

WEST VIRGINIA LEGISLATURE
2019 FIRST EXTRAORDINARY SESSION

Introduced

Senate Bill 1002

BY SENATORS CARMICHAEL (MR. PRESIDENT) AND

PREZIOSO

(BY REQUEST OF THE EXECUTIVE

[Introduced May 20, 2019]

1 A BILL to amend and reenact §11-21-17 and §11-21-17a of the Code of West Virginia, 1931, as
 2 amended; to amend and reenact §11-21-37c of said code as contained in Chapter 244,
 3 Acts of the Legislature, Regular Session, 2019; and to amend said code by adding thereto
 4 a new section, designated §11-21-12j, all relating generally to the personal income tax;
 5 creating additional modification to West Virginia adjusted gross income of shareholder of
 6 S corporation, or member of a limited liability company, when engaged in business as a
 7 financial organization in this state; setting forth apportionment rules for certain financial
 8 organizations; specifying special gross receipts factor; defining terms; making technical
 9 corrections; and providing retroactive effective date.

Be it enacted by the Legislature of West Virginia:

ARTICLE 21. PERSONAL INCOME TAX.

**§11-21-12j. Additional modification reducing federal adjusted gross income for
 shareholders of S corporations and members of limited liability companies engaged
 in banking business.**

1 (a) For taxable years beginning on and after January 1, 2018, the West Virginia adjusted
 2 gross income of a taxpayer who is a shareholder of an S corporation, or member of a limited
 3 liability company, engaged in business as a financial organization as defined in §11-24-3a(a)(14)
 4 of this code, as adjusted pursuant to §11-21-12 of this code, shall be further adjusted by
 5 multiplying that portion of the taxpayer's West Virginia adjusted gross income attributable to the
 6 taxpayer's proportional share of all items of income, loss, deduction or credit of the S corporation,
 7 or limited liability company, as shown on the K-1 received by the taxpayer for the tax year, by a
 8 fraction equal to one minus a fraction:

9 (1) The numerator of which is the sum of the average of the monthly beginning and ending
 10 account balances of the S corporation, or limited liability company, during the taxable year
 11 (account balances to be determined at cost in the same manner that obligations, investments and
 12 loans are reported on Schedule L of Federal Form 1120S, or Schedule L of Form 1065) of the

13 following:

14 (A) Obligations or securities of the United States, or of any agency, authority, commission
15 or instrumentality of the United States and any other corporation or entity created under the
16 authority of the United States Congress for the purpose of implementing or furthering an objective
17 of national policy;

18 (B) Obligations or securities of this state and any political subdivision or authority of the
19 state;

20 (C) Investments or loans primarily secured by mortgages, or deeds of trust, on residential
21 property located in this state and occupied by nontransients; and

22 (D) Loans primarily secured by a lien or security agreement on residential property in the
23 form of a mobile home, modular home or double-wide located in this state and occupied by
24 nontransients.

25 (2) The denominator of which is the average of the monthly beginning and ending account
26 balances of the total assets of the S corporation, or limited liability company, which are shown on
27 Schedule L of Federal Form 1120S, which is filed by the S corporation, or on Schedule L of
28 Federal Form 1065, which is filed by the limited liability company, with the Internal Revenue
29 Service: *Provided*, That the adjustment allowed herein shall not be made to the extent that the
30 adjustments provided for in this section are otherwise allowed by §11-21-12 of this code and shall
31 not be made to adjusted gross income of a taxpayer who is a shareholder of an S corporation, or
32 a member of a limited liability company, engaged in banking business if the income of the S
33 corporation, or limited liability company, of which the taxpayer is a shareholder, or member, has
34 been adjusted at the S corporation, or limited liability company, level for the tax year.

35 (b) *Apportionment rules for organizations engaged in business both within and without this*
36 *state.* -- For taxable years beginning on and after January 1, 2018, an S corporation, or a limited
37 liability company, engaged in business as a financial organization as defined in §11-24-3a(a)(14)
38 of this code, which regularly engages in business both within and without this state shall apportion

39 the business income component of its federal taxable income, after adjustment as provided in
 40 subsection (a) of this section, by multiplying the amount thereof by the special gross receipts
 41 factor determined as provided in subsection (c) of this section.

42 (c) *Special gross receipts factor.* -- The gross receipts factor is a fraction, the numerator
 43 of which is the total gross receipts of the S corporation, or limited liability company, engaged in
 44 business as a financial organization as defined in §11-24-3a(a)(14) of this code from sources
 45 within this state during the taxable year and the denominator of which is the total gross receipts
 46 of the S corporation, or limited liability company, engaged in business as a financial organization
 47 as defined in §11-24-3a(a)(14) of this code wherever earned during the taxable year: *Provided,*
 48 That neither the numerator nor the denominator of the gross receipts factor shall include receipts
 49 from obligations described in subsection(a) of this section.

50 (d) *Effective date.* - The provisions of this section are retroactive with respect to tax years
 51 beginning on or after January 1, 2018, the law in effect for each of those years is fully preserved
 52 as to those years, except as provided in this section.

§11-21-17. Resident partners.

1 (a) *Partner's modifications.* -- In determining West Virginia adjusted gross income and
 2 West Virginia taxable income of a resident partner, any modification described in ~~section twelve~~
 3 ~~(b), (c) or (d) or section fifteen (e)~~ §11-21-12(b), §11-21-12(c), §11-21-12(d), or §11-21-12j of this
 4 code, which relates to an item of partnership income, gain, loss or deduction shall be made in
 5 accordance with the partner's distributive share, for federal income tax purposes, of the items to
 6 which the modifications relate. Where a partner's distributive share of any such item is not
 7 required to be taken into account separately for federal income tax purposes, the partner's
 8 distributive share of such item shall be his or her distributive share for federal income tax purposes
 9 of partnership taxable income or loss generally.

10 (b) *Character of items.* -- Each item of partnership income, gain, loss, or deduction shall
 11 have the same character for a partner under this article as for federal income tax purposes. Where

12 an item is not characterized for federal income tax purposes, it shall have the same character for
13 a partner as if realized directly from the source from which realized by the partnership, or incurred
14 in the same manner as incurred by the partnership.

15 (c) *West Virginia tax avoidance or evasion.* -- Where a partner's distributive share of an
16 item of partnership income, gain, loss or deduction is determined for federal income tax purposes
17 by special provision in the partnership agreement with respect to such item, and where the
18 principal purpose of such provision is the avoidance or evasion of tax under this article, the
19 partner's distributive share of such item, and any modification required with respect thereto shall
20 be determined as if the partnership agreement made no special provision with respect to such
21 item.

22 (d) *Partnership defined.* -- For purposes of this article, "partnership" means a partnership
23 as defined in §11-21A-1 of this code.

§11-21-17a. Resident shareholders of S corporations.

1 (a) S corporation shareholder's modifications. -- In determining West Virginia adjusted
2 gross income and West Virginia taxable income of a resident S corporation shareholder, any
3 modification described in ~~section twelve (b), (c) or (d)~~ §11-21-12(b), §11-21-12(c), §11-21-12(d),
4 or §11-21-12j of this code, which relates to an item of income, gain, loss or deduction shall be
5 made in accordance with the S corporation shareholder's pro rata share, for federal income tax
6 purposes, of the items to which the modifications relate. Where a shareholder's pro rata share of
7 any such item is not required to be taken into account separately for federal income tax purposes,
8 the shareholder's pro rata share of such item shall be his or her pro rata share for federal income
9 tax purposes of S corporation taxable income or loss generally.

10 (b) Character of items. -- Each item of S corporation income, gain, loss or deduction shall
11 have the same character for a shareholder under this article as for federal income tax purposes.
12 Where an item is not characterized for federal income tax purposes, it shall have the same
13 character for a shareholder as if realized directly from the source from which realized by the S

14 corporation, or incurred in the same manner as incurred by the S corporation.

§11-21-37c. Special apportionment rules - financial organizations.

1 (a) *General.* — The Legislature hereby finds that the general formula set forth in
2 §11-21-37a of this code for apportioning the business income of persons taxable in this state as
3 well as in another state is inappropriate for use by financial organizations due to the particular
4 characteristics of those organizations and the manner in which their business is conducted.
5 Accordingly, the general formula set forth in §11-21-37a of this code may not be used to apportion
6 the business income of financial organizations, which shall use only the apportionment formula
7 and methods set forth in this section.

8 (b) *West Virginia financial organizations taxable in another state.* — The West Virginia
9 taxable income of a financial organization that has its commercial domicile in this state and which
10 is taxable in another state shall be the sum of: (1) The nonbusiness income component of its
11 adjusted federal taxable income for the taxable year which is allocated to this state as provided
12 §11-21-37a(d) of this code; plus (2) the business income component of its adjusted federal
13 taxable income for the taxable year which is apportioned to this state as provided in this section.

14 (c) *Out-of-state financial organizations with business activities in this state.* — The West
15 Virginia taxable income of a financial organization that does not have its commercial domicile in
16 this state but which regularly engages in business in this state shall be the sum of: (1) The
17 nonbusiness income component of its adjusted federal taxable income for the taxable year which
18 is allocated to this state as provided in §11-21-37a(d) of this code; plus (2) the business income
19 component of its adjusted federal taxable income for the taxable year which is apportioned to this
20 state as provided in this section.

21 (d) *Engaging in business - nexus presumptions and exclusions.* — A financial organization
22 that has its commercial domicile in another state is presumed to be regularly engaging in business
23 in this state if during any year it obtains or solicits business with 20 or more persons within this
24 state, or if the sum of the value of its gross receipts attributable to sources in this state equals or

25 exceeds \$100,000. However, gross receipts from the following types of property, as well as those
26 contacts with this state reasonably and exclusively required to evaluate and complete the
27 acquisition or disposition of the property, the servicing of the property or the income from it, the
28 collection of income from the property or the acquisition or liquidation of collateral relating to the
29 property shall not be a factor in determining whether the owner is engaging in business in this
30 state:

31 (1) An interest in a real estate mortgage investment conduit, a real estate investment trust,
32 or a regulated investment company;

33 (2) An interest in a loan backed security representing ownership or participation in a pool
34 of promissory notes or certificates of interest that provide for payments in relation to payments or
35 reasonable projections of payments on the notes or certificates;

36 (3) An interest in a loan or other asset from which the interest is attributed to a consumer
37 loan, a commercial loan, or a secured commercial loan and in which the payment obligations were
38 solicited and entered into by a person that is independent, and not acting on behalf, of the owner;

39 (4) An interest in the right to service or collect income from a loan or other asset from
40 which interest on the loan is attributed as a loan described in the previous paragraph and in which
41 the payment obligations were solicited and entered into by a person that is independent, and not
42 acting on behalf, of the owner; or

43 (5) Any amounts held in an escrow or trust account with respect to property described
44 above.

45 (e) *Definitions.* — For purposes of this section:

46 (1) “Commercial domicile” has same meaning as that term is defined in §11-24-3a of this
47 code.

48 (2) “Deposit” means:

49 (A) The unpaid balance of money or its equivalent received or held by a financial
50 organization in the usual course of business and for which it has given or it is obligated to give

51 credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift
52 account whether or not advance notice is required to withdraw the credit funds, or which is
53 evidenced by a certificate of deposit, thrift certificate, investment certificate, or certificate of
54 indebtedness, or other similar name, or a check or draft drawn against a deposit account and
55 certified by the financial organization, or a letter of credit or a traveler's check on which the
56 financial organization is primarily liable: *Provided*, That without limiting the generality of the term
57 "money or its equivalent", any account or instrument must be regarded as evidencing the receipt
58 of the equivalent of money when credited or issued in exchange for checks or drafts or for a
59 promissory note upon which the person obtaining any credit or instrument is primarily or
60 secondarily liable or for a charge against a deposit account or in settlement of checks, drafts or
61 other instruments forwarded to the bank for collection;

62 (B) Trust funds received or held by the financial organization, whether held in the trust
63 department or held or deposited in any other department of the financial organization;

64 (C) Money received or held by a financial organization or the credit given for money or its
65 equivalent received or held by a financial organization in the usual course of business for a special
66 or specific purpose, regardless of the legal relationship thereby established, including, without
67 being limited to, escrow funds, funds held as security for an obligation due the financial
68 organization or other, including funds held as dealers' reserves or for securities loaned by the
69 financial organization, funds deposited by a debtor to meet maturing obligations, funds deposited
70 as advance payment on subscriptions to United States government securities, funds held for
71 distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and
72 withheld taxes: *Provided*, That there may not be included funds which are received by the financial
73 organization for immediate application to the reduction of an indebtedness to the receiving
74 financial organization, or under condition that the receipt thereof immediately reduces or
75 extinguishes an indebtedness;

76 (D) Outstanding drafts, including advice or authorization to charge a financial

77 organization's balance in another organization, cashier's checks, money orders or other officer's
78 checks issued in the usual course of business for any purpose, but not including those issued in
79 payment for services, dividends, or purchases or other costs or expenses of the financial
80 organization itself; and

81 (E) Money or its equivalent held as a credit balance by a financial organization on behalf
82 of its customer if the entity is engaged in soliciting and holding balances in the regular course of
83 its business.

84 (3) "Financial organization" has the same meaning as that term is defined in §11-21-3a of
85 this code.

86 (4) "Sales" means, for purposes of apportionment under this section, the gross receipts of
87 a financial organization included in the gross receipts factor described in subsection (g) of this
88 section, regardless of their source.

89 (f) *Apportionment rules.* — A financial organization which regularly engages in business
90 both within and without this state shall apportion the business income component of its federal
91 taxable income, after adjustment as provided in ~~§11-24-6~~ §11-21-12j of this code, by multiplying
92 the amount thereof by the special gross receipts factor determined as provided in subsection (g)
93 of this section.

94 (g) *Special gross receipts factor.* — The gross receipts factor is a fraction, the numerator
95 of which is the total gross receipts of the taxpayer from sources within this state during the taxable
96 year and the denominator of which is the total gross receipts of the taxpayer wherever earned
97 during the taxable year: *Provided*, That neither the numerator nor the denominator of the gross
98 receipts factor shall include receipts from obligations described in ~~§11-24-6(f)(1)(A), (B), (C), and~~
99 ~~(D)~~ §11-21-12j(1)(A), (B), (C), and (D) of this code.

100 (1) *Numerator.* — The numerator of the gross receipts factor shall include, in addition to
101 items otherwise includable in the sales factor under §11-21-37a of this code, the following:

102 (A) Receipts from the lease or rental of real or tangible personal property whether as the

103 economic equivalent of an extension of credit or otherwise if the property is located in this state;

104 (B) Interest income and other receipts from assets in the nature of loans which are secured
105 primarily by real estate or tangible personal property if the security property is located in the state.

106 If the security property is also located in one or more other states, receipts are presumed to be
107 from sources within this state, subject to rebuttal based upon factors described in rules to be
108 proposed by the Tax Commissioner, including the factor that the proceeds of any loans were
109 applied and used by the borrower entirely outside of this state;

110 (C) Interest income and other receipts from consumer loans which are unsecured or are
111 secured by intangible property that are made to residents of this state, whether at a place of
112 business, by traveling loan officer, by mail, by telephone or other electronic means or otherwise;

113 (D) Interest income and other receipts from commercial loans and installment obligations
114 which are unsecured or are secured by intangible property if and to the extent that the borrower
115 or debtor is a resident of or is domiciled in this state: *Provided*, That receipts are presumed to be
116 from sources in this state and the presumption may be overcome by reference to factors described
117 in rules to be proposed by the Tax Commissioner, including the factor that the proceeds of any
118 loans were applied and used by the borrower entirely outside of this state;

119 (E) Interest income and other receipts from a financial organization's syndication and
120 participation in loans, under the rules set forth in paragraphs (A) through (D), inclusive, of this
121 subdivision;

122 (F) Interest income and other receipts, including service charges, from financial institution
123 credit card and travel and entertainment credit card receivables and credit card holders' fees if
124 the borrower or debtor is a resident of this state or if the billings for any receipts are regularly sent
125 to an address in this state;

126 (G) Merchant discount income derived from financial institution credit card holder
127 transactions with a merchant located in this state. When merchants are located within and without
128 this state, only receipts from merchant discounts attributable to sales made from locations within

129 this state shall be attributed to this state. It shall be presumed, subject to rebuttal, that the location
130 of a merchant is the address shown on the invoice submitted by the merchant to the taxpayer;

131 (H) Gross receipts from the performance of services are attributed to this state if:

132 (i) The service receipts are loan-related fees, including loan servicing fees, and the
133 borrower resides in this state, except that, at the taxpayer's election, receipts from loan-related
134 fees which are either: (I) "Pooled" or aggregated for collective financial accounting treatment; or
135 (II) manually written as nonrecurring extraordinary charges to be processed directly to the general
136 ledger may either be attributed to a state based upon the borrowers' residences or upon the ratio
137 that total interest sourced to that state bears to total interest from all sources;

138 (ii) The service receipts are deposit-related fees and the depositor resides in this state,
139 except that, at the taxpayer's election, receipts from deposit-related fees which are either: (I)
140 "Pooled" or aggregated for collective financial accounting treatment; or (II) manually written as
141 nonrecurring extraordinary charges to be processed directly to the general ledger may either be
142 attributed to a state based upon the depositors' residences or upon the ratio that total deposits
143 sourced to that state bears to total deposits from all sources;

144 (iii) The service receipt is a brokerage fee and the account holder is a resident of this state;

145 (iv) The service receipts are fees related to estate or trust services and the estate's
146 decedent was a resident of this state immediately before death or the grantor who either funded
147 or established the trust is a resident of this state; or

148 (v) The service receipt is associated with the performance of any other service not
149 identified above and the service is performed for an individual resident of, or for a corporation or
150 other business domiciled in, this state and the economic benefit of service is received in this state;

151 (I) Gross receipts from the issuance of travelers' checks and money orders if the checks
152 and money orders are purchased in this state; and

153 (J) All other receipts not attributed by this rule to a state in which the taxpayer is taxable
154 shall be attributed pursuant to the laws of the state of the taxpayer's commercial domicile.

155 (2) *Denominator.* — The denominator of the gross receipts factor shall include all of the
156 taxpayer's gross receipts from transactions of the kind included in the numerator, but without
157 regard to their source or situs.

158 (h) *Effective date.* — The provisions of this section enacted in 2019 shall apply to all
159 taxable years beginning on or after January 1, 2018.

NOTE: The purpose of this bill is to provide a reducing modification to the West Virginia adjusted gross income of a shareholder of a Subchapter S corporation, or member of a limited liability company, engaged in banking business in this state and making the modification retroactive with respect to tax years beginning on or after January 1, 2018.

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