

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

Senate Bill 496

FISCAL
NOTE

By Senators Trump and Weld

[Introduced January 27, 2023; referred
to the Committee on Finance]

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

Be it enacted by the Legislature of West Virginia:

ARTICLE 21. 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. Taxation of pass-through entity.

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 (1) "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 (2) "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 (3) "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 (4) "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 (5) "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 (6) "Entity" means any person that is not an individual.

19 (b) 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 (c) 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 (d) 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 (e) 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 (f) 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 (g) 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
 2 this article for any income tax ~~imposed~~ paid to another state of the United States or by the District
 3 of Columbia for the taxable year, either directly paid by the individual or paid by a pass-through
 4 entity in accordance with §11-21-3a of this code and passed through by the entity to the individual
 5 ~~taxpayer by another state or the United States or 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
 12 to 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 West Virginia adjusted gross income under §11-21-12 of this code.

NOTE: The purpose of this bill is to levying a tax on pass through entity's income apportioned to West Virginia for pass through entities that elect to pay West Virginia income tax at the entity level and authorizing a refundable income tax credit for an owner for such tax 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.