

# **WEST VIRGINIA LEGISLATURE**

## **2022 REGULAR SESSION**

**Introduced**

### **House Bill 4410**

BY DELEGATES HOUSEHOLDER AND CRISS

(BY REQUEST OF THE STATE TAX DEPARTMENT)

[Introduced January 26, 2022; referred to the  
Committee on Finance]



1 A BILL to amend and reenact §11-21-37a of the Code of West Virginia, 1931, as amended,  
2 relating to specifying allocation and apportionment of income of flow-through entities and  
3 treatment of income derived from flow-through entities by recipients thereof, providing that  
4 allocation and apportionment of income for flow-through entities to be the same as  
5 allocation and apportionment of income for C corporations; specifying effective date.

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

**ARTICLE 21. PERSONAL INCOME TAX.**

**§11-21-37a. Allocation and apportionment of income of nonresidents from multistate  
business activity.**

1 (a) Notwithstanding any provision of §11-21-37 of this code to the contrary, a business  
2 doing business in West Virginia and in one or more other states shall allocate its nonbusiness  
3 income as provided in §11-21-37a(c) of this code and shall apportion its business income as  
4 provided in §11-21-37a(f) of this code to determine the West Virginia source income of its  
5 nonresident partners and nonresident S corporation shareholders for purposes of this article. For  
6 purposes of this section:

7 (1) The term “business entity” includes a partnership, limited partnership, joint venture,  
8 corporation, S corporation, and any other group or combination acting as a unit, but does not  
9 include a sole proprietorship; and

10 (2) The term “engaging in business” or “doing business” means any activity of a business  
11 entity which enjoys the benefits and protection of government and laws in this state.

12 (b) Business activities entirely within West Virginia. — If the business activities of a  
13 taxpayer take place entirely within this state, the entire net income of the taxpayer is subject to  
14 the tax imposed by this article. The business activities of a taxpayer are considered to have taken  
15 place in their entirety within this state if the taxpayer is not “taxable in another state”. For purposes  
16 of allocation and apportionment of net income under this section, a taxpayer is taxable in another  
17 state if:

18 (1) In that state the taxpayer is subject to a net income tax, a franchise tax measured by  
19 net income, a franchise tax for the privilege of doing business, or a corporation stock tax; or

20 (2) That state has jurisdiction to subject the taxpayer to a net income tax, regardless of  
21 whether, in fact, that state does or does not subject the taxpayer to the tax.

22 (c) Nonbusiness income is allocated. —

23 Nonbusiness income. — The term “nonbusiness income” means all income other than  
24 business income.

25 (d) Business activities partially within and partially without West Virginia; allocation of  
26 nonbusiness income. — If the business activities of a taxpayer take place partially within and  
27 partially without this state and the taxpayer is also taxable in another state, rents and royalties  
28 from real or tangible personal property, capital gains, interest, dividends or patent or copyright  
29 royalties, to the extent that they constitute nonbusiness income of the taxpayer, shall be allocated  
30 as provided in §11-21-37a(d)(1) through (4) of this code: *Provided*, That to the extent the items  
31 constitute business income of the taxpayer, they may not be so allocated but shall be apportioned  
32 to this state according to the provisions of §11-21-37a(e) of this code.

33 (1) Net rents and royalties. —

34 (A) Net rents and royalties from real property located in this state are allocable to this  
35 state.

36 (B) Net rents and royalties from tangible personal property are allocable to this state:

37 (i) If and to the extent that the property is utilized in this state; or

38 (ii) In their entirety if the taxpayer’s commercial domicile is in this state and the taxpayer  
39 is not organized under the laws of or taxable in the state in which the property is utilized.

40 (C) The extent of utilization of tangible personal property in a state is determined by  
41 multiplying the rents and royalties by a fraction, the numerator of which is the number of days of  
42 physical location of the property in the state during the rental or royalty period in the taxable year  
43 and the denominator of which is the number of days of physical location of the property

44 everywhere during all rental or royalty periods in the taxable year. If the physical location of the  
45 property during the rental or royalty period is unknown or unascertainable by the taxpayer,  
46 tangible personal property is utilized in the state in which the property was located at the time the  
47 rental or royalty payer obtained possession.

48 (2) Capital gains. —

49 (A) Capital gains and losses from sales of real property located in this state are allocable  
50 to this state.

51 (B) Capital gains and losses from sales of tangible personal property are allocable to this  
52 state if:

53 (i) The property had a situs in this state at the time of the sale; or

54 (ii) The taxpayer's commercial domicile is in this state and the taxpayer is not taxable in  
55 the state in which the property had a situs.

56 (C) Capital gains and losses from sales of intangible personal property are allocable to  
57 this state if the taxpayer's commercial domicile is in this state.

58 (3) Interest and dividends are allocable to this state if the taxpayer's commercial domicile  
59 is in this state.

60 (4) Patent and copyright royalties. —

61 (A) Patent and copyright royalties are allocable to this state:

62 (i) If and to the extent that the patent or copyright is utilized by the payer in this state; or

63 (ii) If and to the extent that the patent or copyright is utilized by the payer in a state in  
64 which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

65 (B) A patent is utilized in a state to the extent that it is employed in production, fabrication,  
66 manufacturing, or other processing in the state or to the extent that a patented product is produced  
67 in the state. If the basis of receipts from patent royalties does not permit allocation to states or if  
68 the accounting procedures do not reflect states of utilization, the patent is utilized in the state in  
69 which the taxpayer's commercial domicile is located.

70 (C) A copyright is utilized in a state to the extent that printing or other publication originates  
71 in the state. If the basis of receipts from copyright royalties does not permit allocation to states or  
72 if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state  
73 in which the taxpayer's commercial domicile is located.

74 (e) Business income defined. — The term "business income" means income arising from  
75 transactions and activity in the regular course of the taxpayer's trade or business and includes  
76 income from tangible and intangible property if the acquisition, management, and disposition of  
77 the property or the rendering of services in connection therewith constitute integral parts of the  
78 taxpayer's regular trade or business operations and includes all income which is apportionable  
79 under the Constitution of the United States.

80 (f) Business activities partially within and partially without this state; apportionment of  
81 business income. — All net income, after deducting those items specifically allocated under §11-  
82 21-37a(d) of this code, shall be apportioned to this state by multiplying the net income by a  
83 fraction, the numerator of which is the property factor plus the payroll factor plus two times the  
84 sales factor and the denominator of which is four, reduced by the number of factors, if any, having  
85 no denominator.

86 (1) Property factor. — The property factor is a fraction, the numerator of which is the  
87 average value of the taxpayer's real and tangible personal property owned or rented and used by  
88 it in this state during the taxable year and the denominator of which is the average value of all the  
89 taxpayer's real and tangible personal property owned or rented and used by the taxpayer during  
90 the taxable year, which is reported on Schedule L Federal Form 1065, plus the average value of  
91 all real and tangible personal property leased and used by the taxpayer during the taxable year.

92 (2) Value of property. — Property owned by the taxpayer shall be valued at its original  
93 cost, adjusted by subsequent capital additions or improvements thereto and partial disposition  
94 thereof, by reason of sale, exchange, abandonment, etc.: *Provided*, That where records of original  
95 cost are unavailable or cannot be obtained without unreasonable expense, property shall be

96 valued at original cost as determined under rules of the Tax Commissioner. Property rented by  
97 the taxpayer from others shall be valued at eight times the annual rental rate. The term “net annual  
98 rental rate” is the annual rental paid, directly or indirectly, by the taxpayer, or for its benefit, in  
99 money or other consideration for the use of property and includes:

100 (A) Any amount payable for the use of real or tangible personal property, or any part of  
101 the property, whether designated as a fixed sum of money or as a percentage of sales, profits, or  
102 otherwise.

103 (B) Any amount payable as additional rent or in lieu of rents, such as interest, taxes,  
104 insurance, repairs, or any other items which are required to be paid by the terms of the lease or  
105 other arrangement, not including amounts paid as service charges, such as utilities, janitor  
106 services, etc. If a payment includes rent and other charges unsegregated, the amount of rent shall  
107 be determined by consideration of the relative values of the rent and the other items.

108 (3) Movable property. — The value of movable tangible personal property used both within  
109 and without this state shall be included in the numerator to the extent of its utilization in this state.  
110 The extent of the utilization shall be determined by multiplying the original cost of the property by  
111 a fraction, the numerator of which is the number of days of physical location of the property in this  
112 state during the taxable period and the denominator of which is the number of days of physical  
113 location of the property everywhere during the taxable year. The number of days of physical  
114 location of the property may be determined on a statistical basis or by other reasonable method  
115 acceptable to the Tax Commissioner.

116 (4) Leasehold improvements. — Leasehold improvements shall, for purposes of the  
117 property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer  
118 is entitled to remove the improvement, or the improvements revert to the lessor upon expiration  
119 of the lease. Leasehold improvements shall be included in the property factor at their original cost.

120 (5) Average value of property. — The average value of property shall be determined by  
121 averaging the values at the beginning and ending of the taxable year: *Provided*, That the Tax

122 Commissioner may require the averaging of monthly values during the taxable year if substantial  
123 fluctuations in the values of the property exist during the taxable year, or where property is  
124 acquired after the beginning of the taxable year, or is disposed of, or whose rental contract  
125 ceases, before the end of the taxable year.

126 (6) Payroll factor. — The payroll factor is a fraction, the numerator of which is the total  
127 compensation paid in this state during the taxable year by the taxpayer for compensation and the  
128 denominator of which is the total compensation paid by the taxpayer during the taxable year, as  
129 shown on the taxpayer's federal income tax return as filed with the Internal Revenue Service, as  
130 reflected in the schedule of wages and salaries and that portion of cost of goods sold which  
131 reflects compensation or as shown on a pro forma return.

132 (7) Compensation. — The term "compensation" means wages, salaries, commissions,  
133 and any other form of remuneration paid to employees for personal services. Payments made to  
134 an independent contractor or to any other person not properly classifiable as an employee shall  
135 be excluded. Only amounts paid directly to employees are included in the payroll factor. Amounts  
136 considered as paid directly to employees include the value of board, rent, housing, lodging and  
137 other benefits or services furnished to employees by the taxpayer in return for personal services,  
138 provided the amounts constitute income to the recipient for federal income tax purposes.

139 (8) Employee. — The term "employee" means:

140 (A) Any officer of a business entity; or

141 (B) Any individual who, under the usual common-law rule applicable in determining the  
142 employer-employee relationship, has the status of an employee.

143 (9) Compensation. — Compensation is paid or accrued in this state if:

144 (A) The employee's service is performed entirely within this state; or

145 (B) The employee's service is performed both within and without this state, but the service  
146 performed without the state is incidental to the individual's service within this state. The word



147 “incidental” means any service which is temporary or transitory in nature or which is rendered in  
148 connection with an isolated transaction; or

149 (C) Some of the service is performed in this state and:

150 (i) The employee’s base of operations or, if there is no base of operations, the place from  
151 which the service is directed or controlled is in the state; or

152 (ii) The base of operations or the place from which the service is directed or controlled is  
153 not in any state in which some part of the service is performed, but the employee’s residence is  
154 in this state.

155 The term “base of operations” is the place of a more or less permanent nature from which  
156 the employee starts his or her work and to which he or she customarily returns in order to receive  
157 instructions from the taxpayer or communications from his or her customers, or other persons, or  
158 to replenish stock or other materials, repair equipment, or perform any other functions necessary  
159 to the exercise of his or her trade or profession at some other point or points. The term “place  
160 from which the service is directed or controlled” refers to the place from which the power to direct  
161 or control is exercised by the employer.

162 (10) Sales factor. — The sales factor is a fraction, the numerator of which is the gross  
163 receipts of the taxpayer derived from transactions and activity in the regular course of its trade or  
164 business in this state during the taxable year (business income), less returns and allowances.  
165 The denominator of the fraction is the total gross receipts derived by the taxpayer from  
166 transactions and activity in the regular course of its trade or business during the taxable year  
167 (business income) and reflected in its gross income reported and as appearing on the taxpayer’s  
168 Federal Form 1065 or 1120, as appropriate, or any successor form, and consisting of those certain  
169 pertinent portions of the (gross income) elements set forth: *Provided*, That if either the numerator  
170 or the denominator includes interest or dividends from obligations of the United States  
171 government which are exempt from taxation by this state, the amount of such interest and  
172 dividends, if any, shall be subtracted from the numerator or denominator in which it is included.

173 (11) Allocation of sales of tangible personal property. —

174 (A) Sales of tangible personal property are in this state if:

175 (i) The property is received in this state by the purchaser, other than the United States  
176 government, regardless of the free on board point or other conditions of the sale. In the case of  
177 delivery by common carrier or other means of transportation, the place at which the property is  
178 ultimately received after all transportation has been completed is the place at which the property  
179 is received by the purchaser. Direct delivery in this state, other than for purposes of transportation,  
180 to a person or firm designated by the purchaser, is delivery to the purchaser in this state and  
181 direct delivery outside this state to a person or firm designated by the purchaser is not delivery to  
182 the purchaser in this state, regardless of where title passes or other conditions of sale; or

183 (ii) The property is shipped from an office, store, warehouse, factory or other place of  
184 storage in this state and the purchaser is the United States government.

185 (B) All other sales of tangible personal property delivered or shipped to a purchaser within  
186 a state in which the taxpayer is not taxed, as defined in subsection (b) of this section, shall be  
187 excluded from the denominator of the sales factor.

188 (12) Allocation of other sales. — Sales, other than sales of tangible personal property,  
189 are in this state if:

190 (A) The income-producing activity is performed in this state; or

191 (B) The income-producing activity is performed both in and outside this state and a greater  
192 proportion of the income-producing activity is performed in this state than in any other state, based  
193 on costs of performance; or

194 (C) The sale constitutes business income to the taxpayer, or the taxpayer is a financial  
195 organization not having its commercial domicile in this state, and in either case the sale is a receipt  
196 described as attributable to this state in §11-21-7b(b) of this code.

197 ~~(f)~~(g) Income-producing activity. — The term “income-producing activity” applies to each  
198 separate item of income and means the transactions and activity directly engaged in by the

199 taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gain  
200 or profit. The activity does not include transactions and activities performed on behalf of the  
201 taxpayer, such as those conducted on its behalf by an independent contractor. “Income-producing  
202 activity” includes, but is not limited to, the following:

203 (1) The rendering of personal services by employees with utilization of tangible and  
204 intangible property by the taxpayer in performing a service;

205 (2) The sale, rental, leasing, licensing, or other use of real property;

206 (3) The sale, rental, leasing, licensing, or other use of tangible personal property; or

207 (4) The sale, licensing or other use of intangible personal property. — The mere holding  
208 of intangible personal property is not, in itself, an income-producing activity: *Provided*, That the  
209 conduct of the business of a financial organization is an income-producing activity.

210 ~~(g)~~(h) Cost of performance. — The term “cost of performance” means direct costs  
211 determined in a manner consistent with generally accepted accounting principles and in  
212 accordance with accepted conditions or practices in the trade or business of the taxpayer.

213 ~~(h)~~(i) Other methods of allocation and apportionment. —

214 (1) General. — If the allocation and apportionment provisions of §11-21-37a(d) and §11-  
215 21-37a(f) of this code do not fairly represent the extent of the taxpayer’s business activities in this  
216 state, the taxpayer may petition for, or the Tax Commissioner may require, in respect to all or any  
217 part of the taxpayer’s business activities, if reasonable:

218 (A) Separate accounting;

219 (B) The exclusion of one or more of the factors;

220 (C) The inclusion of one or more additional factors which will fairly represent the  
221 taxpayer’s business activity in this state; or

222 (D) The employment of any other method to effectuate an equitable allocation or  
223 apportionment of the taxpayer’s income. The petition shall be filed no later than the due date of  
224 the annual return for the taxable year for which the alternative method is requested, determined

225 without regard to any extension of time for filing the return and the petition shall include a  
226 statement of the petitioner's objections and of the alternative method of allocation or  
227 apportionment as it believes to be proper under the circumstances with detail and proof as the  
228 Tax Commissioner requires.

229 (2) Burden of proof. — In any proceeding before the Office of Tax Appeals established in  
230 §11-10A-1 *et seq.* of this code, or in any court in which employment of one of the methods of  
231 allocation or apportionment provided in subdivision (1) or (2) of this subsection is sought, on the  
232 grounds that the allocation and apportionment provisions of §11-21-37a(d) and §11-21-37a(f) of  
233 this code do not fairly represent the extent of the taxpayer's business activities in this state, the  
234 burden of proof is on:

235 (A) The Tax Commissioner, if the commissioner seeks employment of one of the methods;

236 or

237 (B) The taxpayer, if the taxpayer seeks employment of one of the other methods.

238 (j)(A) Allocation and apportionment on and after January 1, 2022. — For tax years  
239 beginning on and after January 1, 2022, income of flow-through entities allocated and apportioned  
240 under this section and §11-21-32 of this code, shall be allocated and apportioned in the same  
241 manner and to the same extent as the income of corporations and entities taxable under §11-24-  
242 1 *et seq.* of this code are allocated and apportioned under §11-24-7 of this code. Apportioned  
243 income shall be apportioned pursuant to application of a single sales factor to the same extent as  
244 the income of corporations and entities taxable under §11-24-1 *et seq.* of this code are  
245 apportioned under §11-24-7 of this code. Allocated income shall be allocated in the same manner  
246 and to the same extent as the income of corporations and entities taxable under §11-24-1 *et seq.*  
247 of this code are apportioned under §11-24-7 of this code.

248 (B) For purposes of this article the provisions of §11-21-12K, §11-21-37b and §11-21-37c  
249 of this code remain unchanged by this section.

250 (C) For purposes of this article, “flow-through entity”, “conduit entity” or “pass through  
251 entity” means an S corporation, partnership, limited partnership, limited liability partnership, or  
252 limited liability company. The term “flow-through entity,” “conduit entity” or “pass through entity”  
253 includes a publicly traded partnership as that term is defined in section 7704 of the Internal  
254 Revenue Code that has equity securities registered with the Securities and Exchange  
255 Commission under Section 12 of Title I of the Securities Exchange Act of 1934, 15 USC 78I.

256 (D) Allocation of flow-through income to recipients. — Income of a flow-through entity  
257 allocated and apportioned under this section or any other provision of this article is allocated  
258 income in the hands of a shareholder, interest owner, partner, member or other recipient of flow-  
259 through income, and taxable to such recipient as income allocated to this state under the  
260 provisions of this article, or in the case of recipients of such flow through income that are taxable  
261 under the provisions of §11-24-1 et seq. of this code, such income is taxable to such recipient as  
262 income allocated to this state under the provisions of §11-24-1 et seq. of this code.

263 ~~(i)(k)~~ Effective date. — (A) This The provisions of this section added in 2019 shall apply  
264 to taxable years beginning on and after January 1, 2018.

265 (B) The provisions of this section added in 2022 shall apply to taxable years beginning on  
266 and after January 1, 2022.

NOTE: The purpose of this bill is to cause the allocation and apportionment of income for flow-through entities to be the same as allocation and apportionment of income for C corporations.

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