity that is not a disregarded entity for federal income tax purposes  
20 may elect to be subject to the tax levied under this section by filing with the Tax Commissioner a  
21 form prescribed by the commissioner making such election on or before the deadline to file the  
22 return, as specified in §11-24-51 of this code. Such election applies only to the taxable year for  
23 which the election is made and is, once made, is irrevocable for that year.

24 (i) The rate of tax imposed on an electing pass-through entity that elects to be taxed under  
25 this section shall be equal to the top marginal rate imposed on individuals under §11-21-4e of this  
26 code. The rate of tax shall be imposed on the apportioned net income or apportioned income of an  
27 electing pass-through entity, as reported on its federal income tax return, apportionable to this  
28 state. An electing pass-through entity's taxable income shall be apportioned to this state in  
29 accordance with §11-21-37, §11-21-37a, §11-21-37b, and/or §11-21-37c of this code, as  
30 applicable.

31 (j) The tax levied under this section shall be calculated without regard to any deductions or  
32 credits otherwise permitted to be claimed by an owner or member of the electing pass-through  
33 entity in computing the owner's aggregate tax liability under this article and not utilized by the pass-  
34 through entity in determining its taxable income.

35 (k) With respect to an electing pass-through entity that pays the tax imposed under this  
36 section, the tax shall be treated as a tax imposed on the pass-through entity itself. The tax levied  
37 under this section is intended to comply with the provisions of internal revenue service notice  
38 2020-75 in which such tax paid by an electing pass-through entity is deductible to the entity for  
39 federal income tax purposes.

40 (l) The Tax Commissioner shall adopt rules to administer the tax levied under this section.  
41 Such rules shall include a description of how the adjustments to income and the credit allowed

42 under this section apply to direct or indirect owners of an electing pass-through entity based on  
43 various ownership structures.

44 (m) There is hereby allowed a refundable credit against a taxpayer's aggregate tax liability  
45 under this article for a taxpayer who is an owner of an electing pass-through entity. The credit shall  
46 equal the owner's proportionate share of the tax levied under this article remitted by the owner's  
47 electing pass-through entity for the taxable year. The credit shall be claimed for the taxpayer's  
48 taxable year that includes the last day of the electing pass-through entity's taxable year for which  
49 the tax levied under this section was paid. If the credit exceeds the aggregate amount of tax  
50 otherwise due, the excess shall be refunded to the taxpayer. The Tax Commissioner may request  
51 that a taxpayer claiming a credit under this section furnish information as is necessary to support  
52 the claim for the credit under this section, and no credit shall be allowed unless information  
53 requested from the taxpayer is provided to the Tax Commissioner.

**§11-21-20. Credit for income tax of another state.**

1 (a) General. -- A resident shall be allowed a credit against the tax otherwise due under this  
2 article for any income tax ~~imposed~~ paid to another state of the United States or by the District of  
3 Columbia for the taxable year, either directly paid by the individual or paid by a pass-through entity  
4 in accordance with §11-21-3a of this code and passed through by the entity to the individual  
5 taxpayer, by another state of the United States or by the District of Columbia upon income both  
6 derived therefrom and subject to tax under this article.

7 (b) Limitations. -- (1) The credit under this section shall not exceed the percentage of the  
8 tax otherwise due under this article determined by dividing the portion of the taxpayer's West  
9 Virginia income subject to taxation by such other jurisdiction by the total amount of the taxpayer's  
10 West Virginia income.

11 (2) The credit under this section shall not reduce the tax otherwise due under this article to  
12 an amount less than would have been due if the income subject to taxation by such other  
13 jurisdiction were excluded from the taxpayer's West Virginia income.

14 (c) Exception. -- No credit shall be allowed under this section for a tax of a jurisdiction  
15 which allows residents of this state a credit against the taxes imposed by such other jurisdiction for  
16 the tax under this article, if such other credit is substantially similar to the credit granted by section  
17 forty.

18 (d) Definition. -- For purposes of this section West Virginia income means:

19 (1) The West Virginia adjusted gross income of an individual, or

20 (2) The amount of the income of an estate or trust, determined as if the estate or trust were  
21 an individual computing his or her West Virginia adjusted gross income under section twelve.

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NOTE: The purpose of this bill is to establish allow pass-through entities to elect to be taxed at the entity level and to provide a refundable tax credit to owners or members of an electing pass-through entity on their individual tax returns.

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