

Senate Bill No. 249

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

[Introduced January 25, 2011; referred to the Committee on
Economic Development; and then to the Committee on Finance.]

**FISCAL
NOTE**

A BILL to amend the Code of West Virginia, 1931, as 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 and §11-13BB-9; and to amend said code by adding
thereto a new section, designated §11-24-9d, all relating to
taxation; providing a phased-in allowance of credits against
corporation net income tax and personal income tax for
payments in this state of ad valorem property tax on certain
industrial tangible personal property consisting of machinery
and equipment; and allowing a transitional credit against the
portion of a taxpayer's corporation net income tax relating to
the change to combined reporting, with the amount of the
credit being measured by the taxpayer's payments in this state
of ad valorem property tax on certain industrial tangible
personal property consisting of machinery and equipment.

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

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

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

10 **§11-13BB-1. Short title.**

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

13 **§11-13BB-2. Definitions.**

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

19 (b) *Terms defined.* --

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

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

1 (B) A third party or third parties control or have the power
2 to control two persons, the two thus being affiliates. In
3 determining whether concerns are independently owned and operated
4 and whether or not an affiliation exists, consideration shall be
5 given to all appropriate factors, including common ownership,
6 common management and contractual relationships.

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

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

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

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

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

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

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

24 (9) "Manufacturing machinery and equipment" means and includes
25 all tangible personal property consisting of machinery and

1 equipment that is classified for West Virginia ad valorem property
2 tax purposes as industrial property as defined in section ten,
3 article one-c of this chapter, and is used in this state by a
4 person engaged in a manufacturing business.

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

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

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

15 (13) "Related entity", "related person", "entity related to"
16 or "person related to" means:

17 (A) An individual, corporation, partnership, affiliate,
18 association or trust or any combination or group thereof controlled
19 by the taxpayer;

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

23 (C) An individual, corporation, partnership, affiliate,
24 association or trust or any combination or group thereof controlled
25 by an individual, corporation, partnership, affiliate, association

1 or trust or any combination or group thereof that is in control of
2 the taxpayer; or

3 (D) A member of the same controlled group as the taxpayer. For
4 purposes of this article, "control", with respect to a corporation,
5 means ownership, directly or indirectly, of stock possessing fifty
6 percent or more of the total combined voting power of all classes
7 of the stock of the corporation which entitles its owner to vote.
8 "Control", with respect to a trust, means ownership, directly or
9 indirectly, of fifty percent or more of the beneficial interest in
10 the principal or income of the trust. The ownership of stock in a
11 corporation, of a capital or profits interest in a partnership,
12 limited liability company or association or of a beneficial
13 interest in a trust shall be determined in accordance with the
14 rules for constructive ownership of stock provided in Section
15 267(c) of the United States Internal Revenue Code, as amended:
16 *Provided*, That paragraph (3), Section 267(c) of the United States
17 Internal Revenue Code shall not apply.

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

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

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

24 **§11-13BB-3. Eligibility for tax credits; creation of the credit.**

25 There shall be allowed to every eligible taxpayer a credit

1 against the taxes imposed under articles twenty-one and twenty-four
2 of this chapter, as determined under this article.

3 **§11-13BB-4. Amount of credit allowed.**

4 (a) *Credit allowed.* -- Eligible taxpayers shall be allowed a
5 credit against the taxes imposed under article twenty-one or
6 twenty-four of this chapter, the amount and application of which
7 shall be determined as provided in this article.

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

20 (c) *Credit percentage.* -- For purposes of this section, the
21 credit percentage shall be one hundred percent in the case of an
22 eligible taxpayer whose liability in a tax year for attributable
23 tax, before application of the credit provided in this section, is
24 less than \$50,000; the credit percentage shall be sixty percent in
25 the case of an eligible taxpayer whose liability in a tax year for

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

25 (d) *Phase-in percentage.* -- For purposes of this section, the

1 phase-in percentage applicable to an eligible taxpayer's tax year
2 beginning in the calendar year 2012, shall be twenty-five percent;
3 the phase-in percentage applicable to an eligible taxpayer's tax
4 year beginning in the calendar year 2013, shall be fifty percent;
5 the phase-in percentage applicable to an eligible taxpayer's tax
6 year beginning in the calendar year 2014, shall be seventy-five
7 percent and the phase-in percentage applicable to an eligible
8 taxpayer's tax years beginning in the calendar year 2015, and
9 thereafter, shall be one hundred percent.

10 **§11-13BB-5. Application of annual credit allowance.**

11 (a) *Application of credit against corporate net income tax.* --
12 The credit allowed shall be applied to reduce the attributable tax
13 liabilities of an eligible taxpayer for the current tax year
14 imposed by article twenty-four of this chapter: *Provided*, That in
15 any taxable year, the amount of credit applied by an eligible
16 taxpayer pursuant to this subsection shall not exceed the amount of
17 the taxpayer's remaining liability for all tax imposed by article
18 twenty-four of this chapter after the amount of that liability has
19 been reduced on account of any other credit or credits allowed and
20 applied against that liability.

21 (b) *Application of credit against personal income tax.* --
22 After application of subsection (a) of this section, any unused
23 credit is then applied to reduce the attributable tax liabilities
24 of an eligible taxpayer for the current tax year imposed by article
25 twenty-one of this chapter: *Provided*, That in any taxable year,

1 the amount of credit applied by an eligible taxpayer pursuant to
2 this subsection shall not exceed the amount of the taxpayer's
3 remaining liability for all tax imposed by article twenty-one of
4 this chapter after the amount of that liability has been reduced on
5 account of any other credit or credits allowed and applied against
6 that liability.

7 (c) *Carry forward of unused credits.* -- The amount of any
8 credit allowed by section four of this article, which is not
9 applied to reduce the taxpayer's liability for the tax imposed by
10 article twenty-one or by article twenty-four of this chapter in the
11 current tax year, may, until the allowed credit is exhausted, be
12 carried forward to, and applied in, subsequent tax years against
13 the taxpayer's liability for the attributable tax imposed by
14 article twenty-one or article twenty-four of this chapter, after
15 the taxpayer's total liability for tax imposed under either article
16 has been reduced on account of any other credit or credits
17 otherwise allowed and applied against that liability.

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

24 **§11-13BB-6. Availability of credit to successors.**

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

1 (1) Where there has been a transfer or sale of the business
2 assets of an eligible taxpayer to a successor which subsequent to
3 the transfer constitutes an eligible taxpayer as defined in this
4 article, which continues to operate the manufacturing business in
5 this state, and which remains subject to the taxes prescribed under
6 article twenty-one or twenty-four of this chapter, the successor
7 eligible taxpayer is entitled to the credit allowed under this
8 article: *Provided*, That the successor taxpayer otherwise remains
9 in compliance with the requirements of this article for entitlement
10 to the credit.

11 (2) For any taxable year during which a transfer, or sale of
12 the business assets of an eligible taxpayer to a successor eligible
13 taxpayer under this section occurs, or a merger occurs pursuant to
14 which credit is allowed under this article, the credit allowed
15 under this article shall be apportioned between the predecessor
16 eligible taxpayer and the successor eligible taxpayer based on the
17 number of days during the taxable year that each taxpayer based and
18 the number of days during the taxable year that each taxpayer owned
19 the business assets transferred.

20 (b) *Entity purchases*. -- When an entity which is an eligible
21 taxpayer entitled to the credit allowed under this article is
22 purchased through a purchase of equity interests in the entity by
23 a new owner and the eligible taxpayer remains a legal entity so as
24 to retain its legal identity as such, the entitlement of that
25 entity and its owners to the credit allowed under this article will

1 not be affected by the ownership change: *Provided*, That the entity
2 otherwise remains in compliance with the requirements of this
3 article for entitlement to the credit.

4 (c) *Mergers.* --

5 (1) When an entity which is an eligible taxpayer entitled to
6 the credit allowed under this article is merged with another
7 entity, the surviving entity, and its owners in the case of a
8 limited liability company, small business corporation or
9 partnership, shall be entitled to the credit to which the
10 predecessor eligible taxpayer was originally entitled: *Provided*,
11 That the surviving entity otherwise complies with the provisions of
12 this article.

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

18 (d) No provision of this section or of this article shall be
19 construed to allow sales or other transfers of the tax credit
20 allowed under this article. The credit allowed under this article
21 can be transferred only in circumstances where there is a valid
22 successorship as described under this section.

23 **§11-13BB-7. Credit recapture; interest; penalties; additions to**
24 **tax; statute of limitations.**

1 (a) If it appears upon audit or otherwise that any person or
2 entity has taken the credit against tax allowed under this article
3 and was not entitled to take the credit, then the credit improperly
4 taken under this article shall be recaptured. Amended returns
5 shall be filed for any tax year for which the credit was improperly
6 taken. Any additional taxes due under this chapter shall be
7 remitted with the amended return or returns filed with the Tax
8 Commissioner, along with interest, as provided in section
9 seventeen, article ten of this chapter and such other penalties and
10 additions to tax as may be applicable pursuant to the provisions of
11 article ten of this chapter.

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

16 (c) Notwithstanding the provisions of article ten of this
17 chapter, the statute of limitations for the issuance of an
18 assessment of tax by the Tax Commissioner shall be five years from
19 the date of filing of any tax return on which this credit was taken
20 or five years from the date of payment of any tax liability
21 calculated pursuant to the assertion of the credit allowed under
22 this article, whichever is later.

23 **§11-13BB-8. Report on credit.**

24 (a) The Tax Commissioner shall provide to the Joint Committee
25 on Government and Finance by July 1, 2013, and on July 1 of each

1 year thereafter, a report detailing the amount of credit claimed
2 pursuant to this article. The report is to include the amount of
3 credit claimed against the personal income tax and the amount of
4 credit claimed against the corporate net income tax.

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

10 **§11-13BB-9. Effective date.**

11 This article shall be effective for tax years beginning on or
12 after January 1, 2012.

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

14 **§11-24-9d. Transitional credit against portion of tax**
15 **attributable to adoption of combined reporting**
16 **for property tax paid on industrial tangible**
17 **personal property, consisting of machinery and**
18 **equipment.**

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

20 (1) "Combined reporting tax increase" means that portion of
21 the taxpayer's liability in a tax year for the amount of tax
22 imposed under this article without regard for the credit allowed by
23 this section, if any, that exceeds the amount of liability that the
24 taxpayer would otherwise have for tax imposed under this article,

1 without regard for the credit allowed by this section, in the tax
2 year but for the requirement that the taxpayer comply with the
3 provisions of section thirteen-a of this article relating to the
4 filing of combined reports by taxpayers engaged in a unitary
5 business with one or more other taxpayers.

6 (2) "Manufacturer" means persons engaged in a business
7 activity classified as having a sector identifier, consisting of
8 the first two digits of the six-digit North American Industry
9 Classification System Code number, of thirty-one, thirty-two or
10 thirty-three.

11 (b) *Credit allowed.* -- For the tax years beginning on or after
12 January 1, 2012, a credit shall be allowed against the tax imposed
13 on every manufacturer under this article in an amount to the lesser
14 of: (1) The amount of ad valorem property tax which the taxpayer
15 shall have paid in this state in the tax year with respect to
16 tangible personal property consisting of machinery and equipment,
17 that is classified for ad valorem property tax purposes as
18 industrial property as defined in section ten, article one-c of
19 this chapter; or (2) the portion of the taxpayer's combined
20 reporting tax increase for the tax year as determined in this
21 section. The portion of the combined reporting tax increase for
22 the tax year under this article is one hundred percent for the
23 taxable year beginning on and after January 1, 2012; seventy
24 percent for the taxable year beginning on and after January 1,
25 2013; thirty percent for the taxable year beginning on and after

1 January 1, 2014: *Provided*, That no credit shall be allowed for the
2 payment of ad valorem property tax with respect to industrial
3 property used to extract, produce, process, handle, store or
4 transport natural resource products consisting of fossil fuels or
5 fossil fuel products during the course of their production as such
6 which is subject to the severance tax imposed under article
7 thirteen-a of this chapter: *Provided, however*, That in any taxable
8 year, the amount of credit allowed to, and applied by, the taxpayer
9 pursuant to this section shall not exceed the amount of the
10 taxpayer's remaining liability for the tax imposed by this article
11 after the amount of that liability has been reduced on account of
12 any other credit or credits allowed and applied against that
13 liability, except for any other credit which may be allowed and
14 applied against that liability, which is measured, entirely or in
15 part, by the taxpayer's liability for ad valorem property tax and
16 which the taxpayer shall have paid in this state in the tax year,
17 with respect to tangible personal property consisting of machinery
18 and equipment that is classified for ad valorem property tax
19 purposes as industrial property as defined in section ten, article
20 one-c of this chapter.

21 (c) *Carry forward of unused credits.* -- Except as expressly
22 provided in this section, the amount of any credit allowed by this
23 section, which is not applied to reduce the taxpayer's liability
24 for the tax imposed by this article in the current tax year, may,
25 until it is exhausted, be carried forward to, and applied in,

1 subsequent tax years against the taxpayer's liability for the tax
2 imposed by this article after that liability has been reduced on
3 account of any other credit or credits allowed and applied against
4 that liability, except for any other credit which may be allowed
5 and applied against that liability, which is measured, entirely or
6 in part, by the taxpayer's liability for ad valorem property tax
7 and which the taxpayer shall have paid in this state in the tax
8 year, with respect to tangible personal property consisting of
9 machinery and equipment that is classified for ad valorem property
10 tax purposes as industrial property as defined in section ten,
11 article one-c of this chapter: *Provided*, That the taxpayer shall
12 not be authorized to carry over any credit to any tax year starting
13 in or after the calendar year 2015.

14 (d) *Termination of credit.* -- The credit otherwise allowed by
15 this section shall not be allowed or applied to reduce any
16 liability for tax imposed under this article for any tax year
17 starting in or after the calendar year 2015.

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.