

# WEST VIRGINIA LEGISLATURE

## 2018 REGULAR SESSION

Introduced

### House Bill 4363

FISC  
NOTE

BY DELEGATES WARD, PHILLIPS, FRICH, ANDERSON,  
ZATEZALO, KELLY, HOWELL, CRISS, ROHRBACH AND  
GRAVES

[Introduced January 30, 2018; Referred  
to the Committee on Energy then Finance.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
 2 designated §11-13EE-1, §11-13EE-2, §11-13EE-3, §11-13EE-4, §11-13EE-5, §11-13EE-  
 3 6, §11-13EE-7, §11-13EE-8, and §11-13EE-9, all relating generally to creating a tax credit  
 4 for a manufacturer or power generating facility in West Virginia that purchases and uses  
 5 coal, oil or gas from an entity that has paid the severance tax on the coal, oil or gas.

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

**ARTICLE 13EE. WEST VIRGINIA SEVERANCE TAX CREDIT FOR COAL, OIL AND**  
**GAS USED IN POWER GENERATION OR MANUFACTURING IN WEST**  
**VIRGINIA.**

**§11-13EE-1. Definitions.**

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

4 (b) Terms defined. —

5 (1) “Affiliate” means and includes all persons, as defined in this section, which are affiliates  
 6 of each other when either directly or indirectly:

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

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

12 (2) “Commissioner” or “Tax Commissioner” means the Tax Commissioner of the State of  
 13 West Virginia or the Tax Commissioner's delegate.

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

16 certificate of interest or ownership or similar written instrument.

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

21 (5) "Eligible taxpayer" means an eligible manufacturing business that has purchased  
22 natural resources: (A) From a seller that has paid the tax imposed under article §11-13A-1 et seq.;  
23 of this code and (B) that uses the natural resources in West Virginia, in its manufacturing process  
24 or electric generation process in West Virginia.

25 (6) "Eligible manufacturing business" means any business primarily engaged, in this state  
26 in a business activity classified as having a sector identifier, consisting of the first two digits of the  
27 six-digit North American Industry Classification System code number, of 31, 32 or 33, and any  
28 electricity generating company that operates an electricity generating facility subject to the tax  
29 imposed under article §11-13-1 et seq. of this code.

30 (7) "Natural person" or "individual" means a human being.

31 (8) "Natural resources" means coal, oil or gas.

32 (9) "Partnership" and "partner" means and includes a syndicate, group, pool, joint venture  
33 or other unincorporated organization through or by means of which any business, financial  
34 operation or venture is carried on and which is not a trust or estate, a corporation or a sole  
35 proprietorship. The term "partner" includes a member in a syndicate, group, pool, joint venture or  
36 organization.

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

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

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

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

44 (C) An individual, corporation, partnership, affiliate, association or trust or any combination  
45 or group thereof controlled by an individual, corporation, partnership, affiliate, association or trust  
46 or any combination or group thereof that is in control of the taxpayer; or

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

48 For purposes of this article, “control”, with respect to a corporation, means ownership,  
49 directly or indirectly, of stock possessing 50 percent or more of the total combined voting power  
50 of all classes of the stock of the corporation which entitles its owner to vote. “Control”, with respect  
51 to a trust, means ownership, directly or indirectly, of 50 percent or more of the beneficial interest  
52 in the principal or income of the trust. The ownership of stock in a corporation, of a capital or  
53 profits interest in a partnership or association or of a beneficial interest in a trust shall be  
54 determined in accordance with the rules for constructive ownership of stock provided in Section  
55 267(c) of the United States Internal Revenue Code, as amended: *Provided*, That paragraph (3),  
56 Section 267(c) of the United States Internal Revenue Code does not apply.

57 (12) “Seller” means the vendor, transferor, person or entity that holds title to the natural  
58 resource sold at the time of the sale thereof.

59 (13) “Tax year” or “taxable year” means the tax year of the taxpayer for federal income tax  
60 purposes.

61 (14) “Taxpayer” means an eligible taxpayer as defined in this section.

**§11-13EE-2. Eligibility for tax credits; creation of the credit.**

1 There is allowed to every eligible taxpayer a credit against the taxes under §11-13-1 *et*  
2 *seq.*, §11-23-1 *et seq.*, and §11-24-1 *et seq.* of this code, as determined under this article.

**§11-13EE-3. Amount of credit allowed.**

1 *Credit allowed.* — Eligible taxpayers are allowed a credit against the tax imposed under  
2 §11-13-1 *et seq.*, §11-23-1 *et seq.*, and §11-24-1 *et seq.* of this code. The amount of credit allowed

3 to the eligible taxpayer is the amount of the tax imposed under §11-13A-1 et seq. of this code in  
4 the taxable year attributable to natural resources that were sold to and used by the eligible  
5 manufacturer in the taxable year. Tax attributable to natural resources that were sold to a person  
6 related to an eligible taxpayer do not qualify for the credit authorized under this article: *Provided,*  
7 That the Tax Commissioner may waive this related person sales restriction, if the Tax  
8 Commissioner determines that the natural resources that were sold to a related person were sold  
9 in an arm's length transaction at prices reflective of current market prices, at the time of sale, for  
10 the natural resource sold. The amount of tax imposed under §11-13A-1 et seq. of this code that  
11 is attributable to natural resources that were sold to an eligible manufacturer by a seller that is not  
12 the natural resource producer that paid the severance tax on the natural resources sold, do not  
13 qualify for the credit authorized under this article.

**§11-13EE-4. Application of annual credit allowance.**

1 (a) *Application of credit.* —The amount of credit allowed shall first be taken against the tax  
2 liabilities of the eligible taxpayer for the current taxable year imposed by article §11-13-1 et seq.  
3 of this code, then §11-23-1 et seq. of this code, and then any unused credit may be applied against  
4 taxes owed under §11-24-1 et seq. of this code.

5 (b) Any credit remaining after application of the credit against the tax liabilities specified in  
6 subsection (a) of this section for the current taxable year may be carried forward and claimed  
7 against the taxes imposed under §11-13-1 et seq., §11-23-1 et seq., and §11-24-1 et seq. of this  
8 code of this code in the next five succeeding taxable years. Carried forward credit remaining after  
9 five years is forfeited. The credit allowed under this article shall be applied after application of all  
10 other applicable tax credits allowed for the taxable year against the taxes imposed by §11-13-1  
11 et seq., §11-23-1 et seq., and §11-24-1 et seq. of this code.

12 (c) For purposes of asserting the credit against tax, the taxpayer shall prepare and file an  
13 annual schedule showing the amount of tax paid by the seller for the taxable year, the amount of  
14 credit allowed under this article, and proof required by the Tax Commissioner that it used the

15 natural resources in its manufacturing process or electric generation process in West Virginia.  
16 The annual schedule shall set forth the information and be in the form prescribed by the Tax  
17 Commissioner.

**§11-13EE-5. Availability of credit to successors.**

1 Where there has been a transfer or sale of the business assets of an eligible taxpayer to  
2 a successor which, subsequent to the transfer, constitutes an eligible taxpayer as defined in this  
3 article, and which successor continues to operate the business in this state, and remains subject  
4 to the taxes prescribed under §11-13-1 et seq., §11-23-1 et seq., and §11-24-1 et seq. of this  
5 code, then the successor eligible taxpayer is entitled to the credit allowed under this article:  
6 Provided, That the successor taxpayer otherwise remains in compliance with the requirements of  
7 this article for entitlement to the credit.

**§11-13EE-6. Credit recapture; interest; penalties; additions to tax; statute of limitations.**

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

8 (b) Notwithstanding the provisions of §11-10-1 et seq. of this code, penalties and additions  
9 to tax imposed under that article may be waived at the discretion of the Tax Commissioner:  
10 Provided, That interest is not subject to waiver.

11 (c) Notwithstanding the provisions of §11-10-1 et seq. of this code, the statute of limitations  
12 for the issuance of an assessment of tax by the Tax Commissioner is five years from the date of  
13 filing of any tax return on which this credit was taken or five years from the date of payment of  
14 any tax liability calculated pursuant to the assertion of the credit allowed under this article,

15 whichever is later.

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

22 (e) Where a corporation which is an eligible taxpayer entitled to the credit allowed under  
23 this article is purchased through a stock purchase by a new owner and remains a legal entity so  
24 as to retain its corporate identity, the entitlement of that corporation to the credit allowed under  
25 this article will not be affected by the ownership change: *Provided*, That the corporation otherwise  
26 remains in compliance with the requirements of this article for entitlement to the credit.

27 (f) Where a corporation or other entity which is an eligible taxpayer entitled to the credit  
28 allowed under this article is merged with another corporation or entity, the surviving corporation  
29 or entity is entitled to the credit to which the predecessor eligible taxpayer was originally entitled:  
30 *Provided*, That the surviving corporation or entity otherwise complies with the provisions of this  
31 article.

32 (g) The amount of credit available in any taxable year during which a merger occurs shall  
33 be apportioned between the predecessor eligible taxpayer and the successor eligible taxpayer  
34 based on the number of days during the taxable year that each owned the transferred business  
35 assets.

36 (h) No provision of this section or of this article allows sales or other transfers of the tax  
37 credit allowed under this article. The credit allowed under this article may be transferred only in  
38 circumstances where there is a valid successorship.

**§11-13EE-7. Rulemaking.**

1 The Tax Commissioner shall adopt interpretive and procedural rules and propose

2 legislative rules for legislative approval he or she considers necessary to carry out the purposes  
3 of this article, all under §29A-3-1 et seq. of this code.

**§11-13EE-8. Construction of article; burden of proof.**

1 The provisions of this article shall be strictly construed. The burden of proof is on the  
2 person or entity claiming the credit allowed by this article to establish by clear and convincing  
3 evidence that the person or entity is entitled to the amount of credit asserted for the taxable year.

**§11-13EE-9. Effective date.**

1 The credit allowed under this article is effective for tax years beginning on or after January  
2 1, 2019.

NOTE: The purpose of this bill is to provide a tax credit to West Virginia power generators and manufacturers in the amount of the severance tax imposed on coal, oil and gas produced in West Virginia and sold to and used by the West Virginia power generators and manufacturers in West Virginia.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.