

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 249**

4 (By Senators McCabe, Browning, Unger, Jenkins, Foster, Wells,
5 Stollings, Klempa, Miller and Kessler (Acting President))

6 _____
7 [Originating in the Committee on Economic Development;
8 reported February 7, 2011.]
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10
11 A BILL to amend the Code of West Virginia, 1931, as amended, by
12 adding thereto a new article, designated §11-13BB-1, §11-13BB-
13 2, §11-13BB-3, §11-13BB-4, §11-13BB-5, §11-13BB-6, §11-13BB-7,
14 §11-13BB-8 and §11-13BB-9; and to amend said code by adding
15 thereto a new section, designated §11-24-9d, all relating to
16 taxation; providing a phased-in allowance of credits against
17 corporation net income tax and personal income tax for
18 payments in this state of ad valorem property tax on certain
19 industrial tangible personal property consisting of machinery
20 and equipment; and allowing a transitional credit against the
21 portion of a taxpayer's corporation net income tax relating to
22 the change to combined reporting, with the amount of the
23 credit being measured by the taxpayer's payments in this state
24 of ad valorem property tax on certain industrial tangible
25 personal property consisting of machinery and equipment.

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

1 That the Code of West Virginia, 1931, as amended, be amended
2 by adding thereto a new article, designated §11-13BB-1, §11-13BB-2,
3 §11-13BB-3, §11-13BB-4, §11-13BB-5, §11-13BB-6, §11-13BB-7, §11-
4 13BB-8 and §11-13BB-9; and that said code be amended by adding
5 thereto a new section, designated §11-24-9d, all to read as
6 follows:

7 **ARTICLE 13BB. THE WEST VIRGINIA MANUFACTURING COMPETITIVENESS AND**
8 **GROWTH ACT.**

9 **§11-13BB-1. Short title.**

10 This article shall be known and cited as the "West Virginia
11 Manufacturing Competitiveness and Growth Act".

12 **§11-13BB-2. Definitions.**

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

18 (b) *Terms defined.* --

19 (1) "Affiliate" means and includes all persons, as defined in
20 this section, which are affiliates of each other when either
21 directly or indirectly:

22 (A) One person controls or has the power to control the other;
23 or

24 (B) A third party or third parties control or have the power
25 to control two persons, the two thus being affiliates. In

1 determining whether concerns are independently owned and operated
2 and whether or not an affiliation exists, consideration shall be
3 given to all appropriate factors, including common ownership,
4 common management and contractual relationships.

5 (2) "Attributable tax" means the portion of tax that would
6 actually be imposed on an eligible taxpayer in a tax year under
7 article twenty-one or article twenty-four of this chapter, after
8 applying any other credits, operating losses and other increasing
9 and reducing modifications, which tax is directly attributable to
10 the taxpayer's conduct of, or ownership in an entity engaged in the
11 conduct of, a manufacturing business in this state.

12 (3) "Commissioner" or "Tax Commissioner" means the Tax
13 Commissioner of the State of West Virginia or the Tax
14 Commissioner's delegate.

15 (4) "Corporation" means any corporation, joint-stock company
16 or association and any business conducted by a trustee or trustees
17 wherein interest or ownership is evidenced by a certificate of
18 interest or ownership or similar written instrument.

19 (5) "Delegate", when used in reference to the Tax
20 Commissioner, means any officer or employee of the Tax Division of
21 the Department of Revenue duly authorized by the Tax Commissioner
22 directly, or indirectly by one or more redelegations of authority,
23 to perform the functions mentioned or described in this article.

24 (6) "Eligible taxpayer" means any person engaged in a
25 manufacturing business the income of which is subject to the tax
26 imposed under article twenty-one or article twenty-four of this

1 chapter. "Eligible taxpayer" also means and includes the persons
2 who are owners of an eligible taxpayer that is a limited liability
3 company, small business corporation, or a partnership, that is
4 engaged in a manufacturing business, the income of which is subject
5 to the tax imposed under article twenty-one or article twenty-four
6 of this chapter, or both, and also includes those persons who are
7 members of an affiliated group of taxpayers engaged in a unitary
8 business, in which one or more members of the affiliated group is
9 a person whose income is subject to the tax imposed under article
10 twenty-one or article twenty-four of this chapter, or both.
11 Affiliates not engaged in the unitary business do not qualify as
12 eligible taxpayers.

13 (7) "Limited liability company" means any entity that is a
14 foreign limited liability company or a limited liability company as
15 those terms are defined in section one, article one, chapter
16 thirty-one-b of this code.

17 (8) "Manufacturing business" means a business activity
18 classified as having a sector identifier, consisting of the first
19 two digits of the six-digit North American Industry Classification
20 System code number of thirty-one, thirty-two or thirty-three.

21 (9) "Manufacturing machinery and equipment" means and includes
22 all tangible personal property consisting of machinery and
23 equipment that is classified for West Virginia ad valorem property
24 tax purposes as industrial property as defined in section ten,
25 article one-c of this chapter, and is used in this state by a
26 person engaged in a manufacturing business.

1 (10) "Natural person" or "individual" means a human being.

2 (11) "Partnership" and "partner" means and includes a
3 syndicate, group, pool, joint venture or other unincorporated
4 organization through or by means of which any business, financial
5 operation or venture is carried on and which is not a trust or
6 estate, a corporation or a sole proprietorship. The term "partner"
7 includes a member in a syndicate, group, pool, joint venture or
8 organization.

9 (12) "Person" means and includes any natural person,
10 corporation, limited liability company or partnership.

11 (13) "Related entity", "related person", "entity related to"
12 or "person related to" means:

13 (A) An individual, corporation, partnership, affiliate,
14 association or trust or any combination or group thereof controlled
15 by the taxpayer;

16 (B) An individual, corporation, partnership, affiliate,
17 association or trust or any combination or group thereof that is in
18 control of the taxpayer;

19 (C) An individual, corporation, partnership, affiliate,
20 association or trust or any combination or group thereof controlled
21 by an individual, corporation, partnership, affiliate, association
22 or trust or any combination or group thereof that is in control of
23 the taxpayer; or

24 (D) A member of the same controlled group as the taxpayer. For
25 purposes of this article, "control", with respect to a corporation,
26 means ownership, directly or indirectly, of stock possessing fifty

1 percent or more of the total combined voting power of all classes
2 of the stock of the corporation which entitles its owner to vote.
3 "Control", with respect to a trust, means ownership, directly or
4 indirectly, of fifty percent or more of the beneficial interest in
5 the principal or income of the trust. The ownership of stock in a
6 corporation, of a capital or profits interest in a partnership,
7 limited liability company or association or of a beneficial
8 interest in a trust shall be determined in accordance with the
9 rules for constructive ownership of stock provided in Section
10 267(c) of the United States Internal Revenue Code, as amended:
11 *Provided*, That paragraph (3), Section 267(c) of the United States
12 Internal Revenue Code shall not apply.

13 (14) "Tax year" or "taxable year" means the tax year of the
14 taxpayer for federal income tax purposes.

15 (15) "Taxpayer" means any person subject to the tax imposed
16 under article twenty-one or twenty-four of this chapter.

17 (16) "Unitary business" means a unitary business as defined in
18 section three-a, article twenty-four of this chapter.

19 **§11-13BB-3. Eligibility for tax credits; creation of the credit.**

20 There shall be allowed to every eligible taxpayer a credit
21 against the taxes imposed under articles twenty-one and twenty-four
22 of this chapter, as determined under this article.

23 **§11-13BB-4. Amount of credit allowed.**

24 (a) *Credit allowed.* -- Eligible taxpayers shall be allowed a
25 credit against the taxes imposed under article twenty-one or

1 twenty-four of this chapter, the amount and application of which
2 shall be determined as provided in this article.

3 (b) *Amount of credit.* -- The amount of credit allowed to an
4 eligible taxpayer shall be equal to the amount of West Virginia ad
5 valorem property tax which the eligible taxpayer shall have paid in
6 this state in the tax year with respect to manufacturing machinery
7 and equipment, reduced by the amount of credit, if any, the
8 eligible taxpayer may have been allowed under section nine-d,
9 article twenty-four of this chapter and shall have actually applied
10 in the tax year against its liability for tax under article twenty-
11 four of this chapter, multiplied by the credit percentage
12 applicable to the taxpayer in the tax year and multiplied by the
13 phase-in percentage applicable to the tax year, all as provided in
14 this section.

15 (c) *Credit percentage.* -- For purposes of this section, the
16 credit percentage shall be one hundred percent in the case of an
17 eligible taxpayer whose liability in a tax year for attributable
18 tax, before application of the credit provided in this section, is
19 less than \$50,000; the credit percentage shall be sixty percent in
20 the case of an eligible taxpayer whose liability in a tax year for
21 attributable tax, before application of the credit provided in this
22 section, is at least \$50,000, but less than \$100,000 and the credit
23 percentage shall be forty percent in the case of an eligible
24 taxpayer whose liability in a tax year for attributable tax, before
25 application of the credit provided in this section, is \$100,000 or
26 more: *Provided,* That in the tax year beginning in calendar year

1 2015, the credit percentage for an eligible taxpayer whose
2 liability for attributable tax, before application of the credit
3 provided in this section is as least \$50,000 but less than
4 \$100,000, shall be increased to eighty percent, and the credit
5 percentage for an eligible taxpayer whose liability for
6 attributable tax, before application of the credit provided in this
7 section, is \$100,000 or more, shall be increased to sixty percent:
8 *Provided, however,* That in the tax year beginning in calendar year
9 2016, the credit percentage for an eligible taxpayer whose
10 liability for attributable tax, before application of the credit
11 provided in this section is at least \$50,000, but less than
12 \$100,000, shall be increased to one hundred percent, and the credit
13 percentage for an eligible taxpayer whose liability for
14 attributable tax, before application of the credit provided in this
15 section, is \$100,000 or more, shall be increased to eighty percent:
16 *Provided further,* That for every tax year beginning in or after
17 calendar year 2017, the credit percentage for any eligible taxpayer
18 shall be one hundred percent.

19 (d) *Phase-in percentage.* -- For purposes of this section, the
20 phase-in percentage applicable to an eligible taxpayer's tax year
21 beginning in the calendar year 2012, shall be twenty-five percent;
22 the phase-in percentage applicable to an eligible taxpayer's tax
23 year beginning in the calendar year 2013, shall be fifty percent;
24 the phase-in percentage applicable to an eligible taxpayer's tax
25 year beginning in the calendar year 2014, shall be seventy-five
26 percent and the phase-in percentage applicable to an eligible

1 taxpayer's tax years beginning in the calendar year 2015, and
2 thereafter, shall be one hundred percent.

3 **§11-13BB-5. Application of annual credit allowance.**

4 (a) *Application of credit against corporate net income tax.* --

5 The credit allowed shall be applied to reduce the attributable tax
6 liabilities of an eligible taxpayer for the current tax year
7 imposed by article twenty-four of this chapter: *Provided*, That in
8 any taxable year, the amount of credit applied by an eligible
9 taxpayer pursuant to this subsection shall not exceed the amount of
10 the taxpayer's remaining liability for all tax imposed by article
11 twenty-four of this chapter after the amount of that liability has
12 been reduced on account of any other credit or credits allowed and
13 applied against that liability.

14 (b) *Application of credit against personal income tax.* --

15 After application of subsection (a) of this section, any unused
16 credit is then applied to reduce the attributable tax liabilities
17 of an eligible taxpayer for the current tax year imposed by article
18 twenty-one of this chapter: *Provided*, That in any taxable year,
19 the amount of credit applied by an eligible taxpayer pursuant to
20 this subsection shall not exceed the amount of the taxpayer's
21 remaining liability for all tax imposed by article twenty-one of
22 this chapter after the amount of that liability has been reduced on
23 account of any other credit or credits allowed and applied against
24 that liability.

25 (c) *Carry forward of unused credits.* -- The amount of any

1 credit allowed by section four of this article, which is not
2 applied to reduce the taxpayer's liability for the tax imposed by
3 article twenty-one or by article twenty-four of this chapter in the
4 current tax year, may, until the allowed credit is exhausted, be
5 carried forward to, and applied in, subsequent tax years against
6 the taxpayer's liability for the attributable tax imposed by
7 article twenty-one or article twenty-four of this chapter, after
8 the taxpayer's total liability for tax imposed under either article
9 has been reduced on account of any other credit or credits
10 otherwise allowed and applied against that liability.

11 (d) *Annual schedule.* -- For purposes of asserting the credit
12 against tax, the taxpayer shall prepare and file an annual schedule
13 showing the amount of tax paid for the taxable year, the amount of
14 credit allowed, applied and carried forward under this article.
15 The annual schedule shall set forth the information and be in the
16 form prescribed by the Tax Commissioner.

17 **§11-13BB-6. Availability of credit to successors.**

18 (a) *Transfer or sale of assets.* --

19 (1) Where there has been a transfer or sale of the business
20 assets of an eligible taxpayer to a successor which subsequent to
21 the transfer constitutes an eligible taxpayer as defined in this
22 article, which continues to operate the manufacturing business in
23 this state, and which remains subject to the taxes prescribed under
24 article twenty-one or twenty-four of this chapter, the successor
25 eligible taxpayer is entitled to the credit allowed under this
26 article: *Provided,* That the successor taxpayer otherwise remains

1 in compliance with the requirements of this article for entitlement
2 to the credit.

3 (2) For any taxable year during which a transfer, or sale of
4 the business assets of an eligible taxpayer to a successor eligible
5 taxpayer under this section occurs, or a merger occurs pursuant to
6 which credit is allowed under this article, the credit allowed
7 under this article shall be apportioned between the predecessor
8 eligible taxpayer and the successor eligible taxpayer based on the
9 number of days during the taxable year that each taxpayer based and
10 the number of days during the taxable year that each taxpayer owned
11 the business assets transferred.

12 (b) *Entity purchases.* -- When an entity which is an eligible
13 taxpayer entitled to the credit allowed under this article is
14 purchased through a purchase of equity interests in the entity by
15 a new owner and the eligible taxpayer remains a legal entity so as
16 to retain its legal identity as such, the entitlement of that
17 entity and its owners to the credit allowed under this article will
18 not be affected by the ownership change: *Provided,* That the entity
19 otherwise remains in compliance with the requirements of this
20 article for entitlement to the credit.

21 (c) *Mergers.* --

22 (1) When an entity which is an eligible taxpayer entitled to
23 the credit allowed under this article is merged with another
24 entity, the surviving entity, and its owners in the case of a
25 limited liability company, small business corporation or
26 partnership, shall be entitled to the credit to which the

1 predecessor eligible taxpayer was originally entitled: *Provided,*
2 That the surviving entity otherwise complies with the provisions of
3 this article.

4 (2) The amount of credit available in any taxable year during
5 which a merger occurs shall be apportioned between the predecessor
6 eligible taxpayer and the successor eligible taxpayer or taxpayers
7 based on the number of days during the taxable year that each owned
8 the transferred business assets.

9 (d) No provision of this section or of this article shall be
10 construed to allow sales or other transfers of the tax credit
11 allowed under this article. The credit allowed under this article
12 can be transferred only in circumstances where there is a valid
13 successorship as described under this section.

14 **§11-13BB-7. Credit recapture; interest; penalties; additions to**
15 **tax; statute of limitations.**

16 (a) If it appears upon audit or otherwise that any person or
17 entity has taken the credit against tax allowed under this article
18 and was not entitled to take the credit, then the credit improperly
19 taken under this article shall be recaptured. Amended returns
20 shall be filed for any tax year for which the credit was improperly
21 taken. Any additional taxes due under this chapter shall be
22 remitted with the amended return or returns filed with the Tax
23 Commissioner, along with interest, as provided in section
24 seventeen, article ten of this chapter and such other penalties and
25 additions to tax as may be applicable pursuant to the provisions of
26 article ten of this chapter.

1 (b) Notwithstanding the provisions of article ten of this
2 chapter, penalties and additions to tax imposed under article ten
3 of this chapter may be waived at the discretion of the Tax
4 Commissioner: *Provided*, That interest is not subject to waiver.

5 (c) Notwithstanding the provisions of article ten of this
6 chapter, the statute of limitations for the issuance of an
7 assessment of tax by the Tax Commissioner shall be five years from
8 the date of filing of any tax return on which this credit was taken
9 or five years from the date of payment of any tax liability
10 calculated pursuant to the assertion of the credit allowed under
11 this article, whichever is later.

12 **§11-13BB-8. Report on credit.**

13 (a) The Tax Commissioner shall provide to the Joint Committee
14 on Government and Finance by July 1, 2013, and on July 1 of each
15 year thereafter, a report detailing the amount of credit claimed
16 pursuant to this article. The report is to include the amount of
17 credit claimed against the personal income tax and the amount of
18 credit claimed against the corporate net income tax.

19 (b) Taxpayers claiming the credit shall provide the
20 information as the Tax Commissioner may require to prepare the
21 report: *Provided*, That the information is subject to the
22 confidentiality and disclosure provisions of sections five-d and
23 five-s, article ten of this chapter.

24 **§11-13BB-9. Effective date.**

25 This article shall be effective for tax years beginning on or

1 after January 1, 2012.

2 **ARTICLE 24. CORPORATION NET INCOME TAX.**

3 **§11-24-9d. Transitional credit against portion of tax**
4 **attributable to adoption of combined reporting**
5 **for property tax paid on industrial tangible**
6 **personal property, consisting of machinery and**
7 **equipment.**

8 (a) *Definition.* -- For purposes of this section:

9 (1) "Combined reporting tax increase" means that portion of
10 the taxpayer's liability in a tax year for the amount of tax
11 imposed under this article without regard for the credit allowed by
12 this section, if any, that exceeds the amount of liability that the
13 taxpayer would otherwise have for tax imposed under this article,
14 without regard for the credit allowed by this section, in the tax
15 year but for the requirement that the taxpayer comply with the
16 provisions of section thirteen-a of this article relating to the
17 filing of combined reports by taxpayers engaged in a unitary
18 business with one or more other taxpayers.

19 (2) "Manufacturer" means persons engaged in a business
20 activity classified as having a sector identifier, consisting of
21 the first two digits of the six-digit North American Industry
22 Classification System Code number, of thirty-one, thirty-two or
23 thirty-three.

24 (b) *Credit allowed.* -- For the tax years beginning on or after
25 January 1, 2012, a credit shall be allowed against the tax imposed

1 on every manufacturer under this article in an amount to the lesser
2 of: (1) The amount of ad valorem property tax which the taxpayer
3 shall have paid in this state in the tax year with respect to
4 tangible personal property consisting of machinery and equipment,
5 that is classified for ad valorem property tax purposes as
6 industrial property as defined in section ten, article one-c of
7 this chapter; or (2) the portion of the taxpayer's combined
8 reporting tax increase for the tax year as determined in this
9 section. The portion of the combined reporting tax increase for
10 the tax year under this article is one hundred percent for the
11 taxable year beginning on and after January 1, 2012; fifty percent
12 for the taxable year beginning on and after January 1, 2013:
13 *Provided*, That no credit shall be allowed for the payment of ad
14 valorem property tax with respect to industrial property used to
15 extract, produce, process, handle, store or transport natural
16 resource products consisting of fossil fuels or fossil fuel
17 products during the course of their production as such which is
18 subject to the severance tax imposed under article thirteen-a of
19 this chapter: *Provided, however*, That in any taxable year, the
20 amount of credit allowed to, and applied by, the taxpayer pursuant
21 to this section shall not exceed the amount of the taxpayer's
22 remaining liability for the tax imposed by this article after the
23 amount of that liability has been reduced on account of any other
24 credit or credits allowed and applied against that liability,
25 except for any other credit which may be allowed and applied
26 against that liability, which is measured, entirely or in part, by

1 the taxpayer's liability for ad valorem property tax and which the
2 taxpayer shall have paid in this state in the tax year, with
3 respect to tangible personal property consisting of machinery and
4 equipment that is classified for ad valorem property tax purposes
5 as industrial property as defined in section ten, article one-c of
6 this chapter.

7 (c) *Carry forward of unused credits.* -- Except as expressly
8 provided in this section, the amount of any credit allowed by this
9 section, which is not applied to reduce the taxpayer's liability
10 for the tax imposed by this article in the current tax year, may,
11 until it is exhausted, be carried forward to, and applied in,
12 subsequent tax years against the taxpayer's liability for the tax
13 imposed by this article after that liability has been reduced on
14 account of any other credit or credits allowed and applied against
15 that liability, except for any other credit which may be allowed
16 and applied against that liability, which is measured, entirely or
17 in part, by the taxpayer's liability for ad valorem property tax
18 and which the taxpayer shall have paid in this state in the tax
19 year, with respect to tangible personal property consisting of
20 machinery and equipment that is classified for ad valorem property
21 tax purposes as industrial property as defined in section ten,
22 article one-c of this chapter: *Provided*, That the taxpayer shall
23 not be authorized to carry over any credit to any tax year starting
24 in or after the calendar year 2015.

25 (d) *Termination of credit.* -- The credit otherwise allowed by
26 this section shall not be allowed or applied to reduce any

1 liability for tax imposed under this article for any tax year
2 starting in or after the calendar year 2014.

NOTE: The purpose of this bill is to provide a phased-in credit against corporation net income tax and personal income tax for ad valorem property taxes paid in this state with respect to industrial tangible personal property consisting of machinery and equipment, and to provide a transitional credit against the portion of a taxpayer's corporation net income tax resulting from its use of combined reporting, the amount of the credit being measured by the lesser of the amount of ad valorem property taxes paid in the tax year by the taxpayer in this state with respect to industrial tangible personal property consisting of machinery and equipment or the amount of increased corporation net income tax paid due to combined reporting.

§11-13BB-1, §11-13BB-2, §11-13BB-3, §11-13BB-4, §11-13BB-5, §11-13BB-6, §11-13BB-7, §11-13BB-8, §11-13BB-9 and §11-24-9d are new; therefore, strike-throughs and underscoring have been omitted.