COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 449

(By Senators McCabe, Browning, Prezioso, Snyder, Klempa, Unger, Foster, Jenkins, Stollings, Plymale, Miller, Kessler (Acting President) and Wells)

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[Originating in the Committee on Economic Development; reported February 16, 2011.]

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A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §11-6L-1, §11-6L-2, §11-6L-3, §11-6L-4, §11-6L-5, §11-6L-6 and §11-6L-7; and to amend said code by adding thereto a new article, designated §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, §11-13BB-10, §11-13BB-11, §11-13BB-12, §11-13BB-13, §11-13BB-14, §11-13BB-15, §11-13BB-16, §11-13BB-17 and §11-13BB-18, all relating generally to the West Virginia Innovation Free Trade Act of 2011, consisting of the Twenty-First Century Business Technologies Property Valuation Act; specifying method for valuation of certain property; providing for application to county assessors by specified date; providing procedure for protest and appeal of determination by county assessor;

requiring the West Virginia Development Office to report to the Joint Committee on Government and Finance on the economic impact of such valuation beginning in 2016; specifying effective date; consisting of the West Virginia Twenty-First Century Tax Credit Act; providing short title; setting forth purpose and legislative findings; defining terms; allowing credit and exemption from certain taxes; providing for computation of credit, application of credit and period for which credit is allowed; requiring application to claim credit; requiring that new jobs be good-paying jobs with health benefits; requiring identification of investment credit property and recomputation of credit in event of premature disposition of investment property; providing for forfeiture of unused tax credits and redetermination of credit allowed; imposing recapture tax under specified circumstances to recover state taxes and property taxes; allowing transfer of qualified investment to successors; providing rules for interpretation and construction of act; providing for tax credit review and accountability; specifying effective date; and providing severability clause.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §11-6L-1, §11-6L-2, §11-6L-3, §11-6L-4, §11-6L-5, §11-6L-6 and §11-6L-7; and that said code be amended by adding thereto a new article, designated §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, §11-13BB-10, §11-13BB-11, §11-13BB-12, §11-13BB-13, §11-13BB-14, §11-13BB-15, §11-13BB-16, §11-13BB-17 and §11-13BB-18, all to read as follows:

ARTICLE 6L. SPECIAL METHOD FOR VALUATION OF TWENTY-FIRST CENTURY BUSINESS TECHNOLOGY PROPERTY.

§11-6L-1. Short title.

This article shall be known and cited as the "Twenty-First Century Business Technologies Property Valuation Act".

§11-6L-2. Definitions.

For the purposes of this article:

(1) "Salvage value" means five percent of original cost; and

(2) "Twenty-first century business technologies" means "twenty-first century business technologies" as defined in section three, article thirteen-bb of this chapter when the owner of the property qualifies or qualified for the tax credit allowed by that article. Qualifications for that tax credit and the special valuation methodology provided in this article include, but are not limited to, a minimum capital investment requirement, a minimum new jobs creation requirement and a requirement that the new jobs created be good paying jobs with health insurance benefits, all as defined in article thirteen-bb of this chapter.

§11-6L-3. Valuation of certain twenty-first century business technology property.

Notwithstanding any other provision of this code to the contrary, the value of tangible personal property directly used in a twenty-first century business technoloy shall, for the purpose of ad valorem property taxation under this chapter and under article X of the Constitution of this state, be its salvage value.

§11-6L-4. Initial determination by county assessor.

(a) On or before September 1 of the assessment year, the owner of tangible personal property directly used in a new business, or in a new segment of an existing business, that utilizes twenty-first century business technology and qualifies for the tax credit allowed by article thirteen-bb of this chapter may file a report with the county assessor of the county in which the property was located on July 1 of that assessment year, listing the tangible personal property that is qualified investment for purposes of the credit allowed by article thirteen-bb of this chapter. A taxpayer that fails to timely file the report required by this subsection shall be deemed to have waived valuation of the property as provided in this article for that assessment year.

(b) When the county assessor receives the report described in subsection (a) of this section, the assessor shall review the report and make such inquiries as he or she deems necessary to determine whether the tangible personal property listed in the report is eligible for valuation under this article. The county assessor shall notify the taxpayer in writing of his or her determination not later than January 15th of the assessment year.

(c) Upon making a determination that a taxpayer owns tangible personal property directly used in a twenty-first century business technology that is eligible for valuation under this article, the county assessor shall notify the Tax Commissioner of that determination and shall provide information to the Tax Commissioner as he or she requires relating to that determination.

§11-6L-5. Protest and appeal.

(a) If the taxpayer disagrees with the county assessor’s determination under section four of this article or if the assessor fails to notify the taxpayer of the assessor’s determination on or before the day specified in that section, the taxpayer may file objections in writing with the county assessor. The county assessor shall decide the matter by either sustaining the protest and making proper corrections, or by stating, in writing if requested, the reasons for the county assessor's refusal. The county assessor may, and if the taxpayer requests, the county assessor shall, before February 1 of the assessment year, certify the question to the Tax Commissioner in a statement sworn to by both parties, or if the parties are unable to agree, in separate sworn statements. The sworn statement or statements shall contain a full description of the property and any other information which the Tax Commissioner may require.

(b) The Tax Commissioner shall, as soon as possible on receipt of the question, but in no case later than February 28 of the assessment year, instruct the county assessor as to how the property shall be treated. The instructions issued and forwarded by mail to the county assessor are binding upon the county assessor, but either the county assessor or the taxpayer may apply to the circuit court of the county for review of the question of the applicability of this article to the property in the same fashion as is provided for appeals from the county commission in section twenty-five, article three of this chapter. The Tax Commissioner shall prescribe forms on which the questions under this section shall be certified and the Tax Commissioner has the authority to pursue any inquiry and procure any information necessary for disposition of the matter.

§11-6L-6. Report on economic benefit.

The West Virginia Development Office shall provide to the Joint Committee on Government and Finance by March 1, 2016, and again by March 1, 2019, a report detailing the economic benefit of the valuation method specified in this article. The report shall include the number of new jobs created due to the provisions of this article and the ad valorem property tax impact.

§11-6L-7. Effective date.

This article shall be effective on and after July 1, 2011.

ARTICLE 13BB. TWENTY-FIRST CENTURY TAX CREDIT.

§11-13BB-1. Short title.

This article may be cited as the "West Virginia Twenty-First Century Tax Credit Act."

§11-13BB-2. Purpose and legislative findings.

(a) *Purpose*. -- The purpose of this article is to encourage economic opportunity, greater capital investment and development of the use in this state of twenty-first century technologies by enacting the twenty-first century tax credit.

(b) *Legislative findings*. --

(1) Future expansion and development of the West Virginia economy, job creation potential, and the physical environment are driven by the flow of energy and the nonstop emergence of new technologies.

(2) State-of-the-art technologies are being developed, demonstrated, and manufactured or used in manufacturing in other states in order to support economic development by responding to the emergence of new technologies and the rapidly expanding world-wide export market for such technologies.

(3) West Virginia has been slow to recognize the potential economic and technical benefits of these emerging technologies.

(4) The Legislature finds that it is in public interest of the citizens of West Virginia to:

(A) Establish a foothold in the West Virginia economy for manufacturers of advanced products and the development of businesses employing other emerging technologies that are magnets for capital investment and produce new jobs that are characteristically knowledge-based;

(B) Encourage the application of nanotechnology and other supporting technology to:

(i) Aeronautics and space;

(ii) Agriculture;

(iii) Biotechnology;

(iv) Environment;

(v) Manufacturing and materials science;

(vi) Medicine and health;

(vii) Nanoelectronics and computer technology;

(viii) National and homeland security; and

(ix) Photonics; and

(C) Encourage the manufacture, sale and use of alternative fuel vehicles fueled by natural gas, electricity, hydrogen or other alternative fuel and development of the infrastructure necessary to the convenient and efficient refueling of such vehicles.

§11-13BB-3. Definitions.

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

(b) *Terms defined*. --

(1) “Advanced coal technology” includes, but is not limited to, a technology that is used in a new or existing energy generating facility to reduce airborne carbon emissions associated with the combustion or use of coal and includes, but is not limited to, carbon dioxide capture and sequestration technology, supercritical technology, advanced supercritical technology as that technology is determined by the West Virginia Public Service Commission, ultrasupercritical technology and pressurized fluidized bed technology and any other resource, method, project or technology certified by the Public Service Commission as advanced coal technology.

(2) “Advanced information technology” means the development, installation and implementation of computer systems and applications that utilize cloud computing, quantum computing or the next evolution beyond cloud and quantum computing.

(3) “Advanced manufacturing” means the application of state-of-the-art technologies, processes and methods to design and manufacture tangible personal property for commercial or industrial use or for use by consumers.

(4) “Bioinformatics” means the application of statistics and computer science to the field of molecular biology and entails the creation and advancement of databases, algorithms, computational and statistical techniques and theory to solve formal and practical problems arising from the management and analysis of biological data. The primary goal of bioinformatics is to increase the understanding of biological processes. What sets bioinformatics apart from other approaches is its focus on developing and applying computationally intensive techniques (e.g., pattern recognition, data mining, machine learning algorithms, and visualization) to achieve this goal.

(5) "Bioscience" means the use of compositions, methods and organisms in cellular and molecular research, development and manufacturing processes for such diverse areas as pharmaceuticals, medical therapeutics, medical diagnostics, medical devices, medical instruments, biochemistry, microbiology, veterinary medicine, plant biology, agriculture and industrial, environmental, and homeland security applications of bioscience, and future developments in the

biosciences. Bioscience includes biotechnology and life sciences.

(6) "Bioscience company" means a corporation, limited liability company, S corporation, partnership, registered limited liability partnership, foundation, association, nonprofit entity, business trust, group, or other entity that is engaged in the business of bioscience in this state and has business operations in this state, including, without limitation, research, development, or production directed towards developing or providing bioscience products or processes for specific commercial or public purposes and are identified by the following NAICS codes: 325411, 325412, 325413, 325414, 325193, 325199, 325311, 32532, 334516, 339111, 339112, 339113, 334510, 334517, 339115, 621511, 621512, 541710, 541380, 541940, 622110. “Bioscience company” does not include a sole proprietorship.

(7) “Biotechnology" means those fields focusing on technological developments in areas such as biocomputing, biodefense, bioinformatics, genetic engineering, genomics, molecular biology, nanotechnology, proteomics and physiomics.

(8) "Business" means any activity engaged in by any person in this state that is taxable under article twenty-one, twenty-three or twenty-four of this chapter (or any combination of those articles of this chapter).

(9) “Business segment” means a component or subset of a business enterprise that: (i) Provides a single product or service or a group of related products and services; (ii) is subject to risks and returns that are different from those of other business

segments; and (iii) earns revenue for the business enterprise.

(10) "Clean coal technology" means a technology first used commercially in the United States after December 31, 2010, that significantly reduces the environmental impact of coal usage including but not limited to coal gasification and carbon capture and storage.

(11) "Clean natural gas technology" means a technology first used commercially in the United States after December 31, 2010, that significantly reduces the environmental impact of natural gas.

(12) "Commissioner" and "Tax Commissioner" are used interchangeably herein and means the Tax Commissioner of the State of West Virginia, or his or her designee.

(13) “Compensation” means wages, salaries, commissions, the cost of health insurance benefits and any other form of remuneration paid to employees for personal services.

(14) “Controlled group” means one or more chains of corporations connected through stock ownership with a common parent corporation if stock possessing at least fifty percent of the voting power of all classes of stock of each of the corporations is owned directly or indirectly by one or more of the corporations; and the common parent owns directly stock possessing at least fifty percent of the voting power of all classes of stock of at least one of the other corporations.

(15) “Corporation” means any corporation, joint-stock company or association, and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certificate of

interest or ownership or similar written instrument.

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

(17) “Eligible taxpayer” means a new business or a new segment of a business that is primarily engaged in an emerging technology industry or that is primarily utilizing twenty-first century business technologies, that makes at least the minimum required qualified investment in a new or expanded business facility located in this state and creates the required number of new jobs that pay good salaries and provide health insurance benefits, and that is subject to any of the taxes imposed by articles twenty-one, twenty-three and twenty-four of this chapter (or any one or any combination of those articles).

(18) “Eligible taxpayer” means a new business or a new segment of a business that is primarily engaged in an emerging technology industry or that is primarily utilizing twenty-first century business technologies, that makes at least the minimum required qualified investment in a new or expanded business facility located in this state and creates the required number of new jobs that pay good salaries and provided health insurance benefits, and that is subject to any of the taxes imposed by articles twenty-one, twenty-three and twenty-four of this chapter (or any one or any

combination of those articles).

(19) “Emerging technologies” means technologies that are currently being developed or will be developed over the next five to ten years, that are significant technological developments that broach new territory in some significant way in their field and which will substantially alter the business and social environment. Examples of currently emerging technologies include, but are not limited to, advanced coal technologies, alternative fuel vehicles, artificial intelligence, biotechnology, clean coal and clean natural gas technologies, cognitive science, cloud computing, quantum computing, man-machine communications, nanotechnology, photonics, photovoltaic devices, and advanced robotics. Whether a technology is an emerging technology is determined as of the date the new business or a new segment of an existing business is placed in service or use in this state.

(20) “Expanded business facility” means any business facility (other than a new or replacement facility) resulting from the acquisition, construction, reconstruction, installation or erection of improvements or additions to existing property in this state when the improvements or additions are purchased on or after July 1, 2011, but only to the extent of the taxpayer's qualified investment in the improvements or additions and the extent to which the expansion of the business facility is directly used in a new segment of the taxpayer that primarily employs an emerging business technology or a twenty-first century business technology.

(21) "Health insurance benefits" means employer provided

coverage for medical expenses of the employee or the employee and his or her family under a group accident or health plan, or employer contributions to an Archer medical savings account, as defined in Section 220 of the Internal Revenue Code of 1986, as amended, or to a health savings account, as defined in Section 223 of the Internal Revenue Code, of the employee when the employer's contribution to any such account is not less than fifty percent of the maximum amount permitted for the year as employer-provided coverage under Section 220 or 223 of the Internal Revenue Code, whichever section is applicable.

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

(23) "Internal Revenue Code of 1986, as amended," or "Internal Revenue Code," means the United States Internal Revenue Code of 1986 as codified in Title 26 of the United States Code, as amended, and as defined in section three, article twenty-four of this chapter as last updated by the Legislature.

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

(25) "Life science" means any of several branches of science, such as biology, medicine, anthropology, or ecology, that deal with

living organisms and their organization, life processes, and relationships to each other and their environment.

(26) “Nanotechnology” means the branch of engineering that deals with things smaller than one hundred nanometers. Nanotechnology includes the materials and systems whose structures and components exhibit novel and significantly improved physical, chemical, and biological properties, phenomena, and processes due to their nanoscale size.

(27) “New business” means any business primarily employing emerging technology or a twenty-first century business technology whose ownership and activities are not closely related to a preexisting business. A mere change in the stock ownership of a corporation, or the equity ownership of a partnership or other entity treated as a partnership for federal income tax purposes, shall not affect its status as an exiting business. Additionally, a new business that acquires substantially all of the assets of a corporation or other business entity or of a sole proprietorship shall not be treated as a new business for purposes of this article. In determining whether or not a new business is closely related to a preexisting business, all facts and circumstances shall be considered by the Tax Commissioner. The existence of a majority of the following factors establish that a new business is closely related to an existing business:

(A) The new business’s products or services are very similar to the products or services provided by the preexisting business;

(B) The new business markets products and services to the same class of customers as that of the preexisting business;

(C) The new business is conducted in the same general location as the preexisting business;

(D) The new business requires the use of the same or similar operating assets as those used in the preexisting business;

(E) The new business's economic success builds on, or depends on, the success of the preexisting business;

(F) The activity of the new business is of a type that would normally be treated as a unit with the preexisting business in the accounting records of the preexisting business;

(G) If the new business and the preexisting business are regulated or licensed, they are regulated or licensed by the same or similar governmental authority; and

(H) Twenty percent or more of the equity of the new business is collectively owned by individuals and/or businesses that collectively owned more than fifty percent of the equity of the preexisting business.

These eight listed factors are not the only ones that may be considered by the Tax Commissioner. Others may also be taken into account, in the discretion of the Tax Commissioner. However, this definition shall not exclude the categorization of a business as a new business for the sole reason that the entity engaging in the new business already does business in the State of West Virginia.

(28) "New business facility" means a business facility located in this state which satisfies all the requirements of paragraphs (A), (B),(C) and (D) of this subdivision.

(A) The facility is employed by the taxpayer in a new business or in a new segment of an existing business, the conduct of a business, the net income of which is or will be taxable under article twenty-one or twenty-four of this chapter. The facility is not considered a new business facility in the hands of the taxpayer if the taxpayer's only activity with respect to the facility is to lease it to another person or persons;

(B) The facility is purchased by, or leased to, the taxpayer on or after July 1, 2011;

(C) The facility was not purchased or leased by the taxpayer from a related person: *Provided,* That the Tax Commissioner may waive this requirement if the facility was acquired from a related person for its fair market value and the acquisition was not tax motivated; and

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

(29) “New employee” means:

(A) A person residing and domiciled in this state, hired by the taxpayer to fill a position or a job in this state which previously did not exist in the taxpayer's business enterprise in this state prior to the date on which the taxpayer's qualified investment is placed in service or use in this state. The term “new employee” also includes a person employed by the taxpayer who works outside this state who relocates in this state, becomes domiciled in this state and is employed full-time at the new business facility in this state. In no case may the number of new employees directly attributable to the investment for purposes of this credit exceed the total net increase in the taxpayer's employment in this state: *Provided,* That the Tax Commissioner may require that the net increase in the taxpayer's employment in this state be determined and certified for the taxpayer's controlled group.

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

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

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

(II) "Permanent" does not include employment that is temporary or seasonal and therefore the wages, salaries and other compensation paid to the temporary or seasonal employees may not be considered for purposes of sections five and seven of this article; or

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

(30) “New job” means a job which did not exist in the business of the taxpayer in this state prior to the taxpayer's qualified investment being made, and which is filled by a new employee.

(31) “New property” means:

(A) Property, the construction, reconstruction or erection of which is completed on or after July 1, 2011, and placed in service or use after that date; and

(B) Property leased or acquired by the taxpayer that is placed in service or use in this state on or after July 1, 2011, if the original use of the property commences with the taxpayer and commences after that date.

(32) "NAICS" means the North American Industry Classification System.

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

(34) “Partnership” includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business or venture is carried on, and which is not a trust or estate, a corporation or a sole proprietorship and which is treated as a partnership for tax purposes under the laws of this state. The term "partner" includes a member in such a syndicate, group, pool, joint venture or other organization.

(35) “Person” includes any natural person, corporation or partnership, and includes any entity that is treated like a corporation or partnership for federal income tax purposes.

(36) “Photonics” includes the generation, emission, transmission, modulation, signal processing, switching, amplification, detection and sensing of light.

(37) "Photovoltaic devices" means those products designed, manufactured, and produced to convert sunlight directly into electricity.

(38) “Property purchased or leased for business expansion” means:

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

(i) Real property and improvements thereto having a useful life of four or more years, placed in service or use on or after July 1, 2011, by the taxpayer;

(ii) Real property and improvements thereto, acquired by written lease having a primary term of ten or more years and placed in service or use by the taxpayer on or after July 1, 2011;

(iii) Tangible personal property placed in service or use by the taxpayer on or after July 1, 2011, with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the personal or corporation net income tax liability of the business taxpayer under article twenty-one or twenty-four of this chapter, and which has a useful life, at the time the property is placed in service or use in the state, of four or more years;

(iv) Tangible personal property acquired by written lease having a primary term of four years or longer, that commenced and was executed by the parties thereto on or after July 1, 2011, if used as a component part of a new or expanded business facility, shall be included within this definition; and

(v) Tangible personal property owned or leased, and used by the taxpayer at a business location outside the state which is moved into the State of West Virginia on or after July 1, 2011, for use as a component part of a new or expanded business facility located in the state: *Provided,* That if the property is owned, it must be depreciable or amortizable personal property for income tax purposes, and have a useful life of four or more years remaining at the time it is placed in service or use in the state, and if the property is leased, the primary term of the lease remaining at the time the leased property is placed in service or use in the state, must be four or more years;

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

(i) Property owned or leased by the taxpayer and for which the taxpayer was previously allowed tax credit under article thirteen-c, thirteen-d, thirteen-e, thirteen-h, thirteen-q, thirteen-r, thirteen-s, thirteen-t, thirteen-u or thirteen-aa of this chapter, or the tax credits allowed by this article;

(ii) Property owned or leased by the taxpayer and for which the seller, lessor, or other transferor, was previously allowed tax credit under article thirteen-c, thirteen-d, thirteen-e, thirteen-h, thirteen-q, thirteen-r, thirteen-s, thirteen-t, thirteen-u or thirteen-aa of this chapter, or the tax credits allowed by this article;

(iii) Property owned or leased by the taxpayer that is used to qualify for any other credit against state taxes allowed by this code;

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

(v) Airplanes;

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

(vii) Property which is acquired incident to the purchase of the stock or assets of the seller, unless for good cause shown, the commissioner consents to waiving this requirement;

(viii) Natural resources in place; or

(ix) Purchased or leased property the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time the property is placed in service or use: *Provided,* That when the contract of purchase or lease specifies a minimum purchase price or minimum annual rent the amount thereof shall be used to determine the qualified investment in the property under section eight of this article if the property otherwise qualifies as property purchased or leased for business expansion.

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

(A) The property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under Section 267 or 707 (b) of the United States Internal Revenue Code of 1986, as amended;

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

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

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

(ii) Under Section 1014(e) of the United States Internal Revenue Code of 1986, as amended.

(40) "Qualified activity" means any business or other activity subject to any of the taxes imposed by article thirteen, twenty-one, twenty-three or twenty-four of this chapter (or any combination of those articles of this chapter), but does not include the activity of severance or production of natural

resources.

(41) “Related person” means:

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

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

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

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

For purposes of this definition, "control," with respect to a corporation, means ownership, directly or indirectly, of stock possessing fifty percent or more of the total combined voting power of all classes of the stock of the corporation entitled to vote. "Control," with respect to a trust, means ownership, directly or indirectly, of fifty percent or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association or of a beneficial interest in a trust is determined in accordance with the rules for constructive ownership of stock provided in Section 267(c) of the United States Internal Revenue Code of 1986, as amended, other than paragraph (3) of that section.

(42) “Replacement facility” means any property (other than an expanded facility) that replaces or supersedes any other property located within this state that:

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

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

(43) "State-of-the-art technoloy" or "leading edge technology" means the highest level of development, as of a device, technique, or scientific field achieved at a particular time.

(44) "Taxpayer" means any person subject to any of the taxes imposed by article twenty-one, twenty-three or twenty-four of this chapter (or any combination of those articles of this chapter).

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

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

(47) "Twenty-first century business technologies" means and includes, but is not limited to, emerging technologies and other business technologies that primarily use state-of-the-art methodologies, practices or techniques to manufacture, produce or provide its primary goods or services.

(48) "Used property" means property acquired after June 30, 2011, that is not "new property."

§11-13BB-4. Amount of credit allowed.

(a) *Credit allowed.* -- Eligible taxpayers are allowed a credit against the portion of taxes imposed by this state that are attributable to and the consequence of the taxpayer's qualified investment, as described in section six of this article, in a new business, or in a new segment of an existing business, in this state that utilized twenty-first century technologies, which results in the creation of new jobs. The amount of this credit is determined and applied as provided in this article.

(b) *Amount of credit*. -- When the eligible taxpayer creates at least ten new jobs but less than fifteen new jobs in a new business in this state that utilizes twenty-first century business technologies and whose qualified investment in this state is at least $5 million but is less than $10 million, the eligible taxpayer shall for the tax year in which the ten employees are first employed by the eligible taxpayer and for the next four tax years thereafter be exempt from payment of the taxes imposed by articles twenty-three and twenty-four of this chapter on the taxable capital and West Virginia taxable income of the new business utilizing twenty-first century business technologies in this state: *Provided,* That the eligible taxpayer may elect to defer for one tax year the start of this five-year period. When the eligible business is a partnership or other entity treated as a partnership for federal income tax purposes, the partners, S corporation shareholders or members of the limited liability company shall be exempt from paying the tax imposed by article twenty-one of this chapter on his or her distributive share attributable to the emerging technology business activity in this state. The eligible business shall also be exempt from paying the taxes imposed by article fifteen and fifteen-a of this chapter on tangible personal property and services purchased for use or consumption by the eligible taxpayer in the emerging technology business activity during the same five-year period, except that this exemption shall not apply to the purchase of motor fuel or alternative fuels to power a vehicle or to the purchase or lease of motor vehicles, unless the vehicle is an alternative fuel vehicle. The exemption from paying the taxes imposed by articles fifteen and fifteen-a of this chapter on purchases for use in business allowed by this subsection is in addition to any exemption that might otherwise be available to the taxpayer under articles fifteen and fifteen-a of this chapter. When the taxpayer qualifies for tax benefits under this subsection, these benefits are not forfeited if during the applicable five-year period, the new business creates additional new jobs or makes additional capital investment at the new business facility or does both.

(c) *Amount of credit*. -- When the eligible taxpayer does not qualify for credit under subsection (b) of this section, either because the qualified investment exceeds $10 million or the number of new jobs created is fifteen or more, or for both reasons, the amount of credit allowable is determined by multiplying the amount of the taxpayer's "qualified investment" (determined under section six of this article) in "property purchased or leased for business expansion" (as defined in section three of this article) using twenty-first century business technologies by the taxpayer's new jobs percentage (determined under section seven of this article).

The product of this calculation establishes the maximum amount of credit allowable under this article due to the qualified investment.

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

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

(1) The one-tenth part allowed under subsection (c), section four of this article for qualified investment placed into service or use during a prior taxable year; plus

(2) The one-tenth part allowed under subsection (c), section four of this article for qualified investment placed into service or use during the current taxable year.

(b) *Application of current year annual credit allowance*. -- The amount determined under subsection (a) of this section is allowed as a credit against one hundred percent of that portion of the taxpayer's state tax liability which is attributable to and the direct result of the taxpayer's qualified investment, and applied as provided in subsections (c) through (f), both inclusive, of this section, and in that order.

(c) *Business and occupation taxes*. -- That portion of the allowable credit attributable to qualified investment in a business or other activity subject to the taxes imposed by article thirteen of this chapter under section two-o of article thirteen must first be applied to reduce the taxes imposed or payable under section two-o, article thirteen of this chapter, for the taxable year (determined before application of allowable credits against tax and the annual exemption). In no case may the credit allowed under this article be applied to reduce any tax imposed by under any other section of article thirteen of this chapter except section two-o.

(1) If the taxes due under section two-o, article thirteen of this chapter are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under section two-o, article thirteen of this chapter, the amount of those taxes that are attributable is determined by multiplying the amount of taxes due under section two-o, article thirteen of this chapter, for the taxable year (determined before application of any allowable credits against tax and the annual exemption), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state, whose positions are directly attributable to the qualified investment in a business or other activity taxable under section two-o, article thirteen of this chapter. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state, whose positions are directly attributable to the business or other activity of the taxpayer that is taxable under article thirteen of this chapter.

(2) The annual exemption allowed by section three, article thirteen of this chapter, plus any credits allowable under articles thirteen-d, thirteen-e, thirteen-q, thirteen-r and thirteen-s of

this chapter, shall be applied against and reduce only the portion of article thirteen taxes not apportioned to the qualified investment under this article: *Provided,* That any excess exemption or credits may be applied against the amount of article thirteen taxes apportioned to the qualified investment under this article, that is not offset by the amount of annual credit against the taxes allowed under this article for the taxable year, unless their application is otherwise prohibited by this chapter.

(d) *Business franchise tax*. --

(1) After application of subsection (c) of this section, any unused allowable credit is next applied to reduce the taxes imposed by article twenty-three of this chapter for the taxable year (determined after application of the credits against tax provided in section seventeen of article twenty-three of this chapter, but before application of any other allowable credits against tax).

(2) If the taxes due under article twenty-three of this chapter are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under article twenty-three of this chapter for the taxable year, the amount of the taxes which are so attributable are determined by multiplying the amount of taxes due (determined after application of the credits against tax as provided in section seventeen of article twenty-three of this chapter, but before application of any other allowable credits), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer

employed in this state, whose positions are directly attributable to the qualified investment in a business or other activity taxable under article twenty-three of this chapter. The denominator of the fraction is wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state, whose positions are directly attributable to the business or other activity of the taxpayer that is taxable under article twenty-three of this chapter.

(3) Any credits allowable under articles thirteen-d, thirteen-e, thirteen-q, thirteen-r and thirteen-s of this chapter are applied against and reduce only the portion of article twenty-three taxes not apportioned to the qualified investment under this article*: Provided,* That any excess exemption or credits may be applied against the amount of article twenty-three taxes apportioned to the qualified investment under this article that is not offset by the amount of annual credit against those taxes allowed under this article for the taxable year, unless their application is otherwise prohibited by this chapter.

(e) *Corporation net income taxes*. --

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

(2) If the taxes due under article twenty-four of this chapter (determined before application of allowable credits against tax) are not solely attributable to and the direct result of the

taxpayer's qualified investment, the amount of the taxes that is attributable are determined by multiplying the amount of taxes due under article twenty-four of this chapter for the taxable year (determined before application of allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state whose positions are directly attributable to the qualified investment. The denominator of the fraction is the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this state.

(3) Any credits allowable under article twenty-four of this chapter are applied against and reduce only the amount of article twenty-four taxes not apportioned to the qualified investment under this article: *Provided,* That any excess credits may be applied against the amount of article twenty-four taxes apportioned to the qualified investment under this article that is not offset by the amount of annual credit against such taxes allowed under this article for the taxable year, unless their application is otherwise prohibited by this chapter.

(f) *Personal income taxes*. --

(1) If the person making the qualified investment is an electing small business corporation (as defined in Section 1361 of the United States Internal Revenue Code of 1986, as amended), a partnership, or a limited liability company that is treated as a partnership for federal income tax purposes, then any unused credit

(after application of subsections (c), (d) and (e) of this section) is allowed as a credit against the taxes imposed by article twenty-one of this chapter on the income from business or other activity subject to tax under article thirteen or twenty-three of this chapter that is attributable to the business activity for credit is allowed under this article.

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

(3) If the amount of taxes due under article twenty-one of this chapter (determined before application of allowable credits against tax) that is attributable to business, is not solely attributable to and the direct result of the qualified investment of the electing small business corporation, limited liability company, partnership, other unincorporated organization or sole proprietorship, the amount of the taxes that are so attributable are determined by multiplying the amount of taxes due under article twenty-one of this chapter (determined before application of allowable credits against tax), that is attributable to business by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the electing small business corporation, limited liability company, partnership, other unincorporated organization or sole proprietorship employed in this state, whose positions are directly

attributable to the qualified investment. The denominator of the fraction is the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer.

(4) No credit is allowed under this section against any employer withholding taxes imposed by article twenty-one of this chapter.

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

(1) Separate accounting or identification;

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

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

In order to effectuate the purposes of this subsection, the commissioner may propose for promulgation rules, including emergency rules, in accordance with article three, chapter twenty-nine-a of this code.

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

§11-13BB-6. Qualified investment.

(a) *General*. -- The qualified investment in property purchased or leased for business expansion is the applicable percentage of the cost of each property purchased or leased for the purpose of business expansion which is placed in service or use in this state by the taxpayer during the taxable year.

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

If useful life is:	**The applicable percentage is:**
Less than 4 years	0%
4 years or more but less than 6 years	33 1/3%
6 years or more but less than 8 years	66 2/3%
8 years or more	100%

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

(c) *Cost*. -- For purposes of subsection (a), the cost of each property purchased for business expansion is determined under the following rules:

(1) *Trade-ins*. – Cost does not include the value of property given in trade or exchange for the property purchased for business expansion.

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

(3) *Rental property*. --

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

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

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

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

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

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

(5) *Transferred property*. -- The cost of property used by the

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

§11-13BB-7. New jobs; new jobs percentage.

(a) *In general.* -- For purposes of this article, the new jobs created by the taxpayer must be directly attributable to taxpayer's qualified investment in this state, must be filled by new employees as defined in section three of this article and the compensation of new employees filling the new jobs must be equal to or exceed the compensation and health insurance benefits set forth in section eight of this article during the period for which the credit allowed by this article may be taken.

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

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

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

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

(c) *Applicable percentage*. -- The taxpayer’s new jobs percentage is determined under the following table:

If number of new jobs is at least:	**The applicable percentage is:**
15	15%
20	20%
280	30%
520	40%

(d) *Certification of new jobs*. -- With the annual return for the applicable taxes filed for the taxable year in which the qualified investment is first placed in service or use in this state, the taxpayer shall estimate and certify the number of new jobs reasonably projected to be created by it in this state within the period prescribed in subsection (f) of this section that are, or will be, directly attributable to the qualified investment of the taxpayer. For purposes of this section, "applicable taxes" means the taxes imposed by articles thirteen, twenty-one, twenty-three and twenty-four of this chapter against which this credit is applied.

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

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

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

(2) If the actual number of jobs created would result in a lower new jobs percentage, the credit previously allowed under this article shall be redetermined and amended returns filed for the first and second taxable years. In applying the amount of redetermined credit allowable for the two preceding taxable years, the redetermined credit shall first be applied to the extent it was originally applied in the prior two years to personal income taxes, then to corporation net income taxes, then to business franchise taxes and, lastly, to business and occupation taxes. Any additional taxes due under this chapter shall be remitted with the amended returns filed with the commissioner, along with interest, as provided in section seventeen, article ten of this chapter, and a ten-percent penalty determined on the amount of taxes due with the amended return, which may be waived by the commissioner if the taxpayer shows that the over-claimed amount of the new jobs percentage was due to reasonable cause and not due to willful

neglect.

§11-13BB-8. New jobs compensation and benefits requirement.

(a) Notwithstanding any provision of this article to the contrary, no credit shall be allowed under this article unless the following compensation requirements are met beginning with the tax year when the new employee first begins working at the new or expanded business facility and continuing through the period for which credit is allowed under this article:

(1) The median compensation paid to the employees filling the new jobs must be at least $50,000 annually: *Provided,* That beginning November 1, 2012, and on or before November 1 thereafter, the Tax Commissioner shall adjust this minimum annual compensation requirement in the manner provided in subsection (b) of this section, which adjustment shall apply to compensation paid for employee services during the next calendar year;

(2) Health insurance benefits are provided to all full-time permanent employees working at the new or expanded business facility in this state; and

(3) Each new job is a full-time, permanent position, as those terms are defined in section three, of this article.

Jobs that do not provide health insurance benefits do not qualify as new jobs for purposes of the credit authorized by this article. Additionally, jobs that are less than full-time, permanent positions do not qualify as new jobs under this article.

(b) *Adjustment of annual compensation for inflation*. -- The compensation requirements for credit under this article shall be adjusted for inflation by application of a cost-of-living adjustment. The annual compensation amount shall be applicable, as adjusted, each year throughout the ten-year credit period. Failure of a taxpayer entitled to credit under this article to meet the annual compensation requirement for any year shall result in forfeiture of the credit for that year. However, if in any succeeding year within the original ten-year credit period, the taxpayer pays annual compensation to its employees which exceeds the inflation adjusted annual compensation amount for that year, the taxpayer shall regain entitlement to take the credit for that year only. No credit forfeited in a prior year may be taken, and the tax year or years to which the forfeited credit would have been applied shall be forfeited and deducted from the remainder of the years over which the credit can be taken.

(1) *Cost-of-living adjustment*. -- For purposes of this section, the cost-of-living adjustment for any calendar year is the percentage, if any, by which the consumer price index for the preceding calendar year exceeds the consumer price index for calendar year 2011.

(2) *Consumer price index for any calendar year*. -- For purposes of this section, the consumer price index for any calendar year is the average of the federal consumer price index as of the close of the twelve-month period ending on August 31 of such calendar year.

(3) *Consumer price index*. -- For purposes of this section, the term "Federal Consumer Price Index" means the last consumer price

index for all urban consumers published by the United States Department of Labor.

(4) *Rounding*. -- If any increase in the annual compensation amount under this section is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(c) Unused credit remaining in any tax year after application against the taxes specified in section seven of this article is forfeited and does not carry forward to any succeeding tax year and does not carry back to a prior tax year.

(d) *Reduction in number of employees credit forfeiture*. -- If during the year when a new job was created for which credit was granted under this section or during any of the next succeeding four tax years thereafter, net jobs that are attributable to and the consequence of the taxpayer's business operations in this state, decrease, counting both new jobs for which credit was granted under this article and preexisting jobs, then the total amount of credit to which the taxpayer is entitled under this section shall be decreased and forfeited in the amount of $3,000 for each net job lost.

§11-13BB-9. Application for credit required; failure to make timely application; burden of proof.

(a) *Application for credit required*. -- Notwithstanding any provision of this article to the contrary, no credit is allowed or may be applied under this article for any qualified investment property placed in service or use until the person asserting a claim for the allowance of credit under this article makes written application to the Tax Commissioner for allowance of credit as provided in this subsection. An application for credit shall be filed, in the form prescribed by the Tax Commissioner, no later than the last day for filing the tax returns, determined by including any authorized extension of time for filing the return, required under article twenty-one or twenty-four of this chapter for the taxable year in which the property to which the credit relates is placed in service or use and all information required by the form shall be provided.

(b) *Failure to make timely application*. -- The failure to timely apply for the credit results in the forfeiture of fifty percent of the annual credit allowance otherwise allowable under this article. This penalty applies annually until the application is filed.

(c) The burden of proof is on the taxpayer to establish by clear and convincing evidence that the taxpayer is entitled to the benefits allowed by this article.

§11-13BB-10. Identification of investment credit property.

Every taxpayer who claims credit under this article shall maintain sufficient records to establish the following facts for each item of qualified property:

(1) Its identity;

(2) Its actual or reasonably determined cost;

(3) Its straight-line depreciation life;

(4) The month and taxable year in which it was placed in

service;

(5) The amount of credit taken; and

(6) The date it was disposed of or otherwise ceased to be qualified property.

§11-13BB-11. Forfeiture of unused tax credits; redetermination of credit allowed.

(a) *Disposition of property or cessation of use*. -- If during any taxable year, property with respect to which a tax credit has been allowed under this article:

(1) Is disposed of prior to the end of its useful life, as determined under section eight of this article; or

(2) Ceases to be used in an eligible business of the taxpayer in this state prior to the end of its useful life, as determined under section eight of this article, then the unused portion of the credit allowed for the property is forfeited for the taxable year and all ensuing years. Additionally, except when the property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, the taxpayer shall redetermine the amount of credit allowed in all earlier years by reducing the applicable percentage of cost of the property allowed under section eight of this article, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this state in the new or expanded business of the taxpayer. The taxpayer shall then file a reconciliation statement for the year in which the forfeiture occurs and pay any additional taxes owed due to reduction of the amount of credit allowable for the earlier years, plus interest and

any applicable penalties. The reconciliation statement shall be filed with the annual return for the primary tax for which the taxpayer is liable under articles thirteen and twenty-three of this chapter, or under article twenty-one or twenty-four of this chapter.

(b) *Cessation of operation of business facility*. -- If during any taxable year the taxpayer ceases operation of a business facility in this state for which credit was allowed under this article, before expiration of the useful life of property with respect to which tax credit has been allowed under this article, then the unused portion of the allowed credit is forfeited for the taxable year and for all ensuing years. Additionally, except when the cessation is due to fire, flood, storm or other casualty, the taxpayer shall redetermine the amount of credit allowed in earlier years by reducing the applicable percentage of cost of the property allowed under section eight of this article, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this state in a business of the taxpayer that is taxable under article twenty-three or twenty-four of this chapter, or in the case of a partnership, the distributive share of partnership items is taxable under article twenty-one of this chapter. The taxpayer shall then file a reconciliation statement with the annual return for the primary tax for which the taxpayer is liable under article twenty-one, twenty-three or twenty-four of this chapter, for the year in which the forfeiture occurs, and pay any additional taxes owed due to the reduction of the amount of credit allowable for the earlier years, plus interest and any applicable penalties.

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

§11-13BB-12. Recapture of credit; recapture tax imposed.

(a) *When recapture tax applies*. --

(1) Any person who places qualified investment property in

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

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

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

(1) *Full recapture*. -- If the taxpayer prematurely removes qualified investment property placed in service (when considered as a class) from economic service in the taxpayer's qualified investment business activity in this state, and the number of employees filling the new jobs created by the person falls below the number of new jobs required to be created in order to qualify for the amount of credit being claimed or the requirements of section eight of this article are not satisfied, the taxpayer shall recapture the amount of credit claimed under section seven of this article for the taxable year, and all preceding taxable years, on qualified investment property which has been prematurely removed from service. Additionally, the property tax benefit allowed under article six-l of this chapter shall be recaptured for a like period. The amount of tax due under this subdivision is an amount equal to the amount of credit that is recaptured under this subdivision plus the amount of the property tax benefit recaptured under this section.

(2) *Partial recapture*. -- If the taxpayer prematurely removes qualified investment property from economic service in the taxpayer's qualified investment business activity in this state, and the number of employees filling the new jobs created by the person remains ten or more, but falls below the number necessary to sustain continued application of credit determined by use of the new job percentage upon which the taxpayer's one-tenth annual credit allowance was determined under section four or section ten of this article, taxpayer shall recapture an amount of credit equal

to the difference between: (A) The amount of credit claimed under section seven of this article for the taxable year, and all preceding taxable years; and (B) the amount of credit that would have been claimed in those years if the amount of credit allowable under section four or ten of this article had been determined based on the qualified investment property which remains in service using the average number of new jobs filled by employees in the taxable year for which recapture occurs. The amount of tax due under this subdivision is an amount equal to the amount of credit that is recaptured under this subdivision.

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

(d) *Payment of recapture tax*. -- The amount of tax recaptured under this section is due and payable on the day the person's annual return is due for the taxable year in which this section applies, under article twenty-one or twenty-four of this chapter. When the employer is a partnership, limited liability company or S corporation for federal income tax purposes, the recapture tax shall be paid by those persons who are partners in the partnership, members in the company, or shareholders in the S corporation, in the taxable year in which recapture occurs under this section.

The Tax Commissioner shall cause the property tax benefit recaptured to be paid over to the sheriff of the county in which the property is or was located within sixty days after the recapture tax is paid to the Tax Commissioner.

(e) *Rules*. -- The Tax Commissioner may promulgate such rules as may be useful or necessary to carry out the purpose of this section and to implement the intent of the Legislature. Rules shall be promulgated in accordance with the provisions of article three, chapter twenty-nine-a of this code.

§11-13BB-13. Transfer of qualified investment to successors.

(a) *Mere change in form of business*. -- Property may not be treated as disposed of under section eleven of this article, by reason of a mere change in the form of conducting the business as long as the property is retained in the successor business in this state, and the transferor business retains a controlling interest in the successor business. In this event, the successor business is allowed to claim the amount of credit still available with respect to the business facility or facilities transferred, and the transferor business may not be required to redetermine the amount of credit allowed in earlier years.

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

§11-13BB-14. Failure to keep records of investment credit property.

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

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

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

§11-13BB-15. Interpretation and construction.

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

(b) The provisions of this article shall be reasonably construed in order to effectuate the legislative intent recited in section two of this article.

(c) In no event may any property that is treated as qualified investment property for purposes of this article be used to qualify for credit under any other article of this chapter.

§11-13BB-16. Tax credit review and accountability.

(a) On or before February 1, 2016, and on or before February 1 of every third year thereafter, the Tax Commissioner shall submit to the Governor, the President of the Senate and the Speaker of the House of Delegates, a tax credit review and accountability report evaluating the cost effectiveness of the credit allowed by this article during the most recent three-year period for which information is available. The criteria to be evaluated shall include, but not be limited to, for each year of the three-year period:

(1) The numbers of taxpayers claiming the credit;

(2) The net number of new jobs created by all taxpayers claiming the credit;

(3) The cost of the credit;

(4) The cost of the credit per new job created; and

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

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

§11-13BB-17. Effective date; termination date.

(A) *Effective date*. – The credit allowed by this article is allowed for qualified investment placed in service or use on or after July 1, 2011, subject to the rules contained in this section.

(b) *Termination date*. – Unless extended by the Legislature, this credit shall not be allowed for any qualified investment property placed in service or use after December 31, 2019: *Provided,* That when the qualified investment property was placed in service or use prior to January 1, 2020, taxpayers shall be allowed the tax benefits allowed by section four of this article for the remainder of the five-year period allowed by subsection (b) of that section, or the remainder of the credit period allowed under subsection (c) of that section, depending upon which is applicable to the taxpayer.

§11-13BB-18. Severability.

(a) If any provision of this article or the application thereof is for any reason adjudged by any court of competent jurisdiction to be invalid, the judgment may not affect, impair or invalidate the remainder of the article, but shall be confined in its operation to the provision thereof directly involved in the controversy in which the judgment shall have been rendered, and the applicability of the provision to other persons or circumstances may not be affected thereby.

(b) If any provision of this article or the application thereof is made invalid or inapplicable by reason of the repeal or any other invalidation of any statute therein addressed or referred to, such invalidation or inapplicability may not affect, impair or invalidate the remainder of the article, but shall be confined in its operation to the provision thereof directly involved with, pertaining to, addressing or referring to the statute, and the application of the provision with regard to other statutes or in other instances not affected by any such repealed or invalid statute may not be abrogated or diminished in any way.

NOTE: The purpose of this bill is to enact the West Virginia Innovation Free Trade Act of 2011 consisting of the Twenty-First Century Business Technologies Property Valuation Act and the Twenty-First Century Tax Credit Act, the purpose of which is to encourage the development and use of emerging technologies to create good jobs and grow West Virginia’s economy.

These articles are new; therefore, strike-throughs and underscoring have been omitted.