

## CHAPTER 3

### TAX INCENTIVES FOR BUSINESS DEVELOPMENT IN WEST VIRGINIA

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**[Editor’s Note: several of the tax credits discussed in this chapter have been repealed, terminated, or allowed for investments or expenditures made during a limited time frame, e.g., the strategic research and development tax creditsome of these credits may still be claimed by taxpayers, however, and this chapter maintains explanations of those credits.]**

## **¶ 301 ECONOMIC OPPORTUNITY CREDIT**

### **¶ 301.1 Introduction**

*Law: W. Va. Code § 11-13Q -1 et seq.*

The economic opportunity credit was enacted for investment made in periods beginning on or after January 1, 2003, and replaced the business investment and jobs expansion credit. There are various differences between the business investment and jobs expansion credit and the economic opportunity credit. For example, multi-party projects are not permitted under the economic opportunity credit and the number of new jobs required to obtain the credit is 20 under the economic opportunity credit rather than the 50 required under the prior business investment and jobs expansion credit.

There are also several specialized economic opportunity credits that target either specific types of businesses or types of investment. For example, there is an economic opportunity credit for small businesses which requires a lesser number of jobs to be created to be eligible for the credit. The corporate headquarters relocation credit provides an incentive for businesses that move their corporate headquarters from out of state into West Virginia. Beginning in 2008, a high technology economic opportunity credit provides an enhanced incentive to businesses that are engaged in various high technology activities that create new jobs. In 2009, a jobs creation economic opportunity credit was enacted for businesses that meet the requirements of the economic opportunity credit, but fall short of creating the required number of jobs.

### **¶ 301.2 Eligible Taxpayers**

*Law: W. Va. Code §§ 11-13Q-3(b)(9) and 11-13Q-19*

In order to qualify for the economic opportunity credit, the business must make qualified investment in a new or expanded business facility in West Virginia and be engaged in one of the following activities:

- manufacturing
- information processing
- warehousing
- non-retail goods distribution
- qualified research and development
- the relocation of a corporate headquarters
- destination –oriented recreation and tourism



The business must also create at least 20 new jobs within 3 years of its initial investment. In addition, the taxpayer must be subject to the business and occupation tax, the personal income tax, or corporation net income tax.

For years prior to 2009, the term "eligible taxpayer" included members of an affiliated group of taxpayers if the group elected to file a consolidated corporation net income tax return. However, for years beginning on or after January 1, 2009, the filing of a consolidated return is no longer allowed under West Virginia law. Instead of consolidated returns, combined filing for unitary groups is required for tax years beginning on or after January 1, 2009. Currently the definition of "eligible taxpayer" does not specifically include members of a unitary group filing a combined corporation net income tax return.

### **¶ 301.3 Amount of the Credit**

*Law: W. Va. Code § 11-13Q-4*

The amount of the credit is calculated by taking the qualified investment and multiplying it by the applicable jobs percentage. The credit is taken over a period of ten years at the rate of 10% per year.

### **¶ 301.4 Eligible Investment**

*Law: W. Va. Code § 11-13Q-3(b)(20)*

Qualified investment is property constructed, purchased, leased or transferred into West Virginia and placed in service or use as a component of a new or expanded business facility located in the state. A new or expanded business facility is a business facility which is employed by the taxpayer in the conduct of a business; the net income of which is or will be taxable in the future under the personal income tax or the corporation net income tax.

The facility must be purchased by, or leased to, the taxpayer on or after the first day of January 1, 2003, and cannot be purchased or leased by the taxpayer from a related person. The Commissioner may waive this requirement if the facility was acquired from a related party for its fair market value and the acquisition was not tax motivated.

The facility must not be in service or use during the 90 days immediately prior to transfer of the title to the facility, or prior to the commencement of the term of the lease of the facility: This 90-day period may be waived by the Commissioner if the Commissioner determines that persons employed at the facility may be treated as "new employees" because the jobs would be lost due to the facility being sold by the United States bankruptcy court in a liquidation sale, or the owner was insolvent, or the facility was destroyed in whole or in significant part by fire, flood, or other act of God.

A facility is not considered a new business facility in the hands of the taxpayer if the taxpayer's only activity with respect to the facility is to lease it to another person or persons.

The types of property that are eligible for the credit are as follows:

- Real property and improvements with a useful life of four or more years; or
- Real property and improvements thereto, acquired by written lease having a primary term of ten or more years; or
- Tangible personal property placed in service or use by the taxpayer with respect to which depreciation or amortization in lieu of depreciation is allowable in determining the personal or corporation net income tax liability of the business taxpayer, and which has a useful life of four years or more years at the time it is placed in service; or
- Tangible personal property acquired by written lease having a primary term of four years or longer that is used as a component part of a new or expanded business facility; or
- Tangible personal property owned or leased, and used by the taxpayer at a business location outside the state which is moved into the state of West Virginia for use as a component part of a new or expanded business facility. In order to be eligible, the property must be depreciable or amortizable personal property for income tax purposes, and have a useful life of four or more years remaining at the time it is placed in service or use in the state, and if the property is leased, the primary term of the lease remaining at the time the leased property is placed in service or use in the state must be four or more years.

The types of property that are not eligible for the credit are as follows:

- Property owned or leased by the taxpayer for which the taxpayer was previously allowed tax credits;
- Repair costs, including materials used in the repair, unless the cost of the repair must be capitalized for federal income tax purposes, and not expensed.
- Airplanes;
- Property which is used outside of West Virginia, with use determined by the amount of time it is used within and without the state;
- Property which is acquired incident to the purchase of the stock or assets of the seller, unless for good cause shown, the Tax Commissioner consents to waiving this requirement;
- Natural resources in place;

- Purchased or leased property, the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time the property is placed in service or use; and
- Property acquired from one component member of a controlled group from another component member of the same controlled group. This requirement can be waived by the Tax Commissioner if the property was acquired from a related party for its fair market value at the time of acquisition, and the basis of the property is not determined by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired, or under IRC §1014 (e) as in effect on January 1, 2002.

### ¶ 301.5 Qualified Investment

*Law: W. Va. Code § 11-13Q-8*

In order to compute the credit, the amount of qualified investment must be determined. It is determined by taking the cost of the eligible investment and adjusting it by the useful life of the property as follows:

<b>Useful Life of Property</b>	<b>Applicable Percentage</b>
4 years or more but less than 6 years	33 1/3%
6 years or more but less than 8 years	66 2/3%
8 years or more	100%

For example, if a piece of equipment is purchased for \$100,000 and the useful life is six years, then the qualified investment related to this purchase would be \$66,667 (\$100,000 x 66 2/3%).

The useful life of any property is determined as of the date the property is first placed in service or use in this state.

Cost of the investment does not include the value of property given in trade or exchange for the property purchased for business expansion. If property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, then the cost of replacement property does not include any insurance proceeds received in compensation for the loss. Real property acquired by a written lease for a primary term of ten years or more is 100% of the rent reserved for the primary term of the lease, not to exceed twenty years. For tangible personal property, if the written lease is for four years but less than six years, the cost is one third of the rent reserved for the primary term of the lease. If it is six years but less than eight years, the cost is two thirds of the rent reserved for the primary term of the lease. If it is eight years or longer, the cost is 100% of the rent reserved for the primary term of the lease, not to exceed 20 years or the book life of the equipment using straight line depreciation.

In the case of self-constructed property, cost is the amount charged to the capital account for depreciation in accordance with federal income tax law. Transferred property is valued based on the remaining useful life of the property at the time it is placed in service or use in this state, and the cost is the original cost of the property to the taxpayer, less straight line depreciation for the tax years the property was used outside West Virginia. Leased property transferred into the state is valued based on the rent reserved for the remaining primary lease term, not to exceed twenty years or the remaining useful life of the property.

**¶ 301.6 New Jobs Percentage**

*Law: W. Va. Code § 11-13Q-9*

The new jobs percentage is based on the number of jobs created as a result of the qualified investment in a new or expanded business facility in West Virginia. It is applied to the qualified investment in order to determine the credit amount. In order to qualify for the economic opportunity credit, a taxpayer must create at least 20 new jobs. The new jobs credit can be as high as 30% if at least 520 new jobs are created.

<b>New Jobs Created</b>	<b>New Jobs Percentage</b>
520	30%
280	25%
20	20%
15*	10%
10**	10%

\* A taxpayer can earn economic opportunity credit for corporate headquarters relocation by moving its headquarters to West Virginia and creating 10 new West Virginia jobs.

\*\* A taxpayer that meets certain payroll and gross receipts requirements can earn economic opportunity small business credit by creating 10 new jobs.

After January 1, 2022

<b>New Jobs Created</b>	<b>New Jobs Percentage</b>
520	30%
280	25%
20	20%
10	10%

The percentages for the 20-520 new jobs created categories are increased by 5% if the project has qualified investment of \$20,000,000 or more and is constructed using construction labor and mechanics numbering 75 or more employees or equivalent employees, who are paid average wages equal to at least the prevailing wage.

In order to determine the net increase in jobs, the taxpayer’s employment in the State must be determined on a controlled group basis rather than on an individual subsidiary basis.

### **¶ 301.7 “New Employee” Defined**

*Law: W. Va. Code § 11-13Q-3(b)(14)*

In order to qualify as a “new employee” for purposes of the credit, the person must reside in and be domiciled in West Virginia. Except for the exceptions outlined below, the position or job that the employee fills must be a job that did not previously exist in the business prior to the qualified investment being made and placed in service.

There are two situations where a person that fills a position or job that previously existed may be treated as a “new employee.” If the position is saved as a result of the qualified investment being put into use and the Tax Commissioner finds on the basis of information supplied by the taxpayer that: (1) but for the new employer purchasing the assets of a business in bankruptcy under chapter seven or eleven of the United States bankruptcy code and making investment in the business, the assets would have been sold by the United States bankruptcy court in a liquidation sale and the jobs saved would have been lost; or (2) but for the taxpayer making qualified investment in the property, the business would have been closed and the employees located at the facility would have lost their jobs. In order to make this certification, the Tax Commissioner must find that the taxpayer is insolvent as defined in 11 U.S.C. § 101(32) or that the taxpayer’s business facility was destroyed, in whole or in significant part, by fire, flood or other act of God.

### **¶ 301.8 Application of the Credit**

*Law: W. Va. Code § 11-13Q-7*

The economic opportunity tax credit can be used to offset the following taxes in the following order:

- The business and occupation tax
- The corporation income tax
- The personal income tax on flow through business income

In order to be eligible for offset by the economic opportunity credit, the tax must be attributable to the qualified investment made to earn the credit. The amount of tax that is attributable to the qualified investment is determined by applying a payroll apportionment percentage factor to the total tax being offset. The payroll apportionment percentage is calculated by dividing the payroll attributable to the “new jobs” created by the investment over the total payroll of the taxpayer.

The credit can be used to offset up to 80% of the tax attributable to the investment. When the median salary of the new jobs is higher than the statewide average nonfarm payroll wage, the credit is allowed against 100% of the tax attributable to the qualified investment. In order to qualify for the higher offset percentage, the median compensation of the new jobs must be greater than the statewide average nonfarm payroll amount determined annually by the State Tax Commissioner.

For tax years beginning in:	The Statewide Average Nonfarm Payroll Wage is:
2010	\$35,985
2011	\$36,895
2012	\$37,701
2013	\$39,091
2014	\$39,721
2015	\$40,198
2016	\$41,093
2017	\$41,655
2018	\$41,595
2019	\$43,283
2020	\$46,120
2021	\$46,618
2022	\$48,741
2023	\$50,498
2024	\$53,159
2025	\$56,045

#### **¶ 301.9 Carryover of Unused Credit**

*Law: W. Va. Code § 11-13Q-7(h)*

Unused credits may be carried forward from year to year during the initial 10-year period of the credit. After the initial 10-year period, unused credits may only be carried forward for 3 additional years, or years 11 through 13.

#### **¶ 301.10 Certified Projects**

*Law: W. Va. Code § 11-13Q-6*

A business that is making investment over a period of up to three years may apply for project certification from the Tax Commissioner. In order to be considered eligible for project certification, the investment must be made in accordance with a written business facility development plan, and the investment placed in service during the first year would not have been made without the expectation of making the qualified investment placed in service during the second and third years. The request for certification must be made prior to the claiming of any credit related to the project investment.

#### **¶ 301.11 Forfeiture and Redetermination of the Credit**

*Law: W. Va. Code § 11-13Q-11*

If a taxpayer disposes of qualified investment property before its useful life expires, or otherwise ceases to use the property in an eligible business, the remainder of the credit related to that investment is forfeited. The credit already claimed attributable to the disposed investment must be recalculated using the actual useful life. If an excess amount of credit has been previously claimed based on the actual useful life, then a reconciliation schedule must be filed with payment of any additional tax and interest due. If the investment property has been used for less than four years, all credit is forfeited.

Forfeiture and required redetermination of the credit can also occur if the taxpayer either ceases to operate the business facility or fails to maintain the required number of new jobs necessary to claim the credit. If a taxpayer fails to create the minimum number of jobs within the required time period, the entire credit is forfeited

If the number of new jobs is not maintained during any of the years four through ten of the credit, the credit for that particular year is forfeited, but will be reinstated upon attainment of the minimum number of new jobs required for the credit.

If a jobs percentage of 25% - 30% has previously been attained, but the number of new jobs maintained for the year has decreased below the amount required, the credit must be recalculated using the redetermined new jobs percentage related to the number of new jobs actually maintained for the year.

If the business is sold to a successor and the property continues to be used in an eligible activity, then the successor may continue to claim the unused portion of the credit.

### **¶ 301.12 Recapture Tax**

*Law: W. Va. Code § 11-13Q-12*

If a taxpayer does not maintain the required number of jobs for the economic opportunity credit or disposes of qualified investment property prior to its useful life, they will be responsible for a recapture tax.

If the amount of new jobs maintained falls below 20, the recapture tax will be equal to the amount of credit claimed for the current year and all prior years on the qualified investment that was removed from services prematurely. If the amount of new jobs maintained does not fall below 20, but falls below the threshold number that the credit was originally based upon, the recapture tax will be equal to the amount of credit claimed for the current years and all prior years less the amount of credit based on a recalculation using the revised new jobs percentage and revised qualified investment amount that is still in service.

The recapture tax is due and payable on the date the taxpayer's annual personal income tax return or corporation income tax return is due for the year in which the recapture occurs. If the taxpayer is a partnership or S corporation, the recapture tax is paid by the partner, members, or shareholders in the taxable year in which the recapture occurs.

### **¶ 301.13 Recordkeeping Requirements**

*Law: W. Va. Code § 11-13Q-15*

A taxpayer must keep records that provide information on the qualified investment. Information that must be maintained on the qualified investment include its identity, its actual or determined cost, its straight line depreciation life, the date it was placed in

service, the amount of credit taken, and the date the investment was disposed of or otherwise ceased to be qualified.

If these records are not maintained, then the taxpayer is treated as having disposed of any property that it cannot establish was still on hand at the end of the year. Also, if a taxpayer cannot establish when investment property was placed in service, it is treated as being placed in service in the most recent year that similar property was placed in use, unless it can be proved that the property placed in service in the most recent year is still on hand. In that case, the taxpayer will be treated as having placed the property in service in the next most recent year.

### **¶ 301.14 Filing Requirements**

*Law: W. Va. Code § 11-13Q-18*

In order to claim the credit, the taxpayer must apply for the credit by filing an application, Form WV/EOTC-A, no later than the due date for filing either the corporation net income tax return or personal income tax return, including any authorized extension of time for filing the return for the taxable year to which the credit was placed in service or use. Failure to file the application in a timely manner will result in a forfeiture of 50% of the annual credit allowance. The penalty will apply annually until the application is filed.

In addition, a Form WV/EOTC-1 tax credit schedule must be filed with the tax return on which the credit is claimed.

### **¶ 301.15 Economic Opportunity Tax Credit for “Small Business”**

*Law: W. Va. Code § 11-13Q-10*

Special rules apply to economic opportunity tax credits for “small businesses.” A “small business” is a business or a controlled group of affiliated companies with annual gross sales not exceeding \$7,000,000 with adjustment for a cost of living increase each year. The amount of adjusted annual gross sales per year is shown in the chart below:

2003	\$7,000,000	2010	\$8,384,000
2004	\$7,159,600	2011	\$8,507,850
2005	\$7,324,500	2012	\$8,714,300
2006	\$7,552,050	2013	\$8,938,250
2007	\$7,846,850	2014	\$9,089,800
2008	\$8,026,350	2015	\$9,233,450
2009	\$8,368,450	2016	\$9,275,150
2017	\$9,349,750	2018	\$9,535,400
2019	\$9,766,100	2020	\$9,953,650
2021	\$10,096,800		

A “small business” is allowed an economic opportunity credit if it makes eligible investment and creates at least 10 new jobs within twelve months. The amount of credit



allowed is equal to 10% of the taxpayer's qualified investment and is applied in the same manner as the other economic opportunity credits.

### **¶ 301.16 Economic Opportunity Credit for Corporate Headquarters Relocation**

*Law: W. Va. Code § 11-13Q-5*

A company that relocates its corporate headquarters to West Virginia from a location outside of West Virginia may be eligible for the economic opportunity credit for corporate headquarters relocation. In order to be eligible, the company must create at least 15 new West Virginia jobs.

Qualified investment for purposes of the corporate headquarters relocation credit includes both the investment made in the real property and tangible personal property and the reasonable and necessary expenses incurred by the company to achieve the relocation. If the company creates between 15 and 20 new jobs, the economic opportunity credit is equal to 10% of the qualified investment.

The credit is applied in the same manner as the general economic opportunity credit, except for the corporation net income tax. The economic opportunity credit for corporate headquarters relocation can be applied to offset 100% of the corporation net income tax on allocated income and 80% of the corporate net income tax on apportioned income attributable to the investment.

### **¶ 301.17 Economic Opportunity Tax Credit for High Technology Manufacturers**

*Law: W. Va. Code § 11-13Q-10a*

An economic opportunity credit is allowed eligible high technology manufacturing businesses that make qualified investment in a new or expanded high technology manufacturing business in West Virginia that results in the creation of 20 or more new jobs within 12 months of the qualified investment being placed in service and the median compensation of the new jobs is greater than \$68,250 for new jobs created in 2025. This credit became effective January 1, 2008.

A "high technology manufacturing business" must be classified as having one or more of the following North American Industry Classification System codes:

- **Computer and Peripheral Equipment**
  - o 334111 - Electronic Computers
  - o 334112 - Computer Storage Devices
  
- **Electronic Components**
  - o 334411 - Electron Tubes
  - o 334414 - Electronic Capacitors
  
- **Semiconductors**
  - o 334413 - Semiconductor & Related Devices

o 333295 - Semiconductor Machinery

The annual amount of credit allowable under this subsection is 100% of the tax attributable to qualified investment, for each consecutive year of a twenty-year credit period.

The annual credit allowance may offset up to 100% of the tax attributable to the qualified investment each year for 20 consecutive years. This is in contrast to the 80% offset normally allowed for the economic opportunity credit for other businesses.

**Provided, That for tax years beginning on and after January 1, 2022**, the term “high technology manufacturing business” means and is limited to only those businesses engaged in a business enumerated in subdivision (1) or subdivision (2), or both, of this subsection.

(1) “High technology manufacturing business” means a manufacturing activity properly classified as having one or more of the following six-digit North American Industry Classification System code numbers.

North American Industry Classification System Code	Manufacturing Activity
	Computer & Peripheral Equipment
334111	Electronic Computers
334112	Computer Storage Devices
	Electronic Components
334411	Electron Tubes
334414	Electronic Capacitors
	Semiconductors
334413	Semiconductor & Related Devices
333295	Semiconductor Machinery

(2) “High technology manufacturing business” means, in addition to those activities enumerated in subdivision (1) of this subsection:

(A) The activity of manufacturing drones, target drones, unmanned aircraft or unmanned robotic aircraft.

(B) The activity of manufacturing autonomous motor vehicles.

(C) The activity of manufacturing robots, robotic medical machines or equipment or robotic surgical machines or equipment.

(D) The activity of manufacturing machines, equipment and products predominantly operated by and incorporating artificial intelligence.

(E) The activity of manufacturing biotechnology products.

(F) The activity of manufacturing medical devices.

(3) Definitions – For purposes of this section.

(A) *Artificial Intelligence*. — For purposes of this section “artificial intelligence” means computers and computer systems that, by design and function, perform tasks that would typically require human intelligence, including decision-making, visual perception, speech recognition, or translation of one human language into another human language.

(B) *Autonomous*. — For purposes of this section “autonomous” means that set of characteristics of a machine which taken as a whole cause the machine to be capable of performing designated tasks without immediate direct or explicit human control or intervention beyond initial programming and preliminary set up and initiation.

(C) *Autonomous Motor Vehicle*. — For purposes of this section, The term “autonomous motor vehicle” means a motor vehicle that conforms to Level 3, level 4 or level 5 of the Society of Automotive Engineers automation level definitions specified in SAE International Standard J3016.

(D) Biotechnology

(i) “Biotechnology” means scientific invention, processes and methods, or industrial invention, processes and methods, based on the science of biology, microbiology, molecular biology, cellular biology, biochemistry, or biophysics, or any combination thereof. Biotechnology includes, but is not limited to, recombinant DNA techniques, genetics and genetic engineering, cell fusion techniques, and bioprocesses, using living organisms, or parts of organisms.

(ii) Biotechnology does not include farming, agriculture, or animal or apiary husbandry, or the production of any crop or agricultural product by traditional growing processes or by hydroponic growing processes, or fish farming, or the raising or growing or production of fish or any aquatic animal or product.

(iii) Biotechnology does not include zymurgy, wine making, brewing, preparation of yeast used in food production or preparation, or any food or drink preparation or production.

(E) “Biotechnology product” means any virus, therapeutic serum, antibody, protein, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, or analogous product produced through the application of biotechnology that is used in the prevention, treatment, or cure of diseases or injuries to humans, animals, or plants.

(F) *Drone*. – For purposes of this section “drone” means an unmanned aircraft that may be controlled either remotely or by an autonomous system, which may work with internal systemic sensors or ground positioning satellite systems, or both.

(G) “Medical device” means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, that is:

(i) Recognized in the national formulary or any supplement thereof, or the United States pharmacopeia, or any supplement thereof;

(ii) Intended for use in the diagnosis of disease, or in the cure, mitigation, treatment, or prevention of disease or other conditions in human beings or animals; or

(iii) Intended to affect the structure or any function of the body of human beings or animals, and which does not achieve any of its primary intended purposes through

chemical action within or on the body of human beings or animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

(H) *Program*. – For purposes of this section “program” means a set of instructions that can be executed by a computer, or other machine or device to perform calculations, processes or operations, or a combination thereof, to execute a specific task or series of tasks.

(I) *Robot*. – For purposes of this section “robot” means a programmable machine, for which operating instructions are typically derived from computer programming, which machine is: (i) Capable of performing operations and processes involving physical movement; (ii) designed to operate with a degree of autonomy; (iii) capable of processing data and information, including data or information derived from visual perception or other physical perceptions; and (iv) capable of engaging in intelligent behavior derived from artificial intelligence.

The credit can be applied in the following order to the following taxes: business and occupation tax, the corporation net income tax, and the personal income tax. The credit can only be applied to the tax attributable to and the direct consequence of the qualified investment in the new or expanded high technology manufacturing business in this state. The amount of tax that is attributable to the qualified investment is determined by applying a payroll apportionment percentage factor to the total tax being offset. The payroll apportionment percentage is calculated by dividing the payroll attributable to the “new jobs” created by the investment over the total payroll of the taxpayer.

The annual credit allowance must be taken beginning with the taxable year in which the taxpayer places the qualified investment into service or use in this state, unless the taxpayer elects to delay the beginning of the twenty-year credit period until the next succeeding taxable year. This election is made in the annual income tax return filed under this chapter by the taxpayer for the taxable year in which the qualified investment is first placed in service or use. This election cannot be revoked. There is no carryover of the credit.

In order to be considered a new job for purposes of this credit, the job must be filled by a “new employee.” In order to be a “new employee” the person must reside in and be domiciled in West Virginia. Except for the exceptions outlined below, the position or job that the employee fills must be a job that did not previously exist in the business prior to the qualified investment being made and placed in service.

There are two situations where a person that fills a position or job that previously existed may be treated as a “new employee.” If the position is saved as a result of the qualified investment being put into use and the Tax Commissioner finds on the basis of information supplied by the taxpayer that: (1) but for the new employer purchasing the assets of a business in bankruptcy under chapter seven or eleven of the United States bankruptcy code and making investment in the business, the assets would have been sold by the United States bankruptcy court in a liquidation sale and the jobs saved would have been lost; or (2) but for the taxpayer making qualified investment in the property, the

business would have been closed and the employees located at the facility would have lost their jobs. In order to make this certification, the Tax Commissioner must find that the taxpayer is insolvent as defined in 11 U.S.C. §101(32) or that the taxpayer's business facility was destroyed, in whole or in significant part, by fire, flood or other act of God.

Also, the new job must be attributable to the qualified investment. In order to be attributable to the qualified investment, the employee's service must be performed or his or her base of operation must be at the new or expanded business facility. Also, it is necessary that the position did not exist prior to the construction, renovation, expansion or acquisition of the business facility and the making of the qualified investment, and would not have existed, but for the qualified investment being made by the taxpayer.

The median compensation of the new jobs attributable to the qualified investment must be greater than forty-five thousand dollars per year, adjusted for inflation by application of a cost-of-living adjustment annually. The median compensation requirement will be applied each year of the twenty-year credit period. Failure of the taxpayer to meet the median compensation requirement for any particular year will result in forfeiture of the credit for that year. However, if the median compensation requirement is then met in a later year, the taxpayer shall regain entitlement to take the credit for that year. No credit that was forfeited in an earlier year can be taken in a later year.

<b>Year</b>	<b>Median Compensation</b>
2008	\$45,000
2009	\$46,900
2010	\$47,000
2011	\$47,650
2012	\$48,850
2013	\$50,100
2014	\$50,950
2015	\$51,750
2016	\$52,000
2017	\$52,400
2018	\$53,450
2019	\$54,750
2020	\$55,800
2021	\$56,600
2022	\$58,300
2023	\$62,800
2024	\$64,750
2025	\$68,250

The Tax Commissioner may require the taxpayer who intends to claim the high technology manufacturing tax credit to file a notice of intent to claim this credit before the taxpayer begins reducing his or her monthly or quarterly installment payments of estimated tax by the credit.

## ¶ 301.18 Economic Opportunity Tax Credit for Jobs Creation

Law: W. Va. Code § 11-13Q-22

Effective January 1, 2009, an Economic Opportunity Tax Credit for Jobs Creation is available to businesses that fail to meet the jobs creation requirement of the Economic Opportunity Tax Credit, but otherwise meet the requirements of the act.

To be eligible for the credit, the business must be engaged in the activities of manufacturing, warehousing, information processing, goods distribution, destination tourism, or research and development. In order to qualify for the credit, the jobs created must be full time, pay a minimum salary, and offer health benefits. The minimum salary is increased annually by a cost of living adjustment. See table below. The business does not have to raise the wages of employees in jobs upon which the initial credit was based by reason of the cost of living adjustment.

<b>Calendar Year</b>	<b>Minimum Salary</b>
2009	\$32,000
2010	\$32,000
2011	\$32,450
2012	\$33,250
2013	\$34,100
2014	\$34,650
2015	\$35,200
2016	\$35,400
2017	\$35,700
2018	\$36,400
2019	\$37,300
2020	\$37,950
2021	\$38,500
2022	\$39,650
2023	\$42,700
2024	\$44,100
2025	\$46,450

The credit is equal to \$3,000 annually for a period of five years for each new job created. If the business has a net job decrease within the five years that the credit is allowed, counting both the new jobs and preexisting jobs, then the credit must be reduced by \$3,000 for each net job lost.

The credit is applied in order to the business and occupation tax, corporation net income tax, and the personal income tax in the same manner as the economic opportunity credit. The credit may only offset tax attributable to the taxpayer's operation in West Virginia. There is no carryforward or carryback of excess credit.

The credit may be taken in addition to the business investment and jobs expansion credit, industrial expansion and revitalization credit, coal loading facilities credit, credit for

reducing electric and natural gas utility rates for low income residential customers, tax credit for reducing telephone utility rates for certain low-income residential customers, neighborhood investment tax credit, strategic research and development tax credit, and the manufacturing investment tax credit.

## **¶ 302 MANUFACTURING INVESTMENT CREDIT**

### **¶ 302.1 Introduction**

*Law: W. Va. Code § 11-13S-2*

The manufacturing investment credit was enacted to encourage the establishment of new industrial facilities and the revitalization of existing industrial facilities in West Virginia. It applies to investment made on or after January 1, 2003.

### **¶ 302.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13S-3*

In order to claim the manufacturing investment credit, the taxpayer must make qualified investments in an industrial facility that is used in manufacturing. Manufacturing means any business activity classified under the North American Industry Classification System as having a sector identifier consisting of the first two digits of 31, 32, or 33 of the 6-digit sector identifier or the 6-digit code number 211112 (business of recovering liquid hydrocarbons from natural gas).

An additional requirement must be met by taxpayers who are engaged in the business of recovering liquid hydrocarbons from natural gas (NAICS 21112) that undertake to build a credit qualifying facility costing \$500,000 or more. In that instance, the taxpayer must hire at least 75% of the workers building the facility either from West Virginia or from counties at least a portion of which is within fifty miles of the West Virginia border. This requirement can be waived by the West Virginia Tax Commissioner if the taxpayer's efforts to comply are unsuccessful.

### **¶ 302.3 Eligible Investment**

*Law: W. Va. Code § 11-13S-3(b)(7)*

In order to qualify for the Manufacturing Investment Credit, the purchases must be "property purchased for manufacturing investment." "Property purchased for manufacturing investment" includes real property, and improvements thereto, and tangible personal property, if the property was constructed, or purchased, for use as a component part of a new, expanded or revitalized industrial facility.

Only tangible personal property with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the federal income tax liability of the industrial taxpayer and that has a useful life, at the time the property is placed in service or use in this state, of four years or more, is eligible for the credit. Property acquired by written lease, for a primary term of 10 years or longer, if used as a component part of a

new or expanded industrial facility, is also considered to be “property purchased for manufacturing investment.”

"Property purchased for manufacturing investment" does not include the following:

- Repair costs including materials used in the repair, unless for federal income tax purposes, the cost of the repair must be capitalized and not expensed;
- Motor vehicles licensed by the Department of Motor Vehicles;
- Airplanes;
- Off-premises transportation equipment;
- Property which is primarily used outside this state; and
- Property which is acquired incident to the purchase of the stock or assets of an industrial taxpayer, which property was or had been used by the seller in his or her industrial business in this state, or in which investment was previously the basis of a credit against tax taken under any other article of this chapter.
- Purchases or acquisitions of land or depreciable property qualify as purchases of property purchased for manufacturing investment for purposes of this article only if the following are true:
  - The property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under IRC § 267 or §707(b);
  - The property is not acquired from a related person or by one component member of a controlled group from another component member of the same controlled group. The Tax Commissioner may waive this requirement if the property was acquired from a related party for its then fair market value; and
  - The basis of the property for federal income tax purposes, in the hands of the person acquiring it, is not determined, in whole or in part, by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired; or under IRC § 1014(e).

#### **¶ 302.4 Amount of the Credit**

*Law: W. Va. Code § 11-13S-4*

(a) Credit allowed. — There is allowed to eligible taxpayers and to persons described in subdivision (4), subsection (b) of this section a credit against the taxes imposed by §11-13A-1 et seq., and §11-24-1 et seq. of this code: Provided, That a tax credit for any eligible taxpayer operating a business activity classified as having a sector identifier,



consisting of the six digit code number 211112 such eligible taxpayer must comply with the provisions of subsection (e) of this section for all construction related thereto in order to be eligible for any credit under this article. The amount of credit shall be determined as hereinafter provided in this section.

(b) Amount of credit allowable. — The amount of allowable credit under this article is equal to five percent of the qualified manufacturing investment (as determined in section five of this article): Provided, That the amount of allowable credit under this article is equal to 50 percent of the qualified manufacturing investment (as determined in §11-13S-5. of this code) for any eligible taxpayer operating a business that is or may be classified as having a sector identifier, consisting of the six-digit code number 332986 or 332994, as defined on January 1, 2021. This credit shall reduce the severance tax, imposed under §11-13A-1 et seq. of this code and the corporation net income tax imposed under §11-24-1 et seq. of this code, in that order, subject to the following conditions and limitations:

- The amount of credit allowable is applied over a 10-year period, at the rate of one-tenth thereof per taxable year, beginning with the taxable year in which the property purchased for manufacturing investment is first placed in service or use in this state;
- Severance tax. — The credit is applied to reduce the severance tax imposed under §11-13A-1 et seq. of this code (determined before application of the credit allowed by §11-12B-3 of this code and before any other allowable credits against tax and before application of the annual exemption allowed by §11-13A-10 of this code). The amount of annual credit allowed may not reduce the severance tax, imposed under §11-13A-1 et seq. of this code, below 50 percent of the amount which would be imposed for such taxable year in the absence of this credit against tax: Provided, That for tax years beginning on and after January 1, 2009, the amount of annual credit allowed may not reduce the severance tax, imposed under §11-13A-1 et seq. of this code, below 40 percent of the amount which would be imposed for such taxable year in the absence of this credit against tax. When in any taxable year the taxpayer is entitled to claim credit under this article and §11-13D-1 et seq. of this code, the total amount of all credits allowable for the taxable year may not reduce the amount of the severance tax, imposed under §11-13A-1 et seq. of this code, below 50 percent of the amount which would be imposed for such taxable year (determined before application of the credit allowed by §11-12B-3 of this code and before any other allowable credits against tax and before application of the annual exemption allowed by §11-13A-10 of this code): Provided, however, That when in any taxable year beginning on and after January 1, 2009, the taxpayer is entitled to claim credit under this article and §11-13D-1 et seq. of this code, the total amount of all credits allowable for the taxable year may not reduce the amount of the severance tax imposed under §11-13A-1 et seq. of this code, below 40 percent of the amount which would be imposed for such taxable year as determined before application of the credit allowed by §11-12B-3 of this code and before any other allowable credits against tax and before application of the annual exemption allowed by §11-13A-10 of this code;

- Corporation net income tax. After application of subdivision (2) of this subsection, any unused credit is next applied to reduce the corporation net income tax imposed under §11-24-1 et seq. of this code (determined before application of any other allowable credits against tax). The amount of annual credit allowed will not reduce corporation net income tax, imposed under §11-24-1 et seq. of this code, below 50 percent of the amount which would be imposed for such taxable year in the absence of this credit against tax: Provided, That for tax years beginning on and after January 1, 2009, the amount of annual credit allowed will not reduce corporation net income tax, imposed under §11-24-1 et seq. of this code, below 40 percent of the amount which would be imposed for such taxable year in the absence of this credit against tax. When in any taxable year the taxpayer is entitled to claim credit under this article and §11-13D-1 et seq. of this code, the total amount of all credits allowable for the taxable year may not reduce the amount of the corporation net income tax, imposed under §11-24-1 et seq. of this code, below 50 percent of the amount which would be imposed for the taxable year (determined before application of any other allowable credits against tax): Provided, however, That when in any taxable year beginning on and after January 1, 2009, the taxpayer is entitled to claim credit under this article and §11-13D-1 et seq. of this code, the total amount of all credits allowable for the taxable year may not reduce the amount of the corporation net income tax, imposed under article §11-24-1 et seq. of this code, below 40 percent of the amount which would be imposed for the taxable year as determined before application of any other allowable credits against tax;
- Pass-through entities. (A) If the eligible taxpayer is a limited liability company, small business corporation or a partnership, then any unused credit (after application of subdivisions (2) and (3) of this subsection) is allowed as a credit against the taxes imposed by §11-24-1 et seq. of this code on owners of the eligible taxpayer on the conduit income directly derived from the eligible taxpayer by its owners. Only those portions of the tax imposed by §11-24-1 et seq. of this code that are imposed on income directly derived by the owner from the eligible taxpayer are subject to offset by this credit.

(c) The amount of annual credit allowed will not reduce corporation net income tax, imposed under §11-24-1 et seq. of this code, below 50 percent of the amount which would be imposed on the conduit income directly derived from the eligible taxpayer by each owner for such taxable year in the absence of this credit against the taxes (determined before application of any other allowable credits against tax): Provided, That for tax years beginning on and after January 1, 2009, the amount of annual credit allowed will not reduce corporation net income tax, imposed under §11-24-1 et seq. of this code, below 40 percent of the amount which would be imposed on the conduit income directly derived from the eligible taxpayer by each owner for such taxable year in the absence of this credit against the taxes as determined before application of any other allowable credits against tax.

(d) When in any taxable year the taxpayer is entitled to claim credit under this article and §11-13D-1 et seq. of this code, the total amount of all credits allowable for the taxable

year will not reduce the corporation net income tax imposed on the conduit income directly derived from the eligible taxpayer by each owner below 50 percent of the amount that would be imposed for such taxable year on the conduit income (determined before application of any other allowable credits against tax): Provided, That when in any taxable year beginning on and after January 1, 2009, the taxpayer is entitled to claim credit under this article and §11-13D-1 et seq. of this code, the total amount of all credits allowable for the taxable year will not reduce the corporation net income tax imposed on the conduit income directly derived from the eligible taxpayer by each owner below 40 percent of the amount that would be imposed for such taxable year on the conduit income as determined before application of any other allowable credits against tax;

(e) Small business corporations, limited liability companies, partnerships and other unincorporated organizations shall allocate any unused credit after application of subdivisions (2) and (3) of this subsection among their members in the same manner as profits and losses are allocated for the taxable year; and

(f) No credit is allowed under this article against any tax imposed by §11-21-1 et seq. of this code.

(g) No carryover to a subsequent taxable year or carryback to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance. Any unused credit is forfeited.

**Application for credit required. —**

- Application required. — Notwithstanding any provision of this article to the contrary, no credit is allowed or may be applied under this article for any qualified investment property placed in service or use until the person claiming the credit makes written application to the Tax Commissioner for allowance of credit as provided in this section. This application shall be in the form prescribed by the Tax Commissioner and shall provide the number and type of jobs created, if any, by the manufacturing investment, the average wage rates and benefits paid to employees filling the new jobs and any other information the Tax Commissioner may require. This application shall be filed with the Tax Commissioner no later than the last day for filing the annual return, determined by including any authorized extension of time for filing the return, required under §11-21-1 et seq. or §11-24-1-1 et seq. of this code for the taxable year in which the property to which the credit relates is placed in service or use.
- Failure to file. — The failure to timely apply the application for credit under this section results in forfeiture of 50 percent of the annual credit allowance otherwise allowable under this article. This penalty applies annually until the application is filed.
- Any person or entity undertaking any construction related to any business activity included within North American Industrial Code six-digit code number 211112, the value of which is an amount equal to or greater than \$500,000, shall hire at least 75 percent of employees for said construction from the local labor market, to be rounded off, with at least two employees from outside the local labor market permissible for each employer per project, “the local labor market” being defined

as every county in West Virginia and any county outside of West Virginia if any portion of that county is within 50 miles of the border of West Virginia.

- Any person or entity unable to employ the minimum number of employees from the local labor market shall inform the nearest office of the Bureau of Employment Programs' division of employment services of the number of qualified employees needed and provide a job description of the positions to be filled.
- If, within three business days following the placing of a job order, the division is unable to refer any qualified job applicants to the person or entity engaged in said construction or refers less qualified job applicants than the number requested, then the division shall issue a waiver to the person or entity engaged in said construction stating the unavailability of applicants and shall permit the person or entity engaged in said construction to fill any positions covered by the waiver from outside the local labor market. The waiver shall be either oral or in writing and shall be issued within the prescribed three days. A waiver certificate shall be sent to the person or entity engaged in said construction for its permanent project records.

### ¶ 302.5 Qualified Investment

*Law: W. Va. Code § 11-13S-5*

The qualified manufacturing investment is the cost of the property purchased for manufacturing investment, adjusted for the useful life of the property. The investment is adjusted for the useful life of the property as follows:

<b>Useful Life of Property</b>	<b>Applicable Percentage</b>
4 years or more but less than 6 years	33 1/3%
6 years or more but less than 8 years	66 2/3%
8 years or more	100%

The cost of property does not include the value of property given in trade or exchange for property purchased for manufacturing investment. It also does not include insurance proceeds received in compensation for the loss of property damaged or destroyed by fire, flood, storm or other casualty, or stolen. The cost of rental property that is leased for a primary term of 10 years or longer is 100% of the rent reserved for the primary term of the lease, not to exceed 20 years. The cost of self-constructed property shall be the amount properly charged to the capital account for purposes of depreciation. If property is purchased for multiple uses, the cost is apportioned between the eligible use and the non-eligible use, and the amount apportioned to the manufacturing business is treated as a qualified manufacturing investment.

### ¶ 302.6 Application of the Credit

*Law: W. Va. Code § 11-13S-4*

The manufacturing investment credit can be used to offset up to 60% of the severance tax, and corporation net income tax in that order. If the entity that is claiming the credit is also claiming the industrial expansion and revitalization credit, the sum of the two credits may not offset more than 50% of the total severance, or corporation net income tax.

If the eligible entity is a limited liability company, small business corporation or a partnership, any unused credit, after application to severance tax, and corporation net income tax, is allowed as a credit against the corporation net income tax on owners of the eligible taxpayer on conduit income directly derived from the eligible taxpayer by its owners. Personal income tax is not eligible for offset by the credit. Unused credit is forfeited and cannot be carried forward or backward.

### **¶ 302.7 Forfeiture and Redetermination of Credits**

*Law: W. Va. Code § 11-13S-6*

If property for which the credit was allowed ceases to be used in an industrial facility, the unused portion of the credit derived from that property for that year and future years is forfeited. Also, in the event of such cessation of use or disposition, the credits taken in prior years are to be redetermined with the useful life of the property to be considered the period for which it was actually used. The percentage of the cost of the property which is an eligible investment is then redetermined accordingly. Any additional tax, interest and penalties owed should be filed together with a reconciliation statement.

A cessation due to a casualty loss of the eligible investment will not cause a redetermination of the credit for prior years although the credit is forfeited for that year and future years. Cessations for other reasons such as those resulting from labor disputes or lack of market are not similarly exempted. It is unclear how permanent a cessation must be before a redetermination of the credit is required. Presumably a temporary shutdown of business which is not a permanent abandonment of the use of the facility would not cause a redetermination of the credit. A sale to a purchaser who continues to operate the facility is not a disposition causing a redetermination of the credit. In the event of a transfer to a successor, the successor may take the remaining available credit.

### **¶ 302.8 Filing for the Credit**

*Law: W. Va. Code § 11-13S-4(d)(1)*

In order to claim the credit, the taxpayer must file a written application (Form WV/MITC-A) on or before the last day for filing the annual return, determined by including any authorized extension of time for filing the return for the taxable year in which the property to which the credit relates is placed in service or use. Failure to file the application for credit will result in forfeiture of the 50% of the annual credit allowance until the application is filed.

The taxpayer must also file a Schedule MITC-1 Credit for Manufacturing Investment with the tax return on which they claim the credit.

## **¶ 303 MANUFACTURING PROPERTY TAX CREDIT ADJUSTMENT**

### **¶ 303.1 Introduction**

*Law: W. Va. Code § 11-13Y-1*

Effective January 1, 2009, the Manufacturing Property Tax Adjustment Act was enacted to provide a credit against corporate income tax for property tax paid during the tax year on manufacturing inventory.

### **¶ 303.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13Y-2(b)(5) and (6)*

In order to be eligible for the credit, the taxpayer must be engaged in a business that is classified under the North American Industry Classification System (NAICS) codes as having a 31, 32, or 33 as the first two digits of its sector identifier. The taxpayer must be subject to West Virginia corporation net income tax and have paid property tax on manufacturing inventory in a West Virginia county. Taxpayers owning property assessed by the Board of Public Works are not eligible taxpayers for this credit.

Members of an affiliated group of taxpayers engaged in a unitary business in which one of the group members s subject corporation net income tax are eligible for this credit.

### **¶ 303.3 Amount of the Credit**

*Law: W. Va. Code § 11-13Y-4(b)*

The amount of the credit is equal to the property tax paid during the tax year on manufacturing inventory.

### **¶ 303.4 Application of the Credit**

*Law: W. Va. Code § 11-13Y-5*

The credit is applied corporation net income tax credit. Any excess credit is forfeited and cannot be carried forward or backward.

**¶ 303.5 Filing for the Credit**

*Law: W. Va. Code § 11-13Y-5(d)*

The taxpayer must prepare and file an annual schedule as required by the Tax Department with corporation net income tax returns in order to claim the credit.

**¶ 304 INDUSTRIAL EXPANSION AND REVITALIZATION CREDIT FOR ELECTRIC POWER PRODUCERS**

**¶ 304.1 Introduction**

*Law: W. Va. Code § 11-13D-10*

This credit is the vestige of the earlier industrial expansion and revitalization credit that was repealed for other types of taxpayers. The current credit only applies to electric power producers as described in West Virginia Code §11-13-2o on or after January 1, 2003.

**¶ 304.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13D-10*

Persons engaging or continuing within this State in the business of generating or producing electricity for sale, profit or commercial use, either directly or indirectly through the activity of others, in whole or in part, or in the business of selling electricity to consumers, or in both that make eligible investment in an electric power generation facility located in West Virginia are eligible for the credit.

**¶ 304.3 Eligible Investment**

*Law: W. Va. Code §§ 11-13D-2(b)(1), 11-13D-2(b)(4), 11-13D-2(b)(5), 11-13D-2(b)(13) and 11-13D-4*

An eligible investment is an investment for expansion or revitalization of an "industrial facility" in this State made by an electric power producer. An industrial facility is broadly defined as almost any real or tangible personal property located within this State used in an "industrial business." The eligible investment is the cost of the property acquired or constructed, adjusted for the useful life of the property. The eligible investment is adjusted for the useful life of the property as follows:

<b>Useful Life of Property</b>	<b>Applicable Percentage</b>
4 years or more but less than 6 years	33 1/3%
6 years or more but less than 8 years	66 2/3%
8 years or more	100%

Tangible personal property purchased to modernize buildings and equipment is an eligible investment if the property is capitalized for federal income tax purposes. If property is partly used in the expansion or revitalization of a business and is partly used for some non-qualifying purpose, the cost of the property is to be allocated in order to determine the eligible investment.

The cost of property acquired for industrial expansion or revitalization does not include credit given for trade-ins or insurance proceeds which are used to acquire replacement property. Property for which a credit was allowed which is acquired as a result of the acquisition of the assets or stock of a business does not qualify for the credit. However, property which was not previously used in this State and which was purchased as part of the acquisition of a business may be eligible for the credit. Property which is leased as part of an industrial expansion or revitalization is deemed to be an eligible investment if the lease is for a term of 10 years or longer, not including renewal periods. The cost of the leased property is considered to be the rentals that are to be paid over the primary term of the lease not to exceed 20 years.

#### **¶ 304.4 Amount of the Credit**

*Law: W. Va. Code § 11-13D-3(e)*

The amount of the credit is 10% of the eligible investment. One-tenth of the credit is taken each year for ten consecutive years beginning with the year in which the property is first placed in service or use in this State.

#### **¶ 304.5 Application of the Credit**

*Law: W. Va. Code §§ 11-13D-3 and 11-13D-3a*

The credit may be applied against the taxpayer's liability for the business and occupation tax, the sales and service tax, the use tax and the severance tax. This credit cannot reduce the sum of the taxes against which the credit may be taken below 50%. If the credit cannot be used in any one year because of these limitations, it is forfeited.

#### **¶ 304.6 Forfeiture and Redetermination of the Credit**

*Law: W. Va. Code §§ 11-13D-6 and 11-13D-7*

If property for which the credit was allowed ceases to be used in an electricity generation business, the unused portion of the credit derived from that property for that year and future years is forfeited. Also, in the event of such cessation of use or disposition, the credits taken in prior years are to be redetermined with the useful life of the property to be considered the period for which it was actually used. The percentage of the cost of the property which is an eligible investment is then redetermined accordingly.

Example: 100% of the cost of land acquired for an industrial site would be an eligible investment since the land would have a useful life of more than eight years. If the business conducted at the site was permanently shut down after five years, the useful life of the property would be considered to be five years and the allowable credit would be redetermined for all prior years, considering only one-third of the cost of the land as an eligible investment.

A cessation due to a casualty loss of the eligible investment will not cause a redetermination of the credit for prior years although the credit is forfeited for that year



and future years. Cessations for other reasons such as those resulting from labor disputes or lack of market are not similarly exempted. It is unclear how permanent a cessation must be before a redetermination of the credit is required. Presumably a temporary shutdown of business which is not a permanent abandonment of the use of the facility would not cause a redetermination of the credit. A sale to one who continues to operate the facility is not a disposition causing a redetermination of the credit. In the event of a transfer to a successor, the successor may take the remaining available credit.

### **¶ 304.7 Example of the Industrial Expansion and Revitalization Credit for Electric Power Producers**

A power company invests \$300,000,000 in scrubbers for its existing power generation plant. Only nine new jobs are created by the investment so it does not qualify for the economic opportunity credit, but it will qualify for the industrial expansion and revitalization credit.

The economic useful life of the scrubbers is greater than eight years so 100% of the cost of the equipment is an eligible investment. The credit is 10% of the total eligible investment. The total available credit is \$30,000,000. This credit is spread over 10 years so that there is a \$3,000,000 credit for each of the ten successive years commencing with the year in which the property is placed into service.

## **¶ 305 COAL LOADING FACILITY CREDIT**

### **¶ 305.1 Introduction**

*Law: W. Va. Code § 11-13E-1 et seq.*

An investment in a coal loading facility was not generally covered by the industrial expansion and revitalization credit due to the limitation on the type of business which was eligible for that credit. Consequently, a separate coal loading facilities credit was enacted.

### **¶ 305.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13E-2(h)(2)*

Any taxpayer subject to the business and occupation tax, or the severance tax is eligible to take the coal loading facility credit.

### **¶ 305.3 Eligible Investment**

*Law: W. Va. Code §§ 11-13E-2(b)(1), 11-13E-2(b)(2), 11-13E-2(b)(4) and 11-13E-4*

Property purchased for the purpose of building, expanding or revitalizing a "coal loading facility" in this State is an investment eligible for the credit. A coal loading facility includes real and personal property used solely for the purpose of transferring coal from a coal preparation facility, from a coal storage facility or from *any* means of transportation to rail or barge transportation. It should be noted that only a coal tipple used to load railroad cars or river barges will qualify for this credit and any other type of coal tipple

used, such as a truck tipple, will not be eligible. An investment in a coal loading facility does not include the cost of a coal preparation plant, or coal blending or sizing equipment. It does, however, include such items as conveyors, coal storage facilities, weighing equipment and railroad track, provided such items are directly associated with and used solely for the loading of coal. Therefore, land purchased to be used for the storage of coal in conjunction with a coal tipple will qualify for this credit as well as the cost of laying track to the tipple or the cost of constructing a dock for barges to be loaded from a coal tipple.

The cost of property purchased for the coal loading facility is adjusted for its useful life according to the following schedule:

<b>Useful Life of Property</b>	<b>Applicable Percentage</b>
4 years or more but less than 6 years	33 1/3%
6 years or more but less than 8 years	66 2/3%
8 years or more	100%

If property is partly used in a coal loading facility business and is partly used for some non-qualifying purpose, the cost of the property is to be allocated in order to determine the qualified investment. However, there is no procedure set forth for determining how such allocation is to be made. The cost of property acquired for the coal loading facility does not include credit given for trade-ins or insurance proceeds which are used to acquire replacement property.

Property which was previously used to compute any credit described in this chapter, which is acquired as a result of the acquisition of the assets or stock of a business, cannot be used to qualify for the coal loading credit. However, property which was not previously used in this State and which was purchased as part of the acquisition of a business may be eligible for the credit. Property which is leased as part of a coal loading facility is deemed to be an eligible investment if the lease is for a term of 10 years or longer, not including renewal periods. The cost of the leased property is considered to be the rentals that are to be paid over the primary term of the lease not to exceed 20 years.

**¶ 305.4 Amount of the Credit**

*Law: W. Va. Code §§ 11-13E-3(c) and 11-13E-3(d)*

The amount of the coal loading facility credit is 10% of the "eligible investment." One-tenth of the credit is taken each year for ten consecutive years beginning with the year in which the facility is first placed in service or use in this State. If the investment in the coal loading facility has been used to compute any other credit described in this chapter, it cannot be used to qualify for the coal loading facility credit.

**¶ 305.5 Application of the Credit**

*Law: W. Va. Code § 11-13E-3(d)*

The credit may be applied against the taxpayer's liability for the business and occupation tax, and the severance tax. The credit cannot reduce the sum of the taxes

against which the credit may be taken below 50%. If the credit cannot be used in any one year because of these limitations, it is forfeited.

### **¶ 305.6 Forfeiture and Redetermination of the Credit**

*Law:* W. Va. Code §§ 11-13E-5 and 11-13E-6

If property for which the credit was allowed ceases to be used in a coal loading facility, the unused credits derived from that property for that year and future years are forfeited. Also, in the event of such cessation of use or disposition, the credits taken in prior years are to be redetermined considering the useful life of the property to be the period for which it was actually used. The percentage of the cost of the property which is an eligible investment is redetermined accordingly. A cessation due to a casualty loss of the eligible investment will not cause a redetermination of the credit for prior years although the credit is forfeited for that year and future years. Cessations for other reasons such as economic decline are not similarly exempted. A sale to one who continues to operate the property as a coal loading facility is not a disposition causing a redetermination of the credit. In the event of a transfer to a successor, the successor may take the remaining available credit.

## **¶ 306 STRATEGIC RESEARCH AND DEVELOPMENT TAX CREDIT**

### **¶ 306.1 Introduction**

*Law:* W. Va. Code § 11-13R-2

The strategic research and development tax credit was enacted to encourage research and development in West Virginia in order to promote economic development and increase employment.

*Credit termination.* This credit terminated on January 1, 2014 and no credit is available to any taxpayer for any qualified investment or expenditure made on or after that date. Taxpayers that have gained entitlement to the credit for investment made prior to January 1, 2014 will be able to apply the credit that they have earned within the guidelines of the credit.

### **¶ 306.2 Eligible Taxpayers**

*Law:* W. Va. Code § 11-13R-3(b)(6)

A credit is available to any taxpayer who purchases property or services for the purpose of conducting qualified research and development activities prior to January 1, 2014.

### **¶ 306.3 Qualified Research and Development Activities**

*Law:* W. Va. Code § 11-13R-3(b)(10)

Qualified research and development activities mean systematic scientific, engineering or technological study and investigation in a field of knowledge in the physical, computer or software sciences, often involving the formulation of hypotheses and experimentation,

for the purpose of revealing new facts, theories or principles, or increasing scientific knowledge, which may reveal the basis for new or enhanced products, equipment or manufacturing processes.

Research and development includes, but is not limited to, design, refinement and testing of prototypes of new or improved products, or equipment, or design, refinement and testing of manufacturing processes before commercial sales relating thereto have begun. Commercial sales include, but are not limited to, sales of prototypes or sales for market testing.

Research and development does not include: market research; sales research; efficiency surveys; consumer surveys; product market testing; product testing by product consumers or through consumer surveys for evaluation of consumer product performance or consumer product usability; the ordinary testing or inspection of materials or products for quality control (quality control testing); management studies; advertising; promotions; the acquisition of another's patent, model, production or process or investigation or evaluation of the value or investment potential related thereto; research in connection with literary, historical or similar activities; research in the social sciences, economics, humanities or psychology and other non-technical activities; and the providing of sales services or any other service, whether technical service or non-technical service.

#### **¶ 306.4 Eligible Investment**

*Law: W. Va. Code § 11-13R-4*

The annual combined qualified research and development expenditure is the sum of the applicable percentage of the cost of depreciable property purchased for the conduct of a qualified research and development activity, which is placed in service or use in this State during the taxable year, plus the amount of qualified research and development expenses deducted by the eligible taxpayer, for federal income tax purposes for the taxable year. No credit may be claimed for investment made on or after January 1, 2014.

Qualified research and development credit property means depreciable property purchased for the conduct of qualified research and development. The amount of qualified investment property research and development property is determined by adjusting the cost of the property by a percentage based on the useful life of the property.

<b>Useful Life of Property</b>	<b>Applicable Percentage</b>
4 years or more but less than 6 years	33 1/3%
6 years or more but less than 8 years	66 2/3%
8 years or more	100%

Qualified research and development expenses means the sum of in-house and contract research and development expenses for qualified research and development allocated to West Virginia, which are paid or incurred by the eligible taxpayer during the taxable year. Ineligible expenses include any expenses that must be capitalized and depreciated for federal tax purposes, and any expenses related to the ascertaining the

existence, location, extent or quality of any deposit of coal, limestone, oil and gas, or other natural resource. In addition, wage and salary expense reported on a Form W-2 for federal income tax purposes on which the West Virginia personal income tax is imposed and against which the strategic research and development credit is applied are also ineligible.

In house research and development expenses include wages paid or incurred to an employee for qualified services performed in this State by the employee; amounts paid or incurred for supplies used in the conduct of qualified research in this State; and amounts paid or incurred to another person for the right to use personal property in the conduct of qualified research and development in this State.

Contract research and development expenses include 65% of any amount paid or incurred by the taxpayer to any person for qualified research and development. It does not include amounts paid to employees. The expenses are treated as paid or incurred during the taxable year during which the research is conducted, not the year they are paid.

Contract research and development expenses also include 65% of the amounts paid to colleges, universities, and nonprofit organizations exempt from federal income taxes, which are organized and operated primarily to conduct scientific research, and are not a private foundation for federal income tax purposes.

Property or expenses that were the basis of any other credit against tax is not eligible for the strategic research and development credit.

### **¶ 306.5 Amount of the Credit**

*Law: W. Va. Code § 11-13R-5*

The amount of the credit is the greater of 3% of the annual qualified research and development expenditures within West Virginia, or 10% of the excess of the annual qualified research and development expenditure within West Virginia over the base amount. The base amount is the average annual research and development expenditure within West Virginia during the 3 years preceding the current year.

### **¶ 306.6 Application of the Credit**

*Law: W. Va. Code § 11-13R-6*

The credit may be used to offset up to 100% of the taxpayer's annual liability for corporation net income tax, and personal income tax on flow through business profits in that order. The credit is first applied to the corporation income tax of the eligible taxpayer before application of any other investment credit. If the eligible taxpayer is a limited liability company, an electing small business corporation as defined in IRC §1361, or a partnership, any unused credit is then applied against the corporation net income tax liability of the owners of the eligible taxpayers. The tax credit shall be allocated among the owners in the same ratio as profits and losses. After application to the corporation

income tax, any remaining credit may be applied to the personal income tax of the eligible taxpayer. If the eligible taxpayer is a limited liability company, an electing small business corporation as defined in IRC §1361, or a partnership, any unused credit is then applied against the personal income tax liability of the owners of the eligible taxpayers. The tax credit shall be allocated among the owners in the same ratio as profits and losses.

### **¶ 306.7 Refundable Credit for Small Qualified Research and Development Company**

*Law: W. Va. Code § 11-13R-6(i)*

For investment made on or after July 1, 2004, but prior to January 1, 2008, the taxpayer and owners of the eligible taxpayer may claim for any year there is excess credit available after application of the credit to the corporation net income tax and the personal income tax, the excess amount as a refundable credit, not to exceed one hundred thousand dollars. In order to claim a refundable credit, the eligible taxpayer must have gross revenues of not more than \$20,000,000 and a payroll of not more than \$2,500,000. If the taxpayer is a member of a controlled group, the gross revenues of all the members of the controlled group must be considered when determining if this test is met.

Not more than \$1,000,000 may be approved for refundable credit by the Tax Commissioner during any fiscal year. Eligibility for the refundable credit will be determined by the Tax Commissioner based on the filing date of the claim for refund with the earlier claims having priority over later claims.

### **¶ 306.8 Forfeiture and Redetermination of the Credit**

*Law: W. Va. Code § 11-13R-7*

If a taxpayer disposes of qualified research and development property before its useful life expires, or otherwise ceases to use the property in a qualified research and development activity, the remainder of the credit related to that investment is forfeited. The credit already claimed attributable to the disposed property must be recalculated using the actual useful life. If an excess amount of credit has been previously claimed based on the actual useful life of the property, then a reconciliation schedule must be filed with payment of any additional tax and interest due. If the property has been used for less than four years, all credit is forfeited.

The forfeiture rules do not apply if the property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen.

### **¶ 306.9 Transfer of Qualified Research and Development Property to Successors**

*Law: W. Va. Code § 11-13R-8*

If a taxpayer changes the form of conducting its business, but retains a controlling interest in the successor business, and the qualified research and development property is retained in a business in West Virginia and used in research and development, the forfeiture and redetermination rules do not apply, and the successor business is allowed to claim the amount of credit still available for subsequent years. The same is true where

property is transferred or sold to a successor business that continues to use the property in a qualified research and development activity.

### **¶ 306.10 Filing Requirements**

*Law: W. Va. Code § 11-13R-6(j)*

In order to claim the credit, taxpayer must file an application (Form WV/SRDTC-A) with the Tax Commissioner in order to receive certification of the research and development project or program. The application must be filed by no later than the due date of the annual state income tax, including lawful extensions of time to file, for the tax year in which the qualified research and development activity occurred. Failure to file the application will result in forfeiture of 100% of the tax credit for the time periods until the application is filed.

In addition, a schedule WV/SRDTC-1 must be filed with the tax return on which the credit is claimed.

No credit may be claimed for investment made on or after January 1, 2014.

## **¶ 307 HIGH GROWTH BUSINESS INVESTMENT TAX CREDIT**

### **¶ 307.1 Introduction**

*Law: W. Va. Code § 11-13U-2; WVCSR § 117-5-1 et seq.*

The high growth business investment tax credit was enacted in 2005 to encourage investment in start-up, growth-oriented, research and development businesses in this State and thereby increase employment and economic development. (NOTE: This credit program expired July 1, 2008. However, taxpayers who became entitled to the credit before that date may continue to apply the credit in subsequent years as if the program had not expired.)

### **¶ 307.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13U-3(3)*

An eligible taxpayer is a person that is subject to corporation net income tax, or personal income tax that has made investment in a qualified research and development company, and received certification from the economic development authority that a portion of the annual available high growth business investment credit has been allocated to it.

### **¶ 307.3 Eligible Investment**

*Law: W. Va. Code §§ 11-13U-3(5) and 11-13U-5*

“Qualified investment” means an equity financing of a West Virginia qualified strategic research and development company. The investment must be in cash or in cash equivalents and cannot be an exchange of in-kind property. A “qualified strategic research

and development company is an entity that has been certified by the State Tax Commissioner as eligible for the West Virginia research and development tax credit as provided in W. Va. Code § 1-13R that has annual gross receipts of less than \$20,000,000, annual payroll of less than \$2,500,000, and maintains its corporate headquarters in West Virginia. The total amount of qualified investment that a qualified research and development company may accept from all eligible taxpayers in any particular taxable year is one million dollars.

Investment must be maintained in a qualified strategic research and development company for a minimum period of five years. If an investment is repaid before the expiration, the eligible taxpayer has 3 months from the date of repayment to reinvest the repaid amount in another qualified research and development company for a period of at least equal to the remaining period of the initial 5-year term.

Investment may not be made in an entity that is the alter ego of an eligible taxpayer. The alter ego of an eligible taxpayer means a qualified research and development company where the ownership of the business is “substantially related to the ownership of the eligible taxpayer or where the board of directors of the qualified research and development company is controlled by the eligible taxpayer. “Substantially related” means a 5% common ownership interest exists between the eligible taxpayer and the qualified research and development company. An eligible taxpayer is considered to have control of the qualified research and development company when it controls a simple majority of the board of directors.

#### **¶ 307.4 Amount of the Credit**

*Law: W. Va. Credit § 11-13U-4(a)*

The high growth business investment credit will be equal to 50% of the total value of the qualified investment in the taxable year when the qualified investment was actually made. The total amount of credits allocated by the Economic Development Authority for any one fiscal year cannot exceed \$1,000,000. The credits are allocated by the Economic Development Authority in the order in which applications are received.

#### **¶ 307.5 Application of the Credit**

*Law: W. Va. Code § 11-13U-4*

The credit is first applied to the corporation income tax of the eligible taxpayer before application of any other investment credit. If the eligible taxpayer is a limited liability company, an electing small business corporation as defined in IRC § 1361, or a partnership, any unused credit is then applied against the corporation net income tax liability of the owners of the eligible taxpayers. The tax credit shall be allocated among the owners in the same ratio as profits and losses. After application to the corporation income tax, any remaining credit may be applied to the personal income tax of the eligible taxpayer. If the eligible taxpayer is a limited liability company, an electing small business corporation as defined in IRC § 1361, or a partnership, any unused credit is then applied



against the personal income tax liability of the owners of the eligible taxpayers. The tax credit shall be allocated among the owners in the same ratio as profits and losses.

The total amount of tax credit that may be used in any taxable year by an eligible taxpayer in conjunction with the owners of the taxpayer is \$50,000. Excess credit may be carried forward for a period of four years from the year the investment was initially made. Any remaining credit is forfeited.

### **¶ 307.6 Filing for the Credit**

*Law: W. Va. Code § 11-13U-4(j)*

In order to receive the credit, an eligible taxpayer must make written application to the economic development authority to receive the amount of tax credit to be allocated to it. In addition to the written application, the eligible taxpayer must file with the economic development authority the certification received from the Tax Commissioner by the qualified research and development company and the certificate of incorporation for the qualified research and development company.

In order to claim the credit, the eligible taxpayer must file with the Tax Commissioner, Schedule WV/HGBITC-1.

## **¶ 308 TOURISM DEVELOPMENT CREDIT/ PROFESSIONAL SERVICES DESTINATION FACILITY CREDIT**

### **¶ 308.1 Introduction**

*Law: W. Va. Code § 5B-2E-2*

The tourism development credit allows an approved company that invests in and operates a new or expanding tourism destination project to retain some of the sales tax that it collect from its customers on sales from operation of the tourism attraction or facility. The amount is based on a percentage of approved costs and is prorated over a 10-year period.

The professional services destination facility credit is available to an eligible company that constructs a qualified professional services destination facility with a minimum qualified investment of not less than \$80 million that is located at or adjacent to an existing historic resort hotel with at least five hundred rooms in West Virginia. Professional services include only services provided by certain medical professionals licensed to practice in West Virginia. The credit is equal to 25% of the qualified investment and is prorated over a ten year period.

The tourism development credit and tourism development expansion credit and their rules and requirements will be discussed first in this section and then the professional services destination facility credit and the professional services destination facility project expansion credit and its rules and requirements will be discussed in the latter part of this section.

### **¶ 308.2 Eligible Taxpayers – Tourism Development Credit**

*Law: W. Va. Code § 5B-2E-3(7)*

In order to qualify for the tourism development credit, the taxpayer must operate either a tourism development project or a tourism development expansion project that has been approved for the credit by the West Virginia Development Office. An eligible taxpayer may operate the project directly or indirectly through a lessee.

### **¶ 308.3 Tourism Development Project**

*Law: W. Va. Code §§ 5B-2E-3(14) and (15)*

A new or expanded tourism development project involves the acquisition, constructing and equipping of a tourism attraction or the expansion of an existing tourism attraction, including the acquisition of real estate by a leasehold interest with a minimum term of ten years, the construction and installation of improvements to facilities necessary or desirable for the acquisition, construction, installation of a new tourism attraction or the expansion of an existing tourist attraction. The improvements may include surveys, installation of utilities, which may include water, sewer, sewage treatment, gas, electricity, communications and similar facilities, and off-site construction of utility extensions to the boundaries of the real estate on which the facilities are located, all of which are to be used to improve the economic situation of the approved company in a manner that allows the approved company to attract persons. It does not include a project that will be substantially owned, managed or controlled by an eligible company with an existing project located within a 10 mile radius, or by a person or persons related by a family relationship to the owner of an eligible company with an existing project located within a 10 mile radius.

A tourism attraction means a cultural or historical site, a recreation or entertainment facility, an area of natural phenomenon or scenic beauty, a West Virginia crafts and products center, or an entertainment destination center or a qualified professional service destination facility.

It does not include lodging facilities unless: (1) the facility constitutes less than fifty percent of the total approved cost of the project, or the facility is to be located on recreational property owned or leased by the state or federal government and the facility has received prior approval from the appropriate state or federal agency; (2) the facility involves the restoration or rehabilitation of a structure that is listed individually in the national register of historic places or is located in a national register historic district and certified by the state historic preservation officer as contributing to the historic significance of the district and the rehabilitation or restoration project has been approved in advance the state historic preservation officer; or (3) the facility involves the construction, reconstruction, restoration, rehabilitation or upgrade of a full-service lodging facility or the reconstruction, restoration, rehabilitation or upgrade of an existing structure into a full-service lodging facility having not less than five hundred guest rooms, with construction, reconstruction, restoration, rehabilitation, or upgrade costs exceeding ten million dollars.

A tourism attraction does not include a facility that is primarily devoted to the retail sale of goods, other than an entertainment destination center, a West Virginia crafts and products center or a project where the sale of goods is a secondary and subordinate component of the project.

A tourism attraction also does not include a recreational facility that does not serve as a likely destination where individuals who are not residents of the state would remain overnight in commercial lodging at or near the project or existing attraction.

#### **¶ 308.4 Application and Approval Process for Tourism Development Project**

*Law: W. Va. Code §§ 5B-2E-4 and 5B-2E-5*

In order to qualify for the tourism development project credit or tourism development expansion project credit, an eligible company must file a written application for approval of the project with the development office. A nonrefundable application fee of \$10,000 must be paid to the Development Office upon the filing of the application. The application must include a description and location of the project, capital and other anticipated expenditures for the project and the sources of funding therefor; the anticipated employment and wages to be paid at the project; business plans that indicate the average number of days in a year in which the project will be in operation and open to the public; and the anticipated revenue and expenses generated by the project.

Within sixty days of receipt of the application, the director of the development office will either grant or deny approval of the application. The development office will base its approval of the project on whether the project will meet the following criteria:

- (1) The project will attract at least 25% of its visitors from outside of this State;
- (2) Will have approved costs in excess of \$1,000,000;
- (3) Will have a significant and positive economic impact on this State considering, among other factors, the extent to which the project will compete directly with or complement existing tourism attractions in this State and the amount by which increased tax revenues from the project will exceed the credit given to the approved company;
- (4) Will produce sufficient revenues and public demand to be operating and open to the public for a minimum of 100 days per year; and
- (5) Will provide additional employment opportunities in this State.
- (6) The quality of the proposed project and how it addresses economic problems in the area in which the project will be located.
- (7) Whether there is substantial and credible evidence that the project is likely to be started and completed in a timely fashion.

- (8) Whether the project will, directly or indirectly, improve the opportunities in the area where the project will be located for the successful establishment or expansion of other industrial or commercial businesses.
- (9) Whether the project will, directly or indirectly, assist in the creation of additional employment opportunities in the area where the project will be located.
- (10) Whether the project helps to diversify the local economy.
- (11) Whether the project is consistent with the goals of the law establishing the credit.
- (12) Whether the project is economically and fiscally sound using recognized business standards of finance and accounting.
- (13) The ability of the eligible company to carry out the project.

The Development Office may establish additional criteria for consideration when reviewing the applications. The decision by the Director of the Development Office is final.

#### **¶ 308.5 Agreement between West Virginia Development Office and Approved Company for Tourism Development Credit**

*Law: W. Va. Code § 5B-2E-6*

Upon approval of the project, the development office and approved company will enter into an agreement containing provisions outlining the amount of approved costs of the project that will qualify for the sales tax credit and a date certain that the project will be completed and opened to the public. Within 3 months of the completion date, the approved company must provide a certification of the actual costs of the project reviewed by a certified public accountant acceptable to the Development Office.

Extensions of time to complete and open the project not exceeding 3 years from the date of final approval can be given by the Development Office.

#### **¶ 308.6 Amount of the Tourism Development Credit and Tourism Development Project Expansion Credit**

*Law: W. Va. Code §§ 5B-2E-7 and 5B-2E-7a*

An approved company is allowed a credit against the sales tax that has been collected on sales generated by or arising from the operations of the tourism development project. The credit cannot be taken against sales tax arising from activities other than the new or expanded tourist development project.

In the case of an expanded tourist development project, only the increase in sales tax attributable to the expansion of the project may be offset by the credit. In order to

determine the increase in sales tax, a baseline is determined by the Development Office and only the sales tax that is in excess of the baseline may be offset by the credit.

Except as set forth below, the maximum amount of the credit is 25% of the approved company's approved costs as provided in the agreement between the Development Office and the approved company.

If the tourism development project site is located within the permit area or an adjacent area of a surface mining operation from which all coal has been extracted prior to commencement the tourism development project, or adjacent to recreational property owned by the state or federal government, the maximum amount of the credit allowable will be 35% of the approved company's costs as provided in the agreement between the Development Office and the approved company.

However, "approved cost" does not include any portion of the cost for the acquisition, construction, equipping or installation of a project that is financed with governmental incentives, grants or bonds or for which the eligible taxpayer elects to qualify for other tax credits, including, but not limited to, the economic opportunity tax credit discussed in ¶ 301 above.

#### **¶ 308.7 Application of the Tourism Development Project Credit or Tourism Development Expansion Project Credit**

*Law: W. Va. Code §§ 5B-2E-7 and 5B-2E-7a*

The credit allowable is taken over a 10-year period, at the rate of one tenth of the total credit per year. The credit is first taken in the year the tourism development project or tourism development expansion project is opened to the public, unless the approved company opts to delay the beginning of the ten-year period until the next succeeding tax year. This election is made with the first sales tax return filed by the approved company following the opening of the project, and cannot be revoked.

The credit is claimed on the monthly sales tax returns filed by the approved company by reducing the monthly tax remittance amount until the annual allowance has been claimed. If there is any excess annual credit allowance remaining, it may be carried over to the next tax year until the third tax year following the end of the initial 10-year period. No carryback of the credit to a prior year is allowed.

#### **¶ 308.8 Eligible Taxpayer – Professional Services Destination Facility Credit**

*Law: W. Va. Code §§5B-2E-7b(b)(5) and 5B-2E-7b (b)(11)*

In order to qualify for the professional services destination facility credit, the taxpayer must operate a qualified professional services destination facility located at or adjacent to an existing historic resort hotel with at least five hundred rooms. The facility may be either owned or leased. The taxpayer must perform the following:

- Create at least one hundred twenty-five new jobs in this state within thirty-six months after the date the qualified investment is placed into service or use, and maintain those jobs for the entire ten year life of the tax credit.
- Make a minimum investment of \$80 million
- Make available to its full-time employees health insurance coverage and pay at least fifty percent of the premium for the health insurance.
- Generate, within thirty-six months after the date the qualified investment is placed into service or use, not less than \$10 million of gross receipts upon which West Virginia Healthcare Provider Tax ( W. Va. Code §11-27 et. seq.) is paid.
- Meet the standards, limitations and requirement of the West Virginia Development Office.

Professional services for purposes of the credit includes only those services provided directly by a physician, surgeon, dentist, podiatrist, osteopathic physician, psychologist, optometrist, registered nurse, physician assistant, licensed practical nurse, social worker or other medical professional licensed to practice in West Virginia.

### **¶ 308.9 Qualified Investment – Professional Services Destination Facility Credit**

*Law: W. Va. Code §5B-2E-7b (b)(12) and 5B-2E-7B(c)(2)*

One hundred percent (100%) of the cost of the property purchased or leased by an eligible company for the construction and equipping of a qualified professional services destination facility which is placed in service or use in West Virginia is considered to be qualified investment.

The cost of the property purchased for a qualified professional services destination facility includes the cost of real property acquired by written lease for a primary term of ten years or longer. The cost is one hundred percent of the rent reserved for the primary term of the lease, not to exceed ten years. Qualified investment also includes the cost of tangible personal property acquired by written lease for a primary term of not less than four years. In the case of self-constructed property, the cost is the amount properly charged to the capital account for depreciation in accordance with federal income tax law. The value of property given in trade or exchange for the property purchased for business expansion is not included in qualified investment. If property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, then the cost of replacement property does not include any insurance proceeds received in compensation for the loss.

Property is considered to be placed in service or use in the earlier of the following two taxable years:

1. The taxable year in which, under the eligible company's depreciation practice, the period for depreciation with respect to the property begins; or
2. The taxable year in which the property is placed in a condition or state of readiness and availability for a specifically assigned function.

### **¶ 308.10 Certified Multiple Year Projects – Professional Services Destination Facility Credit**

*Law: W. Va. Code §5B-2E-7b(f)(1)*

A professional services destination facility project credit can be obtained where the required minimum number of new jobs is created and the qualified investment is placed in service or use over a period of up to three successive tax years. In order to qualify for a multiple year project credit, the qualified investment must be made pursuant to a written business facility development plan of the taxpayer providing for an integrated project for investment at one or more new or expanded business facilities. Also it is required that the qualified investment placed in service or use during the first tax year would not have been made without the expectation of making the qualified investment placed in service or use during the next two succeeding tax years. A copy of the business plan must be attached to the taxpayer's application for project certification and approved by the West Virginia Development Office.

### **¶ 308.11 New Jobs and New Job Compensation Requirements – Professional Services Destination Facility Credit**

*Law: W. Va. Code §5B-2E-7b(d)*

In order to qualify as a new job for purposes of meeting the one hundred twenty-five new job requirement for obtaining the professional services destination facility credit, the job must meet the following requirements:

- (1) It must be a new job that did not exist in the business of the taxpayer in West Virginia prior to the filing of the application for credit.
- (2) It must be filled by a person residing and domiciled in West Virginia who is filling a position that did not previously exist in the taxpayer's business enterprise in West Virginia prior to the filing of the application for credit.
- (3) The compensation of an employee filling a new job position must be a median wage of at least \$37,000 annually, adjusted annually by a cost-of-living adjustment.
- (4) The new job position must provide health insurance benefits. Other benefits such as child care, retirement and other benefits may also be provided by the employer.
- (5) The new job must be a full-time, permanent position. A full-time position means employment for at least eighty hours per month at the required compensation rate.

Permanent employment does not include employment that is temporary or seasonal even if the compensation paid meets the credit requirements.

### **¶ 308.12 Amount of Credit – Professional Services Destination Facility Credit**

*Law: W. Va. Code §5B-2E-7b (c)*

The professional services destination facility credit is twenty-five percent (25%) of the qualified investment made by an eligible company in a professional services destination facility credit.

The professional services destination facility credit and any follow-up project expansion credit is limited to \$37.5 million total aggregate tax credit per taxpayer or group of taxpayers and to \$2.5 million annual credit in any tax year per taxpayer or group of taxpayers, if taken either in the form of a refund or an offset to a tax liability.

### **¶ 308.13 Application of the Credit – Professional Services Destination Facility Credit**

*Law: W. Va. Code §5B-2E-7b (c)*

The professional services destination facility credit is taken over a ten-year period, at the rate of one tenth of the total per taxable year. The credit can be taken beginning in the first year that the professional services destination facility is placed in service or use.

The eligible company can elect to delay the claiming of the credit for one year. This election must be made in the annual income tax return for the first year in which the qualified professional destination facility is first placed in service or use. This election may not be revoked.

The credit can first be claimed to offset one hundred percent of an eligible company's liability for corporation net income calculated before application of any other allowable credits against tax. If the eligible company is an electing small business corporation, as defined in section 1361 of the United States Internal Revenue Code of 1986, as amended, a partnership, or a limited liability company that is treated as a partnership for federal income tax purposes or a sole proprietorship, then the credit may then be claimed against personal income taxes of the members, owners, partners or interest holders in the eligible company. The credit must be allocated using the same manner that the profits and losses are allocated the members. Employer withholding taxes may not be offset by the credit.

The Neighborhood Investment Program Tax Credit, Economic Opportunity Tax Credit, Manufacturing Investment Tax Credit, Strategic Research and Development Tax Credit, Apprenticeship Training Tax Credit, and Commercial Patent Incentives Tax Credit may not be applied against any tax liability that is being offset by the professional services destination facility credit. No other credit may be obtained by any eligible company authorized or entitled to the professional services destination facility credit that is related to the investment or activity upon which the credit was based.



The Tax Commissioner may apply any amount of the tax credit otherwise available to a taxpayer to pay any delinquent West Virginia state tax liability of the taxpayer. The tax credit may also be used to pay any outstanding obligation to the Workers' Compensation Fund, or any outstanding obligation under the West Virginia Unemployment Compensation Act., or any delinquent or unpaid assessment, fee, fine, civil penalty or monetary imposition imposed by the West Virginia Division of Environmental Protection or the United States Environmental Protection Agency, or any agency charged with enforcing federal, state or local environmental or hazardous waste regulations.

If any annual credit remains after application to the corporation income tax or personal income tax or any outstanding tax liability, that amount will be refunded annually to the eligible company, and distributed in accordance with the credit distribution described previously. The limitation on annual tax credit or limitation on total aggregate tax credit cannot be exceeded.

If any credit remains after the initial ten year credit application period, the amount of remaining credit can be carried forward to each taxable year for five years. If any credit remains after expiration of the fifth taxable year subsequent to the end of the initial ten year credit application period, such credit is forfeited, and may not be used to offset any West Virginia tax liability. No carryback to a prior taxable year is allowed for any unused portion of any annual credit allowance.

#### **¶ 308.14 Application and Approval Process for Professional Services Destination Facility Credit**

*Law:* W. Va. Code §§5B-2E-4 and 5B-2e-7b(e)

In order to obtain the credit, the eligible taxpayer must file an application with the West Virginia Development Office. A nonrefundable application fee of \$10,000 must be paid to the Development Office upon the filing of the application.

The taxpayer must provide the following information with the application: (1) the name and address of the applicant; (2) documentation that the applicant is a eligible company; (3) documentation that the applicant meets the requirements of this section; (4) documentation that the taxpayer does not owe any delinquent taxes or any other amounts to the federal government, this state or any political subdivision of this state; (5) An affidavit that the applicant has not filed for or publicly announced its intention to file for bankruptcy protection and that the company will not seek bankruptcy protection within the next six calendar months following the date of the application; (6) A waiver of confidentiality for information provided in the application; and (7) any other information required by the Development Office.

The Development Office, in conjunction with the Tax Department, will review the application to determine if the taxpayer is an eligible company and if the requirements for obtaining the credit have been met. The Development Office will approve or deny the application and will notify the applicant in writing. No credit may be claimed by the eligible company until the application is approved. If the application is approved the Development

Office will enter into an agreement with the eligible company for benefits. An application that is not approved by the Development Office within thirty days will be deemed denied.

**¶ 308.15 Agreement between the West Virginia Development Office and the Eligible Company for the Professional Services Destination Facility Credit**

*Law: W. Va. Code §5B-2E-7(b)(g)*

Once an application is approved, an agreement that specifies the terms and conditions that the eligible company must comply with to receive the credit will be entered into between the West Virginia Development Office and the eligible company. The agreement will also require the Development Office to certify to the West Virginia Tax Department each year that the eligible company is eligible to receive benefits, the number of new jobs created during each taxable year, the amount of gross wages determined in accordance with Form W-2 guidelines being paid to each individual in a new job, the amount of qualified investment made by the eligible company, the maximum credit allowable to the eligible company and any other information deemed necessary by the Development Office.

**¶ 308.16 Filing of Annual Information Form with West Virginia Tax Department – Professional Services Destination Facility Credit**

*Law: W. Va. Code § 5B-2E-7b (h)*

Each year on or before the due date of the income tax return the eligible company must file with the West Virginia Tax Department a form prescribed by the Tax Commissioner that requires the name and employer identification number of the eligible company, the effective date of the agreement, the reporting period end date, information relating to each individual employed in a new job as required by the Tax Commissioner, the aggregate gross receipts for the tax period and gross receipts on which tax has been paid under the West Virginia Healthcare Provider Tax (W. Va. Code §11-27-1 et seq.), and any other information required by the Tax Commissioner. Taxpayers claiming the credit must also file with their annual income tax returns (1) certification that the qualified investment property continues to be used in the project, and if disposed of during the tax year, was not disposed of prior to expiration of its useful life; (2) certification that the new jobs created by the project's qualified investment continue to exist and are filled by persons who are residents of this State; and (3) any other information that the Tax Commissioner requires to determine continuing eligibility to claim the annual credit allowance of the project's qualified investment.

**¶ 308.17 Certified Follow-Up Project Expansion Credit – Professional Services Destination Facility Credit**

*Law: W. Va. Code §5B-2E-7b(f)(2)*

An eligible company that has earned entitlement to a professional services destination facility credit can obtain credit for a one-time follow-up project expansion to a professional service destination facility. The follow-up expansion must create and maintain at least twenty-five new jobs held by new employees in addition to the jobs created by the initial

qualified professional services destination facility project. The follow-up project expansion must be on property that is contiguous to, or within not more than one mile of the initial qualified professional services destination facility. It must be placed in service within the fourth tax year subsequent to the tax year in which qualified investment was first placed into service or use in the initial qualified professional services destination facility project, or under a multiple year project certification, in the fourth, fifth and sixth tax year subsequent to the tax year in which qualified investment was first placed into service or use in the initial qualified professional services destination facility project.

The credit is equal to the lesser of twenty-five percent of qualified investment in the follow-up project expansion or \$12.5 million. However, the annual credit per taxpayer or group of taxpayers in the aggregate, including both the professional services destination facility project facility and the certified follow-up project expansion credit may not exceed \$2.5 million, either in the form of a refund or directly against a tax liability or in any combination.

### **¶ 308.18 Forfeiture of Tax Credits and Credit Recapture for Tourism Development Credit and Professional Services Destination Facility Credit**

*Law: W. Va. Code § 5B-2E-8*

If after the first year of operation, the new or expanded tourism development project fails to attract at least 25% of its visitors from among person who are not residents of this State or is not open to the public for at least one hundred days, then the credit will be forfeited and the recapture tax will be due and owing. The credit will also be forfeited and the recapture tax due and owing if the approved company has an outstanding Worker's Compensation obligation, unemployment compensation tax obligation, or other State tax obligation.

Any company earning the professional services destination facility credit that does not meet the requirements specified to be a "eligible taxpayer" or a "qualified professional services destination facility" including those relating to jobs maintenance, employee wage and employee health benefits, aggregate gross receipts and amount of gross receipts taxable under the West Virginia Health Care Provider Tax will forfeit the credit. Also the credit will be forfeited if the approved company is delinquent in payment of any assessment, fee, fine, civil penalty or monetary imposition issued by the West Virginia Division of Environmental Protection or the United States Environmental Protection Agency or any agency charged with enforcing federal, state or local environmental or hazardous waste regulations. Delinquency in compliance with any order, injunction, compliance agreement ,agreed order, court order, mandamus or other enforcement or compliance instrumentality of those agencies or failure to comply with any citation or order issued by those agencies requiring that a condition be abated or corrected will also result in forfeiture of the credit.

If either of the credits is forfeited, then a credit recapture tax will be imposed. The recapture tax will be equal to all previously claimed tourism development project tax credit or professional services destination facility credit taken by the approved company. The

recapture tax will be paid by the filing of amended returns and the payment of any tax due together with applicable interest. For purposes of the credit recapture tax, the statute of limitations will not begin to run until the eighteenth year subsequent to the earlier of the year when qualified investment was first placed into service or use, or the year when the application for the tax credit was filed with the West Virginia Development Office.

### **¶ 308.19 Annual Reporting-Tourism Development Credit and Professional Services Destination Facility Credit**

*Law: W. Va. Code § 5B-2E-8(c)*

Within 45 days after the end of each calendar year during the term of the agreement, the approved company will provide the development office with all reports and certifications required by the development office to demonstrate that the project is in compliance with all applicable laws. The Development Office will then review this documentation and certify to the Tax Commissioner that the project is in compliance.

### **¶ 308.20 Transferability to Successor**

*Law: W. Va. Code § 5B-2E-8(d)*

These tax credits are transferable to an eligible successor company that continues to operate the approved project. The Development Office must give written consent to the transfer.

### **¶ 308.21 Termination of the Tax Credit Program**

*Law: W. Va. Code §5B-2E-11*

Applications for the Tourism Development Project Credit and Tourism Development Expansion Project Credit and the Professional Services Destination Facility Credit and Professional Services Destination Facility Project Expansion Credit that have not been approved prior to January 1, 2026 will be null and void as of that date. No applications will be accepted by the West Virginia Development Office after December 31, 2025.

## **¶ 309 ENVIRONMENTAL AGRICULTURAL EQUIPMENT TAX CREDIT**

### **¶ 309.1 Introduction**

*Law: W. Va. Code § 11-13K-1.*

This credit was enacted to encourage the agricultural industry to invest in equipment and structures that are protective of the environment.

### **¶ 309.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13K-2*

To be eligible for the credit, the taxpayer must be engaged in agricultural operations in West Virginia and purchase and install qualified agricultural equipment for use in that activity. Agricultural operations include the commercial production of food, fiber, or

woodland products (but not timbering activity) by means of cultivation, tillage, of the soil or by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, aquacultural activity, horticultural activity, or any other plant or animal production activity and all farm practices related, usual or incidental to the operations.

Commercial production consists of annual sales by the producer of at least \$1,000 of agricultural products. This requirement does not need to be met in order for the activity to be commercial production of an agricultural product in the first twelve months after: (1) the occurrence of a catastrophe (such as fire, drought or flood), other than mere mechanical breakdowns, which substantially destroyed the agricultural product being produced or the means for harvesting that product, or (2) the commercial producer of an agricultural product has first commenced the production activity.

### **¶ 309.3 Qualified Agricultural Equipment and Structures**

*Law: W. Va. Code § 11-13K-2(g)*

Equipment and structures that are considered to be qualified agricultural equipment and structures and eligible for the credit include the following:

- Advanced technology pesticide and fertilizer application equipment
- Conservation tillage equipment
- Dead poultry composting facility
- Mortality incinerator
- Nutrient management system
- Stream bank and shoreline protection system
- Stream channel stabilization systems
- Stream crossing or access plans
- Waste management systems
- Waste storage facilities
- Waste treatment lagoons

### **¶ 309.4 Amount of the Credit**

*Law: W. Va. Code § 11-13K-3*

The credit is equal to 25% of the price of all certified expenditures for qualified agricultural equipment. Expenditures for land do not qualify.

### **¶ 309.5 Application of the Credit**

*Law: W. Va. Code § 11-13K-3*

The amount of claim claimed in any one year may not exceed \$2500 or the total amount of the taxpayer's liability under either the corporation net income tax, personal income tax, or personal income tax attributable to the flow through of income from an S corporation, partnership, or limited liability company that is attributable to agricultural operations in this State. Excess credits may be carried forward for five years and must be used before any credit earned from new purchases is applied.

## **¶ 309.6 Filing Requirements**

*Law: W. Va. Code § 11-13K-1*

In order to claim the credit, the taxpayer must file Form WV/AG1, the West Virginia Environmental Agricultural Equipment Tax Credit Schedule. The taxpayer must also provide proof of purchase and installation specific to identify the item as qualified agricultural equipment. Written certification by the Commissioner of Agriculture that each item purchased is in fact qualified agricultural equipment must also be attached to the tax credit schedule. If the qualified agricultural equipment is advanced technology pesticide and fertilizer application equipment, the written certification must be obtained from the West Virginia Department of Environmental Protection. If the qualified equipment is a mortality incinerator, the written certification is obtained from the Office of Air Quality at the Department of Environmental Protection.

## **¶ 310 HISTORIC REHABILITATED BUILDINGS INVESTMENT CREDIT**

### **¶ 310.1 Introduction**

*Law: W. Va. Code §§ 11-24-23a and 11-24-23g*

This credit was enacted to encourage the restoration of historic buildings in West Virginia and is modeled on the Federal Certified Historic Structure Credit. The standards are the same as the federal program. Unlike most other credits, eligible taxpayers may transfer, sell, or assign these credits upon approval by the West Virginia Department of Culture and History.

### **¶ 310.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-24-23a*

Taxpayers eligible for the historic rehabilitated buildings investment credit include taxpayers who make qualified rehabilitation project expenditures on or after June 6, 1990 on residential and nonresidential properties located in West Virginia that are designated by the National Park Service, Department of the Interior, as “certified historic structures” and as “qualified rehabilitated structures.” The Tax Commissioner shall promulgate procedural rules in accordance with §29A-3-1 et seq. of this code that provide what information must accompany any claim for the tax credit for the determination that the taxpayer is not in arrears in the payment of any tax administered by the Tax Division, is not delinquent in the payment of any local or municipal tax, nor is the taxpayer delinquent in the payment of property taxes on the property containing the certified historic tax structure, and such other administrative requirements as the Tax Commissioner may specify..

### **¶ 310.3 Eligible Investment**

*Law: W. Va. Code § 11-24-23a*

Rehabilitation costs are the same as those that qualify for the federal credit. In order to qualify for the credit, rehabilitation costs must within a 24-month period within the total period of the renovation exceed the greater of \$5,000, or the adjusted basis of the property.

### **¶ 310.4 Amount of Credit**

*Law: W. Va. Code § 11-24-23a*

For certified historic structures, the credit is equal to 10 percent of qualified rehabilitation expenditures as defined in §47(c)(2), Title 26 of the United States Code, as amended: Provided, That for qualified rehabilitation expenditures made after December 31, 2017, pursuant to an historic preservation certification application, Part 2 – Description of Rehabilitation, received by the state historic preservation office after December 31, 2017, the credit allowed by this section is equal to 25 percent of the qualified rehabilitation expenditure: Provided, however, That the credit authorized by this section for qualified rehabilitation expenditures made after December 31, 2017, may not be used to offset tax liabilities of the taxpayer prior to the tax year beginning on or after January 1, 2020: Provided further, That the taxpayer is not entitled to this credit if, when the applicant begins to claim the credit and throughout the time period within which the credit is claimed, the taxpayer is in arrears in the payment of any tax administered by the Tax Division or the taxpayer is delinquent in the payment of any local or municipal tax, or the taxpayer is delinquent in the payment of property taxes on the property containing the certified historic tax structure when the applicant begins to claim the credit and throughout the time period within which the credit is claimed

### **¶ 310.5 Application of the Credit**

*Law: W. Va. Code §§ 11-24-23f and 11-24-23g*

The credit may be used to offset the personal income tax and the corporation income tax. It is applied after all other allowable tax credits.

### **¶ 310.6 Filing Requirements**

*Law: W. Va. Code § 11-24-23c and 11-24-23a*

In order to claim the credits, the taxpayer must file Schedule RBIC, together with a copy of the request for a final National Park Service certification (NPS Form 10-168 c).

(1) Any claim for the tax credits authorized pursuant to this section shall be accompanied by a tax credit certificate issued by the state historic preservation officer.

(2) The historic preservation certification application, Part 2 – Description of Rehabilitation, will be reviewed by the State Historic Preservation Office for completion and submitted to the National Park Service for full review. At the time the historic

preservation certification application, Part 2 – Description of Rehabilitation, is submitted to the National Park Service, the state historic preservation officer shall send a request for the fee prescribed in subsection (e) of this section to the property owner

(3) The state historic preservation officer shall issue tax credit certificates for rehabilitation projects that the National Park Service has determined have met the Secretary of the Interior standards for rehabilitation based on the issuance of an approved historic preservation certification application, Part 3 – Request for Certification of Completed Work, or a Phase Advisory Determination.

(d) Application fee - Each application for tax credits authorized pursuant to this section and §11-21-8a of this code shall require a fee payable to the state historic preservation officer equal to the lesser of: (1) 0.5% of the amount of the tax credits requested for in such application; and (2) \$10,000. The state historic preservation officer shall review and act on all such applications within 30 days of receipt.

Fees collected under this subsection shall be deposited into a special revenue account which is hereby created. The fund shall be administered by the state historic preservation officer and expended for the purposes of administering the provisions of this section and §11-21-8a of this code.

### **¶ 310.7 Phased Rehabilitations**

*Law: W. Va. Code § 11-24-23a*

Phased rehabilitations are authorized for any rehabilitation completed after July 1, 2022. For certified rehabilitations that may reasonably be expected to be completed in phases set forth in a plan of rehabilitation submitted contemporaneously with the Description of Rehabilitation, which may be amended by the applicant, the state historic preservation officer shall permit phased rehabilitations.

A rehabilitation may reasonably be expected to be completed in phases if it consists of two or more distinct stages of development. A phased rehabilitation plan shall be consistent with phasing guidance issued by the National Park Service.

The state historic preservation officer may review each phase as it is presented, but a phased rehabilitation cannot be designated a certified rehabilitation until all of the phases are completed.

The owner may elect to claim the credit allowable for each completed phase of a phased rehabilitation, upon receipt from the state historic preservation officer of a written tax credit certificate, for each phase of the phased rehabilitation.

Written tax credit certificates for completed phases of a phased rehabilitation shall be issued when the substantial rehabilitation test has been satisfied with respect to the completed phase and the completed phase has been placed into service, consistent with phase advisory guidance issued by the National Park Service.



## **¶ 311 RESIDENTIAL HISTORIC REHABILITATED BUILDINGS INVESTMENT CREDIT**

### **¶ 311.1 Introduction**

This credit was enacted to encourage the rehabilitation of residential homesteads that are certified historic structures.

### **¶ 311.2 Eligible Taxpayers**

*Law: W. Va. Code §§ 11-21-8 and 11-21-8a*

Taxpayers eligible for the residential historic rehabilitated building investment credit include persons who make qualified purchases on or after January 1, 2000 for the restoration of residential homesteads that have been designated by the West Virginia Department of Culture and History as “certified historic structures” and as a “qualified rehabilitated structures.” Unlike most other credits, eligible taxpayers may transfer, sell, or assign these credits upon approval by the West Virginia Department of Culture and History.

### **¶ 311.3 Eligible Investment**

*Law: W. Va. Code §11-21-8g*

The taxpayer must receive certification from the West Virginia Department of Culture and History for the expenditures made on the building. The certificate received from the West Virginia Department of Culture and History is attached to the credit schedule when claiming the credit.

### **¶ 311.4 Amount of Credit**

*Law: W. Va. Code § 11-21-8g*

The credit is equal to 20% of the qualified expenditures.

### **¶ 311.5 Application of the Credit**

*Law: W. Va. Code § 11-21-8g*

The credit can be used to offset up to 100% of the personal income tax liability of the taxpayer after application of all other credits. Any excess credit may be carried forward for a total of 5 years, similar to the treatment for the federal credit.

### **¶ 311.6 Filing Requirements**

A copy of the request for certification (Form 10-168c) filed with the West Virginia Department of Culture and History should be attached to the personal income tax return, together with Schedule RBIC-A.

## **¶ 312 NEIGHBORHOOD INVESTMENT CREDIT**

### **¶ 312.1 Introduction**

*Law: W. Va. Code § 11-13J-2; WVCSR § 145-7-1 et seq.*

This legislation was enacted to provide credit to individuals or businesses that make eligible contributions to community based nonprofit organizations that establish projects to assist neighborhoods and local communities. The total tax credits allowed annually to project plans certified by the West Virginia Development Office is \$3,000,000.

### **¶ 312.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13J-3(b)*

An eligible taxpayer is a person or entity subject to the West Virginia corporate income tax, or personal income tax that makes an eligible contribution to a qualified charitable organization pursuant to the terms of a Certified Neighborhood Investment Program Project Plan.

### **¶ 312.3 Eligible Contributions**

*Law: W. Va. Code § 11-13J-3(b)*

Eligible contributions include cash, tangible personal property (valued at fair market value), real property (valued at fair market value), and in kind professional services (valued at 75% of their fair market value). Publicly traded corporate stock can also be contributed, but must be sold within 180 days after its receipt. The maximum contribution by a taxpayer for a taxable year is \$200,000. The minimum annual contribution eligible for the credit is \$500.

### **¶ 312.4 Eligible Project Plans**

*Law: W. Va. Code § 11-13J-4*

Eligible project plans are determined by the West Virginia Development Office and the Neighborhood Investment Advisory Board by qualification based on contributions destined for a certified economically disadvantaged area or by need.

### **¶ 312.5 Amount of Credit**

*Law: W. Va. Code § 11-13J-5(b)*

The amount of the credit is 50% of the taxpayer's eligible contributions.

### **¶ 312.6 Application of the Credit**

*Law: W. Va. Code §§ 11-13J-5 and 11-13J-6(b)*

The credit is first applied against the corporation net income tax to offset up to 50% of the tax before application of any other tax credits.

If the taxpayer is either an electing small business corporation as defined in IRC §1361, a partnership, a limited liability company, treated as a partnership for federal tax purposes, or a sole proprietorship, then any unused credit, after application against corporate net income tax, is allowed against the personal income tax of the partners, members, or owners, to offset up to 50% of the personal income tax attributable to the income from the business. The credit is allocated to the members or partners in the same manner as profits or losses are allocated for the year.

An individual taxpayer, who makes an eligible contribution to a qualified charitable organization, and receives back from that organization a properly completed neighborhood investment program tax credit voucher, is eligible to claim the credit to offset up to 50% of their personal income tax regardless of the source of the income whether it is from wages, passive investment or retirement income, income from a trade or business or any other source.

The amount of the charitable contribution deduction taken for federal purposes must be added back to taxable income when computing the amount of tax eligible for offset by this credit. The maximum credit allowed per year per taxpayer is \$100,000. The credit must be taken over a 5-year period. Any unused credit available after the 5-year period is forfeited.

#### **¶ 312.7 Termination Date**

*Law: W. Va. Code §11-13J-12*

The Neighborhood Investment Program Act shall terminate on July 1, 2026, unless the program is terminated by the Legislature before that date. No entitlement to the tax credit under this article shall result from any contribution made to any certified project after July 1, 2026, and no credit shall be available to any taxpayer for any contribution made after that date. Taxpayers which have gained entitlement to the credit pursuant to eligible contributions made to certified projects prior to that date shall retain that entitlement and apply the credit as prescribed.

#### **¶ 312.8 Filing for the Credit**

*Law: W. Va. Code §11-13J-7*

To claim the credit, the taxpayer must file Form WV/NIPA-2, Neighborhood Investment Program Tax Credit Schedule and attach it to their tax return. In addition, a copy of the Neighborhood Investment Program Tax Credit Voucher (WV/NIPS-1) issued by the organization sponsoring the Neighborhood Investment Project must be attached to the tax credit schedule.

## **¶ 313 APPRENTICESHIP TAX TRAINING CREDITS**

### **¶ 313.1 Introduction**

*Law: W. Va. Code §11-13W-1*

This credit is available to taxpayers who participate in a qualified apprenticeship training program for the construction trades on or after January 1, 2008.

### **¶ 313.2 Eligible Taxpayers**

*Law: W. Va. Code §§ 11-13W-1(a) and 11-13W-1(c)*

To be eligible for the credit the taxpayer must participate in a qualified apprenticeship training program that is administered in accordance with 29 USC § 50 and is certified according to regulations adopted by the U.S. Bureau of Apprenticeship and training. The program must consist of at least 2,000, but no more than 10,000 hours of on the job apprenticeship. The apprentice must be registered with the U.S. Department of Labor, Office of Apprenticeship, West Virginia State Office.

### **¶ 313.3 Amount of Credit**

*Law: W. Va. Code § 11-13W-1(b)*

For tax years beginning on or after January 1, 2012, the tax credit is equal to two dollars per hour multiplied by the total number of hours worked during the apprenticeship program. The total credit for tax years beginning on after January 1, 2012 may not exceed \$2,000 or 50% of actual wages paid in the tax year for the apprenticeship, whichever is less.

### **¶ 313.4 Application of the Credit**

*Law: W. Va. Code § 11-13W-1(d)*

The apprenticeship training credit may be used to offset corporation net income tax, and personal income tax. The credit is applied first applied against the corporation net income tax before any other tax credits.

If the taxpayer is either an electing small business corporation as defined in IRC §1361, a partnership, a limited liability company, treated as a partnership for federal tax purposes, a sole proprietorship, then any unused credit after application against corporate net income tax credit is allowed against the personal income tax attributable to the income from the business. The credit is allocated to the members or partners in the same manner as profits or losses are allocated for the year.

The credit may not be carried forward to a future taxable year or carried back into a prior taxable year. Any unused credit is forfeited.

## ¶ 314- FILM INDUSTRY INVESTMENT TAX CREDIT

### ¶ 314.1 Introduction

*Law:* W. Va. Code § 11-13X-1.

The new West Virginia Film Industry Investment Act Credit was enacted in reinstating the film investment tax credit

### ¶ 314.2 Definitions

*Law:* W. Va. Code §11-13x-3.

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

(b) *Terms defined.* —

“Commercial exploitation” means reasonable intent for public viewing for the delivery medium used.

“Direct production expenditure” means a transaction that occurs in the State of West Virginia or with a West Virginia vendor and includes:

(A) Payment of wages, fees, and costs for related fringe benefits provided for talent, management or labor that are subject to West Virginia income tax;

(B) Payment to a personal services corporation for the services of a performing artist if:

(i) The personal services corporation is subject to West Virginia income tax on those payments; and

(ii) The performing artist receiving payments from the personal services corporation is subject to West Virginia income tax; and

(C) Any of the following provided by a West Virginia vendor:

(i) The story and scenario to be used by a qualified project;

(ii) Set construction and operations, wardrobe, accessories, and related services;

(iii) Photography, sound synchronization, lighting, and related services;

(iv) Editing and related services;

(v) Rental of facilities and equipment;

(vi) Leasing of vehicles;

(vii) Food or lodging;

(viii) Airfare if purchased through a West Virginia-based travel agency or travel company;

(ix) Insurance coverage and bonding if purchased through a West Virginia-based insurance agent; and

(x) Other direct costs of producing a qualified project in accordance with generally accepted entertainment industry practices: *Provided*, That “direct production expenditure” shall not include depreciation of any item that has less than one full year of depreciable life.

“Eligible company” means a person or business entity engaged in the business of producing film industry productions. The term excludes state agencies.

“Feature length” means in excess of 40 minutes.

“Film industry production” means a qualified project intended for reasonable national or international commercial exploitation.

“Multi-state distribution” means reaching at least one other state besides West Virginia.

“Postproduction expenditure” means a transaction that occurs in West Virginia or with a West Virginia vendor after the completion of principal photography, including editing and negative cutting; Foley recording and sound effects; automatic dialogue replacement (also known as ADR or dubbing); special effects or visual effects, including computer-generated imagery or other effects; scoring and music editing; sound editing; beginning and end credits; soundtrack production; subtitling or addition of sound or visual effects; but not including an expenditure for advertising, marketing, distribution, or expense payments.

“Qualified project” means a feature length theatrical or direct-to-video motion picture, a made-for-television motion picture, a music video, commercial still photography, a television pilot program, a television series, and a television mini-series that incurs a cumulative amount of \$50,000 in a calendar year in direct production expenditures and post-production expenditures in West Virginia or any combination of projects not previously claimed that would qualify for the credit except for cost, and that combined meets or exceeds the cumulative amount of \$50,000 in a calendar year. The term excludes news or current affairs programming, a weather or market program, a talk show, a sporting event or show, an awards show, a gala, a production that solicits funds, a home

shopping program, a program that primarily markets a product or service, political advertising, or a concert production.

A qualified project may be produced on any single media or multimedia program that:

(A) Is fixed on film, digital medium, videotape, computer disk, laser disc, or other similar delivery medium;

(B) Can be viewed or reproduced;

(C) Is not intended to and does not violate §61-8C-1 *et seq.* of this code;

(D) Does not contain obscene matter or sexually explicit conduct, as defined by §61-8A-1 *et seq.* of this code;

(E) Is intended for reasonable commercial exploitation for the delivery medium used whether delivery is in state or multi-state distribution; and

(F) Does not contain content that, in the sole discretion of the Office of Economic Development, negatively portrays the state of West Virginia.

“Tax Commissioner” means the West Virginia State Tax Commissioner or his or her designee.

### **¶ 314.3 Credit**

**Law: W. Va. Code §11-13x-3.**

(a) An eligible company may apply for, and the Tax Commissioner shall allow, a nonrefundable tax credit in an amount equal to the percentage specified in §11-13X-5 of this code of:

(1) Direct production expenditures incurred in West Virginia that are directly attributable to the production in West Virginia of a qualified project which expenditures occur in West Virginia or with a West Virginia vendor; and

(2) Postproduction expenditures incurred in West Virginia that are:

(A) Directly attributable to the production of a qualified project; and

(B) For services performed in West Virginia.

(b) Expenditures utilized by an eligible company for purposes of calculating the tax credit authorized by this article shall in no event be utilized by the eligible company for the purpose of calculating or qualifying investment for claiming the economic opportunity tax credit authorized by §11-13Q-1 *et seq.* of this code or the manufacturing investment tax credit authorized by §11-13S-1 *et seq.* of this code.

#### **¶ 314.4 Amount of Credit and Limitations**

*Law: W. Va. Code §11-13x-5.*

(a) *Base allowance.* — The amount of credit allowed to every eligible company, except as provided in subsection (b) of this section, is 27 percent.

(b) *Extra allowance for hiring of local workers.* — Any amount allowed in subsection (a) of this section shall be increased by an additional four percent if the eligible company, or its authorized payroll service company, employs 10 or more West Virginia residents as part of its full-time employees working in the state or as apprentices working in the state.

(c) *Application of the credits.* — The tax credit allowed under this section shall be applied to the eligible company's state tax liability as provided in §11-13X-7 of this code.

#### **¶ 314.5 Requirements for credit.**

*Law: W. Va. Code §11-13x-6.*

(a) In order for any eligible company to claim a tax credit under this article, it shall comply with the following requirements:

(1) If the qualified project contains production credits, the eligible company shall agree, upon request by the Office of Economic Development, to recognize the State of West Virginia with the following acknowledgment in the end credit roll: "Filmed in West Virginia with assistance of the West Virginia Film Industry Investment Act";

(2) Apply to the Office of Economic Development on forms and in the manner the Office of Economic Development may prescribe;

(3) If an eligible company submits a proposal to perform a qualified project for a state agency, the eligible company shall indicate its intention to claim the tax credit provided by this article; and

(4) Submit to the Office of Economic Development information required by the office to demonstrate conformity with the requirements of this section and shall agree in writing:

(A) To pay all obligations the eligible company has incurred in West Virginia; and

(B) To delay filing of a claim for the tax credit authorized by this article until the Office of Economic Development delivers written notification to the Tax Commissioner that the eligible company has fulfilled all requirements for the credit.

The Office of Economic Development shall determine the eligibility of the company and the qualification of each project, and shall report this information to the Tax Commissioner in a manner and at times the Office of Economic Development and the Tax Commissioner shall agree upon.



(b) Upon completion of a qualified project:

(1) An eligible company shall have filed all required West Virginia tax reports and returns and paid any balance of West Virginia tax due on those returns;

(2) All claims for the tax credit shall be filed with an expense verification report prepared by an independent certified public accountant, utilizing “agreed upon procedures” which are prescribed by the Office of Economic Development in accordance with generally accepted auditing standards in the United States. The certified public accountant will render a report as to the qualification of the credits, consistent with guidelines to be determined by the Office of Economic Development and approved by the Tax Commissioner; and

(3) An eligible company claiming an extra allowance for employing local workers shall submit to the Office of Economic Development documentation verifying West Virginia residency for all individuals claimed to qualify for the extra allowance. The documentation shall include the name, home address, and telephone number for all individuals used to qualify for the extra allowance.

(c) If the requirements of this section have been complied with, the Office of Economic Development shall approve the film tax credit and issue a document granting the appropriate tax credit to the eligible company and shall report this information to the Tax Commissioner.

#### **¶ 314.6 Application Of Credit To State Taxes.**

*Law:* W. Va. Code §11-13x-7.

(a) *Credit allowed.* —

Beginning in the taxable year that the expenditures permitted under section four of this article are incurred, eligible companies and owners of eligible companies, as described in subsection (d) of this section, are permitted a credit, as described in section five of this article, against the taxes imposed by articles twenty-four and twenty-one of this chapter, in that order, as specified in this section.

(b) *Corporation net income taxes.* —

After application of subsection (b) of this section, any unused credit is next applied to reduce the taxes imposed by article twenty-four of this chapter for the taxable year, determined before application of allowable credits against tax.

(c) *Personal income tax.* —

(1) If the eligible taxpayer is an electing small business corporation (as defined in Section 1361 of the United States Internal Revenue Code of 1986, as amended), a

partnership, a limited liability company that is treated as a partnership for federal income tax purposes or a sole proprietorship, then any unused credit, after application of subsections (b) and (c) of this subsection, is allowed as a credit against the taxes imposed by article twenty-one of this chapter on the income from business or other activity subject to tax under article twenty-three of this chapter or on income of a sole proprietor attributable to the business.

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

**¶ 314.7 Uses Of Credit; Unused Credit; Carry Forward; Carry Back Prohibited; Expiration And Forfeiture Of Credit.**

*Law:* W. Va. Code §11-13x-8.

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

(b) If the tax credit allowed under this article in any taxable year exceeds the sum of the taxes enumerated in subsections (b), (c), or (d) of §11-13X-7 of this code, for that taxable year, the excess may be applied against those taxes, in the order and manner stated in §11-13X-7 of this code, for succeeding taxable years until the earlier of the following:

(1) The full amount of the excess tax credit is used;

(2) The expiration of the second taxable year after the taxable year in which the expenditures occurred. The tax credit remaining thereafter is forfeited; or

(3) The excess tax credit is transferred or sold.

(c) No carryback is allowed to a prior taxable year that does not have qualified expenditures for the amount of any unused portion of any annual credit allowance.

(d) The transfer or sale of this credit does not extend the time in which the credit can be used. The carry forward period for credit that is transferred or sold begins on the date on which the credit was originally issued by the Office of Economic Development.

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

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

(2) Transferors and sellers shall apply to the office for approval of any transfer, sale, or assignment of the tax credit. Any amount of the tax credit that has been transferred or assigned shall be subject to the same limitations and conditions that apply to the eligible company's or seller's entitlement, use and application of the credit. The application for sale, transfer or assignment of the credit shall include the transferor's tax credit balance prior to transfer, the credit certificate number, the name of the seller, the transferor's remaining tax credit balance after transfer, if any, all tax identification numbers for both transferor and transferee, the date of transfer, the amount transferred, a copy of the credit certificate and any other information required by the Office of Economic Development or the Tax Commissioner.

(3) The Office of Economic Development shall not approve the transfer or assignment of a tax credit if the seller or transferor has an outstanding tax obligation with the State of West Virginia for any prior taxable year.

(f) The transferee, assignee or purchaser shall apply such credits in the same manner and against the same taxes as specified in this article.

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

(h) The Tax Commissioner shall not seek recourse against the transferee for any portion of the credit that may be subsequently disqualified.

Failure to comply with this section will result in the disallowance of the tax credit until the seller or transferor is in full compliance.

**¶ 314.8 Burden of Proof.**

*Law: W. Va. Code §11-13x-10*

The burden of proof is on the eligible company claiming the credit allowed by this article to establish by clear and convincing evidence that the eligible company or credit transferee is entitled to the amount of credit asserted for the taxable year.

**¶ 314.9 Tax Credit Review And Accountability.**

*Law: W. Va. Code §11-13x-11*

(a) Beginning on the first day of the third taxable year after the passage of this article and every two years thereafter, the Office of Economic Development shall submit to the Governor, the President of the Senate and the Speaker of the House of Delegates a tax credit review and accountability report evaluating the cost effectiveness of the Film Industry Investment Act during the most recent two-year period for which information is available. The criteria to be evaluated shall include, but not be limited to, for each year of the two-year period:

- (1) The number of eligible companies claiming the credit;
- (2) The dollar amount of tax credit certificates issued to taxpayers;
- (3) The number of new businesses created by the tax credit;
- (4) The number of new jobs, if any, created by the tax credit;
- (5) The amount of direct expenditures made on qualified projects; and
- (6) The cost of the credit.

(b) Eligible companies claiming the credit shall provide any information the Tax Commissioner and the Office of Economic Development may require to prepare the report: Provided, That the information provided is subject to the confidentiality and disclosure provisions of §11-10-5d and §11-10-5s of this code: Provided, however, That notwithstanding the provisions of §11-10-5d and §11-10-5s of this code, the Tax Department is hereby authorized to disclose to the Office of Economic Development such tax information as may be necessary to compile the report required by this section and the report required by §11-13X-12 of this code.

**¶ 314.10 Effective Date, Elimination Of Film Tax Credits, Preservation Of Film Tax Credits Earned Prior To The Sunset Date**

*Law: W. Va. Code §11-13x-13*

(a) The credit allowed by this article shall be allowed upon eligible expenditures occurring after December 31, 2007 and before January 16, 2018, and shall be allowed upon eligible expenditures occurring on and after the date specified in subsection (d) of this section and before the termination date specified therein.

(b) Film tax credits to which a taxpayer has gained lawful entitlement, after December 31, 2007, and before January 16, 2018 may continue to be applied against tax liabilities, subject to the conditions, limitations, and constraints applicable to such credit under this article, until exhausted or otherwise terminated in accordance with the terms of this article and this code. Film tax credits to which a taxpayer has gained lawful entitlement prior to the effective date of this subsection may be transferred in accordance with §11-13X-8 of this code, subject to the conditions, limitations, and constraints applicable to such credit under this article, until exhausted or otherwise terminated in accordance with the terms of this article and this code.

(c) Effective July 1, 2018, all operations of the West Virginia Film Office shall cease. To the extent necessary to settle, finalize, and conclude business relating to outstanding film tax credits issued prior to the effective date of the bill, the Division of Tourism is hereby authorized to administer such duties for that limited purpose.

(d) The amendments to this article enacted in the year 2022 shall apply to all taxable years beginning on or after July 1, 2022: Provided, That, unless sooner terminated by law, the film investment tax credit will terminate on December 31, 2027. No entitlement to any tax credit authorized by this article may result from, and no credit is available to any person for, expenditures incurred subsequent to December 31, 2027. Film tax credits to which a taxpayer has gained lawful entitlement on or after July 1, 2022, and on or before December 31, 2027, may continue to be applied against tax liabilities, subject to the conditions, limitations, and constraints applicable to such credit under this article, until exhausted or otherwise terminated in accordance with the terms of this article and this code. Film tax credits to which a taxpayer has gained lawful entitlement on or after July 1, 2022, and on or before December 31, 2027, may be transferred in accordance with §11-13X-8 of this code, subject to the conditions, limitations, and constraints applicable to such credit under this article, until exhausted or otherwise terminated in accordance with the terms of this article and this code.

## **¶ 315 RESIDENTIAL SOLAR ENERGY TAX CREDIT**

### **¶ 315.1 Introduction**

*Law: W. Va. Code § 11-13Z-1; WVCSR § 110-21D-1 et seq.*

The residential solar energy credit was enacted in 2009 to provide a credit against personal income tax for persons who install a solar energy system in their home and has subsequently be repealed.

## **¶ 316 NONFAMILY ADOPTION CREDIT**

### **¶ 316.1 Introduction**

*Law: W. Va. Code § 11-21-10a*

The nonfamily adoption credit was enacted to provide a credit to be applied against personal income tax for the adoption of a nonfamily child.

### **¶ 316.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-21-10a*

In order to be eligible for the credit, the taxpayer must adopt a nonfamily child whose age at adoption is less than 18 years of age. A nonfamily adoption means adoption of a child or children by a taxpayer or taxpayers who are not the father, mother, or stepparent of the child.

### **¶ 316.3 Amount of the Credit**

*Law: W. Va. Code § 11-21-10a*

The amount of the credit is \$4000 in the tax year of the nonfamily adoption. The credit may be taken at the taxpayer's option over 3 years.

## ¶ 317 COMMERCIAL PATENT INCENTIVES CREDIT

### ¶ 317.1 Introduction

*Law: W. Va. Code § 11-13AA-1 et seq.; WVCSR §110-13Q-1 et seq.*

The commercial patent incentives credit was passed to encourage the development and use of patents in West Virginia. The bill was effective June 9, 2010, but only applies to patents developed or used in West Virginia for the first time during the years beginning January 1, 2011 and ending December 31, 2016. It does not apply to copyrights, trademarks, mask works, trade secrets or any intellectual property that is not a patent. A patent is a United States patent issued pursuant to 35 U.S.C. § 101, *et seq.* or the Patent Cooperation Treaty done at Washington, on June 19, 1970 and is limited to plant patents, design patents, and patents developed in West Virginia for direct use in a manufacturing process or product, or both developed for use and directly used in a manufacturing process or product in West Virginia.

### ¶ 317.2 Eligible Taxpayers

*Law: W. Va. Code §§ 11-13AA-4 and §11-13AA-5*

There are two types of persons who are eligible for the commercial patent incentives credit:

- A person who develops patents in West Virginia for direct use in a manufacturing process or product who has an agreement entered into after December 31, 2010, between a person developing patents in West Virginia and either a corporation formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12-3, or a center for economic development and technical advancement formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12A-3, for purposes of developing a patent eligible for this credit; or
- A person who directly uses a patent developed in West Virginia in a manufacturing process or product in West Virginia

"Development of a patent" means the act of inventing or discovering any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereto through significant investment of money, performance of research, or application of design or engineering expertise, which culminates in the issuance of a patent.

"Directly used in a manufacturing process or product" means application or incorporation of a patented process, machine, article of manufacture or composition of matter, in manufacturing operations or processes, or in manufactured products, in circumstances where United States or foreign patent laws require that the specific patent for the process, machine, article of manufacture or composition of matter be owned by the manufacturer, or purchased, leased, licensed or authorized by contract to be applied

or incorporated in the manufacturing operation, processes or product, and where such lawful ownership, purchases, lease, licensure or contractual authorization is in effect.

The person may be a natural person, corporation, limited liability company, or partnership. Manufacturing includes those business activities classified as having a sector identifier, consisting of the first two digits of the six-digit North American Industry Classification System (NAICS) code number of 31, 32 or 33.

### **¶ 317.3 Amount of the Credit**

*Law: W. Va. Code §§ 11-13AA-4 and 11-13AA-5*

The tax credit for developing patents in West Virginia for direct use in a manufacturing process or product is equal to 20% of the royalties, license fees, or other consideration received by the developer during the year from the sale, lease or licensing of the patent. However, no credit is allowed for consideration received by the developer from a related party as defined IRC §267. The tax credit increases to 30% when the developer reinvests at least 80% of the amount of the credit for the year in one of the following ways:

- In depreciable property purchased for purposes of developing additional patents in West Virginia or improving upon a patent developed in West Virginia; or
- By contributing to a stipend to retain a graduate or post-doctoral student in West Virginia integral to the development of the patents or related technology and the developer has an agreement entered into after December 31, 2010, with either a corporation formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12-3, or a center for economic development and technical advancement formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12A-3, for purposes of developing a patent eligible for this credit.

The tax credit for using a patent developed in West Virginia in a manufacturing process or product is equal to 20% of the "net profit attributable to the patent." The tax credit is increased to 30% of the "net profit attributable to the patent" when the taxpayer reinvests at least 80% of the tax credit for the year in capital improvements to add product lines to or increase productivity in West Virginia during the next taxable year.

The "net profit attributable to the patent" is calculated differently depending on whether the patent is being used in an ongoing or new manufacturing process or product.

If the patent is being used in an ongoing manufacturing process, the "net profit attributable to the patent" is the West Virginia taxable income that is in excess of the "base net profit" accrued through the manufacturing process that has an integrated patent eligible for the credit. The "base net profit" accrued through the manufacturing process is equal to the portion of the West Virginia taxable income attributable to the manufacturing process for the year immediately preceding the introduction of the patent.

If the patent is being used in a new manufacturing process, the "net profit attributable to the patent" is the total net profit from the manufacturing process multiplied by a fraction, with the numerator being the total cost of using the patent, and the denominator being the total cost of the manufacturing process.

If the patent is being used in a new manufactured product, the "net product attributable to the patent" is the total net profit accrued through the sale or use of the product utilizing the product multiplied by a fraction, with the numerator being the total cost of using the patent and the denominator being the total cost of producing the product.

The total cost of using the patent is equal to the total amount of royalties, license fees or other consideration paid for the right to use a patent. For a developer, the total cost of using a patent is the total cost of developing the patent divided by the 20-year life of the patent. For any other patent holder, the total cost of a patent is the total cost of acquiring the patent divided by the remaining years of the 20-year life of the patent.

Amounts received from a related person as defined by IRC §267 are not allowed when calculation the net profit attributable to a patent.

#### **¶ 317.4 Application of the Credit**

*Law: W. Va. Code §§ 11-13AA-4 and 11-13AA-5*

The commercial patent tax credit can be applied only after all other allowable credits have been applied. It is not refundable and cannot offset the tax to below zero. The credit is not assignable. Credit is not allowed for any activity; investment, assets, or expenditures for which any other tax credits have been authorized, taken or allowed.

The credit shall be applied first against the taxpayer's corporate net income tax liability. If the taxpayer is a pass-thru entity or sole proprietorship, the credit may be applied against the personal income tax. If the taxpayer is a pass-thru entity the credit may be applied to the West Virginia personal income tax liabilities of the owners of the pass-through entity. The credit should be distributed to the owners of the pass-thru entity in the same manner as the items of income, gain, loss or deduction are distributed or allocated to the owners.

Any unused credit maybe carried forward for a period of 9 consecutive years from the year that the credit was earned. Any credit not used within the 10-year period will be forfeited.

#### **¶ 317.5 Transfer of the Credit to Successors**

*Law: W. Va. Code §11-13AA-6*

The commercial patent credit may be transferred or sold to a successor business as long as the patent continues to be used in a manufacturing process or product in West Virginia. The successor business may claim the amount of credit that remains available when the transfer or sale occurred.



If the form of the business changes, the credit maybe transferred to the successor business as long as the patent continues to be used in a manufacturing process or product in West Virginia and the person who developed the patent retains a controlling interest in the successor business.

### **¶ 317.6 Recordkeeping**

*Law: W. Va. Code §§ 11-13AA-7 and 11-13AA-8; WVCSR §110-13Q-8.3*

Every developer of a patent in this State for direct use in a manufacturing process or product who claims a credit under this article must maintain sufficient records to establish the following facts for each item of a patent for which a credit is claimed:

- (1) The patent number and title.
- (2) The amount of royalties, license fees or the consideration received for use of the patent.
- (3) The month and taxable year in which the agreement with either a corporation formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12-3, or a center for economic development and technical advancement formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12A-3, for purposes of developing a patent eligible for this credit was entered into.
- (4) The month and taxable year in which the patent was first used, placed in service or directly used in the person's manufacturing process or product in this State.
- (5) The amount of credit taken.
- (6) The date the patent was disposed of or otherwise ceased to be used in a manufacturing process or product in West Virginia.
- (7) The direct cost for developing the patent.
- (8) The direct cost for developing the patent in this State.

Any person who develops a patent for use in a manufacturing process or product in West Virginia and claims the enhanced 30% credit under W. Va. Code § 11-13AA-4 must maintain sufficient records to clearly establish entitlement to claim the amount of the enhanced credit. At a minimum those records must identify all the items listed above as well as the following additional items:

- (1) Each and every item of depreciable property purchased for purposes of claiming the enhanced credit;
- (2) The date the depreciable property was purchased, its cost and its estimated useful life determined using the straight-line method of depreciation;

- (3) The date the depreciable property was placed in service or used in the person's business activity in West Virginia.
- (4) The date the depreciable property was taken out of service or use in the person's business activity in West Virginia and the reason why the property was taken out of service or use.

Every person who uses a patent directly in a manufacturing process or product in this State must maintain sufficient records to clearly establish entitlement to the credit and the following information concerning each patent.

- (1) The patent number and title.
- (2) The amount of net profit attributable to the patent along with all information used to derive this figure in accordance with the applicable law and regulations.
- (3) The month and taxable year in which the agreement with either a corporation formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12-3, or a center for economic development and technical advancement formed with respect to Marshall University or West Virginia University as provided in W. Va. Code § 18B-12A-3, for purposes of developing a patent eligible for this credit was entered into.
- (4) The month and taxable year in which the patent was first used, placed in service or directly used in the person's manufacturing process or product in this State.
- (5) The amount of credit taken.
- (6) The date the patent was disposed of or otherwise ceased to be used in a manufacturing process or product in West Virginia.

Any person who uses a patent in a manufacturing process or product in West Virginia and claims the enhanced 30% credit under W. Va. Code § 11-13AA-5 must maintain sufficient records to clearly establish entitlement to claim the amount of the enhanced credit. At a minimum those records must identify all the items listed above as well as the following additional items:

- (1) Each and every item of depreciable property purchased for purposes of claiming the enhanced credit;
- (2) The date the depreciable property was purchased, its cost and its estimated useful life determined using the straight-line method of depreciation;
- (3) The date the depreciable property was placed in service or used in the person's business activity in West Virginia.
- (4) The date the depreciable property was taken out of service or use in the person's business activity in West Virginia and the reason why the property was taken out of service or use.

Every person who claims a commercial patent incentives tax credit must also maintain sufficient records to establish the number and types of new jobs, if any created the wages and benefits paid to the employees filling the new jobs and the duration of each job.

These recordkeeping requirements do not apply to an owner of a pass-through entity that develops or uses a patent for which a credit is claimed.

If the taxpayer does not maintain the required records for identification of a patent for which a credit was claimed, the patent is treated as having been disposed of by the taxpayer during the taxable year in which the records are unavailable to establish that the patent was being directly used in the person's manufacturing process or product in West Virginia at the end of the taxable year. If the taxpayer cannot establish when a patent was placed in service in the manufacturing process or product in West Virginia, no credit will be allowed.

### **¶ 317.7 Filing Requirements**

*Law: W. Va. Code § 11-13AA-10; WVCSR §110-13Q-8.1*

To claim the tax credit, the eligible taxpayer will timely provide any forms, returns, schedules or other information that the Tax Commissioner may require.

## **¶ 318 INNOVATIVE MINE SAFETY TECHNOLOGY TAX CREDIT**

### **¶ 318.1 Introduction**

*Law: W. Va. Code § 11-13BB-1 et seq.*

Beginning in 2010 and terminating on December 31, 2025, the Office of Miner's Health, Safety and Training will allocate \$2 million of tax credits during each fiscal year to taxpayers who invest in innovative mine safety technology. No one taxpayer may be allocated more than \$100,000 in credit in any given year. The allocation is done based on the order the applications are received by the Office of Mine Safety and Training. A lot of the eligible taxpayers and amount of credit claimed will be published in the State Register by the State Tax Commissioner each year.

### **¶ 318.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13BB-3(b)(2)*

In order to qualify for the credit, the taxpayer must be a coal mining company which purchases eligible safety property. A coal mining company includes companies subject to the severance tax imposed by W. Va. Code §11-13A-3 or companies working as a contract miner, mining coal under contract with a person subject to the severance tax imposed by West Virginia Code § 11-13A-3.

### ¶ 318.3 Eligible Investment

Law: W. Va. Code §§ 11-13BB-3(b)10 and 11-13BB-4

Investment in "eligible safety equipment" is eligible for the credit. In order to qualify as "eligible safety equipment" the item must either be a machine mounted methane monitor or be on the list of approved innovative mine safety technology. This list will be compiled and maintained by the Board of Coal Mine Health and Safety. The list will be published by the West Virginia Office of Miner's Health Safety and Training. Eligible safety equipment includes proximity detection systems and cameras used on continuous mining machines and underground haulage equipment and machine mounted methane monitors.

According to the legislation, the list is to include only safety equipment that is so new to the industry and innovative in concept, design, operation or performance that it is not yet required by any state or federal agency to be used in a coal mine or on a mine site.

If any equipment on the list is later adopted as required safety equipment by a state or federal agency, or is determined to no longer be innovative or is determined to be ineffective, or to meet the expectations of the Board of Coal Mine Health and Safety or fails to prove its value in minimizing workplace injuries or fatalities, the equipment shall be removed from the list of approved innovative mine safety technologies compiled and issued for the next period.

If the item is delisted, any taxpayer who invested in the equipment while it was on the list of approved innovative safety technologies will not have to forfeit the credit so long as all other requirements are met.

Qualified purchases will include leases of eligible safety property or equipment if the lease was entered into and became effective at a time when the equipment is on the list of approved innovative mine safety technology and the primary term of the lease is five years or more.

Qualified purchases do not include the following:

- Purchases or leases of realty or any cost for, or related to, the construction of any building, facility or structure attached to realty;
- Purchases or leases of any property not exclusively used in West Virginia;
- Repair costs including materials used in the repair, unless for federal income tax purposes, the cost of the repair must be capitalized and not expensed;
- Motor vehicles licenses by the Department of motor Vehicles;
- Clothing;

- Airplanes;
- Off-premises transportation equipment
- Leases of tangible personal property having a primary term of less than five years;
- Property that is used outside West Virginia;
- Property that is acquired incident to the purchase of the stock or assets of an industrial taxpayer, which property was or had been used by the seller in his or her business in West Virginia and any other tax credit was taken relating to the property.

The property may not be acquired from a related person or by one member of a controlled group from another member of the same controlled group. The Tax Commissioner can waive this requirement if the property was acquired from a related party for its fair market value.

The property may not be acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under IRC §§267 or 707(b). The property is only eligible if the basis of the property for federal income tax purposes, in the hands of the person acquiring it, is not determined, in whole or in part, by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired or under IRC § 1014(e).

#### **¶ 318.4 Qualified Investment**

*Law: W. Va. Code § 11-13BB-6*

The qualified investment in eligible safety property is 100% of the cost of a qualified purchase. The property must be placed in service or use in West Virginia during the tax year. The property is considered placed in service or use during the earlier of either the taxable year when federal income tax depreciation begins in regard to the property, or the taxable year when the property is placed in condition or state of readiness and availability for a specifically assigned function.

The cost of the qualified investment does not include the value of property given in trade or exchange for eligible safety property. It also does not include insurance proceeds received in compensation for the loss of property damaged or destroyed by fire, flood, storm or other casualty, or stolen. The cost of rental property that is leased for a term of 5 years or longer is 100% of the rent reserved for the primary term of the lease, not to exceed 10 years. If property is purchased for multiple uses and is not principally and directly used to minimize workplace injuries and fatalities in a coal mine, the cost does not qualify as qualified investment for purposes of this credit.

### **¶ 318.5 Amount of the Credit**

*Law: W. Va. Code § 11-13BB-5*

The amount of the credit is equal to 50% of the amount of the qualified investment in the eligible innovative mine safety equipment. The amount of credit is applied over a period of 5 years at the rate of one-fifth of the credit beginning with the year the equipment is first placed in service or use.

### **¶ 318.6 Application of the Credit**

*Law: W. Va. Code § 11-13BB-5*

The credit is applied first against the taxpayer liability for corporation net income tax. The credit may be used to offset up to 50% of the liability of the taxpayer before application of any other credits other than the credit in W. Va. Code § 11-23-17.

If the taxpayer is an LLC, small business corporation or a partnership, then any credit remaining after application to corporate net income tax of the eligible taxpayer is allowed to be applied to offset up to 50% of the corporation net income tax imposed on the owners of the eligible taxpayer on the conduit income directly derived from the eligible taxpayer. This credit should be allocated among the owners in the same rates as profits and losses are allocated. The credit may not be used to offset personal income tax.

If the credit cannot be used due to these limitations, it is forfeited and cannot be carried forward or backward to another taxable year.

### **¶ 318.7 Filing Requirements**

*Law: W. Va. Code § 11-13BB-5*

In order to obtain the credit, the taxpayer must file an application for certification of the proposed tax credit with the Office of Miner's Health, Safety and Training. The credit may not be claimed until the taxpayer receives from the Office of Miner's Health, Safety and Training, certification of the amount of tax credit to be allocated to them.

### **¶ 318.8 Forfeiture of Credit**

*Law: W. Va. Code § 11-13BB-7*

If the taxpayer disposes of the eligible safety property or ceases to use the property in a coal mine prior to the end of the fourth tax year after the tax year in which the property was placed in service or use, then the unused portion of the credit allowed for the property is forfeited for the tax year in which the disposition or cessation of use occurred and for all ensuing years.

### **¶ 318.9 Transfer of Credit to Successors**

*Law: W. Va. Code § 11-13BB-8*

If a taxpayer changes the form of conducting its business, but retains a controlling interest in the successor business, and the certified eligible safety equipment is retained in a business in West Virginia for use in a coal mine in West Virginia, the forfeiture and redetermination rules do not apply, and the successor business is allowed to claim the amount of credit still available for subsequent years. The same is true where property is transferred or sold to a successor business that continues to use the property in a coal mine in West Virginia.

Upon the transfer or sale of the property, the successor acquires the amount of credit still remaining for each taxable year subsequent to the year of transfer. The credit available to the successor for the year of transfer is based on the ratio of the number of days remaining in the transferor's taxable year to the total number of days in the transferor's year. The transferor does not have to redetermine the amount of credit taken in earlier years.

### **¶ 318.10 Recordkeeping Requirements**

*Law: W. Va. Code §§ 11-13BB-9 and 11-13BB-10*

The taxpayer must keep records on their investment property. Information that must be maintained includes its identity and actual or reasonably determined cost, its straight-line depreciation life, the month and taxable year it was placed in service, the amount of credit taken, and the date the investment was either disposed of or ceased being actively used in the mine.

If these records are not maintained, then the taxpayer is treated as having disposed of any property that it cannot establish was still on hand and used in a coal mine at the end of the year. Also, if a taxpayer cannot establish when certified eligible safety property was placed in service, it is treated as being placed in service in the most recent year that similar property was placed in use, unless it can be proved that the property placed in service in the most recent year is still on hand. In that case, the taxpayer will be treated as having placed the property in service in the next most recent year.

### **¶ 318.11 Disclosure of Tax Credit Claimants**

*Law: W. Va. Code §11-13BB-12*

Although most tax information is confidential under W. Va. Code §11-10-5d, the Tax Commissioner is required to annually publish in the State Register the name and address of every eligible taxpayer and the amount of the tax credit claimed.

## ¶ 319 ALTERNATIVE-FUEL MOTOR VEHICLE TAX CREDIT

### ¶ 319.1 Introduction

*Law: W. Va. Code § 11-6D-1 et seq.*

The alternative-fuel motor vehicles tax credit is available for tax years beginning on or after January 1, 2011. The credit was enacted to encourage the use of alternative fuel vehicles. **The credit was significantly narrowed through legislation passed in 2013 to apply only to motor vehicles fueled by compressed natural gas, liquefied natural gas and liquefied petroleum gas.** The credit expired December 31, 2017.

## ¶ 320 ENERGY INTENSIVE INDUSTRIAL CONSUMERS REVITALIZATION TAX CREDIT

### ¶ 320.1 Introduction

*Law: W. Va. Code § 11-13CC-2*

The Energy Intensive Industrial Consumers Revitalization Tax Credit was enacted in 2012 and provides a tax credit to coal producers that supply coal to a West Virginia electric utility that provides a special rate to one or more energy intensive industrial consumers of electric power. The credit is designed to encourage energy intensive industrial consumers to locate, remain, or resume operations in West Virginia. This credit has been repealed.

## ¶ 321 RECLAMATION TAX CREDIT

*Law: W. Va. Code § 22-3-11(g)(2)(A)*

### ¶ 321.1 Introduction

A tax credit was enacted for tax years beginning on or after July 12, 2013 for mine operators who perform reclamation or remediation at a bond forfeiture mining site which otherwise would have been reclaimed using funds from the West Virginia Special Reclamation Fund or the West Virginia Special Reclamation Water Trust Fund. The credit is used to offset the special reclamation tax imposed under W. Va. Code §22-3-11(i)(1)(A).

### ¶ 321.2 Eligible Taxpayers

*Law: W. Va. Code § 22-3-11(g)(2)(A)*

In order to be eligible for the credit, a mine operator must perform reclamation or remediation at a mining site where the bond has been forfeited and where the reclamation or remediation would have been performed using funds from the West Virginia Special Reclamation Fund or the West Virginia Special Reclamation Water Trust Fund. The credit is retroactive and may be claimed for reclamation or remediation performed on or after January 1, 2012. For reclamation or remediation performed prior to July 13, 2013, no tax



credit may be granted unless a written application for the tax credit was submitted to the Tax Commissioner prior to September 1, 2014.

### **¶ 321.3 Amount of the Credit**

*Law: W. Va. Code § 22-3-11(g)(2)(B)*

The amount of the reclamation tax credit granted shall be equal to the amount that the Tax Commissioner determines, based on the project costs, as shown in the records of the Secretary of the Department of Environmental Protection, that would have been spent from the Special Reclamation Fund or Special Reclamation Water Trust Fund to accomplish the reclamation or remediation by the mine operator, including expenditures for water treatment.

### **¶ 321.4 Filing Requirements**

*Law: W. Va. Code § 22-3-11(g)(2)(C)*

In order to claim the credit, the mine operator must file with the Tax Commissioner from time to time a written application seeking the amount of the credit earned. Within thirty days of receipt of the application, the Tax Commissioner will issue a certification of the amount of the tax credit to be allocated to the mine operator. If no response is received within thirty days, the application will be deemed certified. The application will contain the information and be in the detail and form required by the Tax Commissioner.

If the amount certified is less than the amount requested, the Tax Commissioner shall set forth in writing the reasons for the difference. The decision of the Tax Commissioner is appealable under the provisions of the “West Virginia Tax Procedure and Administration Act” set forth in Chapter 11 of the West Virginia Code.

### **¶ 321.5 Application of the Credit**

*Law: W. Va. Code § 22-3-11(g)(2)(A)*

The credit can be used to offset the special reclamation tax of fourteen and four-tenths cents per ton of clean coal mined, imposed under W. Va. Code §22-3-11 (i)(1)(A).

## **¶ 322 MILITARY INCENTIVE CREDIT**

*Law: W. Va. Code §§11-21-42 and 21A-2C-2*

### **¶ 322.1 Introduction**

*Law: W. Va. Code § 21A-2C-2*

The Military Incentive Credit was enacted to encourage the employment of economically disadvantaged veterans of the Vietnam era and Korean conflict, as well as disabled veterans and unemployed members of the national guard and reserve forces.

## **¶ 322.2 Eligible Taxpayers**

*Law: W. Va. Code § 21A-2C-4(a)*

Persons, partnerships, and corporations that employ economically disadvantaged Vietnam era or Korean conflict veterans, any disabled veterans, or unemployed members of the national guard or reserve forces are entitled to a credit for each such individual so employed.

To qualify for the credit, the employee must be employed for at least one continuous year and the West Virginia Department of Employment Security must certify that the employee is eligible.

## **¶ 322.3 Amount of Credit**

*Law: W. Va. Code § 21A-2C-4(b)*

The credit available to employers of economically disadvantaged veterans of the Vietnam era and Korean conflict is 30% of the first \$5,000 in wages or compensation actually paid the employee. The credit available to employers of disabled veterans is the percentage of disability suffered by the veteran multiplied by the first \$5,000 in wages. The credit available to employers of unemployed members of the national guard or reserve forces is 25% of the first \$5,000 in wages.

## **¶ 322.4 Application of the Credit**

*Law: W.Va. Code § 21A-2C-4(a)*

In the case of a person or partnership, the tax credit is applied against the employer's personal income tax liability. For corporations, the credit is applied against the corporation's corporate net income tax liability. The credit may not exceed an employer's total tax liability.

## **¶ 323 NATURAL GAS JOBS RETENTION ACT CREDIT**

### **¶ 323.1 Introduction**

*Law: W. Va. Code § 11-13L-1*

The Natural Gas Industry Jobs Retention Act was created to encourage natural gas businesses to retain and hire full-time employees.

### **¶ 323.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13L-2*

To be eligible for the credit, a business must be subject to the natural gas storage provisions of the Business and Occupation Tax, and it must have at least 60% of the number of jobs that existed within the business as of January 1, 1996.

### **¶ 323.3 Amount of the Credit**

*Law: W. Va. Code § 11-13L-4*

The Act provides a \$1,000 tax credit for each qualified full-time employee. A full-time employee is one who works on a work site or is on paid leave at least 1,500 hours a year. The employee must also be a West Virginia resident domiciled in the state to be qualified.

### **¶ 323.4 Application of the Credit**

*Law: W. Va. Code § 11-13L-5*

The credit is applied against only the tax liability created by the natural gas storage provisions of the Business and Occupation Tax. It may not exceed the Business and Occupation Tax liability attributable to natural gas storage activity. The credit may not be carried back or forward.

## **¶ 324 TELEPHONE UTILITIES RATE REDUCTION CREDIT**

### **¶ 324.1 Introduction**

*Law: W. Va. Code § 11-13G-1*

A tax credit is available to C corporations that provide telephone service at reduced rates to low-income residential customers.

### **¶ 324.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13G-2*

Any C corporation that has provided telephone service to qualified low-income residential customers at a special reduced rate is eligible for the credit.

### **¶ 324.3 Amount of the Credit**

*Law: W. Va. Code § 11-13G-3*

The amount of the credit is the cost of providing service to qualified customers, less any reimbursement received through other means as certified under W.Va. Code § 11-24-11a.

### **¶ 324.4 Application of the Credit**

*Law: W. Va. Code §§ 11-13G-3, 5*

The credit is applied against the taxpayer's liability for corporation net income taxes. If any portion of the credit still remains, the unrecovered amount may only be carried over to the subsequent year against the taxpayer's liability for business and occupation tax, if any. The taxpayer may not recover more than 100% of the certified revenue deficiency.

## **¶ 324.5 Filing Requirements**

*Law: W. Va. Code § 11-24-11a*

The West Virginia Public Service Commission must certify the amount of the revenue deficiency resulting from the provision of reduced-rate service. A copy of the certification must be attached to the return on which the credit is claimed.

## **¶ 325 ELECTRIC AND NATURAL GAS UTILITIES RATE REDUCTION CREDIT**

### **¶ 325.1 Introduction**

*Law: W. Va. Code § 11-13F-1*

Similar to the Telephone Utilities Rate Reduction Credit above, this credit was created to reimburse public utilities for revenue deficiencies incurred in providing special reduced electric or natural gas utility rates to low-income residential customers.

### **¶ 325.2 Eligible Taxpayers**

*Law: W. Va. Code § 11-13F-2*

A utility which has provided electric or natural gas service, or both electric and natural gas service; or water or sewer service, or both water and sewer service, to qualified low-income residential customers at special reduced rates.

### **¶ 325.3 Cost of providing electric or natural gas utility service or both at special reduced rates**

The amount certified by the Public Service Commission under the provisions of section three, article two-a, chapter twenty-four §24-2A-2 of this code as the revenue deficiency incurred by a public utility in providing special reduced rates for electric, or natural gas, sewer, or water utility service as required by §24-2A-1 or approved pursuant to §24-2A-5 of this code.

### **¶ 325.4 Amount of the Credit**

*Law: W. Va. Code § 11-13F-3*

(a) There shall be allowed to any eligible taxpayer a credit against the business and occupation taxes imposed by §11-13-1 et seq. of this code, for reducing electric and natural gas utility rates. The amount of the credit available to any eligible taxpayer shall be equal to its cost of providing electric or natural gas service, or both, at special reduced rates as certified by the Public Service Commission under the provisions of §24-2A-2 of this code to qualified residential customers, less any reimbursement of said cost which the taxpayer has received through any other means.

(b) For tax years beginning on or after January 1, 2019, there shall be allowed to any eligible taxpayer a credit against the business and occupation taxes imposed by §11-13-1 et seq. of this code, for reducing rates for providing electric, natural gas, sewer or water

service, or any combination of electric, natural gas, water or sewer services. The amount of the credit available to any eligible taxpayer shall be equal to its cost of providing utility service at special reduced rates to qualified residential customers, less any reimbursement of said cost which the taxpayer has received through any other means.

(c) The tax commissioner may prescribe such regulations as may be necessary to carry out the purposes of this section, of §11-13F-1 *et seq.* of this code and of §11-24-11 of this code.

### **¶ 325.5 Application of the Credit**

*Law: W. Va. Code § 11-13F-5*

The credit is first applied against business and occupation tax liability. Any unused portion of the credit may then be taken as a credit against corporation net income taxes. If any portion of the credit still remains, the unrecovered amount may be carried over to the subsequent year and applied against business and occupation tax liability. It must be applied before any other credit for that year. The taxpayer may not recover more than 100% of the certified revenue deficiency.

### **¶ 325.6 Filing Requirements**

*Law: W. Va. Code § 11-24-11*

The West Virginia Public Service Commission must certify the amount of the revenue deficiency resulting from the provision of reduced-rate service. A copy of the certification must be attached to the return on which the credit is claimed.

## **¶ 326 WEST VIRGINIA FARM-TO-FOOD BANK TAX CREDIT**

### **¶ 326.1 Findings**

*Law: W. Va. Code §11-13DD-1.*

### **¶ 326.2 Definitions**

*Law: W. Va. Code §11-13DD-2.*

- (1) "Department" means the Department of Agriculture;
- (2) "Donor" means a qualified taxpayer who provides free of fee or charge edible agricultural products to a nonprofit food program operating in West Virginia;
- (3) "Edible agricultural products" means fruits, vegetables, beef, poultry, pork, fish or any other edible product raised or grown in West Virginia that is intended for, and fit for, human consumption;
- (4) "Farming taxpayer" means a West Virginia taxpayer responsible for, and deriving income of, at least \$1,000 from growing fruits, vegetables or other edible agricultural products or from raising beef, poultry, pork, fish or other edible agricultural products; and

(5) "Nonprofit food program" means a surplus food collection and distribution program operated and established to collect donated food for redistribution to persons in need and is recognized as exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code.

**¶ 326.3 Amount of credit; limitation of credit**

*Law: W. Va. Code §11-13DD-3*

(a) There is allowed to farming taxpayers who make donations of edible agricultural products to one or more nonprofit food programs in this state a credit against taxes imposed by articles twenty-one and twenty-four of this chapter in the amount set forth in subsection (b) of this section.

(b) The amount of the credit is equal to ten percent of the value of the donated edible agricultural products, but not to exceed \$2,500 during a taxable year or the total amount of tax imposed by article twenty-one or twenty-four of this chapter, whichever is less, in the year of donations.

(c) If the amount of the credit exceeds the taxpayer's tax liability for the taxable year, the amount which exceeds the tax liability may be carried over and applied as a credit against the tax liability of the taxpayer pursuant to article twenty-one or twenty-four of this chapter to each of the next four taxable years unless sooner used.

(d) No more than \$200,000 of tax credits may be allocated to the department in any fiscal year. The department shall allocate the tax credits in the order the donation forms are received.

**¶ 326.4 Determination of value of credit**

*Law: W. Va. Code §11-13DD-4*

(a) The donor shall determine the value of the donated edible agricultural products as follows:

(1) If there was a previous sale of the edible agricultural products to a buyer, the donor should retain a copy of an invoice or other statement identifying the price received by the donor for the edible agricultural products of comparable grade or quality; or previous sale to a buyer, the donor shall on the date of the donation, determine the value of the donated edible agricultural products based on the fair market value as determined by average weekly regional produce auction prices or United States Department of Agriculture prices for meat, fish and dairy products.

(b) At the time of the donation, the donor shall provide to the nonprofit food program the estimated value of the donated edible agricultural products as determined herein. The nonprofit food program shall provide to the donor a signed and dated form prescribed by the department containing at a minimum:

- (1) The type and quantity of product donated;
- (2) The name, address and taxpayer identification number of the donor or donors;
- (3) The name and address of the donee nonprofit food program; and

(4) The estimated value of the donated edible agricultural products, as provided by the donor.

(c) To claim the tax credit, a qualified farming taxpayer shall send the donation form from the nonprofit food program to the department for certification

**¶ 326.5 Legislative rules**

*Law: W. Va. Code §11-13DD-5.*

**¶ 326.6. Tax credit review report**

*Law: W. Va. Code §11-13DD-6*

Beginning on the first day of the second taxable year after the passage of this article and every two years thereafter, the department shall submit to the Governor, the President of the Senate and the Speaker of the House of Delegates a tax credit review and accountability report.

**¶ 327 Downstream Natural Gas Manufacturing Investment Tax Credit**

**¶ 327.1 Findings**

*Law: W. Va. Code §11-13GG-2.*

The Legislature finds that the encouragement of downstream manufacturing in this state is in the public interest and promotes the general welfare of the people of this state. In order to encourage greater capital investment in downstream natural gas manufacturing businesses in this state and thereby increase economic opportunity in this state, there is hereby enacted the downstream manufacturing tax credit.

**¶ 327.2 Definitions**

*Law: W. Va. Code §11-13GG-3.*

(a) General. -- When used in this article, or in the administration of §11-13GG-1 et seq. of this code, terms defined in subsection (b) have the meanings ascribed to them by this section, unless a different meaning is clearly required by either the context in which the term is used, or by specific definition, in §11-13GG-1 et seq. of this code.

(b) Terms defined.

(1) "Affiliated group" means any affiliated group within the meaning section 1504(a) of the Internal Revenue Code, or any similar group defined under a similar provision of state, local, or foreign law, except that section 1504 of Internal Revenue Code shall be applied by substituting "more than 50 percent" for "at least 80 percent" each place it appears in that section.

(2) "Business" means a downstream natural gas manufacturing business activity which is engaged in by any person in this state which is taxable under §11-21-1 et seq. or §11-24-1 et seq. of this code.

(3) “Business expansion” means capital investment in a new or expanded downstream natural gas manufacturing facility in this state.

(4) “Commissioner” or “Tax Commissioner” are used interchangeably in this article and mean the Tax Commissioner of the State of West Virginia, or his or her designee.

(5) “Compensation” means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services.

(6) “Controlled group of corporations” means a controlled group of corporations as defined in section 1563(a) of the Internal Revenue Code.

(7) “Corporation” means any corporation, joint-stock company, association, or other entity treated as a corporation for federal income tax purposes, and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certificate of interest or ownership or similar written instrument.

(8) “Designee” in the phrase “or his or her designee,” when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Department duly authorized by the commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article.

(9) “Downstream natural gas manufacturing” refers to oil and gas manufacturing operations after the production and processing phases and includes, but is not limited to, facilities that use oil, natural gas, natural gas liquids, or the products produced by ethane crackers as raw materials to manufacture industrial and commercial products.

(10) “Downstream natural gas manufacturing business” means a business primarily engaged in this state in downstream natural gas manufacturing.

(11) “Downstream natural gas manufacturing facility” or “downstream manufacturing facility” means any factory, mill, plant, warehouse, building, or complex of buildings located within this state, including the land on which it is located, and all machinery, equipment, and other real and personal property located at or within the facility, used in connection with the operation of the facility, in a business that is taxable in this state, and all site preparation and start-up costs of the taxpayer for the downstream natural gas manufacturing facility which it capitalizes for federal income tax purposes.

(12) “Eligible taxpayer” means any person who makes qualified investment in a new or expanded downstream natural gas manufacturing facility located in this state and creates at least the required number of new jobs and who is subject to any of the taxes imposed by §11-21-1 et seq. or §11-24-1 et seq. of this code.

(13) “Expanded facility” means any downstream natural gas manufacturing facility, other than a new or replacement business facility, resulting from the acquisition, construction, reconstruction, installation, or erection of improvements or additions to existing property if the improvements or additions are purchased on or after July 1, 2020, but only to the extent of the taxpayer’s qualified investment in the improvements or additions.



(14) “Includes” and “including” when used in a definition contained in this article, shall not be considered to exclude other things otherwise within the meaning of the term defined.

(15) “Leased property” does not include property which the taxpayer is required to show on its books and records as an asset under generally accepted principles of financial accounting. If the taxpayer is prohibited from expensing the lease payments for federal income tax purposes, the property shall be treated as purchased property under this section.

(16) “Natural gas” means a gaseous fossil energy source that formed deep beneath the earth’s surface that is a combustible mixture of methane and other hydrocarbons.

(17) “Natural gas liquids” includes the following separated from raw natural gas: butane, ethane, isobutane, pentane, propane, and similar liquid hydrocarbons and byproducts separated from natural gas.

(18) “Natural resources” means all forms of minerals, including, but not limited to, rock, stone limestone, coal shale, gravel, sand, clay, natural gas, oil, and natural gas liquids which are contained in or on the soils or waters of this state and includes standing timber.

(19) “New downstream natural gas manufacturing facility” means a business facility which satisfies all the requirements of paragraphs (A), (B), (C), and (D) of this subdivision.

(A) The facility is employed by the taxpayer in the conduct of a downstream natural gas manufacturing activity the net income of which is or would be taxable under §11-21-1 et seq. or §11-24-1 et seq. of this code. The facility is not considered a new downstream natural gas manufacturing facility in the hands of the taxpayer if the taxpayer’s only activity with respect to the facility is to lease it to another person or persons.

(B) The facility is purchased by, or leased to, the taxpayer on or after July 1, 2020.

(C) The facility was not purchased or leased by the taxpayer from a related person. The commissioner may waive this requirement if the facility was acquired from a related party for its fair market value and the acquisition was not tax motivated.

(D) The facility was not in service or use during the 90 days immediately prior to transfer of the title to the facility, or prior to the commencement of the term of the lease of the facility: Provided, That this 90-day period may be waived by the commissioner if the commissioner determines that persons employed at the facility may be treated as “new employees” as that term is defined in this subsection.

(20) “New employee” -

(A) The term new employee means an individual hired by the taxpayer to fill a position or a job in this state which previously did not exist in the taxpayer’s downstream natural gas manufacturing activity in this state prior to the date on which the taxpayer’s qualified investment in a new or expanded downstream natural gas manufacturing facility is placed in service or use in this state. In no case may the number of new employees directly attributable to the investment for purposes of this credit exceed the total net increase in

the taxpayer's employment in this state: Provided, That the Tax Commissioner may require that the net increase in the taxpayer's employment in this state be determined and certified for the taxpayer's controlled group: Provided, however, That persons filling jobs saved as a direct result of taxpayer's qualified investment in property purchased or leased for business expansion may be treated as new employees filling new jobs if the taxpayer certifies the material facts to the commissioner and the Tax Commissioner expressly finds that:

(i) But for the new employer purchasing the assets of a downstream natural gas manufacturing business in bankruptcy under chapter seven or 11 of the United States bankruptcy code and the new employer making qualified investment in property purchased or leased for business expansion, the assets would have been sold by the United States bankruptcy court in a liquidation sale and the jobs saved would have been lost; or

(ii) But for the taxpayer's qualified investment in property purchased or leased for downstream manufacturing business expansion in this state, the taxpayer would have closed its downstream natural gas manufacturing facility in this state and the employees of the taxpayer located at the facility would have lost their jobs: Provided, That the Tax Commissioner may not make this certification unless the commissioner finds that the taxpayer is insolvent as defined in 11 U.S.C. §101(32) or that the taxpayer's natural gas manufacturing facility was destroyed, in whole or in significant part, by fire, flood, or other act of God.

(B) A person is considered to be a new employee only if the person's duties in connection with the operation of the downstream natural gas manufacturing facility are on:

(i) A regular, full-time and permanent basis:

(I) Full-time employment means employment for at least 140 hours per month at a wage not less than the applicable state or federal minimum wage, depending on which minimum wage provision is applicable to the business.

(II) Permanent employment does not include employment that is temporary or seasonal and therefore the wages, salaries, and other compensation paid to the temporary or seasonal employees will not be considered for purposes of §11-13GG-5 of this code.

(ii) A regular, part-time, and permanent basis: Provided, That the person is customarily performing the duties at least 20 hours per week for at least six months during the taxable year.

(21) "New job" means a job which did not exist in the downstream natural gas manufacturing business of the taxpayer in this state prior to the taxpayer's qualified investment being made, and which is filled by a new employee.

(22) "New property" means:

(A) Property, the construction, reconstruction, or erection of which is completed on or after July 1, 2020, and placed in service or use after that date; and

(B) Property leased or acquired by the taxpayer that is placed in service or use in this state on or after July 1, 2020, if the original use of the property commences with the taxpayer and commences after that date.

(23) "Original use" means the first use to which the property is put, whether or not the use corresponds to the use of the property by the taxpayer.

(24) "Partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, which is treated as a partnership for federal income tax purposes, and which is not a trust or estate, a corporation, or a sole proprietorship.

(25) "Partner" includes a member in such a syndicate, group, pool, joint venture, or other organization.

(26) "Person" includes any natural person, corporation, or partnership.

(27) "Property purchased or leased for business expansion" -

(A) Included property. -- Except as provided in paragraph (B), the term "property purchased or leased for business expansion" means real property and improvements thereto, and tangible personal property, but only if the real or personal property was constructed, purchased, or leased and placed in service or use by the taxpayer, for use as a component part of a new or expanded downstream natural gas manufacturing facility as defined in this section, which is located within the State of West Virginia. This term includes only:

(i) Real property and improvements thereto having a useful life of four or more years, placed in service or use on or after July 1, 2020, by the taxpayer.

(ii) Real property and improvements thereto, acquired by written lease having a primary term of 10 or more years and placed in service or use by the taxpayer on or after July 1, 2020.

(iii) Tangible personal property placed in service or use by the taxpayer on or after July 1, 2020, with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the personal or corporation net income tax liability of the business taxpayer under §11-21-1 et seq. or §11-24-1 et seq. of this code, and which has a useful life, at the time the property is placed in service or use in this state, of four or more years.

(iv) Tangible personal property acquired by written lease having a primary term of four years or longer, that commenced and was executed by the parties thereto on or after July 1, 2020, if used as a component part of a new or expanded downstream manufacturing business facility, shall be included within this definition.

(v) Tangible personal property owned or leased, and used by the taxpayer at a business location outside this state which is moved into the State of West Virginia on or after July 1, 2020, for use as a component part of a new or expanded downstream natural gas manufacturing facility located in this state: Provided, That if the property is owned, it must be depreciable or amortizable personal property for income tax purposes, and have

a useful life of four or more years remaining at the time it is placed in service or use in this state, and if the property is leased, the primary term of the lease remaining at the time the leased property is placed in service or use in this state, must be four or more years.

(B) Excluded property. - The term property purchased or leased for business expansion does not include:

(i) Property owned or leased by the taxpayer and for which the taxpayer was previously or is currently being allowed tax credit under §11-13D-1 et seq., §11-13Q-1 et seq., §11-13S-1 et seq., or §11-13U-1 et seq. of this code.

(ii) Property owned or leased by the taxpayer and for which the seller, lessor, or other transferor, was previously or is currently being allowed tax credit under §11-13D-1 et seq., §11-13Q-1 et seq., §11-13S-1 et seq., or §11-13U-1 et seq. of this code.

(iii) Repair costs, including materials used in the repair, unless for federal income tax purposes the cost of the repair must be capitalized and not expensed.

(iv) Airplanes and helicopters.

(v) Property which is primarily used outside this state, with use being determined based upon the amount of time the property is actually used both within and outside this state.

(vi) Property which is acquired incident to the purchase of the stock or assets of the seller, unless for good cause shown, the Tax Commissioner consents to waiving this requirement.

(vii) Natural resources in place.

(viii) Purchased or leased property, the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time the property is placed in service or use: Provided, That when the contract of purchase or lease specifies a minimum purchase price or minimum annual rent the amount thereof shall be used to determine the qualified investment in the property under §11-13GG-6 of this code if the property otherwise qualifies as property purchased or leased for expansion of a downstream natural gas manufacturing facility.

(28) "Purchase" means any acquisition of property, but only if:

(A) The property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under section 267 or 707 (b) of the United States Internal Revenue Code.

(B) The property is not acquired by one component member of an affiliated or controlled group from another component member of the same affiliated or controlled group, as applicable. The Tax Commissioner may waive this requirement if the property was acquired from a related party for its then fair market value; and

(C) The basis of the property for federal income tax purposes, in the hands of the person acquiring it, is not determined:

(i) In whole or in part, by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired; or

(ii) Under Section 1014(e) of the United States Internal Revenue Code.

(29) "Qualified activity" means any downstream natural gas manufacturing business activity subject to any of the taxes imposed by §11-21-1 et seq. or §11-24-1 et seq. of this code but does not include the activity of severance or production of natural resources.

(30) "Related person" means:

(A) A corporation, partnership, association, or trust controlled by the taxpayer;

(B) An individual, corporation, partnership, association, or trust that is in control of the taxpayer;

(C) A corporation, partnership, association, or trust controlled by an individual, corporation, partnership, association, or trust that is in control of the taxpayer; or

(D) A member of the same affiliated or controlled group as the taxpayer.

For purposes of this subdivision, control, with respect to a corporation, means ownership, directly or indirectly, of stock possessing 50 percent or more of the total combined voting power of all classes of the stock of the corporation entitled to vote.

Control, with respect to a trust, means ownership, directly or indirectly, of 50 percent or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association, or of a beneficial interest in a trust is determined in accordance with the rules for constructive ownership of stock provided in section 267(c) of the United States Internal Revenue Code, other than paragraph (3) of that section.

(31) "Replacement downstream natural gas manufacturing facility" means any property (other than an expanded downstream natural gas manufacturing facility) that replaces or supersedes any other property located within this state that:

(A) The taxpayer or a related person used in or in connection with any downstream natural gas manufacturing facility for more than two years during the period of five consecutive years ending on the date the replacement or superseding property is placed in service by the taxpayer; or

(B) Is not used by the taxpayer or a related person in or in connection with any downstream natural gas manufacturing facility for a continuous period of one year or more commencing with the date the replacement or superseding property is placed in service by the taxpayer.

(32) "Taxpayer" means any person subject to any of the taxes imposed by §11-21-1 et seq. or §11-24-1 et seq. of this code.

(33) "This code" means the Code of West Virginia, 1931, as amended.

(34) "This state" means the State of West Virginia.

(35) "United States Internal Revenue Code" or "I.R.C." means the Internal Revenue Code as defined in §11-21-1 et seq. or §11-24-1 et seq. of this code.

(36) "Used property" means property acquired after June 30, 2020, that is not "new property".

**¶ 327.3 Amount of credit; limitation of credit**

*Law: W. Va. Code §11-13GG-4*

(a) Credit allowed. - Notwithstanding any other provision of this code, eligible taxpayers are allowed a credit against the portion of taxes imposed by this state that are attributable to and the consequence of the taxpayer's qualified investment in a new or expanded downstream natural gas manufacturing facility in this state, which results in the creation of new jobs. The amount of this credit is determined and applied as provided in this article.

(b) Amount of credit. - The amount of credit allowable is determined by multiplying the amount of the taxpayer's qualified investment, determined under §11-13GG-6 of this code, in property purchased or leased for a new, or expansion of an existing "downstream natural gas manufacturing facility", as defined in §11-13GG-3 of this code, by the taxpayer's new jobs percentage, determined under §11-13GG-7 of this code. The product of this calculation establishes the maximum amount of credit allowable under this article due to the qualified investment.

(c) Application of credit over 10 years. - The amount of credit allowable must be taken over a 10-year period, at the rate of one tenth of the amount thereof per taxable year, beginning with the taxable year in which the taxpayer places the qualified investment in service or use in this state, unless the taxpayer elected to delay the beginning of the 10-year period until the next succeeding taxable year. This election shall be made in the annual income tax return filed under this chapter for the taxable year in which qualified investment is first placed into service or use by the taxpayer. Once made, the election cannot be revoked. The annual credit allowance is taken in the manner prescribed in §11-13GG-5 of this code.

(d) Placed in service or use. - For purposes of the credit allowed by this section, property is considered placed in service or use in the earlier of the following taxable years:

(1) The taxable year in which, under the taxpayer's depreciation practice, the period for depreciation with respect to the property begins; or

(2) The taxable year in which the property is placed in a condition or state of readiness and availability for a specifically assigned function.

## ¶ 327.4 Application of annual credit allowance

Law: W. Va. Code §11-13GG-5.

(a) In general. - The aggregate annual credit allowance for the current taxable year is an amount equal to the sum of the following:

(1) The one-tenth part allowed under §11-13GG-4 of this code for qualified investment property placed into service or use during a prior taxable year; plus

(2) The one-tenth part allowed under §11-13GG-4 of this code for qualified investment property placed into service or use during the current taxable year.

(b) Application of current year annual credit allowance. - The amount determined under subsection (a) of this section is allowed as a credit against 80 percent of that portion of the taxpayer's state tax liability which is attributable to and the direct result of the taxpayer's qualified investment, and applied as provided in subsections (c) and (d), both inclusive, of this section, and in that order: Provided, That if the median salary of the new jobs is higher than the statewide average nonfarm payroll wage, as determined annually by Workforce West Virginia, the amount determined under subsection (a) of this section is allowed as a credit against 100 percent of that portion of the taxpayer's state tax liability which is attributable to and the direct result of the taxpayer's qualified investment, and shall be applied, as provided in subsections (c) through (d), both inclusive, of this section, and in that order.

(c) Corporation net income taxes. -

(1) That portion of the allowable credit attributable to qualified investment in a downstream natural gas manufacturing facility may be applied to reduce the taxes imposed by §11-24-1 et seq. of this code for the taxable year as determined before application of allowable credits against tax.

(2) If the taxes due under §11-24-1 et seq. of this code, as determined before application of allowable credits against tax, are not solely attributable to and the direct result of the taxpayer's qualified investment in a downstream natural gas manufacturing business, the amount of the taxes that is attributable are determined by multiplying the amount of taxes due under §11-24-1 et seq. of this code for the taxable year, as determined before application of allowable credits against tax, by a fraction, the numerator of which is all wages, salaries, and other compensation paid during the taxable year to all employees of the taxpayer employed in this state whose positions are directly attributable to the qualified investment. The denominator of the fraction is the wages, salaries, and other compensation paid during the taxable year to all employees of the taxpayer employed in this state.

(d) Personal income taxes. -

(1) If the person making the qualified investment in a downstream natural gas manufacturing facility is an electing small business corporation, as defined in section 1361 of the United States Internal Revenue Code, a partnership, a limited liability company that is treated as a partnership for federal income tax purposes, or a sole proprietorship, then any unused credit is allowed as a credit against the taxes imposed by §11-21-1 et seq. of this code on the income from downstream natural gas manufacturing facility, or on income of a sole proprietor attributable to the downstream natural gas manufacturing facility.

(2) Electing small business corporations, limited liability companies treated as partnerships for federal income tax purposes, partnerships, and other unincorporated organizations shall allocate the credit allowed by this article among its members in the same manner as profits and losses are allocated for the taxable year.

(3) If the amount of taxes due under §11-21-1 et seq. of this code, as determined before application of allowable credits against tax, that is attributable to business, is not solely attributable to and the direct result of the qualified investment of the electing small business corporation, limited liability company treated as a partnership for federal income tax purposes, other unincorporated organization, or sole proprietorship, the amount of the taxes that are so attributable are determined by multiplying the amount of taxes due under §11-21-1 et seq. of this code, as determined before application of allowable credits against tax that is attributable to business by a fraction, the numerator of which is all wages, salaries, and other compensation paid during the taxable year to all employees of the electing small business corporation, limited liability company, partnership, other unincorporated organization, or sole proprietorship employed in this state, whose positions are directly attributable to the qualified investment. The denominator of the fraction is the wages, salaries, and other compensation paid during the taxable year to all employees of the taxpayer.

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

(e) If the wages, salaries, and other compensation fraction formula provisions of subsections (c) and (d) of this section, inclusive, do not fairly represent the taxes solely attributable to and the direct result of qualified investment of the taxpayer the Tax Commissioner may require, in respect to all or any part of the taxpayer's businesses or activities, if reasonable:

(1) Separate accounting or identification;

(2) Adjustment to the wages, salaries, and other compensation fraction formula to reflect all components of the tax liability;

(3) The inclusion of one or more additional factors that will fairly represent the taxes solely attributable to and the direct result of the qualified investment of the taxpayer and all other project participants in the businesses or other activities subject to tax; or



(4) The employment of any other method to effectuate an equitable attribution of the taxes.

In order to effectuate the purposes of this subsection, the Tax Commissioner may propose for promulgation rules, including emergency rules, in accordance with §29A-3-1 et seq. of this code.

(f) Unused credit. - If any credit remains after application of subsection (b) of this section, the amount thereof is carried forward to each ensuing tax year until used or until the expiration of the tenth taxable year subsequent to the end of the initial 10-year credit application period. If any unused credit remains after the 20th year, the amount thereof is forfeited. No carryback to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance.

### ¶ 327.5 Qualified investment

*Law: W. Va. Code §11-13GG-6.*

(a) General. - The qualified investment in property purchased or leased for a new, or expansion of an existing, downstream natural gas manufacturing facility is the applicable percentage of the cost of each property purchased or leased for the purpose of the new, or expansion of an existing, downstream natural gas manufacturing facility which is placed in service or use in this state by the taxpayer during the taxable year.

(b) Applicable percentage. - For the purpose of subsection (a), the applicable percentage of any property is determined under the following table:

<b>If useful life is:</b>	<b>The applicable percentage is:</b>
Less than four years	0%
Four years or more but less than six years	33 1/3%
Six years or more but less than eight years	66 2/3%
Eight years or more	100%

The useful life of any property, for purposes of this section, is determined as of the date the property is first placed in service or use in this state by the taxpayer, determined in accordance with such rules and requirements the Tax Commissioner may prescribe.

(c) Cost. - For purposes of subsection (a) of this section, the cost of each property purchased for a new, or expansion of an existing, downstream natural gas manufacturing facility is determined under the following rules:

(1) Trade-ins. - Cost does not include the value of property given in trade or exchange for the property purchased for a new, or for expansion of an existing, downstream natural gas manufacturing facility.

(2) Damaged, destroyed, or stolen property. - If property is damaged or destroyed by fire, flood, storm, or other casualty, or is stolen, then the cost of replacement property does not include any insurance proceeds received in compensation for the loss.

(3) Rental property. -

(A) The cost of real property acquired by written lease for a primary term of 10 years or longer is 100 percent of the rent reserved for the primary term of the lease, not to exceed 20 years.

(B) The cost of tangible personal property acquired by written lease for a primary term of:

(i) Four years, or longer, is one third of the rent reserved for the primary term of the lease;

(ii) Six years, or longer, is two thirds of the rent reserved for the primary term of the lease; or

(iii) Eight years, or longer, is 100 percent of the rent reserved for the primary term of the lease, not to exceed 20 years: Provided, That in no event may rent reserved include rent for any year subsequent to expiration of the book life of the equipment, determined using the straight-line method of depreciation.

(4) Self-constructed property. - In the case of self-constructed property, the cost thereof is the amount properly charged to the capital account for depreciation in accordance with federal income tax law.

(5) Transferred property. - The cost of property used by the taxpayer out-of-state and then brought into this state, is determined based on the remaining useful life of the property at the time it is placed in service or use in this state, and the cost is the original cost of the property to the taxpayer less straight line depreciation allowable for the tax years or portions thereof the taxpayer used the property outside this state. In the case of leased tangible personal property, cost is based on the period remaining in the primary term of the lease after the property is brought into this state for use in a new or expanded business facility of the taxpayer, and is the rent reserved for the remaining period of the primary term of the lease, not to exceed 20 years, or the remaining useful life of the property, as determined as aforesaid, whichever is less.

### **¶ 327.6 New jobs percentage**

*Law: W. Va. Code §11-13GG-7.*

(a) In general. - The new jobs percentage is based on the number of new jobs created in this state directly attributable to the qualified investment of the taxpayer.

(b) When a job is attributable. - An employee's position is directly attributable to the qualified investment if:

(1) The employee's service is performed or his or her base of operations is at the new or expanded downstream natural gas manufacturing facility;

(2) The position did not exist prior to the construction, renovation, expansion, or acquisition of the downstream natural gas manufacturing facility and the making of the qualified investment; and

(3) But for the qualified investment, the position would not have existed.

(c) Applicable percentage. - For the purpose of subsection (a) of this section, the applicable new jobs percentage is determined under the following table:

<b>If number of new jobs is at least:</b>	<b>The applicable percentage is:</b>
5	10%
50	15%
150	20%

(d) Certification of new jobs. - With the annual return for the applicable taxes filed for the taxable year in which the qualified investment is first placed in service or use in this state, the taxpayer shall estimate and certify the number of new jobs reasonably projected to be created by it in this state within the period prescribed in subsection (f) of this section that are, or will be, directly attributable to the qualified investment of the taxpayer. For purposes of this section, applicable taxes means the taxes imposed by §11-21-1 et seq. or §11-24-1 et seq. of this code against which this credit is applied.

(e) Equivalency of permanent employees. - The hours of part-time employees shall be aggregated to determine the number of equivalent full-time employees for the purpose of this section.

(f) Redetermination of new jobs percentage. - With the annual return for the applicable taxes imposed, filed for the third taxable year in which the qualified investment is in service or use, the taxpayer shall certify the actual number of new jobs created by it in this state that are directly attributable to the qualified investment of the taxpayer.

(1) If the actual number of jobs created would result in a higher new jobs percentage, the credit allowed under this article shall be redetermined and amended returns shall be filed for the first and second taxable years that the qualified investment was in service or use in this state.

(2) If the actual number of jobs created would result in a lower new jobs percentage, the credit previously allowed under this article shall be redetermined and amended returns shall be filed for the first and second taxable years. In applying the amount of

redetermined credit allowable for the two preceding taxable years, the redetermined credit shall first be applied to the extent it was originally applied in the prior two years to personal income taxes, and then to corporation net income taxes. Any additional taxes due under this chapter shall be remitted with the amended returns filed with the Tax Commissioner, along with interest, as provided in §11-10-17 of this code, and a 10-percent penalty determined on the amount of taxes due with the amended return, which may be waived by the commissioner if the taxpayer shows that the overclaimed amount of the new jobs percentage was due to reasonable cause and not due to willful neglect.

(g) Additional new jobs percentage. - When the qualified investment is \$20 million or more and if the number of full-time construction laborers and mechanics working at the job site of the new or expanded business facility is 50 or more, or if the number of hours of all construction laborers and mechanics working at the job site is equal to or greater than the number of hours 50 full-time construction laborers and mechanics would have worked at the job site during a 12 consecutive month period, a taxpayer that is allowed a new jobs percentage determined under subsection (a) of this section shall be allowed a new jobs percentage that is five percentage points higher than the new jobs percentage allowed under subsection (a) of this section. In no event may construction laborers and mechanics be used to attain or retain a subsection (a) new jobs percentage. The number of full-time construction laborers and mechanics working at the job site shall be determined by dividing the total number of hours worked by all construction laborers and mechanics on a new or expanded business facility during a 12 consecutive month period by 2,080 hours per year. A taxpayer may not claim the additional new jobs percentage allowed by this section unless the taxpayer includes with the certification filed under subsection (d) of this section a certification signed by the general contractor or the construction manager certifying that construction laborers employed at the job site during a consecutive 12 month period aggregated the equivalent of at least 50 full-time employees and the taxpayer has received from the general contractor or construction manager records substantiating the certification, which records shall be retained by the taxpayer for 13 years after the day the expansion to an existing business facility, or the new business facility, is first placed in service or use by the taxpayer. For purposes of subsection (g) of this section:

(1) The term construction laborers and mechanics means those workers, utilized by a contractor or subcontractor at any tier, whose duties are manual or physical in nature, including those workers who use tools or are performing the work of a trade, as distinguished from mental or managerial and working foremen who devote more than 20 percent of their time during a workweek performing the duties of a laborer or mechanic; and

(2) The term job site is limited to the physical place or places where the construction called for in the contract will remain when the work on it is completed and nearby property, as described in subdivision (3) of this subsection, used by the contractor or subcontractor during construction that, because of proximity, can reasonably be included in the site.

(3) Except as provided in subdivision (4) of this subsection, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, and tool yards are part of the job site provided they are dedicated exclusively, or nearly so, to performance of the contract or project and are located in proximity to the actual construction location so that it would be reasonable to include them.

(4) The term "job site" does not include permanent home offices, branch offices, branch plant establishments, fabrication yards, or tool yards of a contractor or subcontractor whose locations and continuance in operation are determined without regard to the contract or subcontract for construction of a new or expanded business facility.

### **¶ 327.7 Forfeiture of unused tax credits; redetermination of credit allowed**

*Law: W. Va. Code §11-13GG-8.*

(a) Disposition of property or cessation of use. - If during any taxable year, property with respect to which a tax credit has been allowed under §11-13GG-1 et seq. of this code:

(1) Is disposed of prior to the end of its useful life, as determined under §11-13GG-6 of this code; or

(2) Ceases to be used in a downstream natural gas manufacturing facility of the taxpayer in this state prior to the end of its useful life, as determined under §11-13GG-6 of this code, then the unused portion of the credit allowed for the property is forfeited for the taxable year and all ensuing years. Additionally, except when the property is damaged or destroyed by fire, flood, storm, or other casualty, or is stolen, the taxpayer shall redetermine the amount of credit allowed in all earlier years by reducing the applicable percentage of cost of the property allowed under §11-13GG-5 of this code, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this state in the new or expanded business of the taxpayer. The taxpayer shall then file a reconciliation statement for the year in which the forfeiture occurs and pay any additional taxes owed due to reduction of the amount of credit allowable for the earlier years, plus interest and any applicable penalties. The reconciliation statement shall be filed with the annual income return for the primary tax for which the taxpayer is liable under §11-21-1 et seq. or §11-24-1 et seq. of this code, whichever is applicable.

(b) Cessation of operation of downstream manufacturing facility. - If during any taxable year the taxpayer ceases operation of a downstream natural gas manufacturing facility in this state for which credit was allowed under this article, before expiration of the useful life of property with respect to which tax credit has been allowed under this article, then the unused portion of the allowed credit is forfeited for the taxable year and for all ensuing years. Additionally, except when the cessation is due to fire, flood, storm, or other casualty, the taxpayer shall redetermine the amount of credit allowed in earlier years by reducing the applicable percentage of cost of the property allowed under §11-13GG-6 of this code, to correspond with the percentage of cost allowable for the period of time that

the property was actually used in this state in a downstream manufacturing business of the taxpayer that is taxable under §11-24-1 et seq. of this code, or in the case of a partnership, limited liability company treated as a partnership for federal income tax purposes, electing small business corporation, other unincorporated entity, or sole proprietorship, taxable under §11-21-1 et seq. of this code. The taxpayer shall then file a reconciliation statement with the annual return for the primary tax for which the taxpayer is liable under §11-21-1 et seq. or §11-24-1 et seq. of this code, whichever is applicable, for the year in which the forfeiture occurs, and pay any additional taxes owed due to the reduction of the amount of credit allowable for the earlier years, plus interest and any applicable penalties.

(c) Reduction in number of employees. - If during any taxable year subsequent to the taxable year in which the new jobs percentage is redetermined as provided in §11-13GG-7 of this code, the average number of employees of the taxpayer, for the then current taxable year, employed in positions created because of and directly attributable to the qualified investment falls below the minimum number of new jobs created upon which the taxpayer's annual credit allowance is based, the taxpayer shall calculate what his or her annual credit allowance would have been had his or her new jobs percentage been determined based upon the average number of employees, for the then current taxable year, employed in positions created because of and directly attributable to the qualified investment. The difference between the result of this calculation and the taxpayer's annual credit allowance for the qualified investment as determined under §11-13GG-4 of this code, is forfeited for the then current taxable year, and for each succeeding taxable year unless for a succeeding taxable year the taxpayer's average employment in positions directly attributable to the qualified investment once again meets the level required to enable the taxpayer to utilize its full annual credit allowance for that taxable year.

### **¶ 327.8 Recapture of credit; recapture tax imposed**

*Law: W. Va. Code §11-13GG-9.*

(a) When recapture tax applies. -

(1) Any person who places qualified investment property in service or use at a downstream natural gas manufacturing facility and who fails to use the qualified investment property for at least the period of its useful life, as determined as of the time the property was placed in service or use, or the period of time over which tax credits allowed under this article with respect to the property are applied under this article, whichever period is less, and who reduces the number of its employees filling new jobs at its downstream natural gas manufacturing facility in this state, which were created and are directly attributable to the qualified investment property, after the third taxable year in which the qualified investment property was placed in service or use, or fails to continue to employ individuals in all the new jobs created as a direct result of the qualified investment property and used to qualify for the credit allowed by this article, prior to the end of the tenth taxable year after the qualified investment property was placed in service or use, the person shall pay the recapture tax imposed by subsection (b) of this section.

(2) This section does not apply when §11-13GG-11 of this code applies. However, the successor, or the successors, and the person, or persons, who previously claimed credit under this article with respect to the qualified investment property and the new jobs attributable thereto, are jointly and severally liable for payment of any recapture tax subsequently imposed under this section with respect to the qualified investment property and new jobs.

(b) Recapture tax imposed. - The recapture tax imposed by this subsection is the amount determined as follows:

(1) Full recapture. - If the taxpayer prematurely removes qualified investment property placed in service (when considered as a class) from economic service in the taxpayer's downstream natural gas manufacturing facility in this state, and the number of employees filling the new jobs created by the person falls below the number of new jobs required to be created in order to qualify for the amount of credit being claimed, the taxpayer shall recapture the amount of credit claimed under §11-13GG-5 of this code for the taxable year, and all preceding taxable years, on qualified investment property which has been prematurely removed from service. The amount of tax due under this subdivision is an amount equal to the amount of credit that is recaptured under this subdivision.

(2) Partial recapture. - If the taxpayer prematurely removes qualified investment property from economic service in the taxpayer's downstream natural gas manufacturing facility in this state, and the number of employees filling the new jobs created by the person remains 20 or more, but falls below the number necessary to sustain continued application of credit determined by use of the new job percentage upon which the taxpayer's one-tenth annual credit allowance was determined under §11-13GG-4 of this code, taxpayer shall recapture an amount of credit equal to the difference between:

(A) The amount of credit claimed under §11-13GG-5 of this code for the taxable year, and all preceding taxable years; and

(B) The amount of credit that would have been claimed in those years if the amount of credit allowable under §11-13GG-4 of this code had been determined based on the qualified investment property which remains in service using the average number of new jobs filled by employees in the taxable year for which recapture occurs. The amount of tax due under this subdivision is an amount equal to the amount of credit that is recaptured under this subdivision.

(3) Additional recapture. - If after a partial recapture under subdivision (2) of this subsection, the taxpayer further reduces the number of employees filling new jobs, the taxpayer shall recapture an additional amount determined as provided under subdivision (1) of this subsection. The amount of tax due under this subdivision is an amount equal to the amount of credit that is recaptured under this subdivision.

(c) Payment of recapture tax. - The amount of tax recaptured under this section is due and payable on the day the person's annual return is due for the taxable year in which this section applies, under §11-21-1 et seq. or §11-24-1 et seq. of this code. When the employer is a partnership, limited liability company, or S corporation for federal income tax purposes, the recapture tax shall be paid by those persons who are partners in the partnership, members in the company, or shareholders in the S corporation, in the taxable year in which recapture occurs under this section.

(d) Rules. - The Tax Commissioner may promulgate such rules as may be useful or necessary to carry out the purpose of this section and to implement the intent of the Legislature. Rules shall be promulgated in accordance with the provisions §29A-3-1 et seq. of this code.

### **¶ 327.9 Transfer of qualified investment to successors**

*Law: W. Va. Code §11-13GG-10*

(a) Mere change in form of business. - Property may not be treated as disposed of under §11-13GG-8 of this code, by reason of a mere change in the form of conducting the business as long as the property is retained in the successor's downstream natural gas manufacturing facility in this state, and the transferor business retains a controlling interest in the successor business. In this event, the successor business is allowed to claim the amount of credit still available with respect to the business facility or facilities transferred, and the transferor business may not be required to redetermine the amount of credit allowed in earlier years.

(b) Transfer or sale to successor. - Property is not treated as disposed of under §11-13GG-10 of this code by reason of any transfer or sale to a successor business which continues to operate the downstream natural gas manufacturing facility in this state. Upon transfer or sale, the successor shall acquire the amount of credit that remains available under this article for each subsequent taxable year and the transferor business is not required to redetermine the amount of credit allowed in earlier years.

### **¶ 327.10. Tax credit review report**

*Law: W. Va. Code §11-13GG-11*

Every taxpayer who claims credit under §11-13GG-1 et seq. of this code shall maintain sufficient records to establish the following facts for each item of qualified property:

- (1) Its identity;
- (2) Its actual or reasonably determined cost;
- (3) Its straight-line depreciation life;
- (4) The month and taxable year in which it was placed in service;



(5) The amount of credit taken; and

(6) The date it was disposed of or otherwise ceased to be use as qualified property in the downstream natural gas manufacturing facility of the taxpayer.

**¶ 327.11. Failure to keep records of investment credit property**

*Law: W. Va. Code §11-13DD-12*

A taxpayer who does not keep the records required for identification of investment credit property is subject to the following rules:

(1) A taxpayer is treated as having disposed of, during the taxable year, any investment credit property which the taxpayer cannot establish was still on hand, in this state, at the end of that year.

(2) If a taxpayer cannot establish when investment credit property reported for purposes of claiming this credit returned during the taxable year was placed in service, the taxpayer is treated as having placed it in service in the most recent prior year in which similar property was placed in service, unless the taxpayer can establish that the property placed in service in the most recent year is still on hand. In that event, the taxpayer will be treated as having placed the returned property in service in the next most recent year.

**¶ 327.12. Interpretation and construction**

*Law: W. Va. Code §11-13GG-13*

(a) No inference, implication, or presumption of legislative construction or intent may be drawn or made by reason of the location or grouping of any particular section, provision, or portion of §11-13GG-1 et seq. of this code; and no legal effect may be given to any descriptive matter or heading relating to any section, subsection, or paragraph of this article.

(b) The provisions of §11-13GG-1 et seq. of this code shall be reasonably construed in order to effectuate the legislative intent recited in §11-13GG-2 of this code.

**¶ 327.13. Burden of proof; application required; failure to make timely application**

*Law: W. Va. Code §11-13GG-14*

(a) Burden of proof. - The burden of proof is on the taxpayer to establish by clear and convincing evidence that the taxpayer is entitled to the benefits allowed by §11-13GG-1 et seq. of this code.

(b) Application for credit required. -

(1) Application required. - Notwithstanding any provision of this article to the contrary, no credit is allowed or may be applied under §11-13GG-1 et seq. of this code

for any qualified investment property placed in service or use until the person asserting a claim for the allowance of credit under this article makes written application to the commissioner for allowance of credit as provided in this subsection. An application for credit shall be filed, in the form prescribed by the Tax Commissioner, no later than the last day for filing the tax returns, determined by including any authorized extension of time for filing the return, required under §11-21-1 et seq. or §11-24-1 et seq. of this code for the taxable year in which the property to which the credit relates is placed in service or use and all information required by the form shall be provided.

(2) Failure to make timely application. - The failure to timely apply for the credit results in the forfeiture of 50 percent of the annual credit allowance otherwise allowable under §11-13GG-1 et seq. of this code. This penalty applies annually until the application is filed.

#### **¶ 327.14. Tax credit review and accountability**

*Law: W. Va. Code §11-13GG-15*

(a) Beginning on February 1, 2025, and every third year thereafter, the Tax Commissioner shall submit to the Governor, the President of the Senate, and the Speaker of the House of Delegates a tax credit review and accountability report evaluating the cost effectiveness of this credit during the most recent three-year period for which information is available. The criteria to be evaluated shall include, but not be limited to, for each year of the three-year period:

- (1) The numbers of taxpayers claiming the credit;
- (2) The net number of new jobs created by all taxpayers claiming the credit;
- (3) The cost of the credit;
- (4) The cost of the credit per new job created; and

(5) Comparison of employment trends for an industry and for taxpayers within the industry that claim the credit.

(b) Taxpayers claiming the credit shall provide any information the Tax Commissioner may require to prepare the report required by this section: Provided, That the information provided is subject to the confidentiality and disclosure provisions of §11-10-5d of this code.

(c) On or before February 1, 2025, the Department of Commerce, in consultation with the Tax Commissioner, the Department of Transportation, and the Department of Environmental Protection shall submit to the Governor, the President of the Senate, and the Speaker of the House of Delegates a report of the impact of all the tax credits and other economic incentives provided in §11-13GG-1 et seq. of this code upon; (1) Economic development in this state, including, but not limited to, the creation of jobs in

this state; (2) the state’s infrastructure, including, but not limited to, the need for construction or maintenance of the roads and highways of the state; (3) the natural resources of the state; and (4) upon public and private property interests in the state.

**¶ 327.15 Rules**

*Law: W. Va. Code §11-13GG-16*

The Tax Commissioner may promulgate such interpretive, legislative, and procedural rules as the commissioner deems to be useful or necessary to carry out the purpose of §11-13GG-1 et seq. of this code and to implement the intent of the Legislature. The Tax Commissioner may promulgate emergency rules if they are filed in the West Virginia Register before January 1, 2021. All rules shall be promulgated in accordance with the provisions of §29A-3-1 et seq. of this code.

**¶ 327.16. Crimes and penalties**

*Law: W. Va. Code §11-13GG-18*

Each and every provision of the “West Virginia Tax Crimes and Penalties Act” set forth in §11-9-1 et seq. of this code applies to the tax credit allowed by §11-13GG-1 et seq. of this code with like effect as if that act were applicable only to the tax credit §11-13GG-1 et seq. of this code and were set forth in extenso in this article.

**¶ 327.17 . Effective date**

*Law: W. Va. Code §11-13GG-20*

The credit allowed by this article is allowable for qualified investment property placed in service or use on or after July 1, 2020, subject to the rules contained in §11-13GG-1 et seq. of this code and rules promulgated by the Tax Commissioner pursuant to §29A-3-1 et seq. of this code.

**¶ 328 The High-Wage Growth Business Tax Credit Act**

**¶ 328.1 Definitions**

*Law: W. Va. Code §11-13II-2*

“Benefits” means all remuneration for work performed that is provided to an employee in whole or in part by the employer, other than wages, including the employer’s contributions to insurance programs, health care, medical, dental and vision plans, life insurance, employer contributions to pensions, such as a 401(k), and employer-provided services, such as child care, offered by an employer to the employee. “Benefits” does not include the employer’s share of payroll taxes, Social Security or Medicare contributions, federal or state unemployment insurance contributions or workers’ compensation;

“Consecutive qualifying period” means each of the three qualifying periods successively following the qualifying period in which the new high-wage job was created;

“Division” means the West Virginia State Tax Division;

“Domicile” means the sole place where an individual has a true, fixed, permanent home. It is the place where the individual has a voluntary, fixed habitation of self and family with the intention of making a permanent home;

“Eligible employee” means an individual who is employed in West Virginia by an eligible employer, who is a resident of West Virginia, and 100 percent of the employee’s income from such employment is West Virginia income. “Eligible employee” does not include an individual who:

(1) Bears any of the relationships described in paragraphs (1) through (8) of 26 U.S.C. Section 152(a) to the employer or, if the employer is a corporation, to an individual who owns, directly or indirectly, more than 50 percent in value of the outstanding stock of the corporation or, if the employer is an entity other than a corporation, to an individual who owns, directly or indirectly, more than 50 percent of the capital and profits interest in the entity;

(2) If the employer is an estate or trust, is a grantor, beneficiary, or fiduciary of the estate or trust or is an individual who bears any of the relationships described in paragraphs (1) through (8) of 26 U.S.C. Section 152(a) to a grantor, beneficiary, or fiduciary of the estate or trust;

(3) Is a dependent, as that term is described in 26 U.S.C. Section 152(a)(9), of the employer or, if the taxpayer is a corporation, of an individual who owns, directly or indirectly, more than 50 percent in value of the outstanding stock of the corporation or, if the employer is an entity other than a corporation, of an individual who owns, directly or indirectly, more than 50 percent of the capital and profits interest in the entity or, if the employer is an estate or trust, of a grantor, beneficiary, or fiduciary of the estate or trust; or

(4) Is working or has worked as an employee or as an independent contractor for an entity that, directly or indirectly, owns stock in a corporation of the eligible employer or other interest of the eligible employer that represents 50 percent or more of the total voting power of that entity or has a value equal to 50 percent or more of the capital and profits interest in the entity;

“Eligible employer” means a person whether organized for profit or not, or headquarters of such entity registered to do business in West Virginia that is the owner or operator of a project facility, that offers health benefits to all full-time eligible employees and certifies that it pays at least 50 percent of such health benefit premiums.

“Health benefits” means coverage for basic hospital care, physician care, prescriptions, and shall be the same coverage as is provided to employees employed in a bona fide executive, administrative, or professional capacity by the employer who are exempt from the minimum wage and maximum hour requirements of the federal Fair Labor Standards Act and the employer pays at least 50 percent of such insurance premiums.

“New high-wage job” means a new job created in West Virginia by an eligible employer on or after July 1, 2020, that is occupied for at least 48 weeks of a qualifying period by an eligible employee who is paid wages calculated for the qualifying period to be at least two and twenty-five hundredths times the state median salary;

“New job” means a job that is occupied by an employee who was not previously on the employer’s payroll in West Virginia, nor previously on the payroll of such employer’s parent entity, subsidiary, alter ego, or affiliate in West Virginia, or previously on the payroll of any business whose physical plant and employees are substantially the same as those of the employer in West Virginia in the three years prior to the date of hire. “New job” does not mean any job that is a result of job shifts due to the gain or loss of an in-state contract to supply goods and services, nor does it mean an employee who is retained following the acquisition of all or part of an in-state business by an employer;

“Qualifying period” means the period of 12 months beginning on the day an eligible employee begins working in a new high-wage job or the period of 12 months beginning on the anniversary of the day an eligible employee began working in a new high-wage job;

“Resident” means a natural person whose domicile is in West Virginia at the time of hire or within 180 days of the date of hire;

“Threshold job” means a job that is occupied for at least 44 weeks of a calendar year by an eligible employee and that meets the wage requirements for a “new high-wage job”; and

“Wages” means all compensation paid by an eligible employer to an eligible employee through the employer’s payroll system, including those wages that the employee elects to defer or redirect or the employee’s contribution to a 401(k) or cafeteria plan program, but “wages” does not include benefits or the employer’s share of payroll taxes, Social Security or Medicare contributions, federal or state unemployment insurance contributions, or workers’ compensation.

### **¶ 328.2 High-wage growth business tax credit**

*Law: W. Va. Code §11-13II-3*

(a) The Development Office may authorize no more than \$5 million of the tax credits allowed under this article during any fiscal year and the total amount of tax credit that may be awarded or used in any taxable year by any qualified taxpayer in combination with the owners of the qualified taxpayer may not exceed more than 10 percent of the salaries for the new direct jobs. Depending on the nature of the anticipated benefits to the state, the Development Office may establish a tax credit at a level less than the maximum. Nothing in this article entitles a qualified employer to receive a tax credit under this article and the Development Office has full discretion, subject to annual or ad hoc review, in determining whether and the amount to which to award a tax credit.

(b) A taxpayer that is an eligible employer seeking to obtain a tax credit shall make an application to the Development Office prior to the taxable year in which the eligible employer is seeking the credit. The application shall be on a form prescribed by the Development Office and shall contain such information as may be required by the Development Office to determine if the applicant is qualified. The application shall contain a sworn statement by a duly authorized officer of the employer listing the names of persons or other entities who have received or who will receive any payment or other consideration from the employer for the purpose of representing the employer in applying

for or receiving the benefits provided for in this article and shall include a certificate of good standing from the State Tax Department.

(c) The employer shall certify that during the eligible employer's tax year and that at the end of the eligible employer's tax year it will meet or exceed all of the requirements established in §11-13II-4 of this code;

(d) After the filing of an application by an eligible employer, the Development Office shall undertake an analysis and determine whether, the extent to which, and the conditions upon which an eligible employer may obtain a tax credit if it fulfills the commitments made in the eligible employer's application. In considering whether to approve the eligible employer's application for a tax credit, the Development Office shall consider the following factors:

- (1) The significance of the eligible employer's need for the tax credit;
- (2) The amount of projected net fiscal benefit to the state of the project and the period in which the state would realize such net fiscal benefit;
- (3) The overall size and quality of the proposed project, including the number of new jobs, proposed wages, growth potential of the qualified company, the potential multiplier effect of the project, and similar factors;
- (4) The financial stability and creditworthiness of the eligible employer;
- (5) The level of economic distress in the area;
- (6) An evaluation of the competitiveness of alternative locations for the location of the eligible employer, as applicable;
- (7) Whether other state incentives are available and have been awarded to the eligible employer; and
- (8) The amount of local incentives committed.

(e) The Development Office may authorize the continued ability to receive the tax credit as long as the employer retains its eligibility by maintaining the number of new direct jobs in successive years, as provided under this article, not to exceed five years.

(f) A qualified employer that has qualified pursuant to this article is eligible to receive tax credits under this article only in accordance with the provisions under which it initially applied and was approved. If a qualified employer that is receiving tax credits and creates new direct jobs, it may apply for additional tax credits based on the new direct jobs anticipated from the expansion only, pursuant to this article.

### ¶ 328.3 Obtaining tax credit following tax year

Law: W. Va. Code §11-13II-4.

(a) At the end of the approved employer's tax year, the qualified employer may file an application to use the tax credits previously approved by the Development Office. The application shall contain a sworn statement by a duly authorized officer of the qualified employer concerning with respect to the employer's fiscal year:

(1) That the eligible employer remained a qualified employer under the provisions of this article;

(2) The total number of and the gross payroll of the new direct jobs, with salary information provided by new direct job and that each new direct job was filled for at least 48 weeks during the tax year;

(3) That the employer had or maintained a net overall increase in employment statewide for each new direct job and the number of such net overall increase of at least 10 new direct jobs, in the case where an employer has contracts covering multiple locations;

(4) That employees holding the new direct jobs:

(A) Were residents in the State of West Virginia;

(B) Were not previously on the employer's payroll;

(C) Were not previously on the payroll of the employer's parent entity, subsidiary, or affiliate, alter ego, or previously on the payroll of the business whose physical plant and employees were substantially the same as those of the employer;

(D) Did not exist as of the date the employer filed the application for the tax credit;

(E) Were not jobs created as a result of job shifts due to the gain or loss of an in-state contract to supply goods and services;

(F) Were not jobs retained following the acquisition of all, or part of, an in-state business by the employer;

(5) That the employer has offered the health benefits to the eligible employees it employs in new direct jobs; and

(6) That the employer:

(A) Did not default on or otherwise not repay any loan or other obligation involving public funds;

(B) Has not declared bankruptcy under which an obligation of the employer to pay or repay public funds or moneys was discharged as part of such bankruptcy;

(C) Is not in default on any filing or payment with or to the state or any of its agencies or political subdivisions in which such assessment or judgment is final, not appealable, and remains outstanding.

(b) The division may request such additional information from the employer as may be necessary to determine whether the application is correct and whether the qualified employer is eligible for the annual tax credit for that year, or may request that the qualified employer revise its application.

(c) The tax credits authorized in this article shall be authorized after the qualified employer has filed its application for annual tax credit at the end of the qualified employer's tax year with the Development Office pursuant to this section, and the division has determined from the information submitted along with such application that the employer has fulfilled its obligations in original application.

(d) Upon approval of the application for use of the tax credit, the application shall be forwarded to the Department of Revenue. The eligible employer may then use such tax credit in filing its tax return.

(e) A new high-wage job is not eligible for a credit pursuant to this section for the initial qualifying period unless the eligible employer's total number of employees with threshold jobs on the last day of the initial qualifying period at the location at which the job is performed or based is at least one more than the number of threshold jobs on the day prior to the date the new high-wage job was created. A new high-wage job is not eligible for a credit pursuant to this section for a consecutive qualifying period unless the total number of threshold jobs at a location at which the job is performed or based on the last day of that qualifying period is greater than or equal to the number of threshold jobs at that same location on the last day of the initial qualifying period for the new high-wage job.

(f) If a consecutive qualifying period for a new high-wage job does not meet the wage, occupancy and residency requirements, then the qualifying period is ineligible.

(g) Except as provided in subsection (h) of this section, a new high-wage job is not eligible for a credit pursuant to this section if:

(1) The new high-wage job is created due to a business merger or acquisition or other change in business organization;

(2) The eligible employee was terminated from employment in West Virginia by another employer involved in the business merger or acquisition or other change in business organization with the taxpayer; and



(3) The new high-wage job is performed by:

(A) The person who performed the job or its functional equivalent prior to the business merger or acquisition or other change in business organization; or

(B) A person replacing the person who performed the job or its functional equivalent prior to a business merger or acquisition or other change in business organization.

(h) A new high-wage job that was created by another employer and for which an application for the high-wage growth business tax credit was received and is under review by the division prior to the time of the business merger or acquisition or other change in business organization shall remain eligible for the high-wage growth business tax credit for the balance of the consecutive qualifying periods. The new employer that results from a business merger or acquisition or other change in business organization may only claim the high-wage growth business tax credit for the balance of the consecutive qualifying periods for which the new high-wage job is otherwise eligible.

(i) A new high-wage job is not eligible for a credit pursuant to this section if the job is created due to an eligible employer entering into a contract or becoming a subcontractor to a contract with a governmental entity that replaces one or more entities performing functionally equivalent services for the governmental entity unless the job is a new high-wage job that was not being performed by an employee of the replaced entity.

(j) A new high-wage job is not eligible for a credit pursuant to this section if the eligible employer has more than one business location in the state from which it conducts business and the requirements of subsection (e) of this section are satisfied solely by moving the job from one business location of the eligible employer in this state to another business location of the eligible employer in the state.

(k) With respect to each annual application for a high-wage growth business tax credit, the employer shall certify and include:

(1) The responsibilities and amount of wages paid to each eligible employee in a new high-wage job during the qualifying period;

(2) The number of weeks each position was occupied during the qualifying period;

(3) Which qualifying period the application pertains to for each eligible employee;

(4) The total number of employees employed by the employer at the job location on the day prior to the qualifying period and on the last day of the qualifying period;

(5) The total number of threshold jobs performed or based at the eligible employer's location on the day prior to the qualifying period and on the last day of the qualifying period;

(6) For an eligible employer that has more than one business location in the state from which it conducts business, the total number of threshold jobs performed or based at each business location of the eligible employer in the state on the day prior to the qualifying period and on the last day of the qualifying period;

(7) Whether the eligible employer has ceased business operations at any of its business locations in this state; and

(8) Whether the application is precluded by subsection (o) of this section.

(l) Any person who willfully submits a false, incorrect, or fraudulent certification required pursuant this section shall be subject to all applicable penalties under §11-9-1 et seq. and §11-10-1 et seq. of this code, except that the amount on which the penalty is based shall be the total amount of credit requested on the application for approval.

(m) Except as provided in subsection (o) of this section, an approved high-wage growth business tax credit shall be claimed against the taxpayer's taxes imposed by §11-23-1 et seq., §11-24-1 et seq., and §11-21-1 et seq. of this code, in that order, as specified in this subsection:

(1) Corporation net income taxes. - After application of subdivision (1) of this subsection, any unused credit is next applied to reduce the taxes imposed by §11-24-1 et seq. of this code for the taxable year, determined before application of allowable credits against tax.

(A) If the eligible taxpayer is a limited liability company, small business corporation, or a partnership, then any unused credit after application of subdivisions (1) and (2) of this subsection is allowed as a credit against the taxes imposed by §11-24-1 et seq. of this code on owners of the eligible taxpayer on the conduit income directly derived from the eligible taxpayer by its owners. Only those portions of the tax imposed by §11-24-1 et seq. of this code that are imposed on income directly derived by the owner from the eligible taxpayer are subject to offset by this credit.

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

(3) Personal income tax taxes. - After application of subdivisions (1) and (2) of this subsection, any unused credit is next applied to reduce the taxes imposed by §11-21-1 et seq. of this code for the taxable year determined before application of allowable credits against tax of the eligible taxpayer.

(4) If the eligible taxpayer is a limited liability company, small business corporation, or a partnership, then any unused credit after application of subdivisions (1), (2), and (3) of this subsection is allowed as a credit against the taxes imposed by §11-21-1 et seq. of this code on owners of the eligible taxpayer on the conduit income directly derived from the eligible taxpayer by its owners. Only those portions of the tax imposed by §11-21-1 et

seq. of this code that are imposed on income directly derived by the owner from the eligible taxpayer are subject to offset by this credit.

(5) Small business corporations, limited liability companies, partnerships, and other unincorporated organizations shall allocate the credit allowed by this section among their members in the same manner as profits and losses are allocated for the taxable year.

(6) No credit is allowed under this section against any withholding tax imposed by, or payable under, §11-21-1 et seq. of this code.

(7) Unused credit carry forward. -- Except to the extent excess credit is refunded as provided in subdivision (8) of this subsection, if the credit allowed under this article in any taxable year exceeds the sum of the taxes enumerated in subdivisions (1), (2), and (3) of this subsection for that taxable year, the eligible taxpayer and owners of eligible taxpayers described in subdivisions (4) and (5) of this subsection may apply the excess as a credit against those taxes, in the order and manner stated in this section, for succeeding taxable years until the earlier of the following:

(A) The full amount of the excess credit is used; or

(B) The expiration of the 10th taxable year after the taxable year in which the annual salaries for the new direct job was paid or incurred. Any credit remaining thereafter is forfeited.

(8) If the credit allowed under this section in any taxable year exceeds the sum of taxes enumerated in subdivisions (1), (2), (3), (4), and (5) of this subsection for that taxable year, the eligible taxpayer and owners of the eligible taxpayers described in subdivisions (4) and (5) of this subsection may claim for that year the excess amount as a refundable credit, not to exceed \$100,000 per taxpayer, including owners and the controlled group, if applicable.

(9) Tax credits provided under this section may not be transferred, sold, or assigned by filing a notarized endorsement thereof with the division that names the transferee, the amount of tax credit transferred, and the value received for the credit, as well as any other information reasonably requested by the division.

(n) If the taxpayer ceases business operations in this state while an application for credit approval is pending or after an application for credit has been approved for any qualifying period for a new high-wage job, the division may not grant an additional high-wage growth business tax credit to that taxpayer except as provided in subsection (m) of this section and shall extinguish any amount of credit approved for that taxpayer that has not already been claimed against the taxpayer's modified combined tax liability.

(o) A taxpayer that has received a high-wage growth business tax credit may not submit a new application for the credit for a minimum of two calendar years from the closing date of the last qualifying period for which the taxpayer received the credit if the

taxpayer lost eligibility to claim the credit from a previous application pursuant to subsection (m) of this section.

#### **¶ 328.4 Rules**

*Law: W. Va. Code §11-13II-5*

The division shall propose legislative rules implementing this article in accordance with the provisions of §29A-3-1 et seq. of this code.

#### **¶ 329 TAX CREDIT FOR DONATION OR SALE OF VEHICLE**

##### **¶ 329.1 Definitions**

*Law: W. Va. Code §11-13FF-1*

(1) "Commissioner" means the Tax Commissioner of the State of West Virginia, or his or her delegate.

(2) "Division" means the Tax Division of the Department of Revenue.

(3) "Low-Income Worker" means a person living in a household with total income at or below 200 percent of the Federal Poverty Level.

(4) "Program Value" means the fair market value of the vehicle less an amount to be determined by the qualifying charitable organization based upon the suitability of the vehicle to its program.

(5) "Qualified Charitable Organization" means a nonprofit association which:

(A) Is recognized as exempt from federal taxation under §501(c)(3) of the United States Code;

(B) Is registered as a charitable organization pursuant to §29-19-1 et seq. of this code; and

(C) Operates a program that provides the following services:

(i) Providing low-income workers in the state with below-market, affordable financing to purchase vehicles through cooperating financial institutions; and

(ii) Providing financial counseling and other training and assistance to low-income workers to meet the terms of the loans used to purchase the vehicles through the program.

(6) "Vehicle" means a passenger motor vehicle that is suitable for daily commutes for employment purposes and is acceptable to the qualifying charitable organization as to its suitability for its program.

### **¶ 329.2 Amount of credit; limitation of credit**

*Law: W. Va. Code §11-13FF-2*

(a) There is allowed to taxpayers who make donations of vehicles to qualified charitable organizations in the state a credit against taxes imposed by §11-21-1 *et seq.* and §11-24-1 *et seq.* of this code in an amount equal to 50 percent of the program value of the vehicle or \$2,000, whichever is less.

(b) There is allowed to new or used motor vehicle dealers licensed pursuant to §17A-6-3 of this code that sell a vehicle at a reduced sales price to low-income workers through a program administered by a qualified charitable organization, a credit against taxes imposed by §11-21-1 *et seq.* and §11-24-1 *et seq.* of this code in an amount equal to no more than 50 percent of the difference between the program value of the vehicle and the reduced sales price, or \$2,000, whichever is less.

(c) There shall be no credit allowed pursuant to this article for a new or used motor vehicle dealer unless the dealer certifies that the dealer has no knowledge or reason to believe the vehicle is subject to any unperformed safety recall or was junked or salvaged or should have been branded or reported as junked or salvaged.

(d) If any credit remains after application of the credit against tax for any taxable year under this article, the amount thereof is forfeited. No carryback to a prior taxable year is allowed for the amount of any unused portion of this credit.

(e) No more than \$300,000 of tax credits may be allocated to the department in any fiscal year. The division shall allocate the tax credits in the order the donation forms are received.

### **¶ 329.3 Determination of value of credit**

*Law: W. Va. Code §11-13FF-3*

(a) At the time of the donation or sale of the vehicle, the taxpayer shall provide to the qualified charitable organization an estimate of the fair market value of the vehicle.

(b) Upon accepting the vehicle to be used in their program, the qualified charitable organization shall provide the taxpayer a signed and dated form prescribed by the division containing at a minimum:

- (1) The vehicle identification number of the vehicle, its make and model;
- (2) The name, address and taxpayer identification number of the taxpayer;
- (3) The name and address of the qualifying charitable organization;

(4) The qualifying charitable organization's determination of the program value of the vehicle, based upon the taxpayer's estimate of the fair market value of the vehicle and the suitability of the vehicle for the qualifying charitable organization's programs; and

(5) The maximum amount of tax credit authorized for the donation or sale of the vehicle; as calculated by the qualifying charitable organization: Provided, That the actual amount of tax credit authorized shall be determined by the tax division as provided in section two of this article.

(c) To claim the tax credit, the taxpayer shall send the form provided by the qualified charitable organization to the division for certification.

#### **¶ 329.4 Applicability to “as is” vehicles**

*Law: W. Va. Code §11-13FF-4*

Notwithstanding any other provision of this code to the contrary, the fair market value of the vehicle and not the sales price shall be used to determine the applicability of §46A-6-107a(a)(3)(A) of this code to any vehicle the sale of which qualifies for a tax credit as provided by this article.

#### **¶ 329.5 Legislative rules**

*Law: W. Va. Code §11-13FF-5*

The Tax Commissioner shall propose rules for legislative approval in accordance with the provisions of §29A-3-1 *et seq.* of this code as may be necessary to carry out the purposes of this article.

#### **¶ 329.6 Tax credit review report**

*Law: W. Va. Code §11-13FF-6*

Beginning on the first day of the second taxable year after the passage of this article and every two years thereafter, the division shall submit to the Governor, the President of the Senate and the Speaker of the House of Delegates a tax credit review and accountability report evaluating the cost effectiveness of the tax credit and donations during the most recent two-year period for which information is available.

#### **¶ 329.7 Effective date**

*Law: W. Va. Code §11-13FF-7*

The credit allowed by this article shall be allowed upon donations occurring after December 31, 2020.

## **¶ 330 WEST VIRGINIA TAX CREDIT FOR FEDERAL EXCISE TAX IMPOSED UPON SMALL ARMS AND AMMUNITION MANUFACTURERS**

*Law: W. Va. Code §11-13KK-1 et seq.*

### **¶ 330.1 Legislative finding and purpose**

*Law: W. Va. Code §11-13KK-1*

The Legislature finds that the encouragement of small arms and ammunition manufacturing in this state is in the public interest and promotes the general welfare of the people of this state. In order to encourage capital investment in the manufacturing of small arms and ammunition in this state and thereby increase economic opportunity for its citizens there is hereby enacted the tax credit for the benefit of small arms and ammunition manufacturing

### **¶ 330.2 Definitions.**

*Law: W. Va. Code §11-13KK-2*

(1) “Affiliated group” means any affiliated group within the meaning of section 1504(a) of the Internal Revenue Code, or any similar group defined under a similar provision of state, local, or foreign law, except that section 1504 of the Internal Revenue Code shall be applied by substituting “more than 50 percent” for “at least 80 percent” each place it appears in that section.

(2) “Business” means small arms or ammunition manufacturing business activity, which is or may be classified under the North American Industry Classification System with a six-digit code for a product produced at a facility under code numbers 332986 or 332994 as they are defined on January 1, 2021, which is engaged in by any person in this state which is taxable under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code.

(3) “Business expansion” means capital investment in a new or expanded small arms or ammunition manufacturing facility in this state, which is or may be classified under the North American Industry Classification System with a six-digit code for a product produced at a facility under code numbers 332986 or 332994 as they are defined on January 1, 2021.

(4) “Commissioner” or “Tax Commissioner” are used interchangeably in this article and mean the Tax Commissioner of the State of West Virginia, or his or her designee.

(5) “Controlled group of corporations” means a controlled group of corporations as defined in section 1563(a) of the Internal Revenue Code.

(6) “Corporation” means any corporation, joint-stock company, association, or other entity treated as a corporation for federal income tax purposes, and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certificate of interest or ownership or similar written instrument.

(7) “Designee” in the phrase “or his or her designee,” when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Department duly authorized by the commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this article.

(8) “Small arms and ammunition manufacturing” refers to a facility which is or may be classified under the North American Industry Classification System with a six-digit North American Industry Classification System code for a product produced at a facility with code numbers 332986 or 332994 as they are defined on January 1, 2021.

(9) “Small arms and ammunition manufacturing business” means a business primarily engaged in this state in small arms or ammunition manufacturing which is or may be classified under the North American Industry Classification System with a six-digit North American Industry Classification System code for a product produced at a facility with code numbers 332986 or 332994 as they are defined on January 1, 2021.

(10) “Small arms and ammunition manufacturing facility” means any factory, mill, plant, warehouse, building, or complex of buildings located within this state, including the land on which it is located, and all machinery, equipment, and other real and personal property located at or within the facility, used in connection with the operation of the facility, and all site preparation and start-up costs of the taxpayer for the small arms and ammunition manufacturing facility, which is or may be classified under the North American Industry Classification System with a six-digit North American Industry Classification System code for a product produced at a facility with code numbers 332986 or 332994 as they are defined on January 1, 2021, and which it capitalizes for federal income tax purposes in a business that is taxable in this state.

(11) “Eligible taxpayer” means any person who makes a qualified investment in a new or expanded small arms and ammunition manufacturing facility located in this state and who is subject to any of the taxes imposed by §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code.

(12) “Expanded facility” means any small arms and ammunition manufacturing facility, other than a new or replacement business facility, resulting from the acquisition, construction, reconstruction, installation, or erection of improvements or additions to existing property if the improvements or additions are purchased on or after July 1, 2021, but only to the extent of the taxpayer’s qualified investment in the improvements or additions.

(13) “Includes” and “including” when used in a definition contained in this article, may not be considered to exclude other things otherwise within the meaning of the term defined.

(14) “Leased property” does not include property which the taxpayer is required to show on its books and records as an asset under generally accepted principles of financial accounting. If the taxpayer is prohibited from expensing the lease payments for



federal income tax purposes, the property shall be treated as purchased property under this section.

(15) “New small arms and ammunition manufacturing facility” means a business facility which satisfies all the requirements of paragraphs (A), (B), (C), and (D) of this subsection:

(A) The facility is employed by the taxpayer in the conduct of a small arms and ammunition manufacturing activity the net income of which is or would be taxable under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code. The facility is not considered a new, small arms and ammunition manufacturing facility in the hands of the taxpayer if the taxpayer’s only activity with respect to the facility is to lease it to another person or persons.

(B) The facility is purchased by, or leased to, the taxpayer on or after July 1, 2021.

(C) The facility was not purchased or leased by the taxpayer from a related person. The commissioner may waive this requirement if the facility was acquired from a related party for its fair market value and the acquisition was not tax motivated.

(D) The facility was not in service or use during the 90 days immediately prior to transfer of the title to the facility, or prior to the commencement of the term of the lease of the facility.

(16) “New property” means:

(A) Property, the construction, reconstruction, or erection of which is completed on or after July 1, 2021, and placed in service or use after that date; and

(B) Property leased or acquired by the taxpayer that is placed in service or use in this state on or after July 1, 2021, if the original use of the property commences with the taxpayer and commences after that date.

(17) “Original use” means the first use to which the property is put, whether or not the use corresponds to the use of the property by the taxpayer.

(18) “Partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, which is treated as a partnership for federal income tax purposes, and which is not a trust or estate, a corporation, or a sole proprietorship.

(19) “Partner” includes a member in such a syndicate, group, pool, joint venture, or other organization.

(20) "Person" includes any natural person, corporation, or partnership.

(21) "Property purchased or leased for business expansion" —

(A) *Included property.* — Except as provided in paragraph (B) of this subdivision, the term "property purchased or leased for business expansion" means real property and improvements thereto, and tangible personal property, but only if the real or personal property was constructed, purchased, or leased and placed in service or use by the taxpayer, for use as a component part of a new or expanded small arms and ammunition manufacturing facility as defined in this section, which is located within the State of West Virginia. This term includes only:

(i) Real property and improvements thereto having a useful life of four or more years, placed in service or use on or after July 1, 2021, by the taxpayer.

(ii) Real property and improvements thereto, acquired by written lease having a primary term of 10 or more years and placed in service or use by the taxpayer on or after July 1, 2021.

(iii) Tangible personal property placed in service or use by the taxpayer on or after July 1, 2021, with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the personal or corporation net income tax liability of the business taxpayer under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code, and which has a useful life, at the time the property is placed in service or use in this state, of four or more years.

(iv) Tangible personal property acquired by written lease having a primary term of four years or longer, that commenced and was executed by the parties thereto on or after July 1, 2021, if used as a component part of a new or expanded small arms and ammunition manufacturing business facility, shall be included within this definition.

(v) Tangible personal property owned or leased, and used by the taxpayer at a business location outside this state which is moved into the State of West Virginia on or after July 1, 2021, for use as a component part of a new or expanded small arms and ammunition manufacturing facility located in this state: *Provided*, That if the property is owned, it must be depreciable or amortizable personal property for income tax purposes, and have a useful life of four or more years remaining at the time it is placed in service or use in this state, and if the property is leased, the primary term of the lease remaining at the time the leased property is placed in service or use in this state, must be four or more years.

(B) *Excluded property.* — The term property purchased or leased for business expansion does not include:

(i) Repair costs, including materials used in the repair, unless for federal income tax purposes the cost of the repair must be capitalized and not expensed.

(ii) Airplanes and helicopters.

(iii) Property, which is primarily used outside this state, with use being determined based upon the amount of time the property is actually used both within and outside this state.

(iv) Property which is acquired incident to the purchase of the stock or assets of the seller, unless for good cause shown, the Tax Commissioner consents to waiving this requirement.

(v) Purchased or leased property, the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time the property is placed in service or use: *Provided*, That when the contract of purchase or lease specifies a minimum purchase price or minimum annual rent the amount thereof shall be used to determine the qualified investment in the property under §11-13KK-6 of this code if the property otherwise qualifies as property purchased or leased for expansion of a small arms and ammunition manufacturing facility.

(22) "Purchase" means any acquisition of property, but only if:

(A) The property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under section 267 or 707 (b) of the United States Internal Revenue Code.

(B) The property is not acquired by one component member of an affiliated or controlled group from another component member of the same affiliated or controlled group, as applicable. The Tax Commissioner may waive this requirement if the property was acquired from a related party for its then fair market value; and

(C) The basis of the property for federal income tax purposes, in the hands of the person acquiring it, is not determined:

(i) In whole or in part, by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired; or

(ii) Under Section 1014(e) of the United States Internal Revenue Code.

(23) "Qualified activity" means any small arms and ammunition manufacturing business activity subject to any of the taxes imposed by §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code which is or may be classified under the North American Industry Classification System with a six-digit North American Industry Classification System code for a product produced at a facility with code numbers 332986 or 332994 as they are defined on January 1, 2021.

(24) "Related person" means:

(A) A corporation, partnership, association, or trust controlled by the taxpayer;

(B) An individual, corporation, partnership, association, or trust that is in control of the taxpayer;

(C) A corporation, partnership, association, or trust controlled by an individual, corporation, partnership, association, or trust that is in control of the taxpayer; or

(D) A member of the same affiliated or controlled group as the taxpayer.

For purposes of this subdivision, control, with respect to a corporation, means ownership, directly or indirectly, of stock possessing 50 percent or more of the total combined voting power of all classes of the stock of the corporation entitled to vote.

Control, with respect to a trust, means ownership, directly or indirectly, of 50 percent or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association, or of a beneficial interest in a trust is determined in accordance with the rules for constructive ownership of stock provided in section 267(c) of the United States Internal Revenue Code, other than paragraph (3) of that section.

(25) "Replacement small arms and ammunition manufacturing facility" means any property (other than an expanded small arms and ammunition manufacturing facility) that replaces or supersedes any other property located within this state that:

(A) The taxpayer or a related person used in or in connection with any small arms and ammunition manufacturing facility for more than two years during the period of five consecutive years ending on the date the replacement or superseding property is placed in service by the taxpayer; or

(B) Is not used by the taxpayer or a related person in or in connection with any small arms and ammunition manufacturing facility for a continuous period of one year or more commencing with the date the replacement or superseding property is placed in service by the taxpayer.

(26) "Taxpayer" means any person subject to any of the taxes imposed by §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code.

(27) "This code" means the Code of West Virginia, 1931, as amended.

(28) "This state" means the State of West Virginia.

(29) “United States Internal Revenue Code” or “I.R.C.” means the Internal Revenue Code as defined in §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code.

(30) “Used property” means property acquired after June 30, 2021, that is not “new property”.

(31) “Federal excise tax” means all excise taxes paid to the government of the United States under section 4181 of Title 26 of the Internal Revenue Code imposed upon manufacturers, producers, or importers by the sale of pistols, revolvers, firearms (other than pistols and revolvers), shells and cartridges.

### **¶ 330.3 Amount of credit allowed**

*Law: W. Va. Code §11-13KK-3*

Notwithstanding any other provision of this code, eligible taxpayers are allowed a credit against the portion of taxes imposed by this state that are attributable to and the consequence of the taxpayer’s qualified investment in a new or expanded small arms and ammunition manufacturing facility in this state: Provided, That such qualified investment is equal to or greater than \$2 million. The amount of this credit is determined and applied as provided in this article.

(a) Amount of credit. — The amount of credit allowable is 100 percent of amount of federal excise tax paid in a tax year under section 4181, Title 26 of the Internal Revenue Code, which are attributable to and the consequence of the taxpayer’s qualified investment. The product of this calculation establishes the maximum amount of credit allowable under this article due to the qualified investment.

(b) Application of credit over 10 years. — The amount of credit allowable shall be taken over a 10-year period, beginning with the taxable year in which the taxpayer places the qualified investment in service or use in this state, unless the taxpayer elected to delay the beginning of the 10-year period until the next succeeding taxable year. This election shall be made in the annual income tax return filed under this chapter for the taxable year in which qualified investment is first placed into service or use by the taxpayer. Once made, the election cannot be revoked. The annual credit allowance is taken in the manner prescribed in §11-13KK-4 of this code.

(c) Placed in service or use. — For purposes of the credit allowed by this section, property is considered placed in service or use in the earlier of the following taxable years:

(1) The taxable year in which, under the taxpayer’s depreciation practice, the period for depreciation with respect to the property begins; or

(2) The taxable year in which the property is placed in a condition or state of readiness and availability for a specifically assigned function.

## ¶ 330.4 Application of annual credit allowance

Law: W. Va. Code §11-13KK-4

(a) The amount determined under §11-13KK-3 is allowed as a credit against 100 percent of that portion of the taxpayer's state tax liability which is attributable to and the direct result of the taxpayer's qualified investment and applied as provided in subsections (b) and (c), both inclusive of this section, and in that order.

(b) *Corporation net income taxes.* —

(1) That portion of the allowable credit attributable to qualified investment in a small arms and ammunition manufacturing facility may be applied to reduce the taxes imposed by §11-24-1 *et seq.* of this code for the taxable year as determined before application of allowable credits against tax.

(2) If the taxes due under §11-24-1 *et seq.* of this code, as determined before application of allowable credits against tax, are not solely attributable to and the direct result of the taxpayer's qualified investment in a small arms and ammunition manufacturing business, the amount of the taxes that is attributable are determined by multiplying the amount of taxes due under §11-24-1 *et seq.* of this code for the taxable year, as determined before application of allowable credits against tax, by a fraction, the numerator of which is all wages, salaries, and other compensation paid during the taxable year to all employees of the taxpayer employed in this state whose positions are directly attributable to the qualified investment. The denominator of the fraction is the wages, salaries, and other compensation paid during the taxable year to all employees of the taxpayer employed in this state.

(c) *Personal income taxes.* —

(1) If the person making the qualified investment in a small arms and ammunition manufacturing facility is an electing small business corporation, as defined in section 1361 of the United States Internal Revenue Code, a partnership, a limited liability company that is treated as a partnership for federal income tax purposes, or a sole proprietorship, then any unused credit is allowed as a credit against the taxes imposed by §11-21-1 *et seq.* of this code on the income from small arms and ammunition manufacturing facility, or on income of a sole proprietor attributable to the small arms and ammunition manufacturing facility.

(2) Electing small business corporations, limited liability companies treated as partnerships for federal income tax purposes, partnerships, and other unincorporated organizations shall allocate the credit allowed by this article among its members in the same manner as profits and losses are allocated for the taxable year.

(3) If the amount of taxes due under §11-21-1 *et seq.* of this code, as determined before application of allowable credits against tax, that is attributable to business, is not solely attributable to and the direct result of the qualified investment of the electing small

business corporation, limited liability company treated as a partnership for federal income tax purposes, other unincorporated organization, or sole proprietorship, the amount of the taxes that are so attributable are determined by multiplying the amount of taxes due under §11-21-1 *et seq.* of this code, as determined before application of allowable credits against tax that is attributable to business by a fraction, the numerator of which is all wages, salaries, and other compensation paid during the taxable year to all employees of the electing small business corporation, limited liability company, partnership, other unincorporated organization, or sole proprietorship employed in this state, whose positions are directly attributable to the qualified investment. The denominator of the fraction is the wages, salaries, and other compensation paid during the taxable year to all employees of the taxpayer.

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

(d) If the wages, salaries, and other compensation fraction formula provisions of subsections (b) and (c) of this section, inclusive, do not fairly represent the taxes solely attributable to and the direct result of qualified investment of the taxpayer the Tax Commissioner may require, in respect to all or any part of the taxpayer's businesses or activities, if reasonable:

(1) Separate accounting or identification;

(2) Adjustment to the wages, salaries, and other compensation fraction formula to reflect all components of the tax liability;

(3) The inclusion of one or more additional factors that will fairly represent the taxes solely attributable to and the direct result of the qualified investment of the taxpayer and all other project participants in the businesses or other activities subject to tax; or

(4) The employment of any other method to effectuate an equitable attribution of the taxes. In order to effectuate the purposes of this subsection, the Tax Commissioner may propose for promulgation rules, including emergency rules, in accordance with §29A-3-1 *et seq.* of this code.

(e) *Unused credit.* — If any credit remains after application of subsection (a) of this section, the amount thereof is carried forward to each ensuing tax year until used or until the expiration of the tenth taxable year subsequent to the end of the initial 10-year credit application period. If any unused credit remains after the 20th year, the amount thereof is forfeited. No carryback to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance.

## ¶ 330.5 Qualified investment

Law: W. Va. Code §11-13KK-5

(a) *General.* — The qualified investment in property purchased or leased for a new, or expansion of an existing, small arms and ammunition manufacturing facility is the applicable percentage of the cost of each property purchased or leased for the purpose of the new, or expansion of an existing, small arms and ammunition manufacturing facility which is placed in service or use in this state by the taxpayer during the taxable year.

(b) *Cost.* — For purposes of subsection (a) of this section, the cost of each property purchased for a new, or expansion of an existing, small arms and ammunition manufacturing facility is determined under the following rules:

(1) *Trade-ins.* — Cost does not include the value of property given in trade or exchange for the property purchased for a new, or for expansion of an existing, small arms and ammunition manufacturing facility.

(2) *Damaged, destroyed, or stolen property.* — If property is damaged or destroyed by fire, flood, storm, or other casualty, or is stolen, then the cost of replacement property does not include any insurance proceeds received in compensation for the loss.

(3) *Rental property.* —

(A) The cost of real property acquired by written lease for a primary term of 10 years or longer is 100 percent of the rent reserved for the primary term of the lease, not to exceed 20 years.

(B) The cost of tangible personal property acquired by written lease for a primary term of:

(i) Four years, or longer, is one third of the rent reserved for the primary term of the lease;

(ii) Six years, or longer, is two thirds of the rent reserved for the primary term of the lease; or

(iii) Eight years, or longer, is 100 percent of the rent reserved for the primary term of the lease, not to exceed 20 years: *Provided*, That in no event may rent reserved include rent for any year subsequent to expiration of the book life of the equipment, determined using the straight-line method of depreciation.

(4) *Self-constructed property.* — In the case of self-constructed property, the cost thereof is the amount properly charged to the capital account for depreciation in accordance with federal income tax law.



(5) *Transferred property.* — The cost of property used by the taxpayer out-of-state and then brought into this state, is determined based on the remaining useful life of the property at the time it is placed in service or use in this state, and the cost is the original cost of the property to the taxpayer less straight line depreciation allowable for the tax years or portions thereof the taxpayer used the property outside this state. In the case of leased tangible personal property, cost is based on the period remaining in the primary term of the lease after the property is brought into this state for use in a new or expanded business facility of the taxpayer, and is the rent reserved for the remaining period of the primary term of the lease, not to exceed 20 years, or the remaining useful life of the property, as determined as aforesaid, whichever is less.

### **¶ 330.6 Forfeiture of unused tax credits; redetermination of credit allowed**

*Law:* W. Va. Code §11-13KK-6

(a) *Disposition of property or cessation of use.* — If during any taxable year, property with respect to which a tax credit has been allowed under §11-13KK-1 *et seq.* of this code is disposed of or ceases to be used in a small arms and ammunition manufacturing facility of the taxpayer in this state, then the unused portion of the credit allowed for the property is forfeited for the taxable year and all ensuing years, except when the property is damaged or destroyed by fire, flood, storm, or other casualty, or is stolen.

(b) *Cessation of operation of small arms and ammunition manufacturing facility.* — If during any taxable year the taxpayer ceases operation of a small arms and ammunition manufacturing facility in this state for which credit was allowed under this article, then the unused portion of the allowed credit is forfeited for the taxable year and for all ensuing years, except when the cessation is due to fire, flood, storm, or other casualty.

### **¶ 330.7 Transfer of qualified investment to successors**

*Law:* W. Va. Code §11-13KK-7

(a) *Mere change in form of business.* — Property may not be treated as disposed of under §11-13KK-8 of this code, by reason of a mere change in the form of conducting the business as long as the property is retained in the successor's small arms and ammunition manufacturing facility in this state, and the transferor business retains a controlling interest in the successor business. In this event, the successor business is allowed to claim the amount of credit still available with respect to the business facility or facilities transferred.

(b) *Transfer or sale to successor.* — Property is not treated as disposed of under §11-13KK-10 of this code by reason of any transfer or sale to a successor business which continues to operate the small arms and ammunition manufacturing facility in this state. Upon transfer or sale, the successor shall acquire the amount of credit that remains available under this article for each subsequent taxable year.

### **¶ 330.8 Identification of investment credit property**

Law: W. Va. Code §11-13KK-8

Every taxpayer who claims credit under §11-13KK-1 *et seq.* of this code shall maintain sufficient records to establish the following facts for each item of qualified property:

- (1) Its identity;
- (2) Its actual or reasonably determined cost;
- (3) Its straight-line depreciation life;
- (4) The month and taxable year in which it was placed in service;
- (5) The amount of credit taken;
- (6) The date it was disposed of or otherwise ceased to be used as qualified property in the small arms and ammunition manufacturing facility of the taxpayer; and
- (7) Amounts and dates of federal excise tax paid.

### **¶ 330.9 Failure to keep records of investment credit property**

Law: W. Va. Code §11-13KK-9

A taxpayer who does not keep the records required for identification of investment credit property is subject to the following rules:

(1) A taxpayer is treated as having disposed of, during the taxable year, any investment credit property which the taxpayer cannot establish was still on hand, in this state, at the end of that year.

(2) If a taxpayer cannot establish when investment credit property reported for purposes of claiming this credit returned during the taxable year was placed in service, the taxpayer is treated as having placed it in service in the most recent prior year in which similar property was placed in service, unless the taxpayer can establish that the property placed in service in the most recent year is still on hand. In that event, the taxpayer will be treated as having placed the returned property in service in the next most recent year.

### **¶ 330.10 Burden of proof; application required; failure to make timely application**

Law: W. Va. Code §11-13KK-11

(a) *Burden of proof.* — The burden of proof is on the taxpayer to establish by clear and convincing evidence that the taxpayer is entitled to the benefits allowed by §11-13KK-1 *et seq.* of this code.

(b) *Application for credit required.* —

(1) *Application required.* — Notwithstanding any provision of this article to the contrary, no credit is allowed or may be applied under §11-13KK-1 *et seq.* of this code for any qualified investment property placed in service or use until the person asserting a claim for the allowance of credit under this article makes written application to the

commissioner for allowance of credit as provided in this subsection. An application for credit shall be filed, in the form prescribed by the Tax Commissioner, no later than the last day for filing the tax returns, determined by including any authorized extension of time for filing the return, required under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code for the taxable year in which the property to which the credit relates is placed in service or use and all information required by the form shall be provided.

(2) *Failure to make timely application.* — The failure to timely apply for the credit results in the forfeiture of 50 percent of the annual credit allowance otherwise allowable under §11-13KK-1 *et seq.* of this code. This penalty applies annually until the application is filed.

### **¶ 331 COAL SEVERANCE TAX REBATE**

*Law:* W. Va. Code §11-13EE-1 *et seq.*  
See Chapter 7, Severance Tax

### **¶ 332 NATURAL GAS LIQUIDS PROPERTY TAX ADJUSTMENT ACT**

*Law:* W. Va. Code §11-13HH-1 *et seq.*  
See Chapter 6, Property Tax

### **¶ 333 TAX CREDIT FOR EMPLOYERS PROVIDING CHILD CARE FOR EMPLOYEES**

*Law:* W. Va. Code §11-27-97. and §11-24-44

#### **¶ 333.1 Definitions**

*Law:* §11-27-97. and §11-24-44

“Cost of operation” means reasonable direct operational costs incurred by an employer as a result of providing employer provided or employer sponsored child-care facilities: Provided, That the term cost of operation shall exclude the cost of any property that is qualified child-care property.

“Employer” means any employer upon whom an income tax is imposed by this article.

“Employer provided” refers to child care offered on the premises of the employer.

“Premises of the employer” refers to any location within the State of West Virginia and located on the workplace premises of the employer providing the child care or one of the employers providing the child care in the event that the child-care property is owned jointly or severally by the taxpayer and one or more unaffiliated employers: Provided, That if such workplace premises are impracticable or otherwise unsuitable for the on-site location of such child-care facility, as determined by the commissioner, such facility may be located within a reasonable distance of the premises of the employer.

“Qualified child-care property” means all real property, other than land, and tangible personal property purchased or acquired on or after July 1, 2022, or which property is first placed in service on or after July 1, 2022, for use exclusively in the construction,

expansion, improvement, or operation of an employer provided child-care facility, but only if:

(A) The children who use the facility are primarily children of employees of:

(i) The taxpayer and other employers in the event that the child-care property is owned jointly or severally by the taxpayer and one or more employers; or

(ii) A corporation that is a member of the taxpayer's "affiliated group" within the meaning of section 1504(a) of the Internal Revenue Code; and

(B) The taxpayer has not previously claimed any tax credit for the cost of operation for such qualified child-care property placed in service prior to taxable years beginning on or after January 1, 2022.

Qualified child-care property includes, but is not limited to, amounts expended on building, improvements, and building improvements and furniture, fixtures, and equipment directly related to the operation of child-care property as defined in this section.

### **¶ 333.2 Credit for Capital Expenditures**

*Law:* §11-27-97. and §11-24-44

A taxpayer shall be allowed a credit against the tax imposed under this article for the taxable year in which the taxpayer first places in service qualified child-care property and for each of the ensuing four taxable years following such taxable year. The aggregate amount of the credit shall equal 50 percent of the cost of all qualified child-care property purchased or acquired by the taxpayer and first placed in service during a taxable year, and such credit may be claimed at a rate of 20 percent per year over a period of five taxable years. In the case of a qualified child-care property jointly owned by two or more unaffiliated employers, each employer's credit is limited to that employer's respective investment in the qualified child-care property.

### **¶ 333.3 Limitations on Credit for Capital Expenditures**

*Law:* §11-27-97. and §11-24-44

The tax credit allowable under subsection (b) of this section shall be subject to the following conditions and limitations:

(1) Any such credit claimed in any taxable year but not used in such taxable year may be carried forward for three years from the close of such taxable year. The sale, merger, acquisition, or bankruptcy of any taxpayer shall not create new eligibility for the credit in any succeeding taxpayer;

(2) In no event shall the amount of any such tax credit allowed under subsection (b) of this section, when combined with any such tax credit allowed under subsection (e) of this section, including any carryover of such credits from a prior taxable year, exceed 100

percent of the taxpayer's income tax liability as determined without regard to any other credits; and

(3) For every year in which a taxpayer claims such credit, the taxpayer shall attach a schedule to the taxpayer's West Virginia income tax return setting forth the following information with respect to such tax credit:

(A) A description of the child-care facility;

(B) The amount of qualified child-care property acquired during the taxable year and the cost of such property;

(C) The amount of tax credit claimed for the taxable year;

(D) The amount of qualified child-care property acquired in prior taxable years and the cost of such property;

(E) Any tax credit utilized by the taxpayer in prior taxable years;

(F) The amount of tax credit carried over from prior years;

(G) The amount of tax credit utilized by the taxpayer in the current taxable year;

(H) The amount of tax credit to be carried forward to subsequent tax years; and

(I) A description of any recapture event occurring during the taxable year, a calculation of the resulting reduction in tax credits allowable for the recapture year and future taxable years, and a calculation of the resulting increase in tax for the recapture year.

#### **¶ 333.4 Credit for Operating Expense**

*Law: §11-27-97. and §11-24-44*

In addition to the tax credit provided under subsection (b) of this section, a tax credit against the tax imposed under this article shall be granted to an employer who provides or sponsors child care for employees. The amount of the tax credit shall be equal to 50 percent of the cost of operation to the employer less any amounts paid for by employees during a taxable year.

#### **¶ 333.5 Limitations on Credit for Operating Expense**

*Law: §11-27-97. and §11-24-44*

The tax credit allowed under subsection (e) of this section shall be subject to the following conditions and limitations:

(1) Such credit shall when combined with the credit allowed under subsection (b) of this section shall not exceed 100 percent of the amount of the taxpayer's income tax liability for the taxable year as determined without regard to any other credits;

(2) Any such credit claimed but not used in any taxable year may be carried forward for five years from the close of the taxable year in which the cost of operation was incurred; and

(3) The employer shall certify to the department the names of the employees, the name of the child-care provider, and such other information as may be required by the department to ensure that credits are granted only to employers who provide or sponsor approved child care pursuant to this section.

**¶ 333.6 Recapture event**

*Law: §11-27-97. and §11-24-44*

“Recapture event” means any disposition of qualified child-care property by the taxpayer, or any other event or circumstance under which property ceases to be qualified child-care property with respect to the taxpayer, except for:

(A) Any transfer by reason of death;

(B) Any transfer between spouses or incident to divorce;

(C) Any transaction to which Section 381(a) of the Internal Revenue Code applies;

(D) Any change in the form of conducting the taxpayer's trade or business so long as the property is retained in such trade or business as qualified child-care property and the taxpayer retains a substantial interest in such trade or business; or

(E) Any accident or casualty.

**¶ 333.7 Recapture of Credit**

*Law: §11-27-97. and §11-24-44*

Is the amount equal to the applicable recapture percentage of the aggregate credits claimed under subsection (d) of this section for all taxable years preceding the recapture year, whether or not such credits were used.

“Recapture percentage” refers to the applicable percentage set forth in the following table:

If the recapture event occurs within-The recapture percentage is:

Five full years after the qualified child-care property is placed in service .....100

The sixth full year after the qualified child-care property is placed in service .....	90
The seventh full year after the qualified child-care property is placed in service .....	80
The eighth full year after the qualified child-care property is placed in service .....	70
The ninth full year after the qualified child-care property is placed in service .....	60
The tenth full year after the qualified child-care property is placed in service .....	50
The eleventh full year after the qualified child-care property is placed in service .....	40
The twelfth full year after the qualified child-care property is placed in service .....	30
The thirteenth full year after the qualified child-care property is placed in service .....	20
The fourteenth full year after the qualified child-care property is placed in service .....	10
Any period after the close of the fourteenth full year after the qualified child-care property is placed in service .....	0

All credits previously claimed with respect to such property under subsection (b) of this section shall be recaptured as follows:

(A) Any carryover attributable to such credits pursuant to subdivision (1), subsection (c) of this section shall be reduced, but not below zero, by the recapture amount;

(B) The tax credit otherwise allowable pursuant to subsection (b) of this section for the recapture year, if any, as reduced pursuant to subdivision (1) of this subsection, shall be further reduced, but not below zero, by the excess of the recapture amount over the amount taken into account pursuant to paragraph (A) of this subdivision; and

(C) The tax imposed pursuant to this article for the recapture year shall be increased by the excess of the recapture amount over the amounts taken into account pursuant to paragraphs (A) and (B) of this subdivision, as applicable.

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