WEST virginia legislature

2023 REGULAR session

Introduced

**FISCAL NOTE**

House Bill 2608

By Delegates Statler, Jennings, and Barnhart

[Introduced January 17, 2023; Referred to the Committee on Finance]

A BILL to amend and reenact §11-21-3 of the Code of West Virginia, 1931, as amended; to amend said code by adding thereto a new section, designated §11-21-3a; and to amend and reenact §11-21-20 of said code, all relating to levying a tax on a pass-through entity's income apportioned to West Virginia for pass-through entities that elect to pay West Virginia income tax at the entity level and authorizing a refundable income tax credit for an owner for such tax paid.

Be it enacted by the Legislature of West Virginia:

Article 21. Personal income tax.

§11-21-3. Imposition of tax; persons subject to tax.

(a) Imposition of tax. — A tax determined in accordance with the rates hereinafter set forth in this article is hereby imposed for each taxable year on the West Virginia taxable income of every individual, estate, electing pass-through entity, and trust.

(b) Partners and partnerships. — A partnership or other pass-through entity as such shall not be subject to tax under this article, unless the partnership or other pass-through entity elects to be subject to the tax levied under this section for a taxable year pursuant to §11-21-3a of this code. Persons carrying on business as partners or owners of another type of pass-through entity shall be liable for tax under this article only in their separate or individual capacities, unless the partnership or other pass-through entity elects to be subject to the tax levied under this section for a taxable year pursuant to §11-21-3a of this code. However, partnerships and other pass-through entities are subject to the tax imposed by this article to the extent they elect to pay additional West Virginia income taxes owed that are attributable to final federal partnership audit adjustments under §11-21A-3 of this code.

(c) Associations taxable as corporations. — An association, trust or other unincorporated organization which is taxable as a corporation for federal income tax purposes, shall not be subject to tax under this article.

(d) Exempt trusts and organizations. — A trust or other unincorporated organization which by reason of its purposes or activities is exempt from federal income tax shall be exempt from tax under this article (regardless of whether subject to federal income tax on unrelated business taxable income).

(e) Cross references. — For definitions of West Virginia taxable income of:

(1) Resident individual, see §11-21-11 of this code.

(2) Resident estate or trust, see §11-21-18 of this code.

(3) Nonresident individual, see §11-21-30 of this code.

(4) Nonresident estate or trust, see §11-21-38 of this code.

(f) Effective date. — This section as amended in 2019 shall apply to taxable years beginning on and after January 1, 2018.

§11-21-3a. Credit for income tax of another state.

Definitions. As used in this section, the following terms have the following meanings. Any term used in this section that is not defined in this section has the same meaning as when used elsewhere in this article. Any term undefined in this article has the same meaning as when used in a comparable context in the laws of the United States relating to income taxes, in accordance with §11-21-9 of this code, unless a different meaning is clearly required.

"Electing pass-through entity" means a qualifying pass-through entity that elects to be subject to the tax levied under this article for a taxable year.

"Owner" means a person that is a partner, member, shareholder, or investor in an electing pass-through entity for any portion of the taxable year.

"Income" means the sum of owners’ distributive shares of the income, gain, expense, or loss of an electing pass-through entity for the taxable year, as reported for federal income tax purposes.

"Tax Commissioner" means the Tax Commissioner of the State of West Virginia or his or her delegate, as provided in §11-1-1 of this code.

"Pass-through entity" means any partnership or other business entity that is not subject to tax under §11-24-1 *et seq*. of this code, imposing tax on C corporations or other entities taxable as a corporation.

"Entity" means any person that is not an individual.

(b) A pass-through entity that is not a disregarded entity for federal income tax purposes may elect to be subject to the tax levied under this section by filing with the Tax Commissioner a form prescribed by the commissioner making such election on or before the deadline to file the return, as specified in §11-24-51 of this code. Such election applies only to the taxable year for which the election is made and is, once made, is irrevocable for that year.

(c) The rate of tax imposed on an electing pass-through entity that elects to be taxed under this section shall be equal to the top marginal rate imposed on individuals under §11-21-4e of this code. The rate of tax shall be imposed on the apportioned net income or apportioned income of an electing pass-through entity, as reported on its federal income tax return, apportionable to this state. An electing pass-through entity’s taxable income shall be apportioned to this state in accordance with §11-21-37, §11-21-37a, §11-21-37b, and/or §11-21-37c of this code, as applicable.

(d) The tax levied under this section shall be calculated without regard to any deductions or credits otherwise permitted to be claimed by an owner or member of the electing pass-through entity in computing the owner's aggregate tax liability under this article and not utilized by the pass-through entity in determining its taxable income.

(e) With respect to an electing pass–through entity that pays the tax imposed under this section, the tax shall be treated as a tax imposed on the pass–through entity itself. The tax levied under this section is intended to comply with the provisions of internal revenue service notice 2020-75 in which such tax paid by an electing pass-through entity is deductible to the entity for federal income tax purposes.

(f) The Tax Commissioner shall adopt rules to administer the tax levied under this section. Such rules shall include a description of how the adjustments to income and the credit allowed under this section apply to direct or indirect owners of an electing pass-through entity based on various ownership structures.

(g) There is hereby allowed a refundable credit against a taxpayer's aggregate tax liability under this article for a taxpayer who is an owner of an electing pass-through entity. The credit shall equal the owner's proportionate share of the tax levied under this article remitted by the owner's electing pass-through entity for the taxable year. The credit shall be claimed for the taxpayer's taxable year that includes the last day of the electing pass-through entity's taxable year for which the tax levied under this section was paid. If the credit exceeds the aggregate amount of tax otherwise due, the excess shall be refunded to the taxpayer. The Tax Commissioner may request that a taxpayer claiming a credit under this section furnish information as is necessary to support the claim for the credit under this section, and no credit shall be allowed unless information requested from the taxpayer is provided to the Tax Commissioner.

§11-21-20. Credit for income tax of another state.

(a) General. -- A resident shall be allowed a credit against the tax otherwise due under this article for any income tax ~~imposed~~ paid to another state of the United States or by the District of Columbia for the taxable year, either directly paid by the individual or paid by a pass-through entity in accordance with §11-21-3a of this codeand passed through by the entity to the individual taxpayer, ~~by another state of the United States or by the District of Columbia~~ upon income both derived therefrom and subject to tax under this article.

(b) Limitations. -- (1) The credit under this section shall not exceed the percentage of the tax otherwise due under this article determined by dividing the portion of the taxpayer's West Virginia income subject to taxation by such other jurisdiction by the total amount of the taxpayer's West Virginia income.

(2) The credit under this section shall not reduce the tax otherwise due under this article to an amount less than would have been due if the income subject to taxation by such other jurisdiction were excluded from the taxpayer's West Virginia income.

(c) Exception. -- No credit shall be allowed under this section for a tax of a jurisdiction which allows residents of this state a credit against the taxes imposed by such other jurisdiction for the tax under this article, if such other credit is substantially similar to the credit granted by section forty.

(d) Definition. -- For purposes of this section West Virginia income means:

(1) The West Virginia adjusted gross income of an individual, or

(2) The amount of the income of an estate or trust, determined as if the estate or trust were an individual computing his or her West Virginia adjusted gross income under section twelve.

NOTE: The purpose of this bill is to establish allow pass-through entities to elect to be taxed at the entity level and to provide a refundable tax credit to owners or members of an electing pass-through entity on their individual tax returns.

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