

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

House Bill 4030

**FISCAL
NOTE**

BY MR. SPEAKER (MR. ARMSTEAD) AND DELEGATE MILEY

BY REQUEST OF THE EXECUTIVE

[Introduced January 15, 2016; Referred
to the Committee on Finance.]

1 A BILL to amend and reenact §11-21-9 and §11-21-71a of the Code of West Virginia, 1931, as
 2 amended, all relating to updating the meaning of federal adjusted gross income and
 3 certain other terms used in the West Virginia Personal Income Tax Act; changing due
 4 dates for partnership returns; and specifying effective dates.

Be it enacted by the Legislature of West Virginia:

1 That §11-21-9 and §11-21-71a of the Code of West Virginia, 1931, as amended, be
 2 amended and reenacted, all to read as follows:

ARTICLE 21. PERSONAL INCOME TAX.

§11-21-9. Meaning of terms.

1 (a) Any term used in this article has the same meaning as when used in a comparable
 2 context in the laws of the United States relating to income taxes, unless a different meaning is
 3 clearly required. Any reference in this article to the laws of the United States means the provisions
 4 of the Internal Revenue Code of 1986, as amended, and any other provisions of the laws of the
 5 United States that relate to the determination of income for federal income tax purposes. All
 6 amendments made to the laws of the United States after December 31, ~~2013~~ 2014, but prior to
 7 January 1, ~~2015~~ 2016, shall be given effect in determining the taxes imposed by this article to the
 8 same extent those changes are allowed for federal income tax purposes, whether the changes
 9 are retroactive or prospective, but no amendment to the laws of the United States made on or
 10 after January 1, ~~2015~~ 2016, may be given any effect.

11 (b) *Medical savings accounts.* -- The term "taxable trust" does not include a medical
 12 savings account established pursuant to section twenty, article fifteen, chapter thirty-three of this
 13 code or section fifteen, article sixteen of that chapter. Employer contributions to a medical savings
 14 account established pursuant to those sections are not wages for purposes of withholding under
 15 section seventy-one of this article.

16 (c) *Surtax.* -- The term "surtax" means the twenty percent additional tax imposed on
 17 taxable withdrawals from a medical savings account under section twenty, article fifteen, chapter

18 thirty-three of this code and the twenty percent additional tax imposed on taxable withdrawals
19 from a medical savings account under section fifteen, article sixteen of that chapter which are
20 collected by the Tax Commissioner as tax collected under this article.

21 (d) *Effective date.* -- The amendments to this section enacted in the year ~~2015~~ 2016 are
22 retroactive to the extent allowable under federal income tax law. With respect to taxable years
23 that began prior to January 1, ~~2016~~ 2017, the law in effect for each of those years shall be fully
24 preserved as to that year, except as provided in this section.

25 (e) For purposes of the refundable credit allowed to a low income senior citizen for property
26 tax paid on his or her homestead in this state, the term "laws of the United States" as used in
27 subsection (a) of this section means and includes the term "low income" as defined in subsection
28 (b), section twenty-one of this article and as reflected in the poverty guidelines updated
29 periodically in the federal register by the U.S. Department of Health and Human Services under
30 the authority of 42 U.S.C. § 9902(2).

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

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

9 (b) *Amount of withholding tax.* --

10 (1) *In general.* -- The amount of withholding tax payable by any partnership, S corporation,

11 estate or trust, under subsection (a) of this section, shall be equal to four percent of the effectively
12 connected taxable income of the partnership, S corporation, estate or trust, as the case may be,
13 which may lawfully be taxed by this state and which is allocable to a nonresident partner,
14 nonresident shareholder, or nonresident beneficiary of a trust or estate: *Provided*, That for taxable
15 years commencing on or after January 1, 2008, the amount of withholding tax payable by any
16 partnership, S corporation, estate or trust, under subsection (a) of this section, shall be equal to
17 six and one-half percent of the effectively connected taxable income of the partnership, S
18 corporation, estate or trust, as the case may be, which may lawfully be taxed by this state and
19 which is allocable to a nonresident partner, nonresident shareholder, or nonresident beneficiary
20 of a trust or estate.

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

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

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

35 (2) On distributions to a corporation which is exempt from the tax imposed by article
36 twenty-four of this chapter. For purposes of this subdivision, a corporation is exempt from the tax

37 imposed by article twenty-four of this chapter only if the corporation, by reason of its purpose or
38 activities is exempt from paying federal income taxes on the corporation's West Virginia source
39 income. The pass-through entity may rely on the written statement of the person claiming to be
40 exempt from the tax imposed by article twenty-four of this chapter provided the pass-through
41 entity discloses the name and federal taxpayer identification number for all such corporations in
42 its return for the taxable year filed under this article or article twenty-four of this chapter; or

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

55 (4) On distributions by nonpartnership ventures. An unincorporated organization that has
56 elected, under Section 761 of the Internal Revenue Code, to not be treated as a partnership for
57 federal income tax is not treated as a partnership under this article and is not required to withhold
58 under this section. However, such unincorporated organizations shall make and file with the Tax
59 Commissioner a true and accurate return of information under subsection (c), section fifty-eight
60 of this article, under such regulations and in such form and manner as the Tax Commissioner
61 may prescribe, setting forth: (A) The amount of fixed or determinable gains, profits and income;
62 and (B) the name, address and taxpayer identification number of persons receiving fixed or

63 determinable gains, profits or income from the nonpartnership venture.

64 (d) *Payment of withheld tax.* --

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

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

71 (B) *Partnerships, estates and trusts.* -- The fifteenth day of the fourth month following the
72 close of the taxable year of the partnership, estate or trust, with the annual return of the
73 partnership, estate or trust due under this article, unless paragraph (C) of this subdivision applies:
74 Provided, That for tax years beginning after December 31, 2015, partnerships shall pay the
75 amount required to be withheld to the Tax Commissioner, along with the annual return of the
76 partnership due under this article, on the fifteenth day of the third month following the close of the
77 taxable year of the partnership, unless paragraph (C) of this subdivision applies.

78 (C) *Composite returns.* -- The fifteenth day of the fourth month of the taxable year with the
79 composite return filed under section fifty-one-a of this article: Provided, That for tax years
80 beginning after December 31, 2015, partnerships or partners in a partnership filing composite
81 returns under section fifty-one-a of this article shall pay the amount required to be withheld to the
82 Tax Commissioner, along with the annual return due under this article, on the fifteenth day of the
83 third month following the close of the taxable year.

84 (2) *Special rules.* --

85 (A) *Where there is extension of time to file return.* -- An extension of time for filing the
86 returns referenced in subdivision (1) of this subsection does not extend the time for paying the
87 amount of withholding tax due under this section. In this situation, the pass-through entity shall
88 pay, by the date specified in subdivision (1) of this subsection, at least ninety percent of the

89 withholding tax due for the taxable year, or one hundred percent of the tax paid under this section
90 for the prior taxable year, if such taxable year was a taxable year of twelve months and tax was
91 paid under this section for that taxable year. The remaining portion of the tax due under this
92 section, if any, shall be paid at the time the pass-through entity files the return specified in
93 subdivision (1) of this subsection. If the balance due is paid by the last day of the extension period
94 for filing such return and the amount of tax due with such return is ten percent or less of the tax
95 due under this section for the taxable year, no additions to tax shall be imposed under article ten
96 of this chapter with respect to balance so remitted. If the amount of withholding tax due under this
97 section for the taxable year is less than the estimated withholding taxes paid for the taxable year
98 by the pass-through entity, the excess shall be refunded to the pass-through entity or, at its
99 election, established as a credit against withholding tax due under this section for the then current
100 taxable year.

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

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

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

113 (1) *Allowance of credit.* -- Each nonresident partner, nonresident shareholder, or
114 nonresident beneficiary shall be allowed a credit for such partner's or shareholder's or

115 beneficiary's share of the tax withheld by the partnership, S corporation, estate or trust under this
116 section: *Provided*, That when the distribution is to a corporation taxable under article twenty-four
117 of this chapter, the credit allowed by this section shall be applied against the distributee
118 corporation's liability for tax under article twenty-four of this chapter.

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

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

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

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

131 (h) *Information statement.* --

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

140 (2) A copy of the information statements required by this subsection must be filed with the

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

147 (i) *Liability for withheld tax.* -- Every person required to deduct and withhold tax under this
148 section is hereby made liable for the payment of the tax due under this section for taxable years
149 (of such persons) beginning after December 31, 1991, except as otherwise provided in this
150 section. The amount of tax required to be withheld and paid over to the Tax Commissioner shall
151 be considered the tax of the partnership, estate or trust, as the case may be, for purposes of
152 articles nine and ten of this chapter. Any amount of tax withheld under this section shall be held
153 in trust for the Tax Commissioner. No partner, S corporation shareholder, or beneficiary of a trust
154 or estate, shall have a right of action against the partnership, S corporation, estate or trust, in
155 respect to any moneys withheld from such person's distributive share and paid over to the Tax
156 Commissioner in compliance with or in intended compliance with this section.

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

163 (k) *Distributee agreements.* --

164 (1) The Tax Commissioner shall permit a nonresident distributee to file with a pass-through
165 entity, on a form prescribed by the Tax Commissioner, the agreement of such nonresident
166 distributee: (A) To timely file returns and make timely payment of all taxes imposed by this article

167 or article twenty-four of this chapter in the case of a C corporation, on the distributee with respect
168 to the effectively connected taxable income of the pass-through entity; and (B) to be subject to
169 personal jurisdiction in this state for purposes of the collection of any unpaid income tax under
170 this article (or article twenty-four of this chapter in the case of a C corporation), together with
171 related interest, penalties, additional amounts and additions to tax, owed by the nonresident
172 distributee.

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

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

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

188 (5) The pass-through entity shall file with the Tax Commissioner a copy of all distributee
189 agreements received by the pass-through entity during any taxable year with this annual
190 information return filed under this article, or article twenty-four of this chapter in the case of S
191 corporations. If the pass-through entity fails to timely file with the Tax Commissioner a copy of an
192 agreement executed by a distributee and furnished to the pass-through entity in accordance with

193 this section, then the pass-through entity shall remit to the Tax Commissioner an amount equal
194 to the amount that should have been withheld under this section from the nonresident distributee.
195 The pass-through entity may recover payment made pursuant to the preceding sentence from the
196 distributee on whose behalf the payment was made.

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

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

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

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

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

209 (3) *Internal Revenue Code.* -- The term "Internal Revenue Code" means the Internal
210 Revenue Code of 1986, as amended, through the date specified in section nine of this article.

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

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

216 (6) *Partnership.* -- The term "partnership" includes a syndicate, group, pool, joint venture,
217 or other unincorporated organization through or by means of which any business, financial
218 operation, or venture is carried on and which is not a trust or estate, a corporation or a sole

219 proprietorship. "Partnership" does not include an unincorporated organization which, under
220 Section 761 of the Internal Revenue Code, is not treated as a partnership for the taxable year for
221 federal income tax purposes.

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

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

228 (m) *Effective date.* -- The provisions of this section shall first apply to taxable years of
229 pass-through entities beginning after December 31, 1991.

NOTE: The purpose of this bill is to update the meaning of federal adjusted gross income and certain other terms used in the West Virginia Personal Income Tax Act; change the due date for partnership returns; and specify effective dates.

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