

## Chapter 4

### NON-CORPORATE INCOME TAXES

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## ¶ 401 Individual Income Taxes

### ¶ 401.1 Introduction

The West Virginia Personal Income Tax Act was enacted by the 1961 legislature. The tax became effective in 1961. The West Virginia personal income tax is generally based on federal income tax law. Consequently, terms used in the West Virginia law such as “federal adjusted gross income” have the same meaning as when used in comparable context in the federal law. Any reference to the federal law shall mean the provisions of the Internal Revenue Code (“IRC”) of 1986, as amended, and such other previous codes of the laws of the United States as related to the determination of income for federal income tax purposes. Note that under W.Va. Code 11-21-9(f), for taxable years beginning on or after January 1, 2018, whenever 11-21-1 et. seq. refers to “each exemption for which he or she is entitled to a deduction for the taxable year for federal income tax purposes,” this phrase means the exemption the person would have been allowed to claim for the taxable year had the federal income tax law not been amended to eliminate the personal exemption for federal tax years beginning on or after January 1, 2018.

It is important to note that West Virginia does not automatically adopt changes in federal tax law. The West Virginia legislature must formally adopt any change in federal tax law before the change is recognized for state income tax purposes. As of the date of this publication, taxpayers must follow all changes to federal income tax law made after December 31, 2021 and before January 1, 2023. The legislature will likely update its IRC conformity again in 2024, with such change being retroactive if allowable under federal income tax law.

The West Virginia Personal Income Tax Act applies to individuals, whether resident or nonresident. The tax applies to resident and nonresident partners of partnerships doing business in West Virginia or deriving income from West Virginia sources. It applies to resident and nonresident shareholders of electing small business corporations doing business in West Virginia or deriving income from West Virginia sources. It also applies to resident and nonresident beneficiaries of estates and trusts.

This Act does not apply to corporations subject to the West Virginia corporation net income tax discussed in chapter 1 of this Guidebook such as C corporations, unincorporated associations, such as Massachusetts business trusts, and publicly traded partnerships.

### ¶ 401.2 Basis of Tax

*Law:* W. Va. Code §§ 11-21-3  
*Comparable Federal:* IRC § 63

The West Virginia income tax is imposed on an individual's West Virginia taxable income, which is his or her West Virginia adjusted gross income for the taxable year less allowable personal exemptions. West Virginia adjusted gross income means adjusted gross income as defined in the Internal Revenue Code for the taxable year with the modifications discussed in this chapter. See, e.g., ¶ 401.4, ¶ 401.5 and ¶ 401.6 below.

### **¶ 401.3 Tax year, Accounting Periods and Methods.**

*Law:* W. Va. Code § 11-21-6; WVCSR § 110-21-6

*Comparable Federal:* IRC §§ 441, 442, 443, 446

*Accounting periods:* A taxpayer's taxable year for purposes of the West Virginia income tax is the same as his or her taxable year for federal income tax purposes.

*Change of accounting periods:* If a taxpayer's taxable year is changed for federal income tax purposes, his or her taxable year for purposes of the West Virginia income tax is similarly changed. If a taxable year of less than 12 months results from a change of taxable year, the West Virginia personal exemptions and the credits allowed against the tax must be prorated under regulations of the Tax Commissioner.

*Accounting methods:* A taxpayer's method of accounting for West Virginia income tax purposes is the same as his or her method of accounting for federal income tax purposes. In the absence of any method of accounting for federal income tax purposes, West Virginia taxable income shall be computed under the method that, in the opinion of the Tax Commissioner, clearly reflects income.

*Change of accounting methods:* When taxpayer's method of accounting is changed for federal income tax purposes, the following rules apply:

- (1) If a taxpayer's method of accounting is changed for federal income tax purposes, his or her method of accounting for West Virginia income tax purposes is similarly changed.
- (2) If a taxpayer's method of accounting is changed, other than from an accrual to an installment method, any additional tax which results from adjustments determined to be necessary solely by reason of the change may not be greater than if the adjustments were ratably allocated and included for the taxable year of the change and the preceding taxable years, not in excess of two, during which the taxpayer used the method of accounting from which the change is made.
- (3) If a taxpayer's method of accounting is changed from an accrual to an installment method, any additional tax for the year of the change of method and for any subsequent year which is attributable to the receipt of installment payments properly accrued in a prior year shall be reduced by the portion of

tax for any prior taxable year attributable to the accrual of such installment payments, in accordance with regulations of the Tax Commissioner.

#### **¶ 401.4 Modifications Increasing Federal Adjusted Gross Income**

*Law:* W. Va. Code § 11-21-12(b) and §§ 11-21-12f, and 11-21-12g;  
WVCSR § 110-21-12

The following items of income, unless already included in federal adjusted gross income, are added to federal adjusted gross income to arrive at West Virginia adjusted gross income:

(1) *Income from obligations of other states:* The amount of interest income on obligations of any state, other than obligations of the State of West Virginia, or of a political subdivision of any other state, unless created by compact or agreement to which West Virginia is a party. (W. Va. Code § 11-21-12(b)(1).) The amount to be added to federal adjusted gross income is the gross amount of such interest, without reduction for incidental expenses incurred by the taxpayer, such as custodial fees, investment advisory fees or similar expenses.

*Example:* The gross amount of interest received by a resident individual on bonds of the State of California must be added to his federal adjusted gross income in arriving at his West Virginia adjusted gross income, for this interest is subject to West Virginia income tax but not federal income tax. If a resident individual receives interest income on obligations of the State of West Virginia, the interest is not subject to West Virginia income tax, for interest income on West Virginia obligations is excluded from taxation. (WVCSR § 110-21-12.2.1.2.)

(2) *Income from federal obligations not exempt from state taxes but exempt from federal taxes:* The amount of interest or dividend income on obligations or securities of any authority, commission, or instrumentality of the United States, which the laws of the United States exempt from federal income tax but not from state income taxes. (W. Va. Code § 11-21-12(b)(2).)

(3) Any deduction allowed when determining federal adjusted gross income for federal income tax purposes for the taxable year that is not allowed as a deduction for the taxable year under the West Virginia Personal Income Tax Act. (W. Va. Code § 11-21-12(b)(3).)

(4) *Interest to carry exempt state obligations deductible for federal tax purposes:* Interest on indebtedness incurred or continued to purchase or carry obligations or securities the income from which is exempt from West Virginia tax to the extent that such interest is deductible in determining federal adjusted gross income. (W. Va. Code § 11-21-12(b)(4).)

*Example:* An individual borrowed \$50,000 from his bank to purchase a new issue of the United States Treasury certificates. In computing his federal adjusted

gross income, he includes the interest income received on these certificates and deducts as a business expense the interest payable on the bank loan. However, the interest income received on the certificates is not subject to West Virginia tax and is subtracted from federal adjusted gross income in computing his West Virginia adjusted gross income. Conversely, the interest on the bank loan incurred to purchase these certificates is not deductible for purposes of the West Virginia income tax and must be added back to federal adjusted gross income in computing West Virginia adjusted gross income. (WVCSR § 110-21-12.2.3.)

(5) *Certain lump sum distributions*: The amount of a lump sum distribution for which the taxpayer has elected under IRC § 402(e) to be separately taxed for federal income tax purposes. (W. Va. Code § 11-21-12(b)(6).) (See ¶ 403.6 below for estates and trusts.)

(6) *Certain withdrawals from medical savings accounts*: Amounts withdrawn from a medical savings account established by or for an individual under W. Va. Code § 33-15-20 or § 33-16-15 that are used for a purpose other than payment of medical expenses, as defined in those sections. (W. Va. Code § 11-21-12(b)(7).)

(7) Any distribution from an IRC § 529 prepaid tuition plan or other education savings plan that was used for purposes other than those qualified expenses authorized by IRC § 529 (qualified tuition programs), unless already included in federal adjusted gross income for the taxable year. (W. Va. Code § 11-21-12f.)

(8) For years beginning before December 31, 2017, the amount deducted under IRC § 199 (income attributable to domestic production activities) when determining federal adjusted gross income for the taxable year for federal income tax purposes. (W. Va. Code § 11-21-12g.) The Tax Cuts and Jobs Act (P.L. 115-97) eliminated the deduction under IRC § 199 for tax years beginning after December 31, 2017.

(a) When taxpayer's federal adjusted gross income includes distributive share of income, gain or loss of a partnership, limited liability company, electing small business corporation, or other entity treated as a partnership for federal income tax purposes, and when taxpayer's distributive share for the taxable year includes a deduction, or portion of a deduction computed under IRC § 199 for the taxable year, then in addition to amounts added to federal taxable income pursuant to W. Va. Code § 11-21-12(b), unless already included therein, taxpayer shall add the amount computed under IRC § 199 that flows through to the taxpayer for federal income tax purposes for the taxable year. Taxpayer must file with its annual West Virginia personal income tax return a copy of all schedules K-1 it received showing allocation of an IRC § 199 deduction and such other information as the Tax Commissioner may require.

(b) *Failure to attach required schedules*: When a taxpayer fails to include with the annual West Virginia personal income tax return the schedule or schedules required by W. Va. Code § 11-21-12g, the Tax Commissioner is required to treat the return as an incomplete return until the day the required schedule or schedules

are filed with the Tax Commissioner. Additionally, an incomplete return showing an overpayment of tax will not be treated as a claim for refund until the day the defect is cured, and the filing of an incomplete return does not start the running of the period of time during which the Tax Commissioner may issue a deficiency assessment or take other action to enforce compliance with the West Virginia Personal Income Tax Act.

(9) *WV ABLE account*: Unless already included in federal adjusted gross income for a taxable year, any amount previously deducted from federal adjusted gross income for contributions to an account created pursuant to the West Virginia ABLE Act will be required to be added back to federal adjusted gross income for amounts withdrawn from the account for purposes other than a qualified disability expense authorized by the ABLE Act. (W. Va. Code §11-21-12j(b))

#### **¶ 401.5 Modifications Decreasing Federal Adjusted Gross Income**

*Law*: W. Va. Code § 12-21-12(c) and §§ 11-21-12a, 11-21-12c, 11-21-12d, 11-21-12e, 11-21-12h, and 11-21-12i, 11-21-12j, 11-21-12k, 11-21-12l, and 11-21-12m; WVCSR 110-21-12

The following items of income, to the extent included in federal adjusted gross income, are subtracted from federal adjusted gross income to arrive at West Virginia adjusted gross income:

(1) *Interest or dividend income from federal obligations that are exempt from state taxation*: The amount of interest or dividend income on obligations or securities of the United States and its possessions, to the extent includable in gross income for federal income tax purposes but exempt from state taxation under the laws of the United States. (W. Va. Code § 11-21-12(c)(1).)

*Example*: Interest on United States savings bonds is subject to federal income tax but not subject to state income tax. Therefore, the amount of such interest should be subtracted from federal adjusted gross income when computing West Virginia adjusted gross income. (WVCSR § 110-21-12.3.1.1.)

(2)(a) *Interest from other federal obligations*: Interest or dividend income on obligations or securities of any authority, commission, or instrumentality of the United States or of the State of West Virginia to the extent includable in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States or of the State of West Virginia. (W. Va. Code § 11-21-12(c)(2).)

(2)(b) *Dividends paid by RICs*: Federal interest or dividends paid to shareholders of a regulated investment company, under IRC § 852 (taxation of regulated investment companies and their shareholders) to the extent includable in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States. (W. Va. Code § 11-21-12(c)(2).)



(3) Any amount included in federal adjusted gross income for federal income tax purposes for the taxable year that is not included in federal adjusted gross income under the West Virginia Personal Income Tax Act for the taxable year. (W. Va. Code § 11-21-12(c)(3).)

(4) *Refunds or credit for overpayment of taxes:* Any refund or credit for overpayment of income taxes imposed by this State or any other taxing jurisdiction, to the extent properly included in gross income for federal income tax purposes. (W. Va. Code § 11-21-12(c)(4).)

This modification applies to any refund of income taxes which was actually included in federal adjusted gross income, whether the refund represented West Virginia income taxes or the income taxes of another state, a political subdivision of any state or any foreign government. However, the modification does not include any portion of the total refund which represents interest received. Such interest, whether received in connection with a state, federal or other tax refund, is not exempt from tax.

(5) *State retirement benefits:* Annuities, retirement allowances, returns of contributions and any other benefit received under the West Virginia Public Employees Retirement System, the West Virginia State Teachers Retirement System, and all forms of military retirement, including regular armed forces, reserves, and National Guard, including any survivorship annuities derived therefrom, to the extent includable in gross income for federal income tax purposes. However, this decreasing modification is limited to the first \$2,000 of benefits received under the West Virginia Public Employees Retirement System, the West Virginia State Teachers Retirement System and, including any survivorship annuities derived therefrom, to the extent includable in gross income for federal income tax purposes; and the first \$2,000 of benefits received under any federal retirement system to which Title 4 U.S.C. § 111 applies. However, the total decreasing modification under this paragraph (5) may not exceed \$2,000 per person receiving retirement benefits and this limitation. (W. Va. Code § 11-21-12(c)(5).)

(6) *Police and firemen retirement benefits:* Retirement income received in the form of pensions and annuities under any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes. (W. Va. Code § 11-21-12(c)(6).)

Note: When the retired policeman or fireman receives retirement income from the West Virginia Public Employees Retirement System, the decreasing modification is limited to \$2,000 as discussed in paragraph (5), above. Paragraph (6) applies only to retirees covered by a separate retirement plan established by the municipality for its policemen and/or firemen.

The U.S. Supreme Court has held that the exemption found in W. Va. Code § 11-21-12(c)(6) unlawfully discriminated against a federal retiree, a U.S. Marshall, in violation of the intergovernmental tax immunity doctrine as codified in 4 USC 111. The Court noted that a state violates § 111 when it treats retired state employees more favorably than retired federal employees and “no significant differences between the two classes” justifies the differential treatment. The U.S. Supreme Court reversed the decision of the West Virginia Supreme Court of Appeals and remanded the case for further proceedings and determination of an appropriate remedy. *Dawson v. Steager*, 139 S.Ct. 698 (2019). In September 2019, the West Virginia State Tax Division published TSD-440, Pension Income of Retired Federal Law Enforcement & Federal Firefighter Personnel – *Dawson v. Steager*, which addressed this ruling. As noted in TSD-440, those federal law enforcement and firefighter retirees that qualify for this decreasing modification may provide an attested Federal Form RI 20-124 – — *Certification of Service Performed as a Law Enforcement Officer, Firefighter, Nuclear Materials Courier, Customs and Border Protection Officer (535 Service), or Air Traffic Controller* or other certification showing work performed as a Federal Law Enforcement Officer, or Federal Firefighter, Nuclear Materials Courier, or Customs and Border Protection Officer (535 Service). Air Traffic Controllers cannot claim this modification and no other federal retiree qualifies for this treatment.

Effective for tax years beginning on or after December 31, 2022, certain volunteer firefighters will be eligible to claim a credit of up to \$1,000 against personal income tax obligations. (W. Va. Code §§ 11-13GG-1 *et seq.*) The modification under this paragraph is not impacted by this credit.

(7) *Military retirement income*: The first \$20,000 of military retirement income, including retirement income from the regular armed forces, reserves and National Guard paid by the United States or by this State, including any survivorship annuities, to the extent included in gross income for federal income tax purposes for the taxable year. (W. Va. Code § 11-21-12(c)(7)(B).) For taxable years beginning after December 31, 2017, the \$20,000 cap is removed, and all such military retirement income is subtracted from federal adjusted gross income to arrive at West Virginia gross income. (W. Va. Code § 11-21-12(c)(7)(C)].

(8) *Social Security Income*: For taxable years beginning on or after January 1, 2020, 35 percent of the amount of social security benefits received pursuant to Title 42 U.S.C., Chapter 7, including, but not limited to, social security benefits paid by the Social Security Administration as Old Age, Survivors and Disability Insurance Benefits as provided in Section 42 U.S.C. 401 *et seq.* or as Supplemental Security Income for the Aged, Blind, and Disabled as provided in Section 42 U.S.C. 1381 *et seq.*, included in federal adjusted gross income for the taxable year shall be allowed as a decreasing modification from federal adjusted gross income when determining West Virginia taxable income. This modification increases to 65% of social security benefits received in 2021 and 100% of social security benefits received in 2022. This modification is eligible to taxpayers whose federal adjusted gross income does not exceed \$100,000 if married

filing jointly, or \$50,000 if single or married filing separate returns. (W. Va. Code § 11-21-12(c)(8)]

(9) *Retirement or disability income*: Federal adjusted gross income in the amount of \$8,000 received from any source by any person who has attained the age of 65 on or before the last day of the taxable year, or by any person certified by proper authority as permanently and totally disabled, regardless of age, on or before the last day of the taxable year, to the extent includable in federal adjusted gross income for federal tax purposes. However, if a person has a medical certification from a prior year and he or she is still permanently and totally disabled, a copy of the original certificate is acceptable as proof of disability. A copy of the form filed for the federal disability income tax exclusion is acceptable proof of permanent and total disability. (W. Va. Code § 11-21-12(c)(8).) This decreasing modification is subject to the following adjustments:

- (a) When the total modification under subparagraphs (1), (2), (5), (6), (7) and (8) of this ¶ 401.5 is \$8,000, no deduction is allowed under the paragraph (9); and
- (b) Where the total modification under subparagraphs (1), (2), (5), (6), (7) and (8) of this ¶ 401.5 is less than \$8,000 per person, then the total modification allowed under this paragraph (9) for all gross income received by that person is limited to the difference between \$8,000 and the sum of the modifications under subparagraphs (1), (2), (5), (6), (7) and (8) of this ¶ 401.5 for the taxable year.

(10) *Retirement or disability income of surviving spouse*: Federal adjusted gross income in the amount of \$8,000 received from any source by the surviving spouse of any person who had attained the age of 65 or who had been certified as permanently and totally disabled, to the extent includable in federal adjusted gross income for federal tax purposes. (W. Va. Code § 11-21-12(c)(9).) However, this decreasing modification is subject to the following limitations:

- (a) Where the total modification under subparagraphs (1), (2), (5), (6), (7) and (8) of this ¶ 401.05 is \$8,000 or more, no deduction is allowed under allowed under this subparagraph (9); and
- (b) Where the total modification under subparagraphs (1), (2), (5), (6), (7) and (8) of this ¶ 401.5 is less than \$8,000, then the total decreasing modification allowed under this subparagraph (9) for all gross income received by that person is limited to the difference between \$8,000 and the sum of decreasing modification under subparagraphs (1), (2), (5), (6), (7) and (8) of this ¶ 401.5 for the taxable year.

(11) *Contributions to medical savings account*. Contributions from any source to a medical savings account established by or for the individual pursuant to W. Va. Code §§ 33-15-20 or 33-16-15, plus interest earned on the account, to the extent includable in federal adjusted gross income for federal income tax purposes. However, the maximum

decreasing modification under subdivision (10) is limited to \$2,000 plus the amount of interest earned on the account for that taxable year. For married individuals filing a joint return, the maximum deduction is computed separately for each individual. (W. Va. Code § 11-21-12(c)(10).)

(12) Any other income which this State is prohibited from taxing under the laws of the United States. (W. Va. Code § 11-21-12(c)(12).) For example, West Virginia does not tax United States railroad retirement benefits. All types of United States Railroad Retirement Board benefits, including unemployment compensation, disability and sick pay included on the federal return are allowed as a decreasing modification to federal adjusted gross income.

(13) *Payments to certain prepaid tuition contracts or college savings plans:* Payments made under “West Virginia College Prepaid Tuition and Savings Program Act,” codified in W. Va. Code § 18-30-1 *et seq.*, to the extent not allowed as a deduction when determining federal adjusted gross income for the taxable year. (W. Va. Code § 11-21-12a.)

(14) *Payments for long-term care insurance:* Any payment during the taxable year for premiums for a long-term care insurance policy as defined in W. Va. Code § 33-15A-4 that offers coverage to either the taxpayer, the taxpayer’s spouse, parent or a dependent as defined in IRC § 152, but only to the extent the amount is not allowable as a deduction when arriving at the taxpayer’s federal adjusted gross income for the taxable year in which the payment is made. (W. Va. Code § 11-21-12c.)

(15) *Pension benefit guaranty modification:* Any person who retires under an employer-provided defined benefit pension plan that terminates prior to or after the retirement of that person and the pension plan is covered by a guarantor whose maximum benefit guarantee is less than the maximum benefit to which the retiree was entitled had the plan not terminated may subtract annually from his or her federal adjusted income a sum equal to the difference in the amount of the maximum annual pension benefit the person would have received for such tax year had the plan not terminated and the maximum annual pension benefit actually received from the guarantor under a benefit guarantee plan. This modification is available regardless of the type of return form filed. (W. Va. Code § 11-21-12d.) However, if the Tax Commissioner determines that this adjustment reduces the revenues of this State by \$2 million or more in any one year, then the Tax Commissioner is required to reduce the percentage of the reduction to a level at which the Commissioner believes will reduce the cost of the adjustment to \$2 million for the next year. This tax adjustment terminated for taxable years beginning after December 31, 2015. However, the adjustment was reinstated by the Legislature for the tax year beginning January 1, 2020, and is now scheduled to terminate for taxable years beginning on and after January 1, 2028. (W. Va. Code § 11-21-12d(b), as amended by SB487 during the 2023 regular legislative session.)

(16) *Certain income of members of national guard or armed forces reserves:* An individual on active duty as a member of the national guard or armed forces reserves

called to active duty pursuant to an Executive Order of the President of the United States for domestic security duty is an authorized modification reducing federal adjusted gross income for the amount of active duty military pay received for the period of time an individual is on active duty pursuant to the Executive Order, but only to the extent the active duty military pay is included in federal adjusted gross income for the taxable year in which it is received. (W. Va. Code § 11-21-12e.)

(17) *Certain turnpike tolls*: Any payment during the taxable year for amounts expended by an individual for tolls paid electronically through use of a West Virginia Parkways, Economic Development and Tourism Authority PAC card (parkways authority commuter card) account for noncommercial commuter passes for travel on toll roads in West Virginia, not including amounts paid as refundable transponder deposits or amounts reimbursed by an employer or otherwise. (W. Va. Code § 11-21-12h.)

However, this decreasing modification is allowed only to the extent the amount is not allowable as a deduction when arriving at the taxpayer's federal adjusted gross income for the taxable year in which the payment is made. In the case of a single person, a head of household or married individuals filing a joint return, or a married person filing a separate return, this authorized modification reducing federal adjusted gross income applies only to the portion of the expended amount that equals or exceeds \$25 and the total amount deducted for a taxable year may not exceed \$1,200. Any amount of qualified tolls paid and eligible for this decreasing modification and not used in the taxable year when tolls were paid may be carried forward for up to 3 taxable years subsequent to the taxable year when paid. Qualified toll payments not used by the end of the carry forward period are forfeited.

Note that the turnpike tolls modification under W. Va. Code § 11-21-12h was repealed by HB 4396 from the 2022 regular legislative session, effective June 7, 2022.

(18) *Contributions to qualified trust for child with autism*: The amount of any qualifying contribution to a qualified trust maintained for the benefit of a child with autism by the parent or guardian of a child with autism, up to a maximum of \$1,000 per year for individual filers and persons who are married but filing separately, and \$2,000 per year for persons who are married and filing jointly, but only to the extent the amount is not allowable as a deduction when arriving at the taxpayer's federal adjusted gross income for the taxable year in which the payment is made. This modification is available for taxable years beginning after December 31, 2010, regardless of the type of return form filed. (W. Va. Code § 11-21-12i.)

The taxpayer may elect to carry forward this modification and apply it over a period not to exceed 4 tax years, beginning in the tax year in which the payment was made. However, the amount of this decreasing modification, in combination with all other decreasing modifications authorized in the West Virginia Personal Income Tax Act may not reduce taxable income below zero. Any unused decreasing modification carryforward amount remaining after the 4-year carryforward period is forfeited. The accrued deposits and earnings on the qualified trust account for a child with autism and the subsequent

withdrawal of funds from that trust account, made in accordance with the provisions of W. Va. Code § 44-16-1 et seq. may not be treated as West Virginia taxable income to either the trust or the beneficiary. (W. Va. Code § 11-21-12i)

(19) *Contributions to WV ABLE account:* Effective May 30, 2019, any contribution to an account created pursuant to the West Virginia ABLE Act may be treated as a decreasing modification to federal adjusted gross income, provided the amount was not allowable as a deduction in arriving at federal adjusted gross income in the taxable year the contribution is made. This modification may not reduce taxable income below zero. Additionally, the taxpayer may elect to carry forward the modification over a five-year period, beginning with the taxable year in which the contribution was made. (W. Va. Code §11-21-12j(a)).

(20) *Shareholders or Members of Companies Engaged in Business as a Financial Organization.* Retroactive to tax year 2018, a proportional share of all items of income, loss, deduction or credit of the company can be further reduced in calculating West Virginia adjusted gross income of an S Corporation shareholder or limited liability company member by the percentage of company assets that are obligations or securities of the United States, West Virginia or any West Virginia political subdivision; investments or loans primarily secured by mortgages or deeds of trust on West Virginia residential real estate; or loans primarily secured by a lien or security agreement on residential property in the form of a mobile home, modular home or double wide home located in West Virginia. No shareholder or member adjustment is allowed if an adjustment has been made at the entity level. The legislation also extends special gross receipts factor apportionment for financial organizations to S Corporations and LLCs. (W. Va. Code §11-21-12k).

(21) *Net Income from a Qualified Opportunity Zone Business.* Beginning with income tax year 2019, a decreasing modification from federal adjusted gross income is available for net income from a qualified opportunity zone business. For individuals, the decreasing modification is an amount equal to and limited to that portion of net income included in federal adjusted gross income by a taxpayer in the taxable year that is directly derived from a qualified opportunity zone business located in a qualified opportunity zone which is located in West Virginia. For partners or members of limited liability companies that are treated as partnerships for federal income tax purposes, and other pass-through entities, the decreasing modification is an amount equal to and limited to that portion of the distributive share of the partner or member that is attributable to the flow through income directly derived from the qualified opportunity zone business located in West Virginia. A similar rule applies to shareholders in corporations taxed under subchapter S of the Internal Revenue Code. (W. Va. Code §11-21-12l).

(22) *Jumpstart Savings Program.* For taxable years beginning on or after January 1, 2022, West Virginia taxpayers may subtract from federal adjusted gross income an amount equal to their contribution to a Jumpstart Savings Account for the taxable year in which the payment is made. This reduction is only available to the extent the amount is not allowable as a deduction in arriving at federal adjusted gross income. This decreasing

modification may not exceed \$25,000 in a single taxable year. The taxpayer may elect to carryforward the modification over a period not exceeding five taxable years.

Similarly for distributions, a taxpayer may subtract from federal adjusted gross income an amount equal to the portion of a distribution from a Jumpstart Savings Account received by a distributee that is used to pay for qualified expenses. Such decreasing modification is authorized for the taxable year the distribution is made to the distributee, but only to the extent the distribution amount is not allowable as a deduction when arriving at the distributee's federal adjusted gross income for the taxable year when the distribution was made. This modification may not exceed \$25,000 for the taxable year.

For taxable years beginning on or after January 1, 2023, taxpayers must add back to federal adjusted gross income any amount previously subtracted for amounts contributed to a Jumpstart Savings account that was withdrawn and not used of qualified expenses in the year of the distribution or the subsequent taxable year. (W. Va. Code §11-21-12m).

(23) Gambling losses. HB 2821 from the 2023 Regular Session passed legislation that allows a decreasing modification to be taken against gambling income at the state level. The legislation is retroactive and applicable for taxable years beginning on or after January 1, 2020. The decreasing modification is limited to the amount of gambling income reported. The decreasing modification is available for gambling losses allowable as an itemized deduction under the Internal Revenue Code. The decreasing modification does not include any costs or expenses associated with the gaming or gambling activity.

Amended returns may be filed for the tax years of 2020 through 2022 to reflect the decreasing modification. Per WV Publication TSD 432, the gambling losses for tax years 2020 through 2022 should be reported on Schedule M, Line 41 – Autism modification. A copy of the first two pages of Federal Form 1040, Federal Schedule A, and all W-2Gs must be provided to support the gambling winnings. For tax years 2023 and going forward, there will be a dedicated line to report gambling losses on Schedule M.

#### **¶ 401.6 Low income earned income exclusion**

*Law:* W. Va. Code § 11-21-10

*Earned income exclusion:* In the case of an eligible taxpayer, there is allowed as a deduction from federal adjusted gross income the amount of his or her earned income included therein, not to exceed \$10,000, except that when a married couple file separate West Virginia returns this exclusion may not exceed \$5,000 per separate return. This exclusion applies only to earned income received that is included in the taxpayer's federal adjusted gross income. Except in the case of a taxable year closed by reason of the death of the taxpayer, no low-income deduction is allowed in the case of a taxable year covering a period of less than 12 months.

*“Eligible taxpayer” defined:* The term “eligible taxpayer” means:

- (1) Any unmarried individual and any married couple filing a joint West Virginia income tax return who has or have federal adjusted gross income of \$10,000 or less for the taxable year; or
- (2) Any husband or wife filing a separate West Virginia return who has federal adjusted gross income of \$5,000 or less.

*“Earned income” defined:* For purposes of this exclusion, the term “earned income” means:

- (1) Wages, salaries, tips, and other employee compensation; plus
- (2) The amount of the taxpayer’s net earnings from self-employment for the taxable year (within the meaning of IRC § 1402(a)), but such net earnings must be determined with regard to the deduction allowed to the taxpayer under IRC § 164.

*Exclusions from earned income:* No amount received as pension or annuity income is taken into account, and no amount received for services provided by an individual while the individual is an inmate at a penal institution is taken into account.

#### **¶ 401.7 Other Modifications to Federal Adjusted Gross Income**

*Law:* W. Va. Code §§ 11-21-12(d) and 11-21-12(e)

In addition to the modifications to federal adjusted gross income discussed in ¶ 401.4, ¶ 401.5, and ¶ 401.6 above, the following modifications are also allowed or required:

(1) *Fiduciary adjustment for estate or trust income:* Where a resident individual is a beneficiary of an estate or trust, his or her federal adjusted gross income should be increased or decreased by his or her share of the West Virginia fiduciary adjustment applicable to the estate or trust. This fiduciary adjustment is the net amount of modifications relating to estate or trust items of income, gain, loss, or deduction, and is computed by the fiduciary on the fiduciary’s return for the estate or trust. The fiduciary also allocates to each beneficiary his or her proportionate share of this fiduciary adjustment. Each beneficiary, on his or her individual West Virginia return, must apply his or her share of the fiduciary adjustment as a modification of his or her federal adjusted gross income to determine his or her West Virginia adjusted gross income. (WVCSR § 110-21-12.4.2.)

(2) *Partners and S corporation shareholders -- Modification of federal adjusted gross income for partnership or S corporation income or loss reportable by a partner or shareholder:* Where a resident individual is a member of a partnership or S corporation, the modifications as outlined above are to be made with reference to items of partnership or S corporation income, gain, loss or deduction which are reflected in his or her federal adjusted gross income for the taxable year.



These modifications are applicable since each item of partnership or S corporation income, gain, loss, or deduction has the same character for a partner or S corporate shareholder as for federal income tax purposes. If the partnership or S corporation item is not characterized for federal income tax purposes, it has the same character for a partner or S corporation shareholder as if it were realized directly by him or her from the source from which realized by the partnership or S corporation or incurred by him or her in the same manner as incurred by the partnership or S corporation. (WVCSR § 110-21-12.5.)

#### **¶ 401.8 West Virginia Adjusted Gross Income of Nonresident Individual**

*Law:* W. Va. Code §§ 11-21-32 and 11-21-31(b); WVCSR § 110-21-32

The computation of the West Virginia source income of a nonresident requires a separate determination of those items of income, gain, loss, and deduction entering into his or her federal adjusted gross income that are derived from or connected with West Virginia sources. These items, thus determined, are subject to the same modifications as are applicable for a resident individual. (WVCSR § 110-21-32.1.)

*Income connected with the State:* A nonresident individual's items of income, gain, loss, and deduction derived from or connected with West Virginia sources are items attributable to:

- (1) The ownership of any interest in real or tangible personal property in this State;
- (2) A business, trade, profession, or occupation carried on in this State; or
- (3) Personal services performed in this State.

A nonresident who is a partner in a partnership, a shareholder in an electing small business corporation or a beneficiary of an estate or trust that has West Virginia source income is subject to the West Virginia personal income tax.

*Earned income:* Compensation for services rendered by a nonresident individual wholly outside this State is not included in his or her West Virginia source income, regardless of the fact that payment may be made from a point within the state or that the employer is a resident individual, partnership, or corporation. If services are performed within West Virginia, whether or not as an employee, the compensation for such services is includible in federal adjusted gross because the income constitutes income from West Virginia sources. However, an individual who resides in Kentucky, Maryland, or Ohio, and whose only income from a West Virginia source is from salaries or wages, does not have to report the salary or wage income earned from a West Virginia source due to reciprocal agreements practiced with these states. This rule also applies to residents of the Commonwealths of Pennsylvania and Virginia who are physically in this West Virginia for 183 days or less of the taxable year. If the resident of Pennsylvania or Virginia is physically present in West Virginia for more than 183 days during the taxable years, then

the resident of Pennsylvania or Virginia is a resident of West Virginia for income tax purposes even though their domicile is in the Commonwealth of Pennsylvania or Virginia. See also ¶ 401.38 below.

If employee services were performed in part within West Virginia and in part without West Virginia, the portion of the compensation attributable to the services performed within West Virginia is determined in accordance with the ratio of days worked within West Virginia to the total days worked over the period during which the compensation was earned.

*Example:* X, a nonresident individual, is a salaried employee of a North Carolina construction company. X works partly within West Virginia and partly within North Carolina. X earns twenty thousand dollars (\$20,000) during tax year 2023. The amount allocable to West Virginia sources is that portion of X's salary income which the number of days worked in West Virginia bears to the total days worked during the year (excluding non-working days, such as Saturdays, Sundays, holidays, vacations, sick leave, etc.) both within and without West Virginia. Out of the total of two hundred eighty (280) working days, X worked seventy (70) days within West Virginia. X determines his or her West Virginia income in the following manner:

$$\frac{\text{Days actually worked during year in West Virginia}}{\text{Total days worked during the year}} = \frac{70}{280} = 25\%$$

Since the number of days worked within West Virginia amounts to 25% of X's total working days, X multiplies his or her total salary by 25% to arrive at the amount of his West Virginia income. His or her West Virginia income is \$5,000 (25% X \$20,000 = \$5,000). (WVCSR § 110-21-32.2.1.2.e.)

Under HB 2026, effective January 1, 2022, compensation subject to withholding that is paid to a nonresident individual is exempt from income tax provided the following criteria are met: 1) the compensation is paid for employment duties performed in West Virginia on 30 or fewer days in the calendar year, 2) the individual performed employment duties in more than one state of during the calendar year, 3) the compensation is not paid for employment by the individual in their capacity as a professional athlete, professional entertainer, or public figure, and 4) the nonresident individual's state of residence provides for a substantially similar exclusion.

If the number of days worked in West Virginia during the calendar year exceeds the 30-day threshold, then the employer is required to withhold West Virginia income tax on the wages earned during the year, including the first 30 days.

*Awards and prizes:* Prizes, awards, and similar payments are derived from or connected with West Virginia sources are West Virginia source income to the extent they are incident to the nonresident's presence or other activities within West Virginia.

*Estate or trust income:* The West Virginia source income of a nonresident individual includes the West Virginia source income of an estate or trust of which he or she is a beneficiary.

*Income from a business within and without the State:* Since the West Virginia source income of a nonresident individual takes into account only items of income, gain, loss, and deduction derived from or connected with West Virginia sources, an apportionment and allocation of items of income, gain, loss, and deduction are required when a nonresident individual carries on a business, trade, profession, or occupation partly within and partly without this State. A nonresident individual, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, is not deemed to be carrying on a business, trade, profession, or occupation in this state solely by reason of the purchase and sale of property within this State for his or her own account. (WVCSR § 32.3.1.)

*Income from intangibles:* Items of income, gain, loss and deductions attributable to a nonresident individual's ownership of intangible personal property with a situs in West Virginia, including annuities, dividends, interest, and gains and losses from the disposition of intangible personal property, do not constitute items of income, gain, loss and deduction derived from or connected with West Virginia sources except to the extent attributable to property employed in a business, trade, profession, or occupation carried on in this State.

*Partnership income:* The West Virginia source income of a nonresident individual includes the West Virginia source income of a partnership allocated to the nonresident.

*Pensions:* Pensions and retirement pay which are eligible for federal tax treatment under IRC § 72 as "amounts received as an annuity" under an annuity, endowment or life insurance contract are considered to be income from annuities and not taxable by West Virginia to nonresidents even though the nonresident would not be entitled to the pension or retirement pay but for his or her employment in West Virginia.

*S Corporation income:* The West Virginia source income of a nonresident individual includes the West Virginia source income of a corporation which is an electing small business corporation that is allocated to the nonresident shareholder.

*Service member's Income from Armed Forces:* If the service member's domicile was West Virginia at the time he or she entered military service, assignment to duty outside this State does not change his or her domicile. The service member must file a West Virginia personal income tax return and pay the tax due in the same manner as any other resident individual unless the service member did not have a physical presence in West Virginia for more than 30 days during the taxable year. Service member who is domiciled in West Virginia but does not spend more than 30 days in West Virginia is considered to be a nonresident of West Virginia for income tax purposes and his or her military compensation is not taxable by West Virginia. This is true even though the service member maintains a permanent place of abode in West Virginia.

When a service member whose domicile is West Virginia spends more than 30 days in West Virginia during the taxable year, the service member must file a resident return and report all his or her income to West Virginia. If no West Virginia income tax is withheld from the service member's military income, the service member may need to make quarterly estimated tax payments using Form IT-140ES.

A service member who was domiciled in another state at the time he or she entered military service and who is stationed in West Virginia for some, or all the taxable year does not pay West Virginia income tax on his or her military compensation even if he or she is stationed here for more than 183 days during the taxable year.

However, any service member who has income from a West Virginia source, other than his or her military compensation, such as, for example, rental or royalty income from property located in this State, is required to file a nonresident West Virginia income tax return.

*Combat pay:* Combat pay received during the taxable year that is not taxable on the federal income tax return is not taxable on the West Virginia return.

*Active duty military pay:* Military pay received while a resident individual is a member of the National Guard or Armed Forces Reserves called to duty pursuant to an Executive Order of the President of the United States is not subject to West Virginia income. This income is shown on Schedule M of the annual return as a decreasing modification to federal adjusted gross income.

*Spouses of United States military service members:* Spouses of military service members are exempt from West Virginia income tax on wages received from services performed in West Virginia when all three of the following conditions are met:

- (1) The service member is present in West Virginia in compliance with military orders;
- (2) The spouse is in West Virginia solely to be with the service member; and
- (3) The spouse maintains his or her domicile in another state.

There is no requirement that both spouses have the same state of domicile, nor in the case of border installations, live in the state where the service member is stationed. Eligible spouses desiring to claim this exemption from income tax and avoid withholding of West Virginia tax may file a copy of Form WV/IT-104 with his or her employer. A copy of their "spouse military identification card" should be attached to the form.

However, the spouse of a military service member who receives other types of West Virginia income, such as, for example, business income, interest income, unemployment compensation, *etc.* is subject to West Virginia income tax on that income

if it exceeds the spouse's personal exemption and must file a West Virginia income tax return.

#### **¶ 401.9 West Virginia Adjusted Gross Income -- Part-Year Resident**

*Law:* W. Va. Code § 11-21-44; WVCSR 110-21-31 and 110-21-32

The West Virginia adjusted gross income of a part-year resident consists of two parts – the individual's adjusted federal adjusted gross income for the portion of the year during which he or she was a resident of West Virginia, and the individual's West Virginia source income for the remaining portion of the taxable year during which he or she was a nonresident.

A part-year resident is subject to West Virginia tax on the following:

- (1) Taxable income received from all sources while a resident of West Virginia;
- (2) West Virginia source income earned during the period of nonresidence; and
- (3) Applicable special accruals.

The West Virginia source income of a nonresident is derived from the following sources included in the nonresident's federal adjusted gross income:

- (1) Real or tangible personal property located in West Virginia;
- (2) Employee services performed in West Virginia;
- (3) A business, trade, profession, or occupation conducted in West Virginia;
- (4) Distributive share of an S corporation doing business in West Virginia or deriving income from West Virginia sources in which the nonresident is a shareholder, to the extent allocated to West Virginia;
- (5) Distributive share of a partnership doing business in West Virginia or deriving income from West Virginia sources in which the nonresident is a partner, to the extent allocated to West Virginia;
- (6) The nonresident beneficiary's share of West Virginia source income of an estate or trust.
- (7) West Virginia Unemployment Compensation benefits.

*Special accruals:* If an individual changes his or her status from West Virginia resident to nonresident, he or she must, regardless of the method of accounting he or she normally employs, accrue and include in his or her West Virginia return for the portion of the year prior to the change of residency, any items of income, gain, loss or deduction accruing

prior to the change if not otherwise properly includible or allowable for West Virginia income tax purposes for the portion of the taxable year, or for a prior taxable year, during which he or she was a resident of West Virginia. That is, in computing his or West Virginia taxable income for that period, he or she must include all the items he or she would be required to include if he or she were filing a federal return for the same period on the accrual basis, together with any other accruals such as deferred gain on installment obligations, which are not otherwise includible or deductible for federal or West Virginia income tax purposes either for the period or for a prior taxable period during which he or she was a resident of this State.

*Example:* A taxpayer sells his business in West Virginia at a gain, under a contract whereby the purchase price is to be paid in installments, and later changes his status from resident to nonresident, he must accrue the entire amount of the gain remaining unpaid from such installment obligations, regardless of the method of accounting he normally uses in reporting his transactions. Likewise, where a beneficiary of an estate or trust changes his status during the taxable year from resident to nonresident, he must accrue on his West Virginia return for the resident period of any estate or trust income credited, distributable, payable, or required to be distributed to him as of the date of his change of residence. (WVCSR § 110-21-54.3.1.1)

*Example:* A taxpayer moves from West Virginia and sells his or her West Virginia home on an installment plan. Taxpayer must report all gain from the sale, in the year of the sale, even though federal income tax is deferred until the gain is actually received. The only exception is where taxpayer sells his or her principal residence in West Virginia and purchases a new principal residence in the other state. In this instance, all gain on the sale is deferred for federal income tax purposes and special accrual does not apply.

When an individual changes his or her status from nonresident of West Virginia to resident, the individual must, regardless of his or her method of accounting, accrue to the portion of the taxable year prior to the change in status any items of income, gain, loss, or deduction accruing prior to the change of status (other than items derived from or connected with West Virginia sources) if not otherwise properly entering into his or her federal adjusted gross income for that portion of the taxable year or for a prior taxable year under his or her method of accounting, for the period prior to the change of residency. (WVCSR § 110-21-54.3.2.)

No item of income, gain, loss, or deduction accrued for the portion of a taxable year prior to a change from nonresident to resident status is taken into account when determining West Virginia adjusted gross income for any taxable period that begins after the date of the change from nonresident to resident status.

*Example:* A taxpayer moves from Ohio to West Virginia and sells his Ohio home on an installment plan. The taxpayer excludes from West Virginia income all income from the sale of the Ohio home even though federal income tax is deferred until the installment payments are actually received, which is after the taxpayer becomes a

resident of West Virginia. The only exception is where taxpayer sells his or her principal residence in West Virginia and purchases a new principal residence in Ohio. For federal income tax purposes any gain on the sale is deferred for federal tax purposes and the special accrual rule does not apply.

*Example:* John Smith, a cash-basis calendar year taxpayer residing in Kentucky, performs services in Kentucky in March 2023, for which he is paid \$10,000 in September 2023, from the employer's West Virginia office. On August 10, 2023, John Smith moves to West Virginia where on September 1, 2023, he receives the \$10,000 payment of salary. For 2023, John Smith is required to file two (2) West Virginia returns, one (1) as a nonresident and one (1) as a resident. No part of the \$10,000 salary is taken into account as this item was sourced in another state which preceded the date of the change of residence. (WVCSR § 110-21-54.3.3.1)

#### **¶ 401.10 West Virginia Taxable Income**

*Law:* W. Va. Code § 11-21-11

After computing the West Virginia adjusted gross income of an individual, there is subtracted the taxpayer's personal exemptions, see ¶ 401.11 below, and the resulting balance is the individual's West Virginia taxable income.

An individual is not allowed any standard deduction or any itemized deductions when computing West Virginia taxable income.

#### **¶ 401.11 Personal Exemptions of Resident and Nonresident Individuals**

*Law:* W. Va. Code § 11-21-16

*Comparable Federal:* IRC § 151, as amended by the Tax Cuts and Jobs Act (P.L. 115-97)

For taxable years beginning after January 1, 2018, an individual is allowed the same number of personal exemptions for West Virginia income tax purposes that they would have been allowed to claim for the taxable year had the federal income tax law not been amended by the Tax Cuts and Jobs Act to eliminate the personal exemption for federal tax purposes.

The West Virginia personal exemption is \$2,000 for each exemption properly allowable to the taxpayer for the taxable year for federal income tax purposes, except that if a child is claimed as a dependent on the return of his or her parent and the child files a West Virginia return, the child is allowed a personal exemption of only \$500 for the taxable year.

When resident married individuals file a joint federal return and a joint West Virginia return, the same personal exemptions are allowed on the joint West Virginia return as would have previously been allowed on the joint federal return. Likewise, where married individuals file separate federal returns, the same personal exemptions are allowed on the separate West Virginia resident returns of each spouse as would have been allowed

on the respective separate federal returns. However, if married individuals file a joint federal return but separate West Virginia returns, each of them is entitled to a West Virginia exemption of \$2,000 for each federal exemption as would have been allowed previously for which he or she would have been separately entitled if they had filed separate federal returns.

A surviving spouse is allowed one additional exemption of \$2,000 for the two taxable years beginning after the year of death of the deceased spouse. A surviving spouse is a taxpayer whose spouse died during the taxable year prior to the taxable year for which the annual return is being filed and who has not remarried at any time before the end of the taxable year for which the annual return is being filed.

#### **¶ 401.12 “Resident” and “Nonresident” Defined**

*Law:* W. Va. Code § 11-21-7

*Resident individual:* An individual may be a resident of West Virginia for income tax purposes, even though he or she would not be deemed a resident for other purposes. The term “resident individual” includes: (1) all persons “domiciled” in this State, subject to the exceptions below; and (2) any individual, other than a member of the Armed Forces of the United States, who is not domiciled in this State but who maintains a “permanent place of abode” in this State and spends in the aggregate more than 183 days of the taxable year in this State.

In the case of a person domiciled in West Virginia, the maintenance of a permanent place of abode in this State alone is sufficient to make him a resident for tax purposes, even though he remains outside this State for the entire year. The 183-day rule applies only to taxpayers who are not domiciled in West Virginia.

*Exception to when person domiciled in West Virginia not considered a resident:* Any person domiciled in West Virginia is a resident for income tax purposes for a specified taxable year, unless for that year he or she satisfies all three of the following conditions:

- (1) The person maintains no permanent place of abode in this State;
- (2) The person maintains a permanent place of abode elsewhere; and
- (3) The person spends in the aggregate not more than 30 days of the taxable year in this State.

*Example:* An individual, although retaining his or her West Virginia domicile, maintains his or her only permanent place of abode in the state of New York. As long as this individual continues to meet all three (3) conditions set forth in the preceding paragraph, he or she will be treated as a nonresident of West Virginia for income tax purposes. If, however, for any taxable year there is a failure to meet any one (1) of the three (3) conditions set forth in the preceding paragraph, the individual is subject to West Virginia’s personal income tax as a resident for that year. (WVCSR § 110-21-7.1.5.1.)



*Days in and out of state:* In counting the number of days spent within and without this State, presence within this State for any part of a calendar day constitutes a day spent within this State. However, such presence within this State may be disregarded if it is solely for the purpose of boarding a plane, train, or bus for travel to a destination outside of this State, or while traveling by motor, plane, or train through this State to a destination outside this State. Any person domiciled outside this state who maintains a permanent place of abode within this state during any taxable year and claims to be a nonresident must keep and have available for examination by the Tax Commissioner adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within this State.

*Domicile:* In general, domicile is the place which an individual intends to be his or her permanent home; the place to which he or she intends to return whenever he or she is absent from the domicile. A domicile once established continues until the person moves to a new location with the bona fide intention of making his or her fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The fact that a person registers and votes in one place is important but not necessarily determinative, especially if the facts indicate that he or she did this merely to escape taxation in some other jurisdiction.

*Domicile is not dependent on citizenship.* An alien who has permanently established his or her home in West Virginia is domiciled in this State regardless of whether he or she has become a United States citizen or has applied for citizenship. However, a United States citizen ordinarily will not be deemed to have changed his or her domicile by going to a foreign country unless it is clearly shown that he or she intends to remain there permanently. For example, a United States citizen domiciled in West Virginia who goes abroad because of an assignment by his employer or for study, research, or recreation, does not lose his West Virginia domicile unless it is clearly shown that he or she intends to remain abroad permanently and not to return.

*A person can have only one domicile.* If a person has two or more homes, his or her domicile is at the home which he or she regards and uses as his or her principal and permanent home. In determining his or her intention in the matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out above, a person who maintains a permanent place of abode in this State and spends more than 183 days of the taxable year in this State is taxable as a resident regardless of his domicile.

A wife's domicile follows that of her husband unless a separate domicile has been established by her. Likewise, a child's domicile ordinarily follows that of his or her father, or of his or her mother after the father's death, until he or she reaches the age of self-support and actually establishes his or her own separate domicile.

*Permanent place of abode:* A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by him or her, and generally includes a dwelling place owned or leased by his or her spouse. A camp or cottage that is suitable and only used for vacations or for hunting or fishing is not a permanent place of abode. Also, a place of abode, whether in this State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. Thus, an individual domiciled in another state may be assigned to his or her employer's West Virginia office for a fixed and limited period, after which he or she is to return to his or her permanent location. If such an individual takes an apartment in West Virginia during this period, he or she will not be deemed a resident, even though he or she spent more than 183 days of the taxable year in West Virginia, because his or her place of abode here is not permanent. The individual will, of course, be taxable as a nonresident on his or her income from West Virginia sources, including his or her salary or other compensation received for services performed in West Virginia. However, if the individual's assignment to his or her employer's West Virginia office is not for a fixed or limited period, but is for an indefinite period, then the West Virginia apartment will be deemed a permanent place of abode, and the individual will to be a resident for tax purposes if he or she spends more than 183 days of the year in West Virginia.

*Nonresident individual:* For income purposes, a nonresident individual is anyone who is not a resident as defined above.

**¶ 401.13 Rate of Tax**

*Law:* W. Va. Code § 11-21-4e

*Single individuals, estates and trusts, married individuals filing joint returns:* The tax imposed on West Virginia taxable income of every individual (except married individuals filing separate returns), every individual who is a head of household in the determination of his or her federal income tax for the taxable year, every married couple who file a joint return, every individual who is entitled to file his or her federal income tax return for the taxable year as a surviving spouse, and every estate and trust is determined in accordance with the following table:

<b>If taxable income is:</b>		<b>The tax is:</b>
<b>Over</b>	<b>But not over</b>	
\$0	\$10,000	2.36% of the taxable income
\$10,000	\$25,000	\$236 plus 3.15% of excess over \$10,000
\$25,000	\$40,000	\$708.50 plus 3.54% of excess over \$25,000
\$40,000	\$60,000	\$1,239.50 plus 4.72%, of excess over \$40,000
\$60,000		\$2,183.50 plus 5.12% of excess over \$60,000

*Married individuals filing separate returns:* In the case of married taxpayers filing separate returns for the taxable year, the tax imposed on the West Virginia taxable income for each spouse is determined in accordance with the following table:

**If taxable income is:**

<b>Over</b>	<b>But not over</b>	<b>The tax is:</b>
\$0	- \$5,000	2.36% of the taxable income
\$5,000	\$12,500	\$118 plus 3.15% of excess over \$5,000
\$12,500	\$20,000	\$354.25 plus 3.54% of excess over \$12,500
\$20,000	\$30,000	\$619.75 plus 4.72% of excess over \$20,000
\$30,000		\$1,091.75 plus 5.12% of excess over \$30,000

**¶ 401.14 Resident Partners**

*Law:* W. Va. Code § 11-21-17; WVCSR § 110-21-17

*Partner's modifications:* When determining the West Virginia adjusted gross income and the West Virginia taxable income of a resident partner, any modification described in ¶ 401.4, ¶ 401.5 or ¶ 401.7, above, that relates to an item of partnership income, gain, loss, or deduction is made in accordance with the partner's distributive share, for federal income tax purposes, of the items to which the modifications relate.

When a partner's distributive share of any such item is not required to be taken into account separately for federal income tax purposes, then the partner's distributive share of the item is his or her *distributive* share for federal income tax purposes of partnership taxable income or loss generally.

*Character of items:* Each item of partnership income, gain, loss, or deduction has same character for a partner for purposes of the West Virginia income tax as it has for federal income tax purposes. When an item is not characterized for federal income tax purposes, it has the same character for a partner as if realized directly from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership.

*West Virginia tax avoidance or evasion:* When a partner's distributive share of an item of partnership income, gain, loss or deduction is determined for federal income tax purposes by special provision in the partnership agreement with respect to the item, and where the principal purpose of the provision is the avoidance or evasion of West Virginia income tax, the partner's distributive share of such item, and any modification required with respect to the item must be determined as if the partnership agreement made no special provision with respect to the item.

**¶ 401.15 Nonresident Partners**

*Law:* W. Va. Code § 11-21-37; WVCSR § 110-21-37

*Nonresident partners:* When determining the West Virginia source income of a nonresident partner of any partnership formed under the laws of this State or doing business in this State, there is included only the portion of the partner's distributive share, for federal income tax purposes, that is derived from or connected with West Virginia sources of items of partnership income, gain, loss and deduction, as such portion is

determined under regulations of the Tax Commissioner consistent with the applicable rules of W. Va. Code § 11-21-32. (W. Va. Code § 11-21-37(a)(1).)

*Special rules as to West Virginia sources:* When determining the sources of a nonresident partner's income, no effect is given to a provision of the partnership agreement which:

- (1) Characterizes payments to the partner as being for services or for the use of capital; or
- (2) Allocates to the partner, as income or gain from sources outside West Virginia, a greater proportion of his or her distributive share of partnership income or gain than the ratio of partnership income or gain from sources outside West Virginia to partnership income or gain from all sources, except as authorized when a resident partner becomes a nonresident partner; or
- (3) Allocates to the partner a greater proportion of a partnership item of loss or deduction connected with West Virginia sources than his or her proportionate share, for federal income tax purposes, of partnership loss or deduction generally, except when an alternative method of allocation is authorized by the Tax Commissioner. (W. Va. Code § 11-21-37(b).)

*Alternative methods:* The Tax Commissioner may, on written application filed on or before the due date of the partner's West Virginia income tax return for that taxable year (determined without regard to any extension of time for filing), authorize the use of such other method or methods of determining the nonresident partner's portion of partnership items derived from or connected with West Virginia sources, and the modifications related thereto, as may be appropriate and equitable, and on such terms and conditions as the Tax Commissioner may require. (W. Va. Code § 11-21-37(c).)

The following rules applicable to resident partners also apply to nonresident partners:

- (1) In determining West Virginia adjusted gross income and West Virginia taxable income of a nonresident partner, any modification described in ¶ 401.4, ¶ 401.5 or ¶ 401.7, which relates to an item of partnership income, gain, loss, or deduction shall be made in accordance with the partner's distributive share, for federal income tax purposes, of the items to which the modifications relate. When a partner's distributive share of any such item is not required to be taken into account separately for federal income tax purposes, the partner's distributive share of that item shall be his or her distributive share for federal income tax purposes of partnership taxable income or loss generally.
- (2) The character of partnership items for a nonresident partner is determined under the rule applicable to resident partners. Each item of partnership income, gain, loss, or deduction has the same character for a partner for West Virginia income tax purposes as for federal income tax purposes. Where an item is not

characterized for federal income tax purposes, it has the same character for a partner as if realized directly from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership.

- (3) The effect of a special provision in a partnership agreement, other than a provision described in the special rule discussed above (W. Va. Code § 11-21-37(b)), having the principal purpose of avoidance or evasion of West Virginia income is determined under the following rule. When a partner's distributive share of an item of partnership income, gain, loss or deduction is determined for federal income tax purposes by special provision in the partnership agreement with respect to such item, and where the principal purpose of the provision is the avoidance or evasion of West Virginia income tax, the partner's distributive share of the item, and any modification required with respect thereto is determined as if the partnership agreement made no special provision with respect to the item.

#### **¶ 401.16 Resident Shareholders of S Corporations**

*Law:* W. Va. Code § 11-21-17a; WVCSR § 110-21-17a

*S corporation shareholder's modifications:* When determining the West Virginia adjusted gross income and West Virginia taxable income of a resident S corporation shareholder, any modification described in ¶ 401.4, ¶ 401.5 or ¶ 401.7, above, that relates to an item of income, gain, loss or deduction must be made in accordance with the S corporation shareholder's pro rata share, for federal income tax purposes, of the items to which the modifications relate.

When a shareholder's pro rata share of any such item is not required to be taken into account separately for federal income tax purposes, the shareholder's pro rata share of the item is his or her pro rata share for federal income tax purposes of S corporation taxable income or loss generally.

*Character of items:* Each item of S corporation income, gain, loss, or deduction has the same character for a shareholder for West Virginia income tax purposes that it has for federal income tax purposes. When an item is not characterized for federal income tax purposes, it has the same character for a shareholder as if realized directly from the source from which realized by the S corporation or incurred in the same manner as incurred by the S corporation.

#### **¶ 401.17 Nonresident Shareholders of S Corporations**

*Law:* W. Va. Code § 11-21-37; WVCSR § 110-21-37

When determining the West Virginia source income of a nonresident shareholder of an S corporation doing business in this State or deriving income from sources in this State, there is included only the portion of the nonresident shareholder's pro rata share of items of S corporation income, gain, loss and deduction entering into the shareholder's federal adjusted gross income that are derived from or connected with West Virginia

sources, increased by reductions for taxes described in IRC § 1366(f)(2) and (3), as such portion of these items is determined under regulations of the Tax Commissioner consistent with the applicable methods and rules for allocation under the West Virginia Corporation Net Income Tax Act. See chapter 1 of this Guidebook for discussion of the corporation net income tax.

*Alternative methods:* The Tax Commissioner may, on written application filed on or before the due date of the S corporation shareholder's West Virginia income tax return for the taxable year (determined without regard to any extension of time for filing), authorize the use of such other method or methods of determining the nonresident S corporation shareholder's portion of S corporation items, derived from or connected with West Virginia sources, and the modifications related thereto, as may be appropriate and equitable, and on such terms and conditions as the Tax Commissioner may require.

The following rules applicable to resident shareholders also apply to nonresident shareholders of S corporations:

- (1) *S corporation shareholder's modifications:* When determining West Virginia adjusted gross income and West Virginia taxable income of a nonresident S corporation shareholder, any modification described in ¶ 401.4, ¶ 401.5 or ¶ 401.7, above, that relates to an item of income, gain, loss or deduction are made in accordance with the S corporation shareholder's pro rata share, for federal income tax purposes, of the items to which the modifications relate. When a shareholder's pro rata share of any such item is not required to be taken into account separately for federal income tax purposes, the shareholder's pro rata share of the item is his or her pro rata share for federal income tax purposes of S corporation taxable income or loss generally.
- (2) *Character of items:* Each item of S corporation income, gain, loss, or deduction has the same character for a shareholder for West Virginia income tax purposes as it has for federal income tax purposes. When an item is not characterized for federal income tax purposes, it has the same character for a shareholder as if realized directly from the source from which realized by the S corporation or incurred in the same manner as incurred by the S corporation.

#### **¶ 401.18 Share of resident estate or trust beneficiary fiduciary adjustment**

*Law:* W. Va. Code § 11-21-19; WVCSR § 110-21-19

An adjustment is made under ¶ 401.7 above when determining the West Virginia adjusted gross income of a resident beneficiary of any estate or trust in the amount of the share of each beneficiary in the West Virginia fiduciary adjustment determined as provided in W. Va. Code § 11-21-19.

The West Virginia fiduciary adjustment is the net amount of the modifications described in ¶ 401.4, ¶ 401.5 or ¶ 401.7, above, that relate to items of income, gain, loss or deduction of an estate or trust.

*Shares of West Virginia fiduciary adjustment:* The respective shares of an estate or trust and its beneficiaries (including, solely for the purpose of this allocation, nonresident beneficiaries) in the West Virginia fiduciary adjustment shall be in proportion to their respective shares of distributable net income of the estate or trust for federal income tax purposes for the year.

If the distributable net income for the taxable year of the estate or trust is zero, the share of each beneficiary in the West Virginia fiduciary adjustment is in proportion to his or her share of the estate or trust income for that year, under local law or the governing instrument, which is distributed within the year, or is required to be distributed currently. Any balance of the West Virginia fiduciary adjustment is allocated to the estate or trust.

*Alternate attribution of modifications:* The Tax Commissioner may, on application, authorize the use of such other methods of determining to whom the items comprising the fiduciary adjustment shall be attributed, as may be appropriate and equitable, on such terms and conditions as the Commissioner may require.

#### **¶ 401.19 Nonresident Beneficiary Share of W. Va. Source Income of Estate or Trust**

*Law:* W. Va. Code § 11-21-39; WVCSR § 110-21-39

The share of a nonresident beneficiary of any estate or trust in estate or trust income, gain, loss, and deduction from West Virginia sources is determined under W. Va. Code § 11-21-32(a) as follows:

*Items of distributable net income from West Virginia sources:* First, there is determined the items of income, gain, loss and deduction, derived from or connected with West Virginia sources, which would be included in the determination of federal adjusted gross income if the estate or trust were an individual and which enter into the definition of federal distributable net income of the estate or trust for the taxable year, including such items from another estate or trust of which the first estate or trust is a beneficiary. The determination of the source of the item is made in accordance with the applicable rules of W. Va. Code § 11-21-32 as in the case of a nonresident individual.

Next, the items of income, gain, loss, and deduction, derived from or connected with West Virginia sources, are allocated among the estate or trust and its beneficiaries (including, solely for the purposes of this allocation, resident beneficiaries) in proportion to their respective shares of federal distributable net income.

*Character of items:* The amounts so allocated shall have the same character for West Virginia income tax purposes that they have for federal income tax purposes. When an item entering into the computation of such amounts is not characterized for federal income tax purposes, it has the same character as if realized directly from the source

from which realized by the estate or trust or incurred in the same manner as incurred by the estate or trust.

Alternative methods of determining shares of distributable net income include:

- (1) If the estate or trust has no federal distributable net income for the taxable year, the share of each beneficiary (including, solely for the purposes of this allocation, resident beneficiaries) in the net amount income, gain, loss and deduction, derived from or connected with West Virginia sources as above determined, is in proportion to the beneficiary's share of the estate or trust income for the year, under local law or the governing instrument, which is required to be distributed currently, and any such other amounts of such income distributed for the taxable year. Any balance of the net amounts is allocated to the estate or trust.
- (2) The Tax Commissioner may, on written application filed on or before the due date of the West Virginia fiduciary return for the estate or trust (determined without regard to any extension of time for filing the return), authorize use of such other methods of determining the representative shares of the beneficiaries and of the estate or trust in its income derived from West Virginia sources, and the modifications related thereto, as may be appropriate and equitable, on such terms and conditions as the Commissioner may require.
- (3) The Tax Commissioner may by regulation establish such other method or methods of determining the respective shares of the beneficiaries and of the estate or trust in its income derived from West Virginia sources as may be appropriate and equitable. Such method may be used by the fiduciary in his or her discretion whenever the allocation of the respective shares under the general allocation rule would result in an inequity which is substantial in amount.

#### **¶ 401.20 Computation of Tax on West Virginia Source Income of Nonresidents**

Personal income tax due on income derived from sources in West Virginia by a nonresident individual is computed in the following manner:

- (1) The tax liability is first computed as if the taxpayer were a West Virginia resident for the entire tax year. The result of this computation is known as the tentative tax.
- (2) Tentative tax determined under (1) above is then multiplied by the quotient of West Virginia source Income of the nonresident divided by federal adjusted gross income for the year.
- (3) The result of the computation in (2) above is the tax liability of the nonresident or part year resident.



## ¶ 401.21 Computation of Tax of Part-Year Resident

Personal income tax due on income derived by a taxpayer from all sources while a resident of West Virginia and on all income derived from West Virginia sources while a nonresident of West Virginia is computed in the following manner:

- (1) The tax liability is first computed as if the taxpayer were a West Virginia resident for the entire tax year. The result of this computation is known as the tentative tax.
- (2) Tentative tax determined under (1) above is then multiplied by the quotient of the sum of the West Virginia income of the taxpayer for the period of residency plus the West Virginia source income of the taxpayer for the period of nonresidency, divided by the taxpayer's federal adjusted gross income for the year.
- (3) The result of the computation in (2) above is the tax liability of a taxpayer who is a part year resident of West Virginia.

## ¶ 401.22 Declarations of Estimated Tax

*Law:* W. Va. Code § 11-21-55; WVCSR § 110-21-56

*Comparable Federal:* IRC § 6654

Every resident and nonresident individual whose West Virginia adjusted gross income, other than from wages on which the proper amount of tax is withheld, can reasonably be expected to exceed \$400 plus the sum of his or her West Virginia personal exemptions, must make and file a West Virginia declaration of estimated tax for the taxable year unless: (1) the estimated tax otherwise due in installment payments is remitted through additional withholding by the employer from the employee's wages during the taxable year; or (2) withholding satisfies at least 90% of the annual tax liability.

*Example:* X, a taxpayer making his return on the calendar year basis, is married and has two (2) dependent children. X is sole proprietor of a retail business which is his only source of income. X can reasonably expect to realize twenty-five thousand dollars (\$25,000) from the business during 2023, based on prior year's earnings. Therefore, X is required to make a declaration of estimated tax, because his income can reasonably be expected to exceed the sum of his personal exemptions plus four hundred dollars ( $[2,000 \times 4] + 400 = \$8,400$ ) for 2023. (WVCSR § 110-21-55.1.2.)

*Example:* Y is a cash basis taxpayer with three (3) personal exemptions including himself. Y is employed and expects to receive twenty-three thousand dollars (\$23,000) subject to withholding during calendar year 2023. Also, Y expects to receive twelve thousand dollars (\$12,000) of income during the taxable year from the practice of a profession on his own account. Y is required to file a West Virginia declaration of estimated tax, for Y's income (\$12,000) not subject to withholding exceeds four hundred dollars (\$400). The sum of his personal exemptions ( $2,000 \times 3 = \$6,000$ ) was

considered in determining the amount withheld from his wages for the 2023 taxable year. Alternatively, Y could increase the amount being withheld for West Virginia personal income taxes by his employer. If the amount of estimated tax due on Y's other income is remitted through additional withholding, Y will not be required to file a declaration of estimated tax and make quarterly installment payments. (WVCSR § 110-21-55.1.2.)

*Definition of estimated tax:* In the case of an individual, the term "estimated tax" means the amount which an individual estimates to be his or income tax liability under the provisions of the West Virginia Personal Income Tax Act and the related regulations for the taxable year, less the amount the individual estimates to be the sum of any credits allowable against the tax.

*Joint declaration of married couple:* A married couple may make a joint declaration of estimated tax as if they were one taxpayer, in which case the liability with respect to the estimated tax is joint and several. No joint declaration may be made if married individuals are separated under a decree of divorce or of separate maintenance, or if they have different taxable years. If a joint declaration is made but the married individuals elect to determine their income tax liability separately, the estimated tax for the year may be treated as the estimated tax of either spouse, or it may be divided between them, as they may elect.

*Declaration for deceased taxpayer:* No declaration of estimated income tax is required to be filed for a decedent subsequent to the date of his or her death. However, a short year tax return may need to be filed and additions to tax may be due for any failure of the decedent to timely file a declaration of estimated tax required to timely pay any installment of estimated tax required, or to properly estimate his tax.

#### **¶ 401.23 Payment of Estimated Tax**

*Law:* W. Va. Code § 11-21-56; WVCSR § 110-21-56

*Comparable Federal:* IRC § 6315

The amount of estimated income tax due as shown on a declaration of estimated income tax must be paid in installments unless the taxpayer elects the entire amount of estimated tax at the time of filing the declaration. If the estimated income tax is paid in installments, the first payment must accompany the declaration.

*When timely declaration is filed:* When a declaration of estimated tax is required to be filed, the declaration is due along with the first installment payment on April 15<sup>th</sup> of the calendar year. The remaining installment payments are June 15<sup>th</sup> and September 15<sup>th</sup> of the calendar year and January 15<sup>th</sup> of the next calendar year. When the due date falls on Saturday, Sunday, or a legal holiday in this State, the payment is due the next business day. A payment placed in the mail, postage prepaid, on or before the due date, is considered timely paid.

In some cases, the requirement to file a declaration of estimated tax may first be met after March 31 of the taxable year, due to a change in circumstances, such as a change in income, deductions, or exemptions. In this case the due date of the declaration of estimated tax and the due dates of the installment payments are as follows:

<b>If the requirement to file declaration of estimated tax is met:</b>	<b>Declaration due date is:</b>	<b>Required installment payment due:</b>
After March 31 but before June 1	June 15	50% of estimated tax due June 15; 25% due September 15; and 25% due January 15 of next tax year
After May 31 but before September 1	September 15	75% of estimated tax due September 15; and 25% due January 15 of next tax year
After August 31 but before January 1 of next tax year	January 15 of next tax year	100% of estimated tax due January 15 of the next year

Where an individual first makes and files a declaration of estimated income tax after September 15th of the taxable year, the estimated income tax must be paid in full at the time of the filing of the declaration as provided under W. Va. Code § 11-21-56(b). (WVCSR § 110-21-56.2)

*Filing of declaration of estimated tax by farmers:* Special provisions apply to the filing of the declaration estimated tax and to the payment of estimated tax by an individual whose estimated West Virginia adjusted gross income for the taxable year is at least two-thirds (2/3) from farming as defined in WVCSR § 55.5.1.2. The declaration of a farmer may be filed on or before January 15th of the succeeding taxable year, in lieu of the time prescribed for taxpayers generally. (W. Va. Code § 11-21-56(b)).

*Return of farmer as declaration of estimated tax.* If on or before March 1 of the next taxable year, an individual who is a farmer files his or her annual return for the taxable year for which the declaration was required, and pays therewith the full amount of the tax shown to be due on the return, the annual return is considered to be his or her declaration, if no declaration was required to be filed during the taxable year, but is otherwise required to be filed on or before the January 15 of the next taxable year. (W. Va. Code § 11-21-55(l).)

*Return as declaration of estimated tax:* If on or before the February 15 of the next taxable year an individual, other than a farmer, files his or her annual return for the prior taxable year for which the declaration is required, and pays with the return the full amount of the tax shown to be due on the return, then the annual return will be considered as his or her declaration of estimated tax, if no declaration was required to be filed during the taxable year but is otherwise required to be filed on or before the January 15 of the next taxable year.

*When amended declaration is filed:* If an amended declaration of estimated tax is filed, the remaining installments, if any, must be ratably increased or decreased, as the case may be, to reflect the increase or decrease in the estimated income tax by reason of the amendment.

If an amended declaration of estimated tax is filed after September 15 of the taxable year, any increase in the estimated income tax by reason thereof must be paid in full at the time the amended declaration is filed. If the amended declaration shows a decrease in the amount of estimated tax, the last installment payment may be reduced. If after the fourth installment payment is reduced to zero there is an overpayment of estimated tax, a claim for refund cannot be filed until the annual return for the taxable year is filed.

*Return as amendment of declaration of estimated tax:* The annual return, if filed on or before the January 15 of the next taxable year, will be considered an amendment of the declaration of estimated tax if the tax shown on the annual return is greater than the estimated tax shown on the declaration of estimated tax previously filed for the taxable year.

#### **¶ 401.24 Amount of Estimated Tax Payments**

*Law:* WVCSR § 110-21-56a

Estimated tax payments are required when an individual's estimated tax liability for the taxable year exceeds the amount of estimated withholding tax and other allowable credits by more than \$600. In sum, at least 90% of an individual's tax liability for the taxable year must be prepaid, unless an exception applies. The term "estimated tax payments" includes both the amount of installment payments remitted and the amount of taxes withheld from wages)

To determine if an individual's estimated tax payments (including withholding taxes) required for the taxable year equal at least 90% of his or her actual liability for the tax, determined after allowable credits, other than credits for withheld tax, are considered, the following procedure is applied:

- (1) Determine the sum of the individual's income tax shown on his or her return for the prior taxable year (as reduced by the amount of allowable credits). If no annual return was filed, take 100% of the total tax determined to be due for the taxable year.

- (2) Take 90% of the above amount.
- (3) Divide the amount in (2), above, by the number of installments required for the year. Generally, this will require dividing by four, but may be three, two or one. The result is the amount of each installment payment.
- (4) For each installment payment computed in (3), above, find the excess, if any, of the installment over the amount actually paid or credited toward that installment payment. (Add in any overpayment of estimated tax available from the previous installment payment.) If there is no excess, no further computation is necessary for that installment.

Wages are presumed to be received in equal payments throughout the year and that the employer withheld West Virginia income taxes in equal installments.

Any excess computed above for any installment is the amount of underpayment of that installment. If the actual payment made does not meet at least one of the available “safe harbors” discussed in ¶ 401.25 below, additions for underpayment of estimated tax must be paid.

#### **¶ 401.25 Additions to Tax for Underpayment of Estimated Tax**

*Law:* W. Va. Code § 11-10-18a(a); WVCSR § 110-21-56a

Nonwaivable additions to tax, rather than interest, are imposed for the underpayment of estimated income tax required to be paid for the taxable year. The amount of this addition to tax is computed by applying the statutory rate of interest on underpayments of tax to the amount of the underpayment of estimated tax, for the period of the underpayment. The rate for calendar year 2023 is 11.5% per annum.

This addition to tax is computed separately for each period. Because this addition is computed separately for each installment payment period, an individual may owe this addition to tax for an earlier payment period even if the individual later paid enough to make up the underpayment. Additionally, this addition to tax may be due even if the individual is due a refund when the individual files his or her income tax return for the taxable year.

*Amount of underpayment:* For purposes of this addition to tax, the amount of the underpayment is the excess of the amount determined under subparagraph (1) below over the amount determined under subparagraph (2) below.

- (1) The amount of the installment required to be paid on or before the due date for the installment, if the estimated tax due for the taxable year were an amount equal to 90% of the tax shown due on the annual return for the taxable year divided by the number of installments taxpayer was required to make for the taxable year, or, if no return was filed, 90% of the tax for the taxable year

divided by the number of installment payments taxpayer was required to make for the taxable year.

- (2) The amount, if any, of the installment paid on or before the last date prescribed for payment of that installment. Generally, April 15, June 15, September 15, and January 15 of the next year. See ¶ 401.23 above.

*Period of underpayment:* The period of underpayment of an installment runs from the date the installment was required to be paid (due date) to whichever of the following dates is the earlier:

- (1) The due date of the annual return following the close of the taxable year for which the installment was due (determined without regard to any extension of time for filing such annual return); or
- (2) With respect to any portion of the underpayment, the date on which the portion is paid. For purposes of this paragraph (2), a payment of estimated tax is credited against unpaid required installments in the order in which the installments payments are required to be paid.

For example, if a taxpayer's estimated tax liability for the year is \$8,000, the amount of each installment payment is \$1,800. ( $\$8,000 \times 90\% = \$7,200 \div 4 = \$1,800$ .) If taxpayer files his or her declaration of estimated and pays tax of \$1,000 on April 15, 2023, and pays \$2,600 on June 15, 2023, the period of underpayment of estimated tax is two months. On the other hand, if the \$800 underpayment of estimated tax is not paid until the annual return for the taxable year is filed on April 15, 2024, the underpayment period is 12 months.

*Exceptions:* No additions to tax for underpayment of estimated tax are imposed if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment of each installment equals or exceeds the amount which would have been required to be paid on or before that date if the estimated tax were whichever of the following amounts is lesser:

- (1) *Prior year's tax:* The estimated tax payments aggregate 100% of the tax shown on the return of the taxpayer for the preceding taxable year, if a return showing a liability for tax was filed by the taxpayer for the preceding taxable year and the preceding year was a taxable year of twelve months; or
- (2) *Annualized tax:* In the case of any required installment, if the taxpayer establishes that the annualized income installment is less than the amount of the installment determined using 100% of last year's tax and is less than the installment determined using 90% of this year's tax, then the amount of the required installment is the annualized income installment. For purposes of determining the annualized installment payment, the payment is computed as if four installment payments are required for the taxable year and the

“annualized income installment” is the difference, if any, determined by subtracting the aggregate amount of any prior installments for the taxable year from the amount of tax for the taxable year computed by placing on an annualized basis the taxable income of the individual for months in the taxable year ending before the due date for the installment. When making these computations, the following rules apply:

- a. *Annualization*: Taxpayer’s taxable income is placed on an annualized basis in the same manner that taxable income is annualized for federal income tax purposes for the taxable year.
- b. *Applicable percentage*: The applicable percentage is determined from the following table:

<b>In the case of the following required installments:</b>	<b>The applicable percentage is:</b>
1 <sup>st</sup> payment	22.5%
2 <sup>nd</sup> payment	45%
3 <sup>rd</sup> payment	67.5%
4 <sup>th</sup> payment	90%

*Additional exceptions*: Additions to tax for underpayment of estimated tax also do not apply:

- (1) When the balance of tax shown to be due on the annual return is less than \$600; and
- (2) When the individual had no West Virginia personal income tax liability for the preceding taxable year if:
  - (a) The individual’s preceding taxable year was a taxable year of 12 months;
  - (b) The individual did not have any West Virginia personal income tax liability for the preceding taxable year;
  - (c) The individual was a citizen or resident of the United States throughout the preceding taxable year; and
  - (d) The individual’s West Virginia personal income tax liability for the year for which the annual return was filed, is less than \$5,000.

*Waiver in certain cases*: No addition to tax for underpayment of estimated tax will be imposed with respect to any underpayment of estimated tax if and to the extent the Tax Commissioner determines that by reason of casualty, disaster, or other unusual circumstances the imposition of this addition to tax would be against equity and good conscience.

*Tax computed after application of credits against tax:* As used in this ¶ 401.25, the term “tax” means the amount of personal income tax that is generally payable in two or more installment payments during the taxable year, minus the amount of credits allowable against the tax, other than:

- (1) Taxes on wages withheld as discussed in ¶ 402.1 below;
- (2) Taxes on distributions of pass-through income to nonresidents who are partners, S corporation shareholders or beneficiaries of an estate or trust, withheld as discussed in ¶ 402.6 below;
- (3) Taxes withheld on sales or real property by nonresidents as discussed in ¶ 402.8 below; and
- (4) Taxes on gambling winnings withheld as discussed in ¶ 402.9 below.

*Application of additions to tax for underpayment of estimated tax in case of personal income tax withheld on wages:* For purposes of applying the addition to tax for underpayment of estimated tax, the amount of the credit allowed for employer withholding taxes discussed in ¶ 402.1 below for the taxable year is deemed to be a payment of estimated tax, and an equal part of the tax withheld by the employer is deemed to have been paid on each installment payment due date for the taxable year, unless the taxpayer establishes the specific dates on which all amounts were actually withheld, in which case the amounts so withheld are deemed to be payments of estimated tax on the dates when the amounts were actually withheld by the employer.

#### **¶ 401.26 Returns and Liabilities**

*Law:* W. Va. Code § 11-21-51; WVCSR § 110-21-51

*Due date of annual return:* An annual West Virginia personal income tax return must be filed on or before April 15 of the next taxable year (15th day of the fourth month following the close of the taxable year) by or for the following:

- (1) Every resident individual who is required to file a federal income tax return for the taxable year, or if the West Virginia adjusted gross income of the individual for the taxable year exceeds the sum of his or her West Virginia personal exemptions. (W. Va. Code § 11-21-51(a)(1).)
- (2) Every resident or nonresident individual who is entitled to and claims an overpayment for the taxable year even though he or she would not otherwise be required to file a return. For example, a taxpayer who has had West Virginia income tax withheld from his or her wages or has paid estimated tax during the taxable year but whose West Virginia adjusted gross income for such taxable year does not exceed his or her exemptions, must file a West Virginia return to obtain a refund.



- (3) A nonresident individual who has West Virginia adjusted gross income for the taxable year in excess of the sum of his or her personal exemptions. (W. Va. Code § 11-21-51(a)(3).) However, a nonresident individual is not required to file a West Virginia income tax return if all of his or her West Virginia source income is reported on a composite return. See ¶ 427 below.

*Returns of married individuals:* If a spouse files and determines his or her tax liability on separate federal returns, they must file separate West Virginia income tax returns. (W. Va. Code §§ 11-21-11(b)(1) and 11-21-51(b)(1).)

If married individuals file and determine their federal tax liability on a joint federal return, or if neither spouse files a federal return, they may either file a joint West Virginia income tax return in which event their tax liability is joint and several and each is liable for the entire tax on such joint return, even though one spouse has no income, or file separate West Virginia income tax returns. In this event, their tax liabilities are separate. (W. Va. Code §§ 11-21-11(b)(2) and 11-21-51(b)(2).) An election to file a joint West Virginia return is binding and may not be changed after the due date of the original West Virginia return. (WVCSR § 110-21-60.2.1.2.)

If either the husband or the wife is a resident and the other spouse is a nonresident of West Virginia, they must file separate West Virginia income tax returns regardless of the method of filing for federal tax purposes, in which event their West Virginia tax liabilities are separate. (W. Va. Code § 11-21-51(b)(3).) However, a West Virginia joint resident return may be filed by married individuals provided:

- (1) They are otherwise entitled to file a joint return,
- (2) Each spouse maintained his or her status as a resident or nonresident during the entire taxable year, and
- (3) They elect to determine their West Virginia taxable income on a joint return as if both were residents of this State for the entire taxable year.

(W. Va. Code § 11-21-11(b)(3).) In the event a married couple qualify under the above requirements and file a joint resident West Virginia return, their tax liabilities are joint and several. Additionally, an election to file a joint West Virginia return is binding and may not be changed after the due date of the West Virginia annual return. (WVCSR § 110-21-60.2.1.2.)

Same-sex married couples may file a joint West Virginia personal income tax return for calendar year 2014 and years thereafter. Additionally, amended returns may be filed for “open” years in which separate West Virginia returns were filed but a joint return was filed for federal income tax purposes. For purposes of the West Virginia income tax, the term “marriage” includes married between individuals of the same sex, lawfully married

under the law of any domestic or foreign jurisdiction having the legal authority to sanction marriages. However, such terms do not include individuals (whether of the opposite sex or same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship.

*Return of decedent:* The executor or administrator of the estate of an individual who died during the taxable year, or other person charged with the property of a decedent, must make and file an income tax return for the decedent on the form that would have been appropriate had the decedent lived. A decedent's taxable year encompasses only the portion of the taxable year that the decedent was alive, and the income tax return will cover only that period. Post death income is reported on the return filed by the fiduciary of the decedent's estate (fiduciary income tax return).

*Joint return after death:* Where both spouses are residents of this State and one or both spouses die during the year, a joint West Virginia income tax return may be made and filed if:

- (1) A joint federal return was filed for the taxable year.
- (2) The taxable year of both decedents or of the decedent and the surviving spouse will begin on the same calendar day and end on different calendar days only because of the death of either or both spouses.
- (3) Neither taxpayer was reporting for a fractional part of a year as a result of a change in accounting; and
- (4) The surviving spouse had not remarried before the end of the taxable year. (WVCSR § 110-21-51.3.2.)

*Individuals under a disability:* The return for an individual who is unable to make a return by reason of minority or other disability shall be made and filed by his or her guardian, committee, fiduciary or other person charged with the care of his or her person or property (other than a receiver in possession of only a part of his or her property), by his or her duly authorized agent. (W. Va. Code § 11-21-51(d).)

#### **¶ 401.27 Income Taxes of Members of Armed Forces on Death**

*Law:* W. Va. Code § 11-21-62

*General rule:* When an individual dies while in active service as a member of the armed forces of the United States and the death occurred while serving in a combat zone (as determined under IRC § 112) or as a result of wounds, disease or injury incurred while serving in a combat zone:

- (1) West Virginia income tax does not apply with respect to the taxable year in which falls the date of his or her death, or with respect to any prior taxable year ending on or after the first day he or she served in a combat zone; and

- (2) Any West Virginia income tax for taxable years preceding the date he or she began serving in a combat zone which is unpaid at the date of his or her death (including interest, additions to tax and additional amounts) may not be assessed by the Tax Commissioner. If the taxes have been assessed, the assessment must be abated by the Tax Commissioner and if the assessment has been collected, the amount collected must be credited or refunded as an overpayment of tax.

*Individuals in missing status:* In the case of an individual who was in a missing status within the meaning of IRC § 6013(f)(3)(A), the date of the individual's death is treated as being not earlier than the date on which a determination of the individual's death is made under 37 U.S.C. § 556. West Virginia income tax does not apply with respect to the taxable year in which falls the date of his or her death, or with respect to any prior taxable year ending on or after the first day he or she served in a combat zone, except that this exclusion does not apply for any taxable year beginning more than two years after the date designated under IRC § 112 as the date of termination of combatant activities in a combat zone.

*Certain military or civilian employees of the United States dying as a result of injuries sustained overseas:* In the case of any individual who dies while a military or civilian employee of the United States, if the death occurs as a result of wounds or injury incurred while the individual was a military or civilian employee of the United States and incurred outside the United States in a terroristic or military action, as defined in IRC § 692, West Virginia income tax does not apply:

- (1) With respect to the taxable year in which falls the date of the individual's death;  
and
- (2) With respect to any prior taxable year in the period beginning with the last taxable year ending before the taxable year in which the wounds or injury were incurred.

#### **¶ 401.28 Composite Returns**

*Law:* W. Va. Code § 11-21-51a; WVCSR § 110-21-51a

Nonresident individuals who are partners, S corporation shareholders, or beneficiaries of an estate or trust that derives income from West Virginia sources are required to file nonresident income tax returns. However, as a convenience to these taxpayers, they may elect to have the partnership, S corporation, estate, or trust, as the case may be, file a composite return on their behalf. A composite return is a return filed on a group basis as though there were a single taxpayer. A processing fee of \$50 is required.

In filing a composite return and determining the tax due thereon, no personal exemptions may be utilized, and the rate of tax is 6.5% of the taxable income. The entity

or entities to which the composite return relates are responsible for collection and remittance of all income taxes due at the time the return is filed.

The composite return must set forth the name, address, taxpayer identification number and percentage ownership or interest of each nonresident individual. It need not be signed by all nonresident individuals on whose behalf the return is filed. However, the return must be signed by a partner, in the case of a partnership, by a corporate officer, in the case of an S corporation, by a trustee, in the case of a trust, or by an executor or administrator, in the case of an estate.

When a composite return is filed and the taxes shown due thereon are paid by April 15 following close of the calendar tax year, the entity is not required to comply with the withholding requirements discussed in ¶ 402.6 below.

#### **¶ 401.29 Signing of Returns and Other Documents**

*Law:* W. Va. Code § 11-21-53; WVCSR § 110-21-53

In general, any return, declaration, statement, or other document required to be made pursuant to the West Virginia Personal Income Tax Act must be signed in accordance with regulations or instructions prescribed by the Tax Commissioner. The fact that an individual's name is signed to a return, declaration, statement, or other document is prima facie evidence for all purposes that the return, declaration, statement, or other document was actually signed by him or her.

*Partnerships:* Any return, statement or other document required of a partnership must be signed by one or more partners. The fact that a partner's name is signed to a return, statement, or other document is prima facie evidence for all purposes that the partner is authorized to sign on behalf of the partnership.

*Certifications:* The making or filing of any return, declaration, statement or other document or copy thereof required to be made or filed pursuant the West Virginia Personal Income Tax Act, including a copy of a federal return, constitutes a certification by the person making or filing the return, declaration, statement or other document or copy thereof that the statements contained therein are true and that any copy filed is a true copy.

#### **¶ 401.30 When Amended Return Required**

*Law:* W. Va. Code § 11-21-59

Any taxpayer filing an amended federal income tax return must also, within 90 days thereafter, file an amended West Virginia return and give the Tax Commissioner such information as the Commissioner may require.

#### **¶ 401.31 Report of Change in Federal Taxable Income**

*Law:* W. Va. Code § 11-21-59; WVCSR § 110-21-59

If the amount of a taxpayer's federal taxable income reported on his or her federal income tax return for any taxable year is changed or corrected by the United States Internal Revenue Service or other competent authority, or as the result of a renegotiation of a contract or subcontract with the United States, the taxpayer must report the change or correction in federal taxable income to the Tax Commissioner within 90 days after the final determination of the change, correction, or renegotiation, or as otherwise required by the Tax Commissioner. When the change is reported, the taxpayer must concede the accuracy of the determination or state why it is erroneous.

#### **¶ 401.32 Change of Election**

*Law:* W. Va. Code § 11-21-60; WVCSR § 110-21-60

Any election expressly authorized by the West Virginia Personal Income Tax Act may be changed on such terms and conditions as the Tax Commissioner may prescribe by regulation.

Any change of election made by a taxpayer for federal income tax purposes pursuant to the provisions of the Internal Revenue Code and applicable Treasury regulations, which increases or decreases the taxpayer's federal taxable income for a taxable year, must also be made identically for West Virginia income tax purposes, except to the extent that the federal provisions are inconsistent with the West Virginia Personal Income Tax Act. A taxpayer making a change of election for federal income tax purposes that changes his or her federal taxable income must file an amended West Virginia return.

A change of election is subject to the approval of the Tax Commissioner, and, for this purpose, the Commissioner may require such information, records, or evidence that he or she deems necessary and may attach such conditions or limitations to the approval of the change of election as the Commissioner considers advisable.

#### *Returns of married individuals.*

*Change from separate to joint return:* Married individuals can file separate West Virginia returns, and then, after the time for filing returns (April 15, for calendar year taxpayers) has passed, they may elect to file a joint West Virginia return. This election may be made within three (3) years after the date the original return was originally due, without regard to any extension of time. This election to change from separate to joint may only be made, however if the taxpayer has made the same election for federal income tax purposes.

*Change from joint return to separate returns:* Married individuals that determined their federal taxable income on a joint federal return may elect to determine their West Virginia taxable income on a joint West Virginia return. If the taxpayers elect to change from a joint return to separate returns for federal income tax purposes, the taxpayers must also make the same election for West Virginia purposes. However, in the absence of a change of election for federal income tax purposes, an election to file a joint West Virginia

return is binding and may not be changed for that taxable year after the due date of the original West Virginia return. A different election may be made for the next taxable year.

*Married individuals with different resident status:* When either husband or wife is a resident and the other is a nonresident, they must file separate West Virginia returns unless they were otherwise entitled to file a joint federal return, and both elect to file a joint West Virginia return for the taxable year as if both were residents of West Virginia. A married couple may elect to file a joint West Virginia return only if one spouse was a resident for the entire taxable year and the other spouse was a nonresident for the entire taxable year. If they make this election, they will be permitted to change their original election to file separate West Virginia returns and to make, instead, a joint return as if both were residents provided the tax shown to be due on the joint return is paid in full at the time it is filed. (W. Va. Code §§ 11-21-11 and 11-21-32.)

*Approval for change of election:* Elections to make the changes discussed in this ¶ 401.32 and to file amended returns is subject to the Tax Commissioner's approval and discretion. No amended return filed with the Tax Commissioner is valid unless the amount of tax shown to be due, if any, on the amended return is paid in full at the time the amended return is filed.

#### **¶ 401.33 Payment of Tax**

*Law:* W. Va. Code § 11-21-52; WVCSR § 110-21-52

A person must pay in full the tax due to the State Tax Commissioner on or before the due date for filing the return (determined without regard to any extension of time). However, if an individual's income other than employee compensation exceeds \$400.00 plus the sum of his or her West Virginia personal exemptions, the individual may be required to remit estimated income taxes. (See ¶ 401.22 above.)

#### **¶ 401.34 Method of Paying Tax Due**

*Law:* W. Va. Code § 11-10-5n; WVCSR § 110-21-52.3.2.

The remittance (check or money order) for the balance of the tax shown to be due on the return must be made payable to the West Virginia State Tax Division. In addition to payment by check or money order, a balance due can also be remitted by electronic funds transfer or paid by credit card.

#### **¶ 401.35 Extension of Time to File Declaration of Estimated Tax or Annual Return**

*Law:* W. Va. Code § 11-21-57; WVCSR § 110-21-57

*Comparable Federal:* IRC § 6081

The Tax Commissioner may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by the West Virginia Personal Income Tax Act. The extension, if granted, will be on such terms and conditions as the Tax Commissioner may require. Except for a taxpayer who is outside the United States, the extension may not exceed six months.

*Automatic extension of time to file return:* If a taxpayer will have a federal extension of time to file his or her federal income tax return for the year, the taxpayer is not required to request a separate extension of time to file his or her West Virginia return unless he or she wants to obtain an additional extension of time to file the West Virginia annual return. If the taxpayer obtains an extension of time federally, he or she must make a notation on his or her West Virginia return of the date on which the federal extension was granted, and a copy of the request for federal extension must be attached to the West Virginia return when it is filed.

*West Virginia extension of time to file return:* When the taxpayer does not have an extension of time to file his or her federal return but wants an extension of time to file his or her West Virginia income tax return, the taxpayer must timely request from the Tax Commissioner an extension of time to file the West Virginia return. A taxpayer desiring a separate extension of time to file should prepare and file Form WV 4868, Application for Extension of Time to File, which is included in the IT-140 form and instructions book, on or before the due date of the annual return, determined without regard to any extension of time.

#### **¶ 401.36 Extension of Time to Pay Tax**

*Law:* W. Va. Code § 11-21-57; WVCSR § 110-21-57

*Comparable Federal:* IRC § 6161

The Tax Commissioner may grant a reasonable extension of time for payment of tax or estimated tax (or any installment) on such terms and conditions as the Tax Commissioner may require. Except for a taxpayer who is outside the United States, no extension of time to pay may exceed six months.

*Amount determined as deficiency:* The Tax Commissioner may, under regulations, extend the time for payment of an amount determined as a deficiency for a period not to exceed 18 months from the date designated for payment of the deficiency, and under exceptional circumstances, for an additional period not more than 12 months. An extension of time to pay may be granted only where it is established to the satisfaction of the Tax Commissioner that the payment of a deficiency upon the date designated for payment would result in undue hardship. No extension of time to pay may be granted if any part of the deficiency is due to intentional disregard of rules and regulations or to fraud.

*Claims in bankruptcy or receivership proceedings:* Extension of time for payment of any portion of a claim for tax allowed in bankruptcy, receivership, or similar proceedings, which is unpaid, may be granted subject to the same provisions and limitations as in the case of a deficiency in the tax.

*Furnishing of security:* If any extension of time is granted for payment of any tax or deficiency, the Tax Commissioner may require the taxpayer to furnish a bond or other

security in an amount not exceeding twice the amount for which the extension of time for payment is granted on such terms and conditions as the Tax Commissioner may require.

**¶ 401.37 Minimum Tax**

*Law: W. Va. Code § 11-21-3(a)(3)*

There is no minimum tax. The West Virginia minimum tax was repealed for tax years beginning on or after January 1, 2010. For tax years that began before that date, West Virginia imposed a minimum tax, which was equal to the excess, if any, by which an amount equal to 25% of any federal minimum tax or alternative minimum tax for the taxable year exceeded the individual's regular West Virginia personal income tax for the taxable year.

**¶ 401.38 Credit for Taxes Paid to Other States**

*Law: W. Va. Code § 11-21-40; WVCSR § 110-21-20.*

Subject to certain limitations, a West Virginia resident may claim a credit against his or her West Virginia income tax for any income tax lawfully paid for the taxable year to another state, upon income derived from sources within the other state. The purpose of this credit is to prevent double taxation of such income.

A resident of West Virginia may claim credit on his or her West Virginia Resident Income Tax Return (Form IT-140) for state income tax paid, as a nonresident, to the following 39 states:

Alabama	Iowa	New Mexico
Arizona	Kansas	New York
Arkansas	Louisiana	North Carolina
California	Maine	North Dakota
Colorado	Massachusetts	Oklahoma
Connecticut	Michigan	Oregon
Delaware	Minnesota	Pennsylvania*
District of Columbia	Mississippi	Rhode Island
Georgia	Missouri	South Carolina
Hawaii	Montana	Utah
Idaho	Nebraska	Vermont
Illinois	New Hampshire	Virginia*
Indiana	New Jersey	Wisconsin

\* If a West Virginia resident is employed or otherwise present in either Pennsylvania or Virginia for more than 183 days of the taxable year, the West Virginia resident is also deemed to be a resident of Pennsylvania or Virginia for income tax purposes and must file a resident income tax return with those Commonwealths. When the West Virginia income tax return is filed, he or she will be allowed credit against the West Virginia income tax subject to the following limitations. If a resident of West Virginia has income, other than employee compensation, which is sourced to Kentucky, Maryland, Ohio, Pennsylvania or Virginia, the tax paid on the other income to these states is allowed as a credit against West Virginia income tax, subject to the following rules.



The amount of this credit is subject to the following limitations:

- (1) The credit may not exceed the amount of tax actually payable to the other state on income also subject to West Virginia tax. This is the actual amount of income tax computed on the nonresident return filed with the other state.
- (2) The credit may not exceed the percentage of the West Virginia tax determined by dividing the portion of the taxpayer's West Virginia income subject to taxation in another state by the total amount of the taxpayer's West Virginia income. For example, if the total income of a resident was \$5,000, \$2,000 of which was subject to tax by another state, the amount of West Virginia tax credit would be limited to 40% (\$2,000 divided by \$5,000) of the West Virginia tax.
- (3) The credit may not reduce the West Virginia tax due to an amount that is less than the amount that would have been due if the income subject to taxation by the other state was excluded from the taxpayer's West Virginia income. If in the example above, the taxpayer's West Virginia tax would have been \$42 by eliminating the other state's income from the total income subject to West Virginia tax, the credit could not offset the \$42.
- (4) No credit is allowed for payment of wage taxes, income taxes or any other tax measured by income, gross or net, wages, or employee compensation to a political subdivision of another state, such as a municipality, a county, or a school district.

The amount of the credit allowed is determined in accordance with forms and instructions provided by the Tax Commissioner. A taxpayer desiring to claim this credit should file Schedule E, Credit for Income Tax Paid to Another State, with his or her West Virginia personal income tax return.

The Tax Commissioner, by instruction or otherwise, may require any resident individual to provide evidence, including but not limited to a copy of the completed and signed nonresident personal income tax return filed with the other taxing jurisdiction for the taxable year, in order to establish that the individual is entitled to claim this credit.

West Virginia residents who are employed in Kentucky, Maryland, Ohio, Pennsylvania, and Virginia will generally not pay tax on their employee compensation to those states because of reciprocal agreements West Virginia has executed with those states. This general rule does not apply to earned income taxes, income taxes, wage taxes or other taxes measured by employee compensation that are imposed by a political subdivision of these border states. Application of the general rule is subject to the following rules:

## **Kentucky**

If a West Virginia resident's Kentucky income during the year was from wages and/or salaries only, he or she is not subject to Kentucky income tax on his or her employee compensation and may not claim credit for payment of that tax on the West Virginia income tax return. To receive a refund of Kentucky tax erroneously withheld, he or she must file a return with Kentucky. If a West Virginia resident has income sourced to Kentucky from a source other than wages and/or salaries, he or she must file a nonresident return with Kentucky. The amount of income tax paid to Kentucky on his or her Kentucky source income other than employee compensation is allowed as a credit on the West Virginia income tax return subject to the credit limitation rules previously discussed.

If a Kentucky resident's West Virginia source income during the year was from wages and/or salaries only, he or she is not subject to West Virginia income tax on his or her employee compensation and his or her employer should withhold Kentucky income tax. To receive a refund of West Virginia tax erroneously withheld, he or she must file a return with West Virginia. If a Kentucky resident has income sourced to West Virginia from a source other than wages and/or salaries, he or she must file a nonresident West Virginia income tax return when his or her West Virginia source income from other sources exceeds the amount of his or her allowable personal exemptions.

## **Maryland**

If a West Virginia resident's Maryland income during the year was from wages and/or salaries only, he or she is not subject to Maryland income tax on his or her employee compensation and may not claim credit for payment of that tax on the West Virginia income tax return. To receive a refund of Maryland tax erroneously withheld, he or she must file a return with Maryland. If a West Virginia resident has income sourced to Maryland from a source other than wages and/or salaries, he or she must file a nonresident return with Maryland. The amount of income tax paid to Maryland on his or her Maryland source income other than employee compensation is allowed as a credit on the West Virginia income tax return subject to the credit limitation rules previously discussed.

If a Maryland resident's West Virginia source income during the year was from wages and/or salaries only, he or she is not subject to West Virginia income tax on his or her employee compensation and his or her employer should withhold Maryland income tax. To receive a refund of West Virginia tax erroneously withheld, he or she must file a return with West Virginia. If a Maryland resident has income sourced to West Virginia from a source other than wages and/or salaries, he or she must file a nonresident West Virginia income tax return when his or her West Virginia source income from other sources exceeds the amount of his or her allowable personal exemptions.

## **Ohio**

If a West Virginia resident's Ohio income during the year was from wages and/or salaries only, he or she is not subject to Ohio income tax on his or her employee compensation and may not claim credit for payment of that tax on the West Virginia income tax return. To receive a refund of Ohio tax erroneously withheld, he or she must file a return with Ohio. If a West Virginia resident's income is sourced to Ohio from a source other than wages and/or salaries, he or she must file a nonresident return with the State of Ohio. The amount of income tax paid to Ohio on his or her Ohio source income other than employee compensation is allowed as a credit on the West Virginia income tax return subject to the credit limitation rules previously discussed.

If an Ohio resident's West Virginia source income during the year was from wages and/or salaries only, he or she is not subject to West Virginia income tax on his or her employee compensation and his or her employer should withhold Ohio income tax. To receive a refund of West Virginia tax erroneously withheld, he or she must file a return with Ohio. If an Ohio resident has income sourced to West Virginia from a source other than wages and/or salaries, he or she must file a nonresident West Virginia income tax return when his or her West Virginia source income from other sources exceeds the amount of his or her allowable personal exemptions.

## **Pennsylvania**

Except as discussed below, if a West Virginia resident's Pennsylvania income during the year was from wages and/or salaries only, he or she is not subject to Pennsylvania income tax on his or her employee compensation and may not claim credit for payment of that tax on the West Virginia income tax return. To receive a refund of Pennsylvania tax erroneously withheld, he or she must file a return with Pennsylvania. If a West Virginia resident has income sourced to Pennsylvania from a source other than wages and/or salaries, he or she must file a nonresident income tax return with Pennsylvania. The amount of income tax paid to Pennsylvania on his or her Pennsylvania source income other than employee compensation is allowed as a credit on the West Virginia income tax return subject to the credit limitation rules previously discussed.

Except as discussed below, if a Pennsylvania resident's West Virginia source income during the year was from wages and/or salaries only, he or she is not subject to West Virginia income tax on his or her employee compensation and his or her employer should withhold Pennsylvania income tax. To receive a refund of West Virginia tax erroneously withheld, he or she must file a nonresident income tax return with West Virginia. If a Pennsylvania resident has income sourced to West Virginia from a source other than wages and/or salaries, he or she must file a nonresident West Virginia income tax return when his or her West Virginia source income from other sources exceeds the amount of his or her allowable personal exemptions.

**Caveat.** The above rules are disregarded when the Pennsylvania resident is physically present in West Virginia for more than 183 days during the taxable year and when the West Virginia resident is physically present in Pennsylvania for more than 183 days during the taxable year. In these instances, the Pennsylvania resident is a resident of West Virginia for income tax purposes for the taxable year and the West Virginia resident is a resident of Pennsylvania for income tax purposes for the taxable year. In this situation, the West Virginia resident may claim credit on his or her West Virginia income tax return for income taxes paid to Pennsylvania subject to the credit limitation rules previously discussed.

## Virginia

Except as discussed below, if a West Virginia resident's Virginia income during the year was from wages and/or salaries only, he or she is not subject to Virginia income tax on his or her employee compensation and may not claim credit for payment of that tax on the West Virginia income tax return. To receive a refund of Virginia tax erroneously withheld, he or she must file a return with Virginia. If a West Virginia resident has income sourced to Virginia from a source other than wages and/or salaries, he or she must file a nonresident income tax return with Virginia. The amount of income tax paid to Virginia on his or her Virginia source income other than employee compensation is allowed as a credit on the West Virginia income tax return subject to the credit limitation rules previously discussed.

Except as discussed below, if a Virginia resident's West Virginia source income during the year was from wages and/or salaries only, he or she is not subject to West Virginia income tax on his or her employee compensation and his or her employer should withhold Virginia income tax. To receive a refund of West Virginia tax erroneously withheld, he or she must file a nonresident income tax return with West Virginia. If a Virginia resident has income sourced to West Virginia from a source other than wages and/or salaries, he or she must file a nonresident West Virginia income tax return when his or her West Virginia source income from other sources exceeds the amount of his or her allowable personal exemptions.

**Caveat.** The above rules are disregarded when the Virginia resident is physically present in West Virginia for more than 183 days during the taxable year and when the West Virginia resident is physically present in Virginia for more than 183 days during the taxable year. In these instances, the Virginia resident is a resident of West Virginia for income tax purposes for the taxable year and the West Virginia resident is a resident of Virginia for income tax purposes for the taxable year. In this situation, the West Virginia resident may claim credit on his or her West Virginia income tax return for income taxes paid to Virginia subject to the credit limitation rules previously discussed.

### ¶ 401.39 Senior Citizens' and Disabled Persons Tax Credit for Property Taxes

Law: W. Va. Code § 11-21-21

A low-income senior citizen or disabled person who is allowed a \$20,000 homestead exemption from the assessed value of his or her homestead for ad valorem property tax purposes, as provided in W. Va. Code § 11-6B-3, is allowed a refundable credit against West Virginia income taxes equal to the amount of ad valorem property taxes paid on up to the first \$20,000 of taxable assessed value of the homestead for property tax years unless the individual is required to pay federal alternative minimum tax for the taxable year. For tax years beginning on or after January 1, 2012, taxpayers must calculate this credit prior to calculating the credit authorized in W. Va. Code § 11-21-23.

*Example:* John Smith is aged 66. He owns and lives in a residence that has a market value of \$80,000. The homestead is assessed for ad valorem property taxes at \$48,000. The first \$20,000 of this assessed value is exempt from property taxes under Article X, § 1b and W. Va. Code § 11-6B-3. John Smith pays ad valorem property taxes on the next \$28,000 of assessed value (\$383.99). The amount of those taxes attributable to the first \$20,000 of taxable assessed value (\$274.28) may be claimed as a refundable tax credit on the West Virginia income tax return filed by John Smith provided John Smith does not pay federal alternative minimum tax for the 2023 taxable year.

\$ 80,000 market value
<u>        X 60%</u>
\$ 48,000 assessed value
<u>- 20,000 Senior citizen homestead exemption</u>
\$ 28,000 taxable assessed value
x <u>1.3714%</u> aggregate levy rate
\$ 383.99 property tax liability for 2023
\$20,000 x 1.3714% = \$274.28

Due to the administrative cost of processing, the refundable credit may not be refunded if the credit is less than \$10.

The credit for each property tax year is claimed on the annual West Virginia income tax return or by filing a claim for refund within three years after the due date for the annual income tax return upon which the credit may first be claimed.

*Certain terms defined:* For purposes of this credit:

- (1) "Low income" means federal adjusted gross income for the taxable year that is 150% or less of the federal poverty guideline for the year in which property tax was paid, based upon the number of individuals in the family unit residing in the homestead, as determined annually by the United States Secretary of Health and Human Services.
- (2) "Taxes paid" means the aggregate of regular levies, excess levies and bond levies extended against not more than \$20,000 of the taxable assessed value of a homestead that are paid during the calendar year determined after

application of any discount for early payment of taxes but before application of any penalty or interest for late payment.

*Confidentiality:* The Tax Commissioner may utilize property tax information in the statewide electronic data processing system network to the extent necessary for the purpose of administering this tax credit, notwithstanding the confidentiality provisions of W. Va. Code § 11-1A-23 to the contrary.

#### **¶ 401.40 Low Income Refundable Credit -- Property Taxes Paid on Homestead**

*Law:* W. Va. Code § 11-21-23

Any homeowner living in his or her homestead is allowed a refundable credit against his or her West Virginia income tax equal to the amount of real property taxes paid on the homestead that are in excess of 4% percent of his or her gross household income. However, for taxable years beginning on or after January 1, 2012, any low income homeowner living in his or her homestead in this State is allowed a refundable credit against his or her West Virginia income taxes equal to the amount by which the difference between West Virginia real property taxes paid on the homestead for the tax year, minus the amount of credit authorized in W. Va. Code § 11-21-21, exceeds 4% of the taxpayer's gross household income for the taxable year.

When the amount of this refundable credit exceeds the amount of West Virginia income taxes imposed for the taxable year, the excess amount is refunded to the homeowner. However, due to the administrative cost of processing, the amount may not be refunded if it is less than \$10.

This credit is claimed for each property tax year by filing a claim for refund with the Tax Commissioner within 12 months after the real property taxes are paid on the homestead.

*Certain terms defined:* For the purposes of this credit:

When a homeowner is eligible to claim this credit and the tax credit discussed in ¶ 401.39, the homeowner should compute the amount of credit allowable under both provisions and then claim the credit that provides the homeowner with the greater benefit. Prior to January 1, 2012, no homeowner could receive benefits under both this paragraph and ¶ 401.39 during the same taxable year. However, for taxable years beginning on or after January 1, 2012, a homeowner may take this credit and the credit discussed in ¶ 401.39.

*Exception:* Any person who is required to pay the federal alternative minimum income tax for the taxable year for which the federal income tax return is filed is disqualified from receiving any tax credit under W. Va. Code § 11-21-23.

*Limitations:* No homeowner may receive a refundable tax credit discussed in ¶ 401.39, ¶ 401.40 and ¶ 401.41 in excess of \$1,000 per taxable year. This cap is subject to annual review by the Legislature to determine if an adjustment is necessary.

Additionally, for taxable years commencing on or after January 1, 2012, the credit allowed by W. Va. Code § 11-21-23 may not be taken for property taxes paid on any homestead that is owned, in whole or in part, by any person who is not a low income person.

*Terms defined:* For purposes of the credit allowed by W. Va. Code § 11-21-23:

(1) “Assessed value” means the value of property as determined under for ad valorem property tax purposes under W. Va. Code § 11-3-1 *et seq.*

(2) “Gross household income” is defined as federal adjusted gross income plus the sum of the following:

(a) Modifications in W. Va. Code § 11-21-12(b) increasing federal adjusted gross income;

(b) Federal tax-exempt interest reported on federal tax return; Federal tax-exempt interest reported on federal tax return;

(c) Workers’ compensation and loss of earnings insurance; and

(d) Nontaxable Social Security benefits.

(3) “Homestead” means a homestead qualified for the homestead property tax exemption authorized in W. Va. Code § 11-6-1 *et seq.*, but limited to a single-family residential house, including a mobile or manufactured or modular home, and the land, not exceeding one acre, surrounding the structure that is owned by the owner of the single-family residential house, including a mobile or manufactured or modular home; or a mobile or manufactured or modular home regardless of whether the land upon which such mobile or manufactured or modular home is situated is owned by another.

(4) “Low income” means federal adjusted gross income for the tax year that is 150% or less of the federal poverty guideline for the year in which property tax was paid, based upon the number of individuals in the family unit residing in the homestead, as determined annually by the United States Secretary of Health and Human Services.

(5) A “low income person” means a person whose federal adjusted gross income for the tax year meets the definition of “low income” as above defined.

(6) “Owner” or “homeowner” means the person who is possessed of the homestead, whether in fee or for life. A person seized or entitled in fee subject to a

mortgage or deed of trust shall be considered the owner. A person who has an equitable estate of freehold or is a purchaser of a freehold estate who is in possession before transfer of legal title is also considered the owner. Personal property mortgaged or pledged is, for the purpose of taxation, considered the property of the party in possession.

(7) “Real property taxes paid” means the aggregate of regular levies, excess levies and bond levies extended against the homestead that are paid during the calendar year and determined after any application of any discount for early payment of taxes but before application of any penalty or interest for late payment of property taxes.

(8) “Senior citizen property tax relief tax credit” means the tax credit discussed in ¶ 401.40.

(9) “Sixty-five years of age or older” includes a person who attains the age of 65 on or before June 30 following the July 1 assessment day.

(10) “Tax increment” means the increase of ad valorem taxes levied on the homestead, determined as the difference between the ad valorem taxes levied on the homestead for the current property tax year and the ad valorem taxes levied on the homestead for the property tax year immediately preceding the property tax year for which the taxpayer’s application for the tax credit discussed in ¶ 401.40 is approved by the assessor, or otherwise finally approved in accordance with the provisions of the West Virginia Personal Income Tax Act.

(11) “Tax year” means the property tax calendar year following the July 1 assessment day.

(12) “Used and occupied exclusively for residential purposes” means that the property is used as an abode, dwelling or habitat for more than six consecutive months of the calendar year prior to the date of application by the owner thereof; and that subsequent to making application for tax credit, the property is used only as an abode, dwelling or habitat to the exclusion of any commercial use.

#### **¶ 401.41 Reserved**

#### **¶ 401.42 Low-income Family Tax Credit**

*Law: W. Va. Code § 11-21-22*

To eliminate West Virginia income tax on families with incomes below the federal poverty guidelines and to reduce the West Virginia income tax on families with incomes that are immediately above the federal poverty guidelines, the Legislature created a nonrefundable tax credit, known as the low-income family tax credit, against the West Virginia personal income tax.

The low-income family tax credit is based upon family size and the federal poverty guidelines applicable for the year for which the West Virginia return is filed. However, any



individual who is required to pay the federal alternative minimum income tax for the taxable year is not eligible for the low-income family tax credit.

#### **¶ 401.43 Motor Vehicle Property Tax Adjustment Credit**

*Law: W. Va. Code § 11-13MM-3*

Beginning January 1, 2024, taxpayers are eligible to claim a Motor Vehicle Property Tax Adjustment Credit. The first opportunity to claim this credit will be on the 2024 West Virginia income tax return, filed in 2025, for all timely paid property taxes made on vehicles due in 2024. After the passage of WV HB 125 during the 1<sup>st</sup> Special Session, taxpayers will not be penalized if they pay the second half of their property tax ticket during calendar year 2023 because it is still considered due in 2024 and is therefore timely paid.

This credit is available to individuals, partnerships, S Corporations, LLCs, and C Corporations. Additionally, leasing companies also qualify for this credit, but they are required to pass the savings on to the consumer leasing the vehicle.

The credit is only available for the actual tax paid. If an early payment discount is applied, the credit is limited to the amount actually paid after deduction of the discount. Refer to WV Publication TSD 454 for a list of vehicles that qualify for the credit. Certain vehicles do not qualify for the credit, such as trailers and semi trailers, taxi cabs, mobile equipment, and travel trailers.

This credit is not available for motor vehicle dealers.

Taxpayers that do not owe West Virginia income tax and are not required to file a West Virginia income tax return will still be able to file a claim for the credit in early 2025 for their motor vehicle property taxes paid.

#### **¶ 401.44 Other Credits against Tax**

West Virginia allows certain tax credits to be claimed against the West Virginia personal income tax. These credits are claimed on schedules filed with the annual West Virginia income tax return. Credits are discussed in Chapter 3 of this Guidebook.

<b>Credit</b>	<b>Schedule</b>
Environmental Agricultural Equipment Tax Credit	AG-1
Apprenticeship Training Tax Credit	WV/ATTC-1
Conceal Carry Gun Permit Credit	CCGP-1
Certification for Permanent and Total Disability and Credit for Income Tax paid to another state(s)	Schedules H & E
Family Tax Credit	FTC-1
Farm to Food Bank Tax Credit	
General Economic Opportunity Tax Credit	WV/EOTC-PIT

Historic Rehabilitated Buildings Investment Credit	RBIC
Homestead Excess Property Tax Credit	WV/HEPTC-1
Neighborhood Investment Program Credit	NIPA-2
Non-family Adoption Credit	WV/NFA-1
Qualified Rehabilitated Buildings Investment Credit	RBIC-A
WV Military Incentive Credit	Schedule J

## ¶ 402 Withholding Taxes

### ¶ 402.1 Withholding of Income Tax by Employers

*Law:* W. Va. Code §§ 11-21-71 & 11-21-31(b); WVCSR § 110-21-71

*Comparable Federal:* IRC § 3402

*Who must withhold:* Every employer maintaining an office or transacting business in West Virginia and making payment of any wages taxable to a resident or nonresident individual is required to deduct and withhold from the wages for each payroll period the amount of personal income tax that will result in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax estimated to be due as the result of the inclusion in the employee's West Virginia adjusted gross income of his wages received during the calendar year.

Any remuneration that constitutes wages for federal withholding tax purposes also constitutes wages for West Virginia withholding tax purposes. (WVCSR § 110-21-71.1.2.) If an employer is relieved from federal withholding tax because of a determination by the Internal Revenue Service, the employer is also relieved from West Virginia withholding tax. (WVCSR § 110-21-71.1.3.)

*Definition of employee:* For this purpose, the provisions of the federal Internal Revenue Code and its applicable regulations, with respect to withholding tax and of various federal terms (such as "employer," "employee," "wages," "payroll period," "withholding exemptions") apply for West Virginia income tax purposes.

*Amount of tax to withhold:* The amount of tax to be withheld by the employer is determined based on the employee's withholding exemption certificate and the applicable rate of tax. To determine the amount of tax to be withheld, the employer may use the tax tables or the percentage method. (WVCSR § 110-21-71.6.)

*Withholding tax exemptions:* An employee is entitled to the same number of West Virginia withholding exemptions as the number of withholding exemptions to which he or she is entitled for federal income tax withholding purposes. An employer may rely upon the number of federal withholding exemptions claimed by the employee, except where the employee claims a higher number of West Virginia withholding exemptions. (W. Va. Code § 11-21-71(b); WVCSR § 110-21-71.2.) The employer may accept Federal Form W-4 unless the employee elects to file a West Virginia exemption certificate, Form IT-104. (WVCSR § 110-21-71.2.1.)

*Employees exempt from withholding:* Resident individuals of Kentucky, Maryland, or Ohio who work in West Virginia are exempt from West Virginia withholding taxes on wages and salaries earned in West Virginia. The West Virginia employer should not withhold West Virginia income tax from their salaries earned in West Virginia but instead should withhold tax for their state of domicile.

Individuals who are residents of Pennsylvania or Virginia and who work in West Virginia for more than 183 days or are otherwise present in West Virginia for more than 183 days, are treated as West Virginia residents for income tax purposes and are subject to West Virginia withholding. If a resident of Pennsylvania or Virginia works in West Virginia for 183 days or less or is otherwise present in West Virginia for not more than 183 days, he or she is exempt from West Virginia withholding tax and the employer should withhold tax for the employee's state of domicile.

The compensation paid to a nonresident employee for services rendered entirely without this State is not considered West Virginia wages and therefore is not subject to West Virginia withholding whether payment is made from within or without this State.

*Employees partly exempt from withholding:* If a nonresident employee performs service for his or her employer partly within and partly without West Virginia, the employer may withhold based on the apportionment shown by the nonresident employee.

Under HB 2026, effective January 1, 2022, compensation subject to withholding that is paid to a nonresident individual is exempt from income tax provided the following criteria are met: 1) the compensation is paid for employment duties performed in West Virginia on 30 or fewer days in the calendar year, 2) the individual performed employment duties in more than one state of during the calendar year, 3) the compensation is not paid for employment by the individual in their capacity as a professional athlete, professional entertainer, or public figure, and 4) the nonresident individual's state of residence provides for a substantially similar exclusion.

If the number of days worked in West Virginia during the calendar year exceeds the 30-day threshold, then the employer is required to withhold West Virginia income tax on the wages earned during the year, including the first 30 days.

*Employees entirely subject to withholding:* Wages paid to a resident of West Virginia are fully subject to withholding even though some or all the services may have been rendered outside of West Virginia.

## **¶ 402.2 Duties of Employers with Respect to Withholding Taxes**

*Law:* W. Va. Code § 11-21-74; WVCSR §§ 110-21-74, 110-10D-3 and 110-10D-9

Every employer required to deduct and withhold West Virginia income tax from employees is required to file a withholding return as prescribed by the Tax Commissioner and pay over to the Tax Commissioner the taxes required to be deducted and withheld, in accordance with the procedures established by the Internal Revenue Service pursuant to IRC § 3402.

The due dates for returns and payments shall be established by the Tax Commissioner to match as closely as practicable the due dates in effect for federal income tax purposes, in accordance with the procedures established by the Internal Revenue Service pursuant to IRC § 3402. (W. Va. Code § 11-21-74(b).)

*Electronic filing:* Employers with 25 or more employees are required to file withholding returns using electronic filing. Failure to do so will result in penalties unless reasonable cause is shown. (W. Va. Code §22-21-74(h); WVCSR §§ 110-10D-3 and 110-10D-9 Appendix 1; State Tax Division Taxpayer Services Division Publication TSD-381 (May 2023). Employers with fewer than 25 employees may elect to file returns electronically.

*Electronic payment of tax:* The Tax Commissioner promulgated a procedural regulation that requires certain taxpayers to remit tax by electronic funds transfer (EFT) For years beginning on or after January 1, 2013, any person who had total annual remittance for any single tax equal to or greater than \$50,000 during the immediately preceding tax year (2012) must file electronically all returns and pay by EFT all taxes administered under the West Virginia Tax Procedure and Administration Act, W. Va. Code § 11-10-1 *et seq.* This lookback threshold amount is reduced to \$25,000 for tax returns and payments due in 2014; and to \$10,000 for returns and payments due for tax years beginning on or after January 1, 2015. For tax years beginning on or after January 1, 2016, the threshold amount reverts back to \$25,000, and for tax years beginning on or after January 1, 2019, the threshold is \$50,000. (W. Va. Code § 11-10-5z(a); WVCSR § 110-10D-9 and 9.3.a, and § 110-10F-3.2.)

*Final return:* If an employer ceases doing business or if a change occurs in ownership, or if any other event occurs that permanently eliminates all an employer's liability for further withholding, the employer must submit to the Tax Accounting Division of the State Tax Division the final monthly, quarterly, or annual report form upon the last payment of wages. All West Virginia income tax withheld, or which should have been withheld, and not previously remitted must be remitted with the final report.

*Deposit in trust for Tax Commissioner:* Whenever any employer fails to collect, truthfully account for or pay over the tax, or to make returns of the tax as required by law, the Tax Commissioner may serve a notice requiring the employer to collect the taxes which become collectible after service of the notice, to deposit the taxes in a bank approved by the Tax Commissioner, in a separate account, in trust for and payable to the Tax Commissioner and to keep the amount of the tax in the separate account until payment over to the Tax Commissioner. The notice remains in effect until a notice of cancellation is served by the Tax Commissioner. (W. Va. Code § 11-21-74(d).)

*Annual reconciliation:* An annual reconciliation of West Virginia personal income tax withheld must filed by the employer on or before February 28 following the close of the calendar year, together with Tax Division copies of all withholding tax statements for that preceding calendar year. The reconciliation must be accompanied by a list of the amounts of income withheld for each employee in such form as the Tax Commissioner prescribes and must be filed separately from the employer's monthly or quarterly return. (W. Va. Code § 11-21-74(g).)

### **¶ 402.3 Information Statement for Employee (Form W-2)**

*Law:* W. Va. Code §§ 11-10-19(b) and 11-21-72; WVCSR § 110-21-72

*Comparable Federal:* IRC § 6051

Every employer required to deduct and withhold West Virginia income tax from the wages of an employee, or who would have been required so to deduct and withhold tax if the employee had claimed no more than one withholding exemption, is required to furnish to each employee, on or before February 15 of the succeeding year, a withholding statement in respect of the wages paid by the employer to the employee during the calendar year. If the employee is terminated from employment before the close of the calendar year, this statement must be provided to the employee on the date on which the last payment of the wages is made. The form of this statement is prescribed by the Tax Commissioner and must show the amount of wages paid by the employer to the employee, the amount deducted and withheld as tax, and such other information as the Tax Commissioner may prescribe.

For the willful furnishing of a false withholding statement or for the willful failure to furnish a withholding statement by February 15, the employer is subject to a \$50 money penalty for each failure. (W. Va. Code § 11-10-19(b)).

#### **¶ 402.4 Employer's Liability for Withheld Taxes**

*Law:* W. Va. Code § 11-21-75; WVCSR § 110-21-75

*Comparable Federal:* IRC § 3403

Every employer required to deduct and withhold West Virginia income taxes is made liable for withholding of the tax. For purposes of collection of the withholding tax any amount required to be withheld and paid over to the Tax Commissioner is considered the tax of the employer. Any amount of tax deducted and withheld from employees is deemed to be held to be a special fund in trust for the Tax Commissioner.

#### **¶ 402.5 Employer's Failure to Withhold**

*Law:* W. Va. Code § 11-21-76; WVCSR § 110-21-75

If an employer fails to deduct and withhold tax as required, and thereafter the tax against which the tax may be credited is paid, the tax so required to be deducted and withheld may not be collected from the employer, but the employer is not relieved from liability for any penalties, interest, or additions to the tax otherwise applicable in respect of the failure to deduct and withhold tax.

*100% money penalty:* Additionally, any person required to collect, account for and pay over employer withholding taxes who willfully fails truthfully to account for and pay over the tax, and any person who willfully attempts in any manner to evade or defeat any employer withholding tax or the payment thereof, is, in addition to other penalties provided by law, liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over. (W. Va. Code § 11-10-19(a).)

## **¶ 402.6 Withholding Tax on West Virginia Source Income Distributable to Nonresident Partners, S Corporation Shareholders, Estate and Trust Beneficiaries**

*Law:* W. Va. Code § 11-21-71a

*General rule:* A partnership, S corporation, estate, or trust (*i.e.* pass through entities for federal income tax purposes) that has West Virginia source income allocable to a nonresident must withhold West Virginia income tax from actual or deemed distributions of West Virginia source income to the nonresident.

*Rate of withholding tax:* 5.12% on West Virginia source income allocated to the nonresident beginning January 1, 2023. The withholding rate for prior years was 6.5%.

*Payment of withheld tax:* The amount required to be withheld is due no later than:

- (1) For S corporations and partnerships - the 15th day of the 3rd month following the close of the taxable year with the annual information return due to the state. For composite returns - the 15th day of the 4th month of the taxable year with the composite return filed.
- (2) For estates and trusts - the 15th day of the 4th month following the close of the taxable year with the annual return of the partnership or trust due to the state.

Nonresidents may elect to have the partnership, S corporation, estate, or trust file a composite return and pay the tax shown due on that return by the due date of the composite return. See ¶ 401.28 above for discussion of composite returns. In this situation, the pass-through entity remits tax due rather than withheld tax.

## **¶ 402.7 Credit for Withheld Taxes**

*Law:* W. Va. Code § 11-21-71a(f)

*Allowance of credit:* Each nonresident partner, shareholder or beneficiary is allowed credit for his or her share of taxes withheld by the pass-through entity. For individuals, this credit is taken against their West Virginia income tax liability. Tax withheld is treated as distributed on the earlier of:

- (1) The day on which the tax was paid; or
- (2) The last day of the taxable year for which the tax was paid.

*Information statement:* On or before the due date of the pass-through entity's West Virginia tax return, every pass-through entity required to withhold tax must furnish to each nonresident partner, shareholder, or beneficiary, as the case may be, a written statement showing for the preceding year the amount of distributions for federal income tax purposes, the amount of tax withheld and such other information as the Tax Commissioner may require.

## ¶ 402.8 Withholding Tax When West Virginia Real Property Sold by Nonresident

Law: W. Va. Code § 11-21-71b

When a nonresident sells real property located in West Virginia, the real estate reporting person, as defined for federal income tax purposes, is required to withhold from the net proceeds of sale allocated to the nonresident a 2.5% tax, unless the transaction is exempt from withholding.

For the purposes of this withholding requirement, “nonresident” includes individuals, trusts, partnerships, corporations, limited liability companies, limited liability partnerships, and unincorporated organizations.

The real estate reporting person, sometimes called the closer, is responsible for withholding the tax and remitting it to the State Tax Commissioner. The term “real estate reporting person” means any of the following persons involved in a real estate transaction, in the following order:

- (1) The person (including any attorney or title company) responsible for closing the transaction,
- (2) The mortgage lender,
- (3) The seller’s broker,
- (4) The buyer’s broker, or
- (5) Such other person designated in regulations prescribed by the Secretary of the United States Department of the Treasury, as provided in IRC § 6045.

The person responsible for closing the transaction, the “closer,” will always be responsible for Section 71b withholding.

**Caveat:** Under regulations of the Secretary of the United States Department of the Treasury, the various parties participating in a real estate transaction may sometimes agree amongst themselves who will be the real estate reporting person for purposes of IRC § 6045. However, until the Tax Commissioner promulgates an administrative rule adopting that position, the safe practice is for the real estate reporting person as defined in W. Va. Code § 11-21-71b to do the closing.

*When Withholding Required:* Withholding is required only when the transferor is NOT a resident of West Virginia. Rules for determining whether a transferor is a resident or nonresident are as follows:

- (1) *Resident individual* means an individual:



- (a) Who is domiciled in this State, unless he or she maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this State, or
  - (b) Who is not domiciled in this State but maintains a permanent place of abode in this State and spends in the aggregate more than 183 days of the taxable year in this State.
- (2) *Nonresident individual* means an individual who is not a resident, as above defined.
- (3) *Resident business entity* means is any entity that:
- (a) Is formed under the laws of West Virginia; or
  - (b) Is formed under the laws of another state and is qualified by or registered with the Tax Commissioner to do business in this State, e.g., has a current business registration certificate issued under W. Va. Code § 11-12-4.
- (4) *Nonresident business entity* means any entity that:
- (a) Is not formed under the laws of West Virginia; and
  - (b) Is not qualified by or registered with the Tax Commissioner to do business in this State.
- (5) *Resident estate or trust* means and includes:
- (a) The estate of a decedent who at his or her death was domiciled in this State;
  - (b) A trust created by will of a decedent who at his or her death was domiciled in this State; or
  - (c) A trust created by, or consisting of property of, a person domiciled in this State.
- (6) *Nonresident estate or trust* means any estate or trust that is not a resident estate or trust, as above defined.

*Multiple Transferors:* When two or more persons sell property they own as joint tenants or as tenants in common, each seller's respective residency is determined separately. Withholding is required only on the net proceed of sale payable at closing to the nonresident transferor(s).

*Rate of Tax and Measure of Tax:* Except when the alternative rate and measure of tax are used, the rate of this withholding tax is 2.5% which is applied against net proceeds of sale distributable to a nonresident. "Net proceeds of sale" means total sale price paid to the transferor less:

- (1) Debts of the transferor secured by a mortgage or other lien on the property being transferred that are being paid upon the sale or exchange of the property; and
- (2) Other expenses of the transferor arising out of the sale or exchange of the property and disclosed on a settlement statement prepared in connection with the sale or exchange of the property, but not including adjustments in favor of the transferee.

"Net proceeds" does not include adjustments in favor of the transferor that are disclosed on a settlement statement prepared in connection with the sale or exchange of the property.

*Alternative rate and measure of tax:* An alternative for calculating the withholding is to use the seller's gain. When the alternative measure of tax is used, the rate of tax is 6.5%. Because the real estate reporting person will ordinarily not know the amount of the transferor's taxable gain, the transferor should make an Affidavit of Nonresident Seller's Gain, attesting to the amount of the taxable gain. The transferor is responsible for computing the gain. It is suggested that a copy of this Affidavit be sent to the State Tax Commissioner when the real estate reporting person remits the withheld tax if there is a balance due. The Affidavit of Nonresident Seller's Gain along with an explanation of the cost basis and expenses must be kept with the closing file. The real estate reporting person may rely on the Seller's affidavit unless the real estate reporting person has actual or constructive notice that the affidavit is false or contains erroneous information.

*Total payment form:* For every deed or other instrument of writing that effects a change of ownership on the land books of a county assessor and for which an amount is required to be withheld as described in this ¶ 402.8, the total payment for the transfer must be described in a form prescribed by the Tax Commissioner. "Total payment" means the net proceeds of a sale actually paid to a transferor, including the fair market value of any property transferred to the transferor. This form must be signed under oath by:

- (1) The transferor of the property;
- (2) An agent of the transferor; or
- (3) The real estate reporting person.

*When cash at closing is less than withholding tax:* If the computed amount of this withholding tax is more than the cash received by the transferor at closing, the real estate

reporting person must withhold and remit only the net proceeds otherwise payable to the nonresident seller.

*When withholding not required:* There are several exceptions or exemptions to this withholding requirement. They include:

- (1) *Residency exception:* If the transferor is a resident of West Virginia, no withholding is required. However, to claim this exception, the deed recitals must state that the transferor is a resident of West Virginia, or an affidavit of residency must be made and recorded with the deed.
- (2) *Principal residence exception:* If the property transferred qualifies as a principal residence of the transferor under IRC § 121, the exemption from withholding applies for the amount of gain that is excluded from Federal adjusted gross income (FAGI) under the Internal Revenue Code. This exemption is available whether the transferor is a resident or nonresident of West Virginia. However, to claim this exemption, the deed recitals must state that the property being transferred is the transferor's principal residence, as that term is used in IRC § 121, or an affidavit to that effect must be made and recorded with the deed.
- (3) *Foreclosure exception:* The real estate reporting person is not subject to the withholding requirements if the transfer is pursuant to a deed in lieu of foreclosure or a transfer pursuant to a foreclosure of a mortgage, deed of trust, or other lien instrument. When foreclosed property is sold, that sales transaction is not subject to the withholding tax.
- (4) *Federal and state agencies exception:* The transaction is not subject to the withholding requirements if the transferor is an agency of the United States or the State of West Virginia.
- (5) *FNMA, GNMA, or FHLMC exception:* The transaction is not subject to withholding when the transferor is the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation.
- (6) *Tax Exempt Organization exception:* The transaction is not subject to withholding when the transferor is a tax-exempt organization, or an insurance company that pays a tax on its premium income to the State of West Virginia, and the income from the sale is not subject to State income tax. To claim this exemption, the transferor must provide the real estate reporting person with a certificate of no tax due issued by the West Virginia Tax Commissioner.
- (7) *Like kind exchange:* The transaction is a like kind exchange and all the income from the sale is not subject to federal or state income tax. To claim this exemption, the transferor must provide the real estate reporting person with a certificate of no tax due issued by the State Tax Commissioner.

(8) *Zero consideration*: The property is transferred pursuant to a deed or other instrument of writing that includes a statement indicating that the consideration for the transfer is zero.

*Payment of Tax*: The real estate reporting person must collect the withholding tax before the deed is recorded and remit the amount of tax withheld to the Tax Commissioner within 30 days after the tax was withheld by the real estate reporting person.

## **¶ 402.9 Withholding Tax on Certain Lottery Winnings**

*Law*: W. Va. Code § 11-21-77

*Lottery winnings subject to withholding*: Proceeds of more than \$5,000 from any lottery prize awarded by the West Virginia State Lottery Commission are subject to withholding and are considered West Virginia source income. The Lottery Commission is required to deduct and withhold from the payment a tax in an amount equal to 5.12% of the payment when the proceeds are more than \$5,000.

*Withholding statement by recipient*: Every person who will receive payment of lottery winnings that are subject to withholding must provide the person making the payment with a statement made under the penalties of perjury containing the name, address and taxpayer identification number of the person receiving the payment and of each person entitled to any portion of the payment.

*Backup withholding*: Every person who is required to file Internal Revenue Service Form W-2G, and who is subject to backup withholding under federal law, is subject to West Virginia backup withholding. The payor, whether a licensed racetrack, a limited video lottery retailer or The Greenbrier Hotel, when making any payment of a gambling prize subject to backup withholding, is required to deduct and withhold from the payment a tax in an amount equal to 5.12% of the payment.

*Lottery winnings treated as employee compensation*. For purposes of determining liability for payment of taxes and filing of returns, payments of lottery winnings that are subject to withholding or backup withholding are to be treated as if they were wages paid by an employer to an employee.

## **¶ 403 Estate and Trust Income Taxes**

### **¶ 403.1 In General**

In general, every resident estate and trust that is required to file a federal return for the taxable year or that has West Virginia taxable income is required to file a West Virginia income tax return. Nonresident estates and trusts that have West Virginia source income are also required to file a West Virginia return. The return filed is form IT-141 Fiduciary Income Tax Return.

The fiduciary of the estate or trust is required to make and file the West Virginia return. (W. Va. Code § 11-21-51 and WVCSR § 110-21-51.)

All items of income and deduction to be used for West Virginia tax purposes are the same items used for federal tax purposes and the meaning of all terms is the same.

#### **¶ 403.2 Resident and Nonresident Estate or Trust**

*Law*; W. Va. Code §§ 11-21-7(c) and (d) and 11-21-30(d)

For income tax purposes, a “resident estate or resident trust” means:

- (1) The estate of a decedent who at his or her death was domiciled in West Virginia;
- (2) A trust created by will of a decedent who at his or her death was domiciled in West Virginia; or
- (3) A trust created by, or consisting of property of, a person domiciled in West Virginia.

A nonresident estate or trust is one that is not a resident estate or resident trust as above defined. The state of residence of the fiduciary does not affect the classification of the estate or trust as a resident or nonresident.

#### **¶ 403.3 West Virginia Source Income of Nonresident Estate or Trust**

*Law*: W. Va. Code §§ 11-21-38 and 11-21-39; WVCSR § 110-21-38.2.

The West Virginia source income of a nonresident estate or trust is determined as provided in this paragraph.

(1) *Items in distributable net income*: The distributable net income of the nonresident estate or trust must be analyzed to determine the portion that represents income, gain, loss, and deduction from West Virginia sources. These are the items of income, gain, loss and deduction, derived from or connected with West Virginia sources, that would be included in the determination of federal adjusted gross income if the estate or trust were an individual and that enter into the definition of federal distributable net income of the estate or trust for the taxable year including such items from another estate or trust of which the first estate or trust is a beneficiary. This determination of source is made in accordance with the applicable rules of W. Va. Code § 11-21-32 in the case of a nonresident individual. Income and deductions from West Virginia sources include:

- (a) Items of income, gain, loss, and deduction derived from or connected with West Virginia sources that are attributable to:

- (i) The ownership of any interest in real or tangible personal property in this State; or
  - (ii) A business, trade, profession, or occupation carried on in this State; or
  - (iii) In the case of a shareholder of an S corporation, the ownership of shares issued by such corporation, to the extent determined under W. Va. Code § 11-21-37.
- (b) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, constitutes income derived from West Virginia sources only to the extent that the income is from property employed in a business, trade, profession, or occupation carried on in this State.
- (c) Deductions with respect to capital losses and net operating losses must be based solely on income, gain, loss, and deduction derived from or connected with West Virginia sources, determined under regulations of the Tax Commissioner, but otherwise determined in the same manner as the corresponding federal deductions.
- (d) The deduction allowed by IRC § 215 of the Internal Revenue Code, relating to alimony, does not constitute a deduction derived from West Virginia sources.

(2) *Income and deductions partly from West Virginia sources:* If a business, trade, profession, or occupation is carried on partly within and partly without this State, as determined under regulations of the Tax Commissioner, the items of income, gain, loss, and deduction derived from or connected with West Virginia sources is determined by apportionment and allocation under those regulations. (W. Va. Code § 11-21-32.)

(3) *Items not in federal distributable net income:* There is added to or subtracted (as the case may be) the amount derived from or connected with West Virginia sources of any income, gain, loss and deduction which would be included in the determination of federal adjusted gross income if the estate or trust were an individual and which is recognized for federal income tax purposes, but excluded from the definition of federal distributable net income of the estate or trust. The source of such income, gain, loss, and deduction is determined in accordance with the applicable rules of W. Va. Code § 11-21-32 as in the case of a nonresident individual.

*Items in distributable net income from West Virginia sources:* Income of an estate or trust and the related deductions, to the extent they are West Virginia source items, are taxable in West Virginia. Nonresident estates or trusts with both West Virginia source income and non-West Virginia source income must allocate the income. An item of income, gain, loss, or deduction is considered derived from or connected with West Virginia sources when any such item is attributable to the ownership by the estate or trust of any interest in real or tangible personal property in this State or when the item

is attributable to a business, trade, profession, or occupation carried on in this State by the estate or trust.

*Items not in distributable net income:* The amount of any West Virginia connected items of income, gain, loss, and deduction recognized for federal income tax purposes but excluded from the federal definition of distributable net income, must be added to, or subtracted from, as the case may be, the estate's or trust's share of items reflected in distributable net income.

#### **¶ 403.4 Charitable Deductions**

The West Virginia charitable deduction for nonresident estates or trusts is carried over from the federal tax return, except that a nonresident estate or trust is limited to the extent that the contribution must be made to a West Virginia charity or to this State or a political subdivision thereof, so that West Virginia source income may only be offset by contributions to West Virginia charities.

#### **¶ 403.5 West Virginia Taxable Income of Resident Estate of Trust**

*Law:* W. Va. Code § 11-21-18; WVCSR § 110-21-18

The West Virginia taxable income of a resident estate or trust is its federal taxable income for the taxable year as defined in the laws of the United States for the taxable year, with the following modifications:

- (1) There is subtracted \$600 as the West Virginia personal exemption of the estate or trust, and there is added the amount of its federal deduction for a personal exemption.
- (2) There is added or subtracted, as the case may be, the share of the estate or trust in the West Virginia fiduciary adjustment determined under W. Va. Code § 11-21-19.
- (3) There is added to federal adjusted gross income, unless already included therein, the amount of a lump sum distribution for which the taxpayer has elected under IRC § 402(e) to be separately taxed for federal income tax purposes:
- (4) An electing small business trust as defined in IRC § 1361(e) which is a shareholder in one or more electing small business corporations, must add the portion of the trust's income attributable to electing small business corporation stock held by the trust that is not included in the trust's federal taxable income pursuant to IRC § 641.

#### **¶ 403.6 Lump Sum Distribution**

*Law:* W. Va. Code § 11-21-18(3)

The amount of a lump sum distribution for which the taxpayer has elected under IRC § 402(e) to be separately taxed for federal income tax purposes must be added to federal adjusted gross income.

### **¶ 403.7 Fiduciary Adjustment**

*Law:* W. Va. Code § 11-21-19; WVCSR § 110-21-19

In general, the fiduciary adjustment is the net of all addition modifications and subtraction modifications of the estate or trust. The same modifications available for the West Virginia individual income tax return are available for the fiduciary income tax return. This fiduciary adjustment is then allocated between the beneficiaries and the estate or trust. In general, the percentage share of each beneficiary and of a fiduciary of an estate or trust in the West Virginia fiduciary adjustment is equal to the percentage share of the beneficiary and of the fiduciary in the federal distributable net income of the estate or trust. If the federal distributable net income of the estate or trust for the taxable year is zero or a negative figure, the share of each beneficiary in the West Virginia fiduciary adjustment is in proportion to his share of the income of the estate or trust for the taxable year, determined under local law or the governing instrument. The beneficiary's share of such income consists of the amount thereof which is required to be distributed to him during the taxable year, or which is distributed to him during the taxable year although not required to be distributed currently. Any balance of the West Virginia fiduciary adjustment not so allocable to the beneficiary is allocable to the estate or trust. If any of the fiduciary adjustment is allocable to the fiduciary, it is added to or subtracted from the income of the fiduciary.

*Special rule where estate or trust has no federal distributable net income:* When the federal distributable net income of an estate or trust for the taxable year is zero or a negative number, the share of each beneficiary in the West Virginia fiduciary adjustment is in proportion to his or her share of the income of the estate or trust for the taxable year, determined under local law or the governing instrument. The beneficiary's share of such income consists of the amount thereof which is required to be distributed to him or her during the taxable year, or which is distributed to him or her during the taxable year although not required to be distributed currently. Any balance of the West Virginia fiduciary adjustment not so allocable to the beneficiary is allocable to the estate or trust. (WVCSR § 110-21-19.3.)

*Alternative apportionment of West Virginia fiduciary adjustment between the estate or trust and its beneficiaries:* When the methods of apportionment discussed above will not result in a fair and equitable apportionment of the West Virginia fiduciary adjustment, the fiduciary may, upon application to the Tax Commissioner, adopt and use on a return for the taxable year of the estate or trust, any other method which is equitable, subject to such terms and conditions as the State Tax Commissioner may require. (WVCSR § 110-21-19.4.)

No alternative method will be approved that results in the inclusion in the West Virginia adjusted gross income of the beneficiary an amount greater than the amount of estate or



trust income paid, credited, or required to be distributed to the beneficiary for the taxable year. (WVCSR § 110-21-19.4.1.)

Any fiduciary whose alternative method of apportionment is approved by the Tax Commissioner must attach to the West Virginia fiduciary income tax return for the particular year a signed statement containing a summary of the facts relied upon and used to support the position that the alternative allocation, rather than the general rule for allocation, is fair and equitable. (WVCSR § 110-19-4.2.)

#### **¶ 403.8 Exemption for Estates or Trusts**

*Law: W. Va. Code § 11-21-18(1)*

The West Virginia personal exemption for all estates or trusts (regardless of whether it is simple, complex or the final return) is \$600.

#### **¶ 403.9 Rate of Tax**

*Law: W. Va. Code § 11-21-4e*

The following tax rate schedule applies to all estates and trusts:

<b>If taxable income is:</b>		<b>the tax is:</b>
<b>Over</b>	<b>But not over</b>	
\$0	\$10,000	2.36% of the taxable income
\$10,000	\$25,000	\$236 plus 3.15% of excess over \$10,000
\$25,000	\$40,000	\$708.50 plus 3.54% of excess over \$25,000
\$40,000	\$60,000	\$1,239.50 plus 4.72% of excess over \$40,000
\$60,000		\$2,183.50 plus 5.12% of excess over \$60,000

#### **¶ 403.10 Computation of Tax on Income of Nonresident Estates and Trusts**

*Law: W. Va. Code § 11-21-30*

Income tax due on income derived from West Virginia sources by a nonresident, estate or trust is computed in the following manner:

- (1) The tax liability is first computed as if the estate or trust were a West Virginia resident to determine what is known as the tentative tax.
- (2) The amount of tentative tax determined under (1), above, is then multiplied by the quotient of West Virginia source income of the nonresident estate or trust divided by federal adjusted gross income.
- (3) The product of the computation under paragraph (2), above, is the West Virginia income tax liability of the nonresident estate or trust for the taxable year.

#### **¶ 403.11 West Virginia Source Income of Nonresident Estate or Trust**

*Law: W. Va. Code § 11-21-38; WVCSR § 110-21-38*

In general, the West Virginia source income of a nonresident estate or trust is determined as follows:

*Items in distributable net income:* A nonresident estate or trust determines its share of income, gain, loss, and deduction from West Virginia sources under W. Va. Code § 11-21-39 (relating to items entering into the definition of distributable net income). See ¶ 471 below.

*Items not in distributable net income:* A nonresident estate or trust adds to or subtracts (as the case may be) the amount derived from or connected with West Virginia sources of any income, gain, loss and deduction which would be included in the determination of federal adjusted gross income if the estate or trust were an individual and which is recognized for federal income tax purposes, but excluded from the definition of federal distributable net income of the estate or trust. The source of this income, gain, loss, and deduction is determined in accordance with the applicable rules of W. Va. Code § 11-21-32, as in the case of a nonresident individual. See ¶ 401.19 above.

*Special West Virginia source rules:* Deductions with respect to capital losses and net operating losses are based solely on income, gains, losses, and deductions derived from or connected with West Virginia sources, under regulations of the Tax Commissioner, but otherwise determined in the same manner as the corresponding federal deductions.

#### **¶ 403.12 Share of Nonresident Estate, Trust, or Beneficiary in W. Va. Source Income**

*Law:* W. Va. Code § 11-21-39; WVCSR § 110-21-39

In general, the share of a nonresident estate or trust determined under W. Va. Code § 11-21-38(a)(1) and the share of a nonresident beneficiary of any estate or trust determined under W. Va. Code § 11-21-32(a) in estate or trust income, gain, loss, and deduction from West Virginia sources is determined as follows:

*Items of distributable net income from West Virginia sources:* First there is determined the items of income, gain, loss and deduction, derived from or connected with West Virginia sources, which would be included in the determination of federal adjusted gross income if the estate or trust were an individual and which enter into the definition of federal distributable net income of the estate or trust for the taxable year including those items from another estate or trust of which the first estate or trust is a beneficiary. Determination of source of the income, gain, loss, or deduction is made in accordance with the applicable rules of W. Va. Code § 11-21-32 as in the case of a nonresident individual.

*Allocation among estate or trust beneficiaries:* The amounts determined under the preceding paragraph are allocated among the estate or trust and its beneficiaries (including, solely for the purposes of this allocation, resident beneficiaries) in proportion to their respective shares of federal distributable net income.

The amounts so allocated have the same character for West Virginia income tax purposes as they have for federal income tax purposes. When an item entering into the computation of these amounts is not characterized for federal income tax purposes, the item has the same character as if realized directly from the source from which realized by the estate or trust or incurred in the same manner as incurred by the estate or trust.

*Alternative methods of determining shares:*

If the estate or trust has no federal distributable net income for the taxable year, the share of each beneficiary (including, solely for the purposes of this allocation, resident beneficiaries) in the net amount determined under the preceding paragraphs shall be in proportion to the beneficiary's share of the estate or trust income for such year, under local law or the governing instrument, which is required to be distributed currently and any such other amounts of income distributed for the taxable year. Any balance of the amounts is allocated to the estate or trust.

The Tax Commissioner may, on written application filed on or before the due date of the West Virginia fiduciary return for the taxable year, determined without regard to any extension of time for filing the return, authorize use of such other methods of determining the representative shares of the beneficiaries and of the estate or trust in its income derived from West Virginia sources, and the modifications related thereto, as may be appropriate and equitable, on such terms and conditions as the Tax Commissioner may require.

The Tax Commissioner may allow the use of other methods of determining the respective shares of the beneficiaries and of the estate or trust in its income derived from West Virginia sources, and the modifications related thereto, if such other methods are fair and equitable to all parties concerned, and if a full disclosure of the adopted method is made to the Tax Commissioner. (WVCSR § 110-21-39.2.1.)

**¶ 403.13 Fiduciary Income Tax Returns**

*Law:* W. Va. Code § 11-21-51; WVCSR § 110-21-51

Fiduciary returns must be filed on or before the 15th day of the fourth month following the close of the taxable year for:

- (1) Every resident estate or trust required to file a federal income tax return for the taxable year or having any West Virginia taxable income for the taxable year as determined under W. Va. Code § 11-21-18 and WVCSR § 110-21-18.
- (2) Every nonresident estate or trust having items of income or gain derived from West Virginia sources, determined in accordance with W. Va. Code § 11-21-32 and the applicable rules of WVCSR § 110-21-32 as in the case of a nonresident individual, in excess of its \$600 West Virginia exemption.

The fiduciary may make and file a composite income tax return for those nonresident beneficiaries that elect to join in the filing of the composite return. For additional information on composite returns, see ¶ 401.28 above. When a composite return is timely filed, the taxes remitted with the composite return satisfy the fiduciary's requirement to withhold and remit the withholding tax discussed in ¶ 402.6 above.

#### **¶ 403.14 Resident and Nonresident Qualified Funeral Trust**

A qualified funeral trust (QFT) is a domestic trust that meets all of the following requirements:

- (1) The trust arose as a result of a contract with a person engaged in the trade or business of providing funeral or burial services or property to provide those services;
- (2) The sole purpose of the trust is to hold, invest, and reinvest funds in the trust and to use those funds solely to pay for funeral or burial services or property to provide funeral or burial services for the benefit of the beneficiaries of the trust;
- (3) The only beneficiaries are individuals for whom funeral or burial services or properties are to be provided at their death under the contracts described above;
- (4) The only contributions to the trust are contributions by or for the benefit of the beneficiaries of the trust; the trustee makes or previously made the election to treat the trust as a QFT;
- (5) The trust would have been treated as owned by the purchasers of the contracts under the grantor trust provisions of the Internal Revenue Code if the QFT election had not been made.

*Qualified Funeral Trust filing requirements:* The trustee of a qualified funeral trust files Form IT-141 marked as QFT. This return is required when the Federal 1041-QFT is filed under IRC § 685, which permits certain trusts to elect Qualified Funeral Trust status.

*Qualified Funeral Trust Composite Return:* A trustee may file a single, composite Form IT-141 for all qualified funeral trusts of which he or she is the trustee by marking the IT-141 as a Qualified Funeral Trust Composite. Generally, a qualified funeral trust included in a composite return must have the calendar year as its tax year. However, the return may also include a qualified funeral trust that terminated during the tax year, resulting in a short tax year, provided the tax year of the qualified funeral trust would have been the calendar year (before termination) and the composite return is filed no later than the due date of the return for the short tax year.

The trustee of a QFT must maintain and make available to the State Tax Division, upon request, a schedule to a composite form IT-141 for each qualified funeral trust (or

separate interest if treated as a separate qualified funeral trust). The schedule information must include, for each qualified funeral trust, the name of the owner or beneficiary and, if the trust has more than one beneficiary, the apportioned shares for each beneficiary; the type and gross amount of each type of income earned by the qualified funeral trust for the tax year; the type and amount of each deduction and credit allocable to the QFT; the tax payments for each QFT; the termination date if the QFT was terminated during the year.

#### **¶ 403.15 Resident and Non-resident Electing Small Business Trusts (ESBT)**

A resident or nonresident electing small business trust (ESBT) as defined by § 1361(e)(1) of the Internal Revenue Code of 1986, as amended, that is a shareholder in one or more S corporations must make an addition to the federal taxable income base for any income attributable to stock held by the trust that is not included in the trust's federal taxable income pursuant to IRC § 641(c). W. Va. Code § 11-21-30(b)(3)

#### **¶ 403.16 Estate and trusts - declaration and payment of estimated taxes**

An estate or trust is generally taxed as an individual but is not required to file a declaration of estimated tax or remit estimated tax in installment payments during the taxable year. Beneficiaries of estates and trusts must file declarations of estimated tax in their capacities and must take into consideration their estimated distributive shares of income from estates and trusts. WVCSR § 110-21-55.1.6.

#### **¶ 404 Partnership Returns**

##### **¶ 404.1 Filing Requirements**

*Law:* W. Va. Code §§ 11-21-3(b) and 11-21-58(b)

Prior to tax years beginning January 1, 2022, West Virginia did not impose an income tax at the partnership level. SB 151, passed during the 2023 Regular Legislative Session, created an elective pass-through entity tax which was retroactive to tax years beginning on or after January 1, 2022. The pass-through entity tax is not mandatory but can be elected on a year-by-year basis. The elective pass-through entity tax is discussed in greater detail later in paragraph 404.9. All resident partnerships and nonresident partnerships with either income connected with West Virginia sources or partners who are West Virginia residents are required to file annual returns with the State Tax Division. If, however, a federal partnership return is not required for a taxable year, then a West Virginia partnership return is not required. Partnerships file form PTE-100 West Virginia Income Tax Return – S Corporations & Partnership (Pass-Through Entity). The return is due two and one-half months after the partnership's year end. Obtaining an extension for filing the federal partnership return automatically extends the due date for filing the State partnership return.

Note: Partnerships were previously subject to the West Virginia business franchise tax, which is discussed in chapter 2 of this Guidebook. This tax was phased out over a

period of years and does not apply for taxable years beginning on or after January 1, 2015.

#### **¶ 404.2 Partnership Income and Deductions**

*Law:* W. Va. Code § 11-21-17; WVCSR 110-21-17

*Resident partnerships:* The income and deductions of a resident partnership, except items reported separately on the federal return, are listed as they are reported on the federal return. Separately stated income and deductions and a schedule of modifying items is provided for federal/West Virginia difference. For each partner, the name, address, social security number, ownership percentage and share of income and deductions must be listed.

The West Virginia resident partnership return reports ordinary income and deduction items and separately states items much as they are reported on the federal return. Partners' names, addresses, and deductions are listed on a single schedule. No separate schedule for each partner, like the federal Schedule K-1, is required.

*Nonresident partnerships:* Nonresident partnerships report amounts allocated to West Virginia. An allocation schedule is provided with the return for net income not specifically allocable to West Virginia or any state.

#### **¶ 404.3 “Resident” and “Nonresident” Partnership Defined**

A resident partnership is one organized under the laws of West Virginia whose principal office, place of business or other activity is within West Virginia regardless of the fact that it may also conduct its business in other states. A nonresident partnership is any partnership that is not a resident partnership.

#### **¶ 404.4 Direct Allocation of Income and Deductions -- in General**

*Law:* W. Va. Code § 11-24-7

When a partnership has income derived from or connected with both West Virginia and non-West Virginia sources, its income and deductions must be allocated. Those items of income and deduction that can be directly allocated by reason of their connection with income-producing property should be directly allocated. However, since the partnership income tax return and the partnership business franchise tax return have been combined, that return requires the income of a partnership from multistate business activity to be apportioned using the partnership's apportionment factor for business franchise tax purposes.

#### **¶ 404.5 Allocation and Apportionment -- Multistate Businesses**

*Law:* W.Va. Code § 11-21-37a.

In 2021, the Legislature made several changes to the West Virginia apportionment methodology for C corporations, and HB4410 from the 2022 regular legislative session

extended the same rules to flow-through entities. For tax years beginning on and after January 1, 2022, income of flow-through entities shall be allocated and apportioned in the same manner and to the same extent as the income of C corporations, with income apportioned pursuant to application of a single sales factor. See W.Va. Code § 11-21-37a for flow through entity apportionment and W.Va. Code § 11-24-7 for C Corporation apportionment. Additionally, the “throwout rule” has been repealed and sales of services or other intangibles will follow market-based sourcing rules.

For taxable years beginning on or after January 1, 2022, West Virginia uses a single sales factor formula. Under the formula, the numerator includes sales occurring in West Virginia and the denominator includes sales occurring everywhere. For sales on which a pass-through entity does not pay tax in any state, those sales should not be included in the numerator but remain in the denominator.

For taxable years beginning before January 1, 2022, the income of most flow-through entities was apportioned using three factor apportionment. For taxpayers other than motor carriers and financial organizations, after the direct allocation of certain nonbusiness income, the remaining adjusted federal taxable income is apportioned by multiplying by a fraction, the numerator of which is the sum of the property factor plus the payroll factor plus two times the sales factor, and the denominator of the fraction is four. Where any fraction has a numerator of zero and a denominator of other than zero, the factor is deemed to be zero, *i.e.*,  $0/100 = 0$ . (WVCSR § 110-24-7.3.a.) In cases where a factor has a denominator of zero, the denominator of the apportionment formula fraction is decreased by the number of factors having zero. If the sales factor denominator is zero, then the apportionment fraction denominator is decreased by two. The following formula is applicable:

$$\text{Taxable income subject to apportionment} \quad \times \quad \frac{\text{Property factor} + \text{payroll factor} + (2 \times \text{sales factor})}{4} = \text{Apportioned taxable income}$$

*Property factor:* The property factor is a fraction, the numerator of which is the average value of the taxpayer’s real and tangible personal property owned or rented and used by the taxpayer within West Virginia during the taxable year, and the denominator is the average value of all real and tangible personal property owned or rented and used by the taxpayer during the taxable year. The formula is as follows:

$$\text{Property factor} = \frac{\text{Average value of real and tangible personal property in W.Va.}}{\text{Average value of all real and tangible personal property}}$$

The average value of all real and tangible personal property is taken from the taxpayer’s federal income tax return, Schedule L. The average value of property is determined by averaging the values at the beginning and end of the taxable year. However, in cases where there are substantial fluctuations during the year, the Tax Commissioner may require the taxpayer to average monthly values. For purposes of determining the average value of property, original cost is to be used. Property that is not owned, but rented by the taxpayer, is valued at eight times the net annual rental rate.

Rent includes all amounts payable under the lease arrangement in situations where a rental agreement obligates the lessee to pay for such items as interest, taxes, insurance, repairs, etc., as is typically found in a triple net lease. Leasehold improvements are considered property for purposes of apportionment, even if the improvements revert to the lessor upon termination of the lease.

For purposes of determining the property factor as it relates to movable tangible personal property used within and without West Virginia, the value of the movable property is determined by multiplying the original cost of such property by a fraction, the numerator of which is the number of days the movable property has a physical presence in West Virginia and the denominator of which is the number of days of physical presence everywhere during the taxable year. Days of physical location can be determined by statistical methods or any other reasonable basis acceptable to the Tax Commissioner. The following formula is appropriate:

$$\text{Value of movable Property} = \text{Cost of movable property in W.Va. during any part of year} \times \frac{\text{Days within W.Va.}}{\text{Days everywhere}}$$

*Payroll factor.* The payroll factor is a fraction, the numerator of which is the total compensation paid in West Virginia during the taxable year, and the denominator of which is the total compensation paid by the taxpayer to all employees regardless of domicile as reflected on the taxpayer's federal income tax return. The formula follows:

$$\text{Payroll Factor} = \frac{\text{Payroll in W.Va.}}{\text{Total payroll}}$$

For purposes of the payroll factor, compensation typically means all wages and other forms of remuneration paid to employees for personal services that are reportable on federal Forms W-2. Payments made to independent contractors or to individuals who are not deemed employees for federal income tax purposes are not considered compensation for purposes of the payroll factor.

Compensation is deemed paid in West Virginia and is considered as a part of the numerator in the payroll factor if the employee's services are either:

- (1) Performed entirely within West Virginia; or
- (2) Performed both within and without this State, but the services performed without West Virginia are incidental to the employee's services within this State; or
- (3) Performed both within and without West Virginia and one of the following elements is present:
  - (a) The employee's base of operations is located within West Virginia; or



- (b) The employee has no base of operations, but the employee is directed or controlled from a location within West Virginia; or
- (c) There is no base of operations in any state in which some of the employee's services are performed and the employee's residence is located within West Virginia.

*Sales factor.* The sales factor is a fraction, the numerator of which is the gross receipts of the taxpayer derived from normal business transactions and activities within West Virginia, net of any returns and allowances. The denominator of the fraction is the total gross receipts derived by the taxpayer from its normal business activities and reflected as gross income on its federal income tax return. Below is the applicable formula:

$$\text{Sales Factor} = \frac{\text{Gross receipts from activities within W.Va.}}{\text{Total gross receipts}}$$

Prior to January 1, 2022, the West Virginia net income tax includes a throwout rule, with respect to the sales factor. A throwout rule eliminates from the denominator of the sales factor (i) all destination sales to those states in which the taxpayer transacts no business, (ii) sales to those states where no business is subject to a corporation income tax, franchise tax, or corporation stock tax, or (iii) where the destination state lacks jurisdiction to impose a corporation net income tax, irrespective of whether such state imposes such tax. (WVCSR § 110-24-7.7.g.)

Gross receipts typically means gross income and not gross profit or net income, and it includes all interest income, service charges, carrying charges, federal and state excise taxes (including sales taxes) passed on to the buyer. (WVCSR § 110-24-7.7.a.2.A.) Accordingly, no reduction for cost of goods sold or other expenses (except returns and allowances) shall be subtracted in arriving at gross receipts. If business income includes interest from governmental obligations exempt from taxation by West Virginia, such amounts shall be excluded from the numerator and denominator.

If a taxpayer departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, it must disclose such information by attaching a statement to the West Virginia corporation income tax return, setting forth the nature and effect of the change. (WVCSR § 110-24-7.7.b.)

*Sale of tangible personal property:* Sales of tangible personal property are deemed attributable to West Virginia under either of the following conditions:

- (1) The property is delivered or shipped to a purchaser, other than the United States government, who is located within the State of West Virginia. The f.o.b. point or other conditions of sale are irrelevant for this purpose. West Virginia sales include delivery to a third party within West Virginia, even if the product is then delivered outside West Virginia.
- (2) The tangible property is shipped from a West Virginia location and the purchaser is the United States government.

In situations where a taxpayer sells tangible personal property to a purchaser located within a state in which the taxpayer is not taxed, then such sales shall be excluded from the denominator of the sales factor.

*Sales of other than tangible property:* In cases where the taxpayer's business activities consist of sales other than sales of tangible personal property, the sales are considered West Virginia transactions if either:

- (1) The income-producing activity is performed within West Virginia;
- (2) The income-producing activity is performed both within and without West Virginia and a greater proportion of the income-producing activity is performed within West Virginia as compared to any other state based on the cost of the performance of the service or sale (WVCSR § 110-24-7.7.h.1.); or
- (3) The sale constitutes business income to the taxpayer, or the taxpayer is a financial organization subject to special apportionment rules.

*Alternative apportionment methods:* In situations where either the taxpayer or the Tax Commissioner believes the statutory allocation and apportionment provisions do not fairly represent the extent of a taxpayer's business activities in West Virginia, the taxpayer may petition or the Tax Commissioner may require, with respect to all or part of the taxpayer's business activities: (1) separate accounting; (2) the exclusion of one of the factors; (3) the inclusion of one or more additional factors; or (4) the use of any other method, including a unitary basis in order to equitably allocate or apportion the taxpayer's income. Taxpayers (including public utilities) desiring approval to use an alternative method of allocation must file a petition with the Tax Commissioner no later than the *original* due date (without regard to any extension) of the annual West Virginia corporation income tax return. (W. Va. Code § 11-24-7(h)(1).)

#### **¶ 404.6 Special Allocations Between Partners**

*Law:* W. Va. Code § 11-21-17(c)

When a partnership agreement provides for a special allocation among the partners of any item of income or deduction that is held to have as its principal purpose the avoidance or evasion of West Virginia income tax, the provision must be disregarded, and each partner's share of the pertinent item must be determined in accordance with his or her share of the partnership's ordinary income or loss.

Whether the principal purpose of a special allocation of an item is the avoidance or evasion of West Virginia income tax depends on all the surrounding facts and circumstances. Among the relevant circumstances to be considered are the following:

- (1) Whether the partnership or a partner individually has a business purpose for the allocation;
- (2) Whether the allocation has “substantial economic effect,” that is, whether the allocation may actually affect the dollar amount of the partners’ shares of the total partnership income or loss independently of West Virginia income tax consequences;
- (3) Whether the related items of income, gain, loss, or deduction from the same source are subject to the same allocation;
- (4) Whether the allocation was made without recognition of normal business factors and only after the amount of the specially allocated item could reasonably be estimated;
- (5) The duration of the allocation; and
- (6) The overall tax consequences of the allocation.

#### **¶ 404.7 Modifications of Federal Adjusted Gross Income**

*Law:* W. Va. Code § 11-21-17(a)

Partnership income for federal tax purposes may be subject to certain modifications for West Virginia tax purposes and the distributive share of each partner. Some of these modifications increase and others decrease federal adjusted gross income.

##### *Increasing modifications:*

- (1) Interest income on obligations of any state or its political subdivisions other than West Virginia;
- (2) Interest or dividend income on securities of any United States instrumentality that is exempt from federal but not West Virginia income tax;
- (3) State or local income taxes to the extent they are treated as deductions on the federal return, including the new West Virginia elective passthrough entity tax; and
- (4) Interest on indebtedness to purchase or *carry* exempt securities.

##### *Decreasing modifications:*

- (1) Interest income on United States obligations or securities of United States instrumentalities to the extent included in federal taxable income; and
- (2) Refunds of any state or local income tax to the extent included in federal taxable income.

(3) Qualified Opportunity Zone business income.

(4) Allowance for governmental obligations secured by residential property.

#### **¶ 404.8 Exemptions and Credits**

Because the partnership is not an income tax-paying entity, there are no exemptions or credits available at the partnership level. In most but not all cases, credits flow through to partners in the same manner as distributive share income.

#### **¶ 404.9 Elective Pass-Through Entity Tax**

*Law: W. Va. Code § 11-21-3a; WVCSR 110-21G (proposed)*

SB 151 (2023 Regular Legislative Session) creates an elective pass-through entity tax retroactive to Tax Year 2022. This new pass-through entity tax is meant to comply with the provisions of IRS Notice 2020-75. The new pass-through entity tax is applicable to both partnerships and S corporations.

The elective pass-through entity tax is a tax imposed directly upon the income of the entity, defined as the resident pass-through entity owners' income plus the apportioned nonresident pass-through entity owners' income. The pass-through entity tax is filed and paid instead of the nonresident withholding due with PTE-100. Any entity that elects to pay the pass-through entity tax will no longer be obligated to file the PTE-100. The electing pass-through entity must file Form EPT-100 directly on the West Virginia MyTaxes website.

Once the form for electing to pay the tax at the entity level is filed, the election is binding for that taxable year. The election is binding on all owners.

The elective pass-through entity tax is calculated at the top marginal rate for individuals. This rate is 6.5% for 2022 and 5.12% for 2023.

For Tax Year 2023, the election is due on or before March 15<sup>th</sup> or by the extended due date. Under Administrative Notice 2023-01, a special rule applies to Tax Year 2022 that requires the election be made between June 8 and September 15, 2023.

Electing pass-through entities may be eligible for credits, deductions, or other modifications as provided for by West Virginia law. The elective pass-through entity may also claim a credit for income taxes paid to another state, although this only applies to taxes paid by the electing entity and not those paid directly by their partners or shareholders. The credit for taxes paid to other states is reported on Schedule ITP which must be uploaded as an attachment to Form EPT-100. The pass-through entity should complete a separate Schedule ITP for each state for which a credit is claimed.

An electing pass-through entity's calculation of its pass-through entity taxable income must include all items of gain, loss, and deduction, to the extent they would flow through and be included in the income of resident owners. West Virginia residents are taxable on all their pass-through entity income regardless of the entity's allocation and apportionment. As noted in the preceding paragraph, this amount may be reduced by taxes paid to other states by the electing pass-through entity. Regarding nonresident owners, the electing passthrough entity would only include the items of income or loss, as adjusted by any applicable increasing or decreasing modifications, directly attributable to West Virginia.

An electing pass-through entity can exclude income from the calculation of pass-through entity taxable income to the extent it can establish that the amount is properly allocable to an owner who is not subject to tax on such amount under West Virginia Code §11-21-1 *et seq.* Some of examples of this include income that is not U.S. sourced and is allocable to a nonresident alien partner or shareholder and retirement income of former partners that is exempt from nonresident state taxation under 4 U.S.C. §114.

Every electing pass-through entity must provide Schedule EK-1, Schedule of WV Partner/Shareholder/Member/Beneficiary Elective Pass-through Entity Income Credit to its owners on or before the date it files Form EPT-100. Individual taxpayers must enclose the Schedule EK-1 supplied by the electing pass-through entity when filing their West Virginia personal income tax return.

An electing pass-through entity may not file a composite return on behalf of its nonresident owners. If a nonresident owner's only West Virginia source income is through an electing pass-through entity, that nonresident owner is not required to file a West Virginia personal income tax return but may do so at the owner's election.

Estimated payments are required for the electing pass-through entity tax. For tax year 2022, no estimated payments were required, but the liability was required to be paid in full either by the individual pass-through entity owners or by the entity itself by April 18, 2023. For tax year 2023, the first three quarters of estimated payment were due by September 15<sup>th</sup>, 2023, and the final quarter is due by December 15<sup>th</sup>. For tax year 2024 and beyond, the payments are due April 15<sup>th</sup>, June 15<sup>th</sup>, September 15<sup>th</sup>, and December 15<sup>th</sup>.

## **¶ 405 S Corporation Returns**

### **¶ 405.1 Summary and Filing Requirements**

*Law:* W. Va. Code §§ 11-24-5(d) and 11-24-13b

*Comparable Federal:* IRC §§ 1361 and 1362

A small business corporation that elects under IRC § 1362 to be treated under Subchapter S of the Internal Revenue Code is known as an S corporation.

Prior to tax years beginning January 1, 2022, West Virginia did not impose an income tax at the S corporation level. SB 151, passed during the 2023 Regular Legislative Session, created an elective pass-through entity tax which was retroactive to tax years beginning on or after January 1, 2022. The pass-through entity tax is not mandatory but can be elected on a year-by-year basis. The elective pass-through entity tax is discussed in greater detail in paragraph 404.9. All resident S corporations and all nonresident S corporations having either income connected with West Virginia sources or shareholders who are West Virginia residents are required to file annual information returns with the State Tax Division.

The S corporation information return and the S corporation business franchise tax return have been combined. S corporations doing business in this State or deriving income from this State are required to file form PTE-100 West Virginia Income Tax Return – S Corporations & Partnership (Pass-Through Entity). An S corporation must file this return with the State Tax Commissioner on or before the 15<sup>th</sup> day of the third month following the close of the taxable year. See W. Va. Code § 11-24-13b. Obtaining an extension of time for filing the federal S corporation return automatically extends the due date for filing Form PTE-100.

The penalty for failure to timely file a required information return or for filing an information return that is not complete or provides incorrect information is \$50 per return. This penalty is imposed by and administered under the W. Va. Code § 11-10-19a. See chapter 9 of this Guidebook.

Note: S corporations were previously subject to the West Virginia business franchise tax, which is discussed in chapter 2 of this Guidebook. This tax was phased out over a period of years and does not apply for taxable years beginning on or after January 1, 2015.

#### **¶ 405.2 “Resident” and “Nonresident” S Corporations Defined**

A resident S corporation is one that is recognized as an S corporation for federal purposes for the taxable year, is organized under the laws of West Virginia and whose principal office, place of business or other activity is within West Virginia, regardless of the fact that it may also conduct its business in other states. A nonresident S corporation is any S corporation that is not a resident S corporation.

#### **¶ 405.3 S Corporation Income and Deductions**

*Resident S corporations:* The West Virginia taxable income of a resident S corporation is the same as is reported on the federal return. All shareholders’ names, addresses, social security numbers, ownership percentage and amount of distributions are listed.

Shareholders’ names, addresses, and distributions are listed on a single schedule. No separate schedule for each shareholder, like the federal Schedule K-1, is required.

*Nonresident S corporations:* The West Virginia source income of a nonresident S corporation is the amount reported on the federal return that is allocated or apportioned to West Virginia. An allocation schedule is provided for net income not specifically allocable to West Virginia or any state. This allocation, discussed below, is based on a three-factor formula that is weighted 25% property, 25% salaries and 50% sales.

#### **¶ 405.4 Direct Allocation of Nonbusiness income and Deductions**

*Law:* W. Va. Code § 11-24-7

When an S corporation has income derived from or connected with both West Virginia and non-West Virginia sources, its income and deductions must be allocated. Those items of income and deduction that can be directly allocated by reason of their connection with income-producing property should be directly allocated. This direct allocation is the same as for purposes of the corporation net income tax which is discussed in Chapter 1, ¶ 107.

#### **¶ 405.5 Allocation and Apportionment of Business Income and Deductions**

If items of income and deduction are applicable to business carried on within West Virginia and at least one other state, then they shall be indirectly allocated by multiplying the items by a fraction, the numerator of which is the property factor plus the payroll factor plus twice the sales factor and the denominator of which is four. See ¶ 404.5 above.

#### **¶ 405.6 Modifications of Federal Adjusted Gross Income**

*Law:* W. Va. Code § 11-21-6

S corporation income for federal tax purposes may be subject to certain modifications for West Virginia tax purposes and the distributive share of each shareholder. These modifications increase and others decrease federal adjusted gross income in the same manner as the adjustments for the corporation net income tax discussed in Chapter 1, ¶ 105 and 106.

#### **¶ 405.7 Exemptions and Credits**

Because the S corporation is not an income tax-paying entity, there are no exemptions or credits available at the S corporation level. However, S corporations doing business in West Virginia or deriving income from West Virginia sources are subject to the business franchise tax. Several tax credits are allowed against the business franchise tax. Unused credits frequently, but not always, flow through to shareholders of S corporations in the same manner as distributive share.

#### **¶ 406 Procedure and Administration**

##### **¶ 406.1 Procedure and Administration**

*Law:* W. Va. Code § 11-21-95

The West Virginia Tax Procedure and Administration Act codified in W. Va. Code § 11-10-1 *et seq.* is applicable to the personal income tax as it relates to individuals, trusts and estates, partnerships, S corporations and withholding agents. For additional information about this Act, see chapter 9 of this Guidebook.

The West Virginia Tax Crimes and Penalties Act codified in W. Va. Code § 11-9-1 *et seq.* applies to the West Virginia Personal Income Tax Act. (W. Va. Code § 11-9-2.)

## **¶ 406.2 Overpayments of West Virginia Income Taxes**

*Law:* W. Va. Code §§ 11-10-11, 11-10-14 and 11-10-17

A signed annual return showing an overpayment of West Virginia income tax constitutes a claim for refund. The Tax Commissioner has six months within which to determine whether to grant or deny the claim for refund in whole or in part. If the refund is granted or the overpayment is established as a credit within this 6-month period, no interest is paid by the Tax Commissioner on the amount of the overpayment.

If a claim for refund is denied in whole or in part, the taxpayer may file a petition for refund with the West Virginia Office of Tax Appeals. See chapter 9 of this Guidebook for additional information regarding claims for refund and petitions for refund.

*Intercept of refund or credit:* Whenever a taxpayer has overpaid his or her West Virginia income tax, the Tax Commissioner may reduce the amount of the refund or credit by the amount of any tax collected by the Tax Commissioner, whether it be the same tax or a different tax, that is owed by the taxpayer.

*Agreements with IRS:* The Tax Commissioner may offset State tax refunds against federal tax liabilities just as the IRS may offset federal tax refunds against West Virginia income tax liabilities. At the times moneys are received because of an offset of a taxpayer's federal tax refund under the provisions of IRC § 6402(e), the taxpayer is given credit against state tax liability for the amount of the offset less a deduction for the offset fee imposed by the Internal Revenue Service. The amount of the offset fee imposed by the Internal Revenue Service is then added to the taxes, interest and penalties owed by the taxpayer to this State.

*Municipal costs offset program:* The Tax Commissioner may withhold or deny personal income tax refunds from taxpayers who owe municipal costs, fines, forfeitures, or penalties in excess of \$50. Taxpayers may appeal to the Office of Tax Appeals within 60 days of receipt of the Tax Commissioner's notice of withholding or denial of taxpayer's refund or credit. An injured spouse is not subject to withholding under the refund offset program if (1) a joint return was filed; (2) the separate tax liabilities of both spouses could be reasonably determined and each spouse's proportional share of the refund could be allocated accordingly; and (3) it is inequitable to hold the injured spouse accountable for the obligation of the other, for which the refund is being withheld. (WVCSR §§ 110-40-1; through 10-40-6.)



*Intercept for delinquent child support:* The Tax Commissioner is required to intercept a State income tax refund upon notice from the Child Support Enforcement Division of the Department of Health and Human Resources that the taxpayer owes delinquent child support. (W. Va. Code § 48-18-118(a).)

Before issuing the notice to intercept to the Tax Commissioner the Child Support Enforcement Division must:

- (1) Examined the obligor's pattern of payment of support and the obligee's likelihood of successfully pursuing other enforcement actions; and
- (2) Have determined that the amount of past-due support that will be owed, when support is withheld, will be \$100 or more. (W. Va. Code §48-18-118(b).)

### **¶ 406.3 Interest and Additions to Tax**

*Law:* W. Va. Code §§ 11-10-17, 11-10-18, and 11-10-18a

Interest and additions to tax are imposed on underpayments of West Virginia personal income tax, including underpayments of estimated tax, pursuant to provisions of the West Virginia Tax Procedure and Administration Act, W. Va. Code § 11-10-1 *et seq.* These provisions are discussed in Chapter 9 of this Guidebook. For information on the addition to tax for under payment of estimated tax, see ¶ 401.25 above.

### **¶ 406.4 Penalties for abusive tax shelters and failure to report listed transactions**

*Law:* W. Va. Code § 11-10-18(f)

A penalty is imposed on every person who engages in activities promoting abusive tax shelters described in IRC § 6700(a), or any subsequent corresponding provisions of the Internal Revenue Code, as from time to time amended, and who is subject to a penalty imposed under IRC § 6700, whether or not the penalty has been imposed, where such activities affect tax returns required to be filed with the Tax Commissioner.

The amount of the West Virginia penalty is equal to 50% of the gross income derived from activities by the person who is subject to the penalty under IRC § 6700(a)(2)(A) for making a false or fraudulent statement; and shall be the lesser of \$1,000 or 100% of the gross income when the activity is subject to that penalty under IRC § 6700(a)(1).

When a return is audited and it appears that any part of the deficiency for which an assessment is made is due to failure to disclose a listed transaction or a reportable transaction other than a listed transaction, as the terms are defined in IRC § 6707A on the taxpayer's federal income tax return, there is imposed a penalty, which in the case of a unreported listed transaction is equal to 75% of the amount of the deficiency, and, in the case of other reportable transactions, is equal to 35% of the amount of the deficiency.

Except as otherwise provided in rules of the Tax Commissioner, these penalties are in addition to any other penalty imposed by the West Virginia Tax Procedure and Administration Act or the Tax Shelter Voluntary Compliance Program.

#### **¶ 406.5 Innocent Spouse Relief**

*Law:* W. Va. Code § 11-10-11(k)

A spouse is relieved of liability for delinquent personal income taxes in certain cases, under regulations prescribed by the Tax Commissioner, if:

- (1) A joint personal income tax return was made for a taxable year;
- (2) On the return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse;
- (3) The other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was a substantial understatement; and
- (4) Taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for the taxable year attributable to the substantial understatement, then the other spouse is relieved of any liability for tax, including interest, additions to tax, and other amounts for the taxable year to the extent the liability is attributable to the substantial understatement.

The term “grossly erroneous items” means, with respect to any spouse:

- (1) Any item of gross income attributable to a spouse which is omitted from gross income; and
- (2) Any claim of a deduction, credit, or basis by a spouse in an amount for which there is no basis in fact or law.

Innocent spouse relief is available only when:

- (1) There is a “substantial understatement” of tax. For this purpose, the term “substantial understatement” means any understatement, as defined in regulations prescribed by the Tax Commissioner which exceeds \$500.
- (2) The understatement exceeds the amounts specified in paragraphs (a) and (b), below, and complies with the requirements of paragraphs (c), (d) and (e) below.
  - (a) *W. Va. adjusted gross income of \$20,000 or less:* If the innocent spouse’s West Virginia adjusted gross income for the readjustment year is \$20,000 or less, the innocent spouse relief applies only if the understated liability is greater than 10% of the adjusted gross income of the innocent spouse.

- (b) *W. Va. adjusted gross income of more than \$20,000*: If the innocent spouse's West Virginia adjusted gross income for the readjustment year is more than \$20,000, the innocent spouse relief applies only if the understated liability is greater than 25% of the adjusted gross income of the innocent spouse.
- (c) As used in paragraphs (a) and (b) above, the term "readjustment year" means the most recent taxable year of the spouse ending before the date the deficiency notice was mailed.
- (d) If the innocent spouse is married to another spouse at the close of the readjustment year, the innocent spouse's adjusted gross income includes the income of the new spouse whether or not they file a joint return.
- (e) Innocent spouse relief is not available for any liability attributable to the omission of an item from gross income.

## ¶ 406.6 Forms and Schedules

The State Tax Division's website has many of the forms, schedules, instructions, and publications mentioned in this chapter. These documents are in PDF format that taxpayers may download, and some forms are fill-in versions. These forms can be accessed at <https://tax.wv.gov/>.

<b>Form No.</b>	<b>Name of Form</b>
WV/RC REV 1-08	Certification of Exemption from Withholding upon Disposition of West Virginia Real Estate Affidavit of Residence or Principal Residence
IT-100.1A	Employers Withholding Tax Tables - Booklet
IT-101A	Employer's Annual Return of Income Tax Withheld
IT-101Q	Employer's Quarterly Return of Income Tax Withheld –Form and Instructions
IT-101-V	Employer's West Virginia Income Tax Withheld
IT-102-1	Affidavit of West Virginia Income Tax Withheld by Employer
IT-103	Withholding Year End Reconciliation
IT-104	West Virginia Employee's Withholding Exemption Certificate / Certificate of Nonresidence
IT-104.1	Low-Income Earned Income Exclusion Election Out-Of-State Withholding Instructions
IT-105	Electronic Media Specifications W-2
IT-105.1	Electronic Media Specifications for 1099 and W-2G
IT-140	Personal Income Tax Forms (Web fill-in version)
IT-140	Personal Income Tax Forms and Instructions
IT-140-ES	Individual Estimated Income Tax Payment: Instructions
IT-140-NRC	Nonresident Composite Return

IT-140-V	Individual Income Tax Electronic Payment Voucher & Instructions
IT-141	Fiduciary Income Tax Return
IT-210	Underpayment of Estimated Tax by Individuals
IT-210	Underpayment of Estimated Tax by Individuals (Web fill-in version)
NRAE	Application for Certificate of Full or Partial Exemption
NRER	West Virginia State Tax Division Application for Early Refund of Withholding on Sales of Real Property by Nonresidents
NRSR	West Virginia State Tax Division Return of Income Tax Withholding for Nonresident Sale of Real Property
NRW-1	Extension of Time to File Information Returns
NRW-2	Statement of West Virginia Income Tax Withheld for Non-resident Individual or Organization
NRW-3	Information Report of 761 Non partnership Ventures
NRW-4	Non-resident Income Tax Agreement
OPT-1	Taxpayer E-File Opt Out Form
RC	Certification of Exemption from Withholding upon Disposition of West Virginia Real Estate Affidavit of Residence or Principal Residence
PTE-100	West Virginia Income/Business Franchise Tax Return – S Corporations and Partnership (Pass-Through Entity)
WV/IT-104	West Virginia Employee's Withholding Exemption Certificate West Virginia Certificate of Nonresidence
WV-4868	Application for Extension of Time to File
WV-945-V	Backup Withholding Payment Voucher
WV-8379	Injured Spouse Allocation

## **Schedules**

Family Tax Credit Tables and Low Income / Earned Income Exclusion Worksheets	
Sch A	Nonresidents / Part-Year Residents Schedule of Income
Sch F	Statement of Claimant to Refund Due Deceased Taxpayer
Sch FTC-1	Family Tax Credit Schedule
Sch H & E	Certification for Permanent and Total Disability and Credit for Income Tax Paid to Another State
Sch HEPTC-1	Homestead Excess Property Tax Credit
Sch J	Military Incentives Credit
Sch M	Modifications to Adjusted Gross Income
Sch UT	Purchaser's Use Tax Schedule
RECAP	Tax Credit Recap Schedule
AFTC-1	Alternative-Fuel Tax Credit
AG-1	Environmental Agricultural Equipment Tax Credit
ATTC-1	Apprenticeship Training Tax Credits
CCGP-1	Conceal Carry Gun Permit Training Credit
EOTC-PIT	Economic Opportunity Tax Credit Claims Against Personal Income Tax
NFA-1	Non-family Adoption Credit Schedule
NIPA-2	Neighborhood Investment Program Credit Schedule
RBIC	Historic Rehabilitated Building Investment Credit

**¶ 406.7 Place for Filing Returns and Other Documents**

*Law: W. Va. Code § 11-21-52; WVCSR § 110-21-52*

Returns and other document due under the West Virginia Personal Income Tax Act by or for resident and nonresident individuals, partnerships, S corporations and resident and nonresident estates and trusts; may be electronically filed, hand delivered, or mailed to the West Virginia State Tax Division at the following addresses:

Applications for extension of time to file are mailed to:

Individual Returns

West Virginia State Tax Division  
Tax Account Administration  
P.O. Box 2585  
Charleston, WV 25329-2585

Partnerships and S Corporations

West Virginia State Tax Division  
Tax Account Administration  
P.O. Box 11751  
Charleston, WV 25339-1751

Declarations of estimated income tax and installment tax payments are filed electronically, or mailed to:

West Virginia State Tax Division  
Tax Account Administration  
P.O. Box 342  
Charleston, WV 25322-0342

Fiduciary income tax returns are filed electronically, or mailed to:

West Virginia State Tax Division  
Tax Account Administration  
P.O. Box 1071  
Charleston, WV 25324-1071

Individual income tax electronic payment vouchers are mailed to:

West Virginia State Tax Division  
Electronic Filing Office  
PO Box 11385  
Charleston, WV 25339-1385

Nonresident real property withholding tax forms and returns are mailed to:

West Virginia State Tax Division  
Tax Account Administration  
PO Box 784  
Charleston WV 25323-0784

Personal income tax returns claiming a refund are filed electronically, or mailed to:

West Virginia State Tax Division  
PO Box 1071  
Charleston, WV 25324-1071

Personal income tax returns showing a balance due are filed electronically, or mailed to:

West Virginia State Tax Division  
PO Box 3694  
Charleston, WV 25336-3694

Returns filed by partnerships and other pass-through entities are filed electronically, or mailed to:

West Virginia State Tax Division  
Tax Account Administration  
PO Box 11751  
Charleston, WV 25339-1751

West Virginia accepts returns filed electronically through the joint federal and state electronic filing program known as MeF. Additionally, the state permits taxpayers to electronically file their tax returns using their own computers and state approved software. Electronic filing procedures are set forth in a document titled "2019 West Virginia Modernized Electronic Filing Handbook." See *also* WVCSR § 110-10D-1 *et seq.*

Any taxpayer that has a total annual remittance for any single tax that is equal to or greater than \$50,000 for a taxable year beginning after December 31, 2012, must electronically file the annual return. This \$50,000 threshold is reduced to \$25,000 for taxable years beginning after December 31, 2013, and to \$10,000 for taxable years beginning after December 31, 2014. For tax years beginning on or after January 1, 2016, the threshold amount reverts back to \$25,000, and for tax years beginning on or after

January 1, 2019, the threshold is \$50,000. See W. Va. Code § 11-10-5z(a) and WVCSR § 110-10D-9.3.a.

#### **¶ 406.8 State Tax Division Publications**

The Tax Commissioner publishes several informational publications, called Taxpayer Services Division (TSD) publications, regarding taxes and tax programs administered by the State Tax Division. These publications are posted at the State Tax Division's website. A complete list of TSDs may be found in the introductory materials to this Guidebook. The following publications are relevant to the West Virginia personal income tax:

TSD 110	West Virginia Tax Credits
TSD-380	Requirements for Rehabilitated Building Investment Credit
TSD-380A	Residential Historic Rehabilitated Building Investment Credit
TSD-381	Withholding Tax Information for Employers
TSD-389	Withholding Requirements for Sales of Real Property by Nonresidents
TSD-390	Income Tax Withholding By Partnerships, S Corporations, Estates and Trusts
TSD-411	Senior Citizens Tax Credit`
TSD-413	West Virginia Tax Tips for Senior Citizens
TSD-418	Helpful Tips on Filing Your Personal Income Tax Return
TSD-432	Gambling Winnings and Losses
TSD-436	Requests for Waiver of Electronic Filing and Payment Requirements
TSD-440	Pension Income of Retired Federal Law Enforcement and Federal Firefighter Personnel – Dawson v. Steager
TSD-443	Personal Income Tax of Military Servicemembers
TSD-454	Motor Vehicle Property Tax Adjustment Credit

#### **¶ 406.9 State Tax Division Rules and Regulations**

Administrative regulations are called administrative rules. Rules may be interpretive, legislative, or procedural. Duly promulgated legislative rules have the force and effect of law. A state agency may promulgate a legislative rule only after the Legislature has reviewed and authorized its promulgation. Under limited circumstances emergency legislative rules may be promulgated that are later reviewed by the Legislature. Upon the filing of an emergency rule or the filing of an amendment to an emergency rule by an agency, the Secretary of State is required to review the rule or the amendment and, within 42 days of the filing of the rule or amendment, must issue a decision as to whether or not the emergency rule or the amendment to an emergency rule should be disapproved. The Secretary of State is required to disapprove an emergency rule or an amendment to an emergency rule if he or she determines:

- (1) That the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; or

- (2) That an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or
- (3) That the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of W. Va. Code § 29A-3-15.

Regulations mentioned in this chapter are posted at the webpages of the Secretary of State <https://www.sos.wv.gov>. The regulations are in the Administrative Law Section of the webpage, under "Search for Rules." On the next screen select "Code of State Rules." The agency issuing the rules mentioned in this chapter is the Tax Division. These rules include:

Abusive Tax Shelters <http://WVCSR 110-10J-1> et seq.  
Combined Returns (e.g. BFT & PIT) <http://WVCSR 110-10K-1> et se.  
Obtaining Child Support From Income Tax Refunds <http://WVCSR 93-03-1> et seq.  
Payment of Taxes by Credit or Debit Card <http://WVCSR 110-10B-1> et seq.  
Payment of Taxes by Electronic Funds Transfer <http://WVCSR 110-10F-1> et seq.  
Personal Income Tax <http://WVCSR 110-21-1> et seq.  
Personal Income Tax Low Income Exclusion <http://WVCSR 110-21.1-1> et seq.  
Senior Citizens Credit for Property Taxes Paid <http://WVCSR 110-21B-1> et seq.  
Residential Solar Energy Tax Credit <http://WVCSR 110-21D-1> et seq.  
Use and Acceptance of Electronic Records <http://WVCSR 110-10D-1> et seq.  
Withholding Or Denial Of Personal Income Tax Refunds from Taxpayers Who Owe Municipal Costs, Fines, Forfeitures Or Penalties <http://WVCSR 110-40-1> et seq.



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