SB 2008

FILED

2006 NOV 30 AM 10: 37

OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

Second Extraordinary Session, 2006

ENROLLED

Senate Bill No. 2008

(BY SENATORS TOMBLIN, MR. PRESIDENT, AND SPROUSE, BY REQUEST OF THE EXECUTIVE)

[Passed November 14, 2006; in effect ninety days from passage.]

ENROLLED

Senate Bill No. 2008

(BY SENATORS TOMBLIN, MR. PRESIDENT, AND SPROUSE,
BY REQUEST OF THE EXECUTIVE)

[Passed November 13, 2006; in effect ninety days from passage.]

AN ACT to amend and reenact §11-21-71a of the Code of West Virginia, 1931, as amended, relating to increasing the rate of personal income tax withholding for certain nonresidents of West Virginia.

Be it enacted by the Legislature of West Virginia:

That §11-21-71a of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 21. PERSONAL INCOME TAX.

§11-21-71a. Withholding tax on West Virginia source income of nonresident partners, nonresident S corporation shareholders, and nonresident beneficiaries of estates and trusts.

(a) *General rule.* — For the privilege of doing business in this state or deriving rents or royalties from real or tangible personal property located in this state, including, but not limited to, natural resources in place and standing timber, a partnership, S corporation, estate or trust, which is treated as a pass-through entity for federal income tax purposes and which has taxable income for the taxable year derived from or connected with West Virginia sources any portion of which is allocable to a nonresident partner, nonresident shareholder, or nonresident beneficiary, as the case may be, shall pay a withholding tax under this section, except as provided in subsections (c) and (k) of this section.

(b) *Amount of withholding tax.* —

(1) *In general.* — The amount of withholding tax payable by any partnership, S corporation, estate or trust, under subsection (a) of this section, shall be equal to four percent of the effectively connected taxable income of the partnership, S corporation, estate or trust, as the case may be, which may lawfully be taxed by this state and which is allocable to a nonresident partner, nonresident shareholder, or nonresident beneficiary of a trust or estate: *Provided*, That for taxable years commencing on or after the first day of January, two thousand eight, the amount of withholding tax payable by any partnership, S corporation, estate or trust, under subsection (a) of this section, shall be equal to six and one-half percent of the effectively connected taxable income of the partnership, S corporation, estate or trust, as the case

may be, which may lawfully be taxed by this state and which is allocable to a nonresident partner, nonresident shareholder, or nonresident beneficiary of a trust or estate.

(2) *Credits against tax.* — When determining the amount of withholding tax due under this section, the pass-through entity may apply any tax credits allowable under this chapter to the pass-through entity which pass through to the nonresident distributees: *Provided*, That in no event may the application of any credit or credits reduce the tax liability of the distributee under this article to less than zero.

(c) *When withholding is not required.* — Withholding shall not be required:

(1) On distribution to a person, other than a corporation, who is exempt from the tax imposed by this article. For purposes of this subdivision, a person is exempt from the tax imposed by this article only if such person is, by reason of such person's purpose or activities, exempt from paying federal income taxes on such person's West Virginia source income. The pass-through entity may rely on the written statement of the person claiming to be exempt from the tax imposed by this article provided the pass-through entity discloses the name and federal taxpayer identification number for all such persons in its return for the taxable year filed under this article or article twenty-four of this chapter; or

(2) On distributions to a corporation which is exempt from the tax imposed by article twenty-four of this chapter. For purposes of this subdivision, a corporation is exempt from the tax imposed by article twenty-four of this chapter only if the corporation, by reason of its purpose or activities is exempt from paying federal income taxes on the corporation's West Virginia source

income. The pass-through entity may rely on the written statement of the person claiming to be exempt from the tax imposed by article twenty-four of this chapter provided the pass-through entity discloses the name and federal taxpayer identification number for all such corporations in its return for the taxable year filed under this article or article twenty-four of this chapter; or

(3) On distributions when compliance will cause undue hardship on the pass-through entity: *Provided*, That no pass-through entity shall be exempt under this subdivision from complying with the withholding requirements of this section unless the Tax Commissioner, in his or her discretion, approves in writing the pass-through entity's written petition for exemption from the withholding requirements of this section based on undue hardship. The Tax Commissioner may prescribe the form and contents of such a petition and specify standards for when a pass-through entity will not be required to comply with the withholding requirements of this section due to undue hardship. Such standards shall take into account (among other relevant factors) the ability of a pass-through entity to comply at reasonable cost with the withholding requirements of this section and the cost to this state of collecting the tax directly from a nonresident distributee who does not voluntarily file a return and pay the amount of tax due under this article with respect to such distributions; or

(4) On distributions by nonpartnership ventures. An unincorporated organization that has elected, under Section 761 of the Internal Revenue Code, to not be treated as a partnership for federal income tax is not treated as a partnership under this article and is not required to withhold under this section. However, such unincorporated organizations shall make and file with the Tax Commissioner a true and accurate return of

information under subsection (c), section fifty-eight of this article, under such regulations and in such form and manner as the Tax Commissioner may prescribe, setting forth: (A) The amount of fixed or determinable gains, profits and income; and (B) the name, address and taxpayer identification number of persons receiving fixed or determinable gains, profits or income from the nonpartnership venture.

(d) *Payment of withheld tax.* —

(1) *General rule.* — Each partnership, S corporation, estate or trust, required to withhold tax under this section, shall pay the amount required to be withheld to the Tax Commissioner no later than:

(A) *S corporations.* — The fifteenth day of the third month following the close of the taxable year of the S corporation along with the annual information return due under article twenty-four of this chapter, unless paragraph (C) of this subdivision applies.

(B) *Partnerships, estates and trusts.* — The fifteenth day of the fourth month following the close of the taxable year of the partnership, estate or trust, with the annual return of the partnership, estate or trust due under this article, unless paragraph (C) of this subdivision applies.

(C) *Composite returns.* — The fifteenth day of the fourth month of the taxable year with the composite return filed under section fifty-one-a of this article.

(2) *Special rules.* —

(A) *Where there is extension of time to file return.* — An extension of time for filing the returns referenced in subdivision (1) of this subsection does not extend the time for paying the amount of withholding tax due under this section. In this situation, the pass-through entity shall pay, by the date specified in subdivision (1) of this subsection, at least ninety percent of the withholding tax due for the taxable year, or one hundred percent of the tax paid under this section for the prior taxable year, if such taxable year was a taxable year of twelve months and tax was paid under this section for that taxable year. The remaining portion of the tax due under this section, if any, shall be paid at the time the pass-through entity files the return specified in subdivision (1) of this subsection. If the balance due is paid by the last day of the extension period for filing such return and the amount of tax due with such return is ten percent or less of the tax due under this section for the taxable year, no additions to tax shall be imposed under article ten of this chapter with respect to balance so remitted. If the amount of withholding tax due under this section for the taxable year is less than the estimated withholding taxes paid for the taxable year by the pass-through entity, the excess shall be refunded to the pass-through entity or, at its election, established as a credit against withholding tax due under this section for the then current taxable year.

(B) *Deposit in trust for Tax Commissioner.* — The Tax Commissioner may, if the commissioner believes such action is necessary for the protection of trust fund moneys due this state, require any pass-through entity to pay over to the Tax Commissioner the tax deducted and withheld under this section, at any earlier time or times.

(e) *Effectively connected taxable income.* — For purposes of this section, the term "effectively connected taxable income" means the taxable income or portion thereof of a partnership, S corporation, estate or trust, as the case may be, which is derived from or attributable to West Virginia sources as determined under section thirty-two of this article and such regulations as the Tax Commissioner may prescribe, whether such amount is actually distributed or is deemed to have been distributed for federal income tax purposes.

(f) *Treatment of nonresident partners, S corporation shareholders or beneficiaries of a trust or estate.* —

(1) *Allowance of credit.* — Each nonresident partner, nonresident shareholder, or nonresident beneficiary shall be allowed a credit for such partner's or shareholder's or beneficiary's share of the tax withheld by the partnership, S corporation, estate or trust under this section: *Provided*, That when the distribution is to a corporation taxable under article twenty-four of this chapter, the credit allowed by this section shall be applied against the distributee corporation's liability for tax under article twenty-four of this chapter.

(2) *Credit treated as distributed to partner, shareholder or beneficiary.* — Except as provided in regulations, a nonresident partner's share, a nonresident shareholder's share, or a nonresident beneficiary's share of any withholding tax paid by the partnership, S corporation, estate or trust under this section shall be treated as distributed to such partner by such partnership, or to such shareholder by such S corporation, or to such beneficiary by such estate or trust on the earlier of:

(A) The day on which such tax was paid to the Tax Commissioner by the partnership, S corporation, estate or trust; or

(B) The last day of the taxable year for which such tax was paid by the partnership, S corporation, estate or trust.

(g) *Regulations.* — The Tax Commissioner shall prescribe such regulations as may be necessary to carry out the purposes of this section.

(h) *Information statement.* —

(1) Every person required to deduct and withhold tax under this section shall furnish to each nonresident partner, or nonresident shareholder, or nonresident beneficiary, as the case may be, a written statement, as prescribed by the Tax Commissioner, showing the amount of West Virginia effectively connected taxable income, whether distributed or not distributed for federal income tax purposes by such partnership, S corporation, estate or trust, to such nonresident partner, or nonresident shareholder, or nonresident beneficiary, the amount deducted and withheld as tax under this section; and such other information as the Tax Commissioner may require.

(2) A copy of the information statements required by this subsection must be filed with the West Virginia return filed under this article (or article twenty-four of this chapter in the case of S corporations) by the pass-through entity for its taxable year to which the distribution relates. This information statement must be furnished to each nonresident distributee on or before the due date of the pass-through entity's return under this article or article twenty-four of this chapter for the taxable year, including extensions of time for filing such return, or such later date as may be allowed by the Tax Commissioner.

(i) *Liability for withheld tax.* — Every person required to deduct and withhold tax under this section is hereby made liable for the payment of the tax due under this section for taxable years (of such persons) beginning after the thirty-first day of December, one thousand nine hundred ninety-one, except as otherwise provided in this section. The amount of tax required to be withheld and paid over to the Tax Commissioner shall be considered the tax of the partnership, estate or trust, as the case may be, for purposes of articles nine and ten of this chapter. Any amount of tax withheld under this section shall be held in trust for the Tax Commissioner. No partner, S corporation shareholder, or beneficiary of a trust or estate shall have a right of action against the partnership, S corporation, estate or trust, in respect to any moneys withheld from such person's distributive share and paid over to the Tax Commissioner in compliance with or in intended compliance with this section.

(j) *Failure to withhold.* — If any partnership, S corporation, estate or trust fails to deduct and withhold tax as required by this section and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld under this section shall not be collected from the partnership, S corporation, estate or trust, as the case may be, but the partnership, S corporation, estate or trust shall not be relieved from liability for any penalties or interest on additions to tax otherwise applicable in respect of such failure to withhold.

(k) *Distributee agreements.* —

(1) The Tax Commissioner shall permit a nonresident distributee to file with a pass-through entity, on a form prescribed by the Tax Commissioner, the agreement of such nonresident distributee: (A) To timely file returns and make timely payment of all taxes imposed by this article or article twenty-four of this chapter in the case of a C corporation, on the distributee with respect to the effectively connected taxable income of the pass-through entity; and (B) to be subject to personal jurisdiction in this state for purposes of the collection of any unpaid income tax under this article (or article

twenty-four of this chapter in the case of a C corporation), together with related interest, penalties, additional amounts and additions to tax, owed by the nonresident distributee.

(2) A nonresident distributee electing to execute an agreement under this subsection must file a complete and properly executed agreement with each pass-through entity for which this election is made, on or before the last day of the first taxable year of the pass-through entity in respect of which the agreement applies. The pass-through entity shall file a copy of that agreement with the Tax Commissioner as provided in subdivision (5) of this subsection.

(3) After an agreement is filed with the pass-through entity, that agreement may be revoked by a distributee only in accordance with regulations promulgated by the Tax Commissioner.

(4) Upon receipt of such an agreement properly executed by the nonresident distributee, the pass-through entity shall not withhold tax under this section for the taxable year of the pass-through entity in which the agreement is received by the pass-through entity and for any taxable year subsequent thereto until either the nonresident distributee notifies the pass-through entity, in writing, to begin withholding tax under this section or the Tax Commissioner directs the pass-through entity, in writing, to begin withholding tax under this section because of the distributee's continuing failure to comply with the terms of such agreement.

(5) The pass-through entity shall file with the Tax Commissioner a copy of all distributee agreements received by the pass-through entity during any taxable year with this annual information return filed under this article, or article twenty-four of this chapter in the

case of S corporations. If the pass-through entity fails to timely file with the Tax Commissioner a copy of an agreement executed by a distributee and furnished to the pass-through entity in accordance with this section, then the pass-through entity shall remit to the Tax Commissioner an amount equal to the amount that should have been withheld under this section from the nonresident distributee. The pass-through entity may recover payment made pursuant to the preceding sentence from the distributee on whose behalf the payment was made.

(l) *Definitions.* — For purposes of this section, the following terms mean:

(1) *Corporation.* — The term "corporation" includes associations, joint stock companies and other entities which are taxed as corporations for federal income tax purposes.

(A) *C corporation.* — The term "C corporation" means a corporation which is not an S corporation for federal income tax purposes.

(B) *S corporation.* — The term "S corporation" means a corporation for which a valid election under Section 1362(a) of the Internal Revenue Code is in effect for the taxable period. All other corporations are C corporations.

(2) *Distributee.* — The term "distributee" includes any partner of a partnership, any shareholder of an S corporation and any beneficiary of an estate or trust that is treated as a pass-through entity for federal income tax purposes for the taxable year of the entity, with respect to all or a portion of its income.

(3) *Internal Revenue Code.* — The term "Internal Revenue Code" means the Internal Revenue Code of

1986, as amended, through the date specified in section nine of this article.

(4) *Nonresident distributee.* — The term "nonresident distributee" includes any individual who is treated as a nonresident of this state under this article; and any partnership, estate, trust or corporation whose commercial domicile is located outside this state.

(5) *Partner.* — The term "partner" includes a member of a partnership as that term is defined in this section.

(6) *Partnership.* — The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on and which is not a trust or estate, a corporation or a sole proprietorship. "Partnership" does not include an unincorporated organization which, under Section 761 of the Internal Revenue Code, is not treated as a partnership for the taxable year for federal income tax purposes.

(7) *Taxable period.* — The term "taxable period" means, in the case of an S corporation, any taxable year or portion of a taxable year during which a corporation is an S corporation.

(8) *Taxable year of the pass-through entity.* — The term "taxable year of the pass-through entity" means the taxable year of the pass-through entity for federal income tax purposes. If a pass-through entity does not have a taxable year for federal tax purposes, its tax year for purposes of this article shall be the calendar year.

(m) *Effective date.* — The provisions of this section shall first apply to taxable years of pass-through entities beginning after the thirty-first day of December, one thousand nine hundred ninety-one.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

C Randy White
Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Darrell E. Holmes
Clerk of the Senate

Clerk of the House of Delegates

Earl Ray Tomblin
President of the Senate

Speaker House of Delegates

The within is approved this the 30th Day of November, 2006.

Governor

PRESENTED TO THE
GOVERNOR

NOV 29 2006

Time 10:30am