

# **WEST VIRGINIA LEGISLATURE**

**2023 REGULAR SESSION**

**Introduced**

## **Senate Bill 442**

By Senators Tarr, Martin, and Oliverio

[Introduced January 23, 2023; referred  
to the Committee on Finance]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto two new  
 2 sections, designated §11-21-12n and §11-21-63, all relating to providing an election for  
 3 pass-through entities to pay income tax at the entity level; setting forth the method of  
 4 claiming the election; defining terms; setting forth a rate of tax; dealing with claims for  
 5 refunds and issuing assessments; dealing with claiming tax credits; providing increasing  
 6 and decreasing modifications for partners and shareholders when the pass-through entity  
 7 elects to pay the tax at the entity level; providing for rulemaking; and setting forth an  
 8 effective date which is retroactive.

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

**ARTICLE 21. PERSONAL INCOME TAX.**

**§11-21-12n. Additional modifications reducing and increasing federal adjusted gross income of partners and shareholders when election is made to pay tax at the pass-through entity level.**

1 (a) When a partnership or S Corporation has elected to the pay the tax imposed by this  
 2 article at the entity level pursuant to §11-21-63 of this code, a partner or shareholder shall subtract  
 3 from his or her federal adjusted gross income to the extent included therein the following items:

4 (1) A taxpayer who is a shareholder of an S corporation that made the election and paid the  
 5 tax under §11-21-63 of this code may deduct from his or her federal adjusted gross income the  
 6 amount of the taxpayer's pro rata share of income from the S corporation to the extent it was  
 7 included in the S corporation's West Virginia taxable income and the taxpayer's federal adjusted  
 8 gross income.

9 (2) A taxpayer who is a partner of a partnership that made the election and paid the tax  
 10 under §11-21-63 of this code may deduct the amount of the taxpayer's distributive share of income  
 11 from the partnership from his or her federal adjusted gross income to the extent it was included in  
 12 the partnership's West Virginia taxable income and the taxpayer's federal adjusted gross income.

13 (b) When a partnership or S Corporation has elected to the pay the tax imposed by this

14 article at the entity level pursuant to §11-21-63 of this code, the partner or shareholder shall add to  
15 his or her federal adjusted gross income unless already included therein the following items:

16 (1) A taxpayer who is a shareholder of an S corporation that made the election and paid the  
17 tax under §11-21-63 of this code must add to his or her federal adjusted gross income the amount  
18 of the taxpayer's pro rata share of loss from the S corporation to the extent it was included in the S  
19 corporation's West Virginia taxable income and the taxpayer's federal adjusted gross income.

20 (2) A taxpayer that is a partner of a partnership that made the election and paid the tax  
21 under §11-21-63 of this code must add to his or her federal adjusted gross income the amount of  
22 the taxpayer's distributive share of loss from the partnership to the extent it was included in the  
23 partnership's West Virginia taxable income and the taxpayer's federal adjusted gross income.

24 (c) The amounts authorized to be subtracted from or added to federal adjusted gross  
25 income under this section shall be in addition to any amounts authorized to be subtracted from or  
26 added to federal adjusted gross income under §11-21-12 of this code or any other provisions of  
27 §11-21-1, et seq. of this code: *Provided*, That the modification must not relate to an item of income,  
28 gain, loss or deduction from a qualifying pass-through entity that made the election and paid the  
29 tax under §11-21-63 of this code.

30 (d) The modifications authorized by this section become effective and are authorized for  
31 taxable years beginning on and after January 1, 2022.

**§11-21-63. Elective payment of income tax on pass-through entities.**

1 (a) For taxable years beginning on and after January 1, 2022, a qualifying pass-through  
2 entity may make an election, in a format and according to such requirements and procedures  
3 established by the Tax Commissioner, to pay the tax levied by this article at the entity level for the  
4 taxable year.

5 (1) A qualifying pass-through entity required to file a return under this article shall make an

6 election for the taxable period covered by such return. The election must be made on or before the  
7 due date for filing the applicable return, including any extensions that have been granted.

8 (2) For the purposes of this section, the term "qualifying pass-through entity" means a  
9 pass-through entity that is 100 percent owned by natural persons or, in the case of a Subchapter S  
10 corporation, 100 percent owned by natural persons eligible to be shareholders in an S corporation.

11 (b) A tax at the rate of 6.5 percent of the West Virginia taxable income of qualifying pass-  
12 through entity that makes the election provided under this section is hereby annually imposed.

13 (1) The West Virginia taxable income of a partnership for which the election is made is  
14 equal to the sum of:

15 (A) Each partner's distributive share of the taxed partnership's income or loss attributable  
16 to West Virginia; and

17 (B) Each resident partner's distributive share of the taxed partnership's income or loss not  
18 attributable to West Virginia.

19 (2) The West Virginia taxable income of a taxed S corporation for which the election is  
20 made shall be equal to the sum of the following:

21 (A) Each shareholder's pro rata shares of the taxed S corporation's income or loss  
22 attributable to West Virginia; and

23 (B) Each resident shareholder's pro rata shares of the taxed S corporation's income or loss  
24 not attributable to West Virginia.

25 (c) A qualifying pass-through entity that elects to pay the tax under this section may be  
26 eligible for credits, deductions, or other adjustments to taxable income provided by any applicable  
27 sections of this code: *Provided*, That a qualifying pass-through entity's taxable income shall be  
28 adjusted to eliminate any federal deduction for state and local income taxes. Any credit or unused  
29 portion of such credit claimed by a qualifying pass-through entity that makes the election under  
30 this section shall not pass through to its partners or shareholders.

31 (d) The full amount of the tax payable as shown on the return of the qualifying pass-through

32 entity must be paid to the state within the time allowed for filing the return. In the case of any  
33 overpayment of the tax imposed under this section only the qualifying pass-through entity may  
34 request a refund of the overpayment. In the case of any underpayment of tax imposed under this  
35 section, the Tax Commissioner may collect the tax from the qualifying pass-through entity  
36 pursuant to W. Va. Code §11-10-1, et seq. of this code.

37 (e) The Commissioner may propose rules required to administer this section, including  
38 emergency rules, in accordance with §29A-3-1, et seq. of this code, regarding the election  
39 provided in this section.

NOTE: The purpose of this bill is to provide an election for pass-through entities to pay income taxes at the entity level rather than pass the income through to individual owners. The bill sets forth the method of claiming the election; defines terms; sets forth a rate of tax; deals with claims for refunds and issuing assessments; deals with claiming tax credits; provides increasing and decreasing modifications for partners and shareholders when the pass-through entity elects to pay the tax at the entity level; provides for rulemaking; and sets forth an effective date which is retroactive.

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