

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Enrolled

Senate Bill 499

BY SENATORS BLAIR AND CLINE

[Passed March 9, 2019; to take effect July 1, 2019]

1 AN ACT to amend and reenact §11-10-3, §11-10-4, §11-10-7, §11-10-14, §11-10-15, and §11-
2 10-16 of the Code of West Virginia, 1931, as amended; to amend said code by adding
3 thereto a new section, designated §11-10-18c; to amend and reenact §11-21-3, §11-21-
4 51a, §11-21-59, and §11-21-71a of said code; to amend said code by adding thereto four
5 new sections, designated §11-21-37a, §11-21-37b, §11-21-37c, and §11-21-59a; to
6 amend said code by adding thereto a new article, designated §11-21A-1, §11-21A-2, §11-
7 21A-3, §11-21A-4, §11-21A-5, §11-21A-6, §11-21A-7, §11-21A-8, §11-21A-9, §11-21A-
8 10, §11-21A-11, and §11-21A-12; and to amend and reenact §11-24-20 of said code, all
9 relating generally to amending West Virginia tax laws to conform to changes in how
10 partnerships and their partners and other pass-through entities and their equity owners
11 are treated for federal income tax purposes for tax years beginning after December 31,
12 2017; amending West Virginia Tax Procedures and Administration Act, Personal Income
13 Tax Act, and Corporation Net Income Tax Act to provide for administration, collection, and
14 enforcement of income tax on certain partnerships and other pass-through entities treated
15 as partnerships for federal income tax purposes and their partners and equity owners in
16 conformity with changes made by United States Congress in how these entities and their
17 equity owners are treated for federal income tax purposes for taxable years beginning
18 after December 31, 2017; providing for application of West Virginia Tax Procedure and
19 Administration Act to apply to imputed income taxes imposed on partnerships and other
20 pass-through entities; imposing addition to tax for failure of partnership and other pass-
21 through entity to file partnership's returns and reports; imposing imputed personal income
22 tax on certain partnerships and other pass-through entities treated like partnerships for
23 federal income tax purposes based on federal audit adjustments; providing general rules
24 and special rules for allocation and apportionment of business income; providing for filing
25 of amended composite personal income tax returns by pass-through entities on behalf of

26 nonresident equity owners; providing additional rules for reporting of federal changes to
27 federal taxable incomes; providing amended rules for reporting of federal adjustments by
28 Internal Revenue Service or other competent authority; providing rules for reporting
29 adjustments by other states' resident claims credit for tax paid to another state; providing
30 for pass-through entity withholding on nonresidents when partnership or other pass-
31 through entity pushes federal audit adjustments out to equity owners; adding a new article
32 providing for administration, collection, and enforcement of additional West Virginia
33 income taxes from certain partnerships and other pass-through entities treated like
34 partnerships for federal income tax purposes, or their equity owners, that are attributable
35 to federal audit adjustments; defining certain terms; providing for reporting of adjustments
36 to federal taxable income; providing for reporting of federal audit adjustments resulting
37 from federal audit of pass-through entity or from administrative adjustment requests;
38 providing for assessment of additional West Virginia income taxes, interest, and additions
39 to tax arising from federal adjustments to federal taxable income within applicable statute
40 of limitations; allowing payment of estimated West Virginia income tax payments during
41 course of federal audit of certain partnerships and other pass-through entities treated as
42 partnerships for federal income tax purposes; providing for refund or credit of West Virginia
43 income taxes attributable to finalized federal audit adjustments; providing rules for scope
44 of audit adjustments and extensions of time; specifying effective dates; providing for
45 legislative, interpretive, and procedural rules; providing for Tax Procedures and
46 Administration Act and Tax Crimes and Penalties Act to apply to imputed income tax
47 imposed on certain partnerships and other pass-through entities treated as partnerships
48 for federal income tax purposes; providing additional rules for reporting of changes in
49 federal taxable income of corporations; making technical corrections in existing code
50 sections being amended; and specifying effective dates.

Be it enacted by the Legislature of West Virginia:

ARTICLE 10. WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT.

§11-10-3. Application of this article.

1 (a) The provisions of this article apply to inheritance and transfer taxes, estate tax, and
2 interstate compromise and arbitration of inheritance and death taxes: (1) The business
3 registration tax; (2) the minimum severance tax on coal; (3) the corporate license tax; (4) the
4 business and occupation tax; (5) the severance tax, additional severance taxes,
5 telecommunications tax; (6) the interstate fuel tax; (7) the consumers sales and service tax; (8)
6 the use tax; (9) the economic opportunity district excise taxes; (10) the tobacco products excise
7 taxes; (11) the excise tax on e-vapors; (12) the soft drinks tax; (13) the personal income tax; (14)
8 the business franchise tax; (15) the corporation net income tax; (16) the gasoline and special fuels
9 excise tax; (17) the motor fuels excise tax; (18) the motor carrier road tax; (19) the health care
10 provider taxes; (20) the various solid waste assessment fees administered by the Tax
11 Commissioner pursuant to chapters 17, 17A, 20, 22, and 22C of this code; (21) the excise taxes
12 imposed by this code on sales of alcoholic liquor and wine; (22) the various tax credits
13 administered by the Tax Commissioner; (23) any other tax or fee administered by the Tax
14 Commissioner pursuant to this article; and (24) the tax relief for elderly homeowners and renters
15 administered by the State Tax Commissioner. This article shall not apply to ad valorem taxes on
16 real and personal property or any other tax not listed in this section, except that in the case of ad
17 valorem taxes on real and personal property, when any return, claim, statement or other
18 document is required to be filed, or any payment is required to be made within a prescribed period
19 or before a prescribed date, and the applicable law requires delivery to the office of the sheriff of
20 a county of this state, the methods prescribed in §11-10-5f of this code for timely filing and
21 payment to the Tax Commissioner or State Tax Department are the same methods utilized for
22 timely filing and payment with the sheriff.

23 (b) The provisions of this article apply to beer barrel tax levied by §11-16-1 *et seq.* of this
24 code; and to wine liter tax levied by §60-8-4 of this code.

25 (c) The provisions of this article apply to any other article of this chapter or of this code
26 when the application is expressly provided by the Legislature.

27 (d) The provisions of this article apply to municipal sales and use taxes imposed under
28 §8-13C-1 *et seq.* of this code and collected by the Tax Commissioner.

§11-10-4. Definitions.

1 For the purpose of this article, the term:

2 (a) "C corporation" means a legal entity that is taxed separately from its owners under
3 subchapter C of the Internal Revenue Code as defined in §11-21-1 *et seq.* and §11-24-1 *et seq.*
4 of this code.

5 (b) "Information return or report" means any document required to be filed with the Tax
6 Commissioner by any article of this code, which provides information to the Tax Commissioner
7 but does not include an accurately calculated tax liability of an individual or business entity.
8 Information return or report includes, but is not limited to, information returns filed by S
9 corporations pursuant to §11-24-13b of this code, information returns filed by partnerships
10 pursuant to §11-21-58 of this code, any statement required to be furnished under IRC § 6226(a)(2)
11 or under any other provision of the Internal Revenue Code which provides for the application of
12 rules similar to those in IRC § 6226; and any other information return or report required to be filed
13 with the Tax Commissioner pursuant to §11-21A-1 *et seq.* of this code, or any other article of this
14 code that is administered under §11-10-1 *et seq.* of this code.

15 (c) "Officer or employee of this state" shall include, but is not limited to, any former officer
16 or employee of the State of West Virginia.

17 (d) "Office of Tax Appeals" means the West Virginia Office of Tax Appeals created by §11-
18 10A-3 of this code.

19 (e) "Pass-through entity" means an entity that is not subject to tax under §11-24-1 *et seq.*
20 of this code imposing tax on C corporations or other entities taxable as a C corporation for federal
21 income tax purposes.

22 (f) "Person" shall include, but is not limited to, any individual, firm, partnership, limited
23 partnership, copartnership, joint venture, limited liability company or other pass-through entity,
24 association, corporation, municipal corporation, organization, receiver, estate, trust, guardian,
25 executor, administrator, and also any officer, employee, or member of any of the foregoing who,
26 as an officer, employee, or member, is under a duty to perform or is responsible for the
27 performance of an act prescribed by the provisions of this article and the provisions of any of the
28 other articles of this chapter or this code which impose taxes administered by the Tax
29 Commissioner, unless the intention to give a more limited or broader meaning is disclosed by the
30 context of this article or any of the other articles of this chapter which impose taxes or fees
31 administered by the Tax Commissioner under this article.

32 (g) "Return" means for taxable years beginning on or after January 1, 2007, a tax or
33 information return or report, declaration of estimated tax, claim or petition for refund or credit or
34 petition for reassessment which is complete and that is required by, or provided for, or permitted
35 under the provisions of this article (or any article of this chapter administered under this article)
36 which is filed with the Tax Commissioner by, on behalf of, or with respect to any person and any
37 amendment or supplement thereto, including supporting schedules, attachments, or lists which
38 are supplemental to the return so filed. For purposes of this subsection, "complete" means for
39 taxable years beginning on or after January 1, 2007, the information required to be entered is
40 entered on the applicable return forms. A return form is not to be considered complete if the
41 information required to be entered on the applicable return forms is only contained in amendments
42 or supplements thereto, including supporting schedules, attachments, or lists. A return that is not
43 considered complete is deemed not to be filed:

44 (1) For purposes of claiming a refund of any tax administered under this article;

45 (2) For purposes of the commencement of any limitation on any assessment under §11-
46 10-15 of this code;

47 (3) For purposes of determining the commencement of the period when the Tax
48 Commissioner shall pay interest for the late payment of a refund;

49 (4) For purposes of additions to tax imposed under §11-10-18, §11-10-18a, or §11-10-18b
50 of this code; or

51 (5) For purposes of penalties imposed under §11-10-19 of this code.

52 (h) "State" means any state of the United States or the District of Columbia.

53 (i) "Tax" or "taxes" includes within the meaning thereof taxes and fees specified in §11-10-
54 3 of this code, and additions to tax, penalties, and interest, unless the intention to give the same
55 a more limited meaning is disclosed by the context.

56 (j) "Tax commissioner" or "commissioner" means the Tax Commissioner of the State of
57 West Virginia or his or her delegate.

58 (k) "Taxpayer" means any person required to file a return for any tax or fee administered
59 under this article, or any person liable for the payment of any tax or fee administered under this
60 article.

61 (l) "Tax administered under this article" means any tax or fee to which this article applies
62 as set forth in §11-10-3 of this code.

63 (m) "This code" means the Code of West Virginia, 1931, as amended.

64 (n) "This state" means the State of West Virginia.

§11-10-7. Assessment.

1 (a) *General.* — If the Tax Commissioner believes that any tax administered under this
2 article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to
3 properly remit the tax or fee, or has failed to make a return, or has made a return which is
4 incomplete, deficient, or otherwise erroneous, he or she may proceed to investigate and
5 determine or estimate the tax liability and make an assessment therefor.

6 (b) *Jeopardy assessments.* — If the Tax Commissioner believes that the collection of any
7 tax administered under this article will be jeopardized by delay, he or she shall thereupon make
8 an assessment of tax, noting that fact upon the assessment. The amount assessed shall
9 immediately be due and payable. Unless the taxpayer against whom a jeopardy assessment is
10 made posts the required security and petitions for reassessment within 20 days after service of
11 notice of the jeopardy assessment, such assessment shall become final: *Provided*, That upon
12 written request of the taxpayer made within the 20-day period, showing reasonable cause
13 therefor, the Tax Commissioner may grant an extension of time not to exceed 30 additional days
14 within which such petition may be filed. If a taxpayer against whom a jeopardy assessment has
15 been made petitions for reassessment or requests an extension of time to file a petition for
16 reassessment, the petition or request shall be accompanied by remittance of the amount
17 assessed or such security as the Tax Commissioner may consider necessary to ensure
18 compliance with the applicable provisions of this chapter. If a petition for reassessment is timely
19 filed, and the amount assessed has been remitted, or such other security posted, the provisions
20 for hearing, determination, and appeal set forth in §11-10A-1 *et seq.* of this code shall then be
21 applicable.

22 (c) *Amendment of assessment.* — The Tax Commissioner may, at any time before the
23 assessment becomes final, amend, in whole or in part, any assessment whenever he or she
24 ascertains that such assessment is improper or incomplete in any material respect.

25 (d) *Supplemental assessment.* — The Tax Commissioner may, at any time within the
26 period prescribed for assessment, make a supplemental assessment whenever he or she
27 ascertains that any assessment is imperfect or incomplete in any material respect.

28 (e) *Address for notice of assessment.* —

29 (1) *General rule.* — In the absence of notice to the Tax Commissioner under §11-10-5o of
30 this code of the existence of a fiduciary relationship, notice of assessment, if sent by certified mail
31 or registered mail to the taxpayer at his or her last known address, shall be sufficient even if such

32 taxpayer is deceased, or is under a legal disability, or, in the case of a corporation or other legal
33 entity, has terminated its existence.

34 (2) *Joint income tax return.* — In the case of a joint income tax return filed by a husband
35 and wife, such notice of assessment may be a single notice, except that if the Tax Commissioner
36 has been notified by either spouse that separate residences have been established, then in lieu
37 of a single notice, a duplicate original of the joint notice shall be sent by certified or registered mail
38 to each spouse at his or her last known address.

39 (3) *Estate tax.* — In the absence of notice to the Tax Commissioner of the existence of a
40 fiduciary relationship, notice of assessment of a tax imposed by §11-11-1 *et seq.* of this code, if
41 addressed in the name of the decedent or other person subject to liability and mailed to his or her
42 last known address, by registered or certified mail, shall be sufficient for purposes of this article
43 and §11-11-1 *et seq.* of this code.

44 (f) For purposes of this section, the term “taxpayer” includes any partnership or other pass-
45 through entity that owes tax pursuant to §11-21A-1 *et seq.* of this code.

§11-10-14. Overpayments; credits; refunds and limitations.

1 (a) *Refunds or credits of overpayments.* — In the case of overpayment of any tax (or fee),
2 additions to tax, penalties, or interest imposed by this article, or any of the other articles of this
3 chapter, or of this code, to which this article is applicable, the Tax Commissioner shall, subject to
4 the provisions of this article, refund to the taxpayer the amount of the overpayment or, if the
5 taxpayer so elects, apply the same as a credit against the taxpayer’s liability for the tax for other
6 periods. The refund or credit shall include any interest due the taxpayer under §11-10-17 of this
7 code.

8 (b) *Refunds or credits of gasoline and special fuel excise tax or motor carrier road tax.* —
9 Any person who seeks a refund or credit of gasoline and special fuel excise taxes under §11-14-
10 10, §11-14-11, §11-14-12, §11-14A-9, or §11-14A-11 of this code, or of motor fuel excise tax
11 under §11-14C-9 of this code shall file his or her claim for refund or credit in accordance with the

12 provisions of the applicable sections. The 90-day time period for determination of claims for refund
13 or credit provided in subsection (d) of this section does not apply to these claims for refund or
14 credit: *Provided*, That claims for refund or credit of the motor fuel excise tax under §11-14C-9 of
15 this code are subject to the 90-day time period provided in subsection (d) of this section: *Provided*,
16 *however*, That claims for refund or credit of the motor fuel excise tax under §11-14C-9 of this code
17 made by the United States government or unit or agency thereof, any municipal government or
18 any agency thereof, or any county board of education made pursuant to §11-14C-9(c)(1), (2), (3),
19 (4), (5), and (6) of this code will be subject to a 30-day time period.

20 (c) *Claims for refund or credit.* — No refund or credit shall be made unless the taxpayer
21 has timely filed a claim for refund or credit with the Tax Commissioner. A person against whom
22 an assessment or administrative decision has become final is not entitled to file a claim for refund
23 or credit with the Tax Commissioner as prescribed herein. The Tax Commissioner shall determine
24 the taxpayer's claim and notify the taxpayer in writing of his or her determination.

25 (d) *Petition for refund or credit; hearing.* —

26 (1) If the taxpayer is not satisfied with the Tax Commissioner's determination of taxpayer's
27 claim for refund or credit, or if the Tax Commissioner has not determined the taxpayer's claim
28 within 90 days after the claim was filed, or six months in the case of claims for refund or credit of
29 the taxes imposed by §11-21-1 *et seq.*, §11-21A-1 *et seq.*, and §11-24-1 *et seq.* of this code, after
30 the filing thereof, the taxpayer may file, with the Tax Commissioner, either personally or by
31 certified mail, a petition for refund or credit: *Provided*, That no petition for refund or credit may be
32 filed more than 60 days after the taxpayer is served with notice of denial of taxpayer's claim:
33 *Provided, however*, That after December 31, 2002, the taxpayer shall file the petition with the
34 Office of Tax Appeals in accordance with §11-10A-9 of this code.

35 (2) The petition for refund or credit shall be in writing, verified under oath by the taxpayer,
36 or by taxpayer's duly authorized agent having knowledge of the facts, and set forth with

37 particularity the items of the determination objected to, together with the reasons for the
38 objections.

39 (3) When a petition for refund or credit is properly filed, the procedures for hearing and for
40 decision applicable when a petition for reassessment is timely filed shall be followed.

41 (e) *Appeal*. — An appeal from the Office of Tax Appeals' administrative decision upon the
42 petition for refund or credit may be taken by the taxpayer in the same manner and under the same
43 procedure as that provided for judicial review of an administrative decision on a petition for
44 reassessment, but no bond is required of the taxpayer. An appeal from the administrative decision
45 of the Office of Tax Appeals on a petition for refund or credit, if taken by the taxpayer, shall be
46 taken as provided in §11-10A-19 of this code.

47 (f) *Decision of the court*. — Where the appeal is to review an administrative decision on a
48 petition for refund or credit, the court may determine the legal rights of the parties but in no event
49 shall it enter a judgment for money.

50 (g) *Refund made or credit established*. — The Tax Commissioner shall promptly issue his
51 or her requisition on the treasury or establish a credit, as requested by the taxpayer, for any
52 amount finally administratively or judicially determined to be an overpayment of any tax (or fee)
53 administered under this article. The Auditor shall issue his or her warrant on the Treasurer for any
54 refund requisitioned under this subsection payable to the taxpayer entitled to the refund, and the
55 Treasurer shall pay the warrant out of the fund into which the amount refunded was originally
56 paid: *Provided*, That refunds of personal income tax may also be paid out of the fund established
57 pursuant to §11-21-93 of this code.

58 (h) *Forms for claim for refund or a credit; where return constitutes claim*. — The Tax
59 Commissioner may prescribe by rule or regulation the forms for claims for refund or credit.
60 Notwithstanding the foregoing, where the taxpayer has overpaid the tax imposed by §11-21-1 *et*
61 *seq.*, §11-21A-1 *et seq.*, §11-23-1 *et seq.*, or §11-24-1 *et seq.* of this code, a return signed by the

62 taxpayer which shows on its face that an overpayment of tax has been made constitutes a claim
63 for refund or credit.

64 (i) *Remedy exclusive.* — The procedure provided by this section constitutes the sole
65 method of obtaining any refund, credit, or any tax (or fee) administered under this article, it being
66 the intent of the Legislature that the procedure set forth in this article is in lieu of any other remedy,
67 including the Uniform Declaratory Judgments Act embodied in §55-13-1 *et seq.* of this code, and
68 §11-1-2a of this code.

69 (j) *Applicability of this section.* — The provisions of this section apply to refunds or credits
70 of any tax (or fee), additions to tax, penalties or interest imposed by this article, or any article of
71 this chapter, or of this code, to which this article is applicable.

72 (k) *Erroneous refund or credit.* — If the Tax Commissioner believes that an erroneous
73 refund has been made or an erroneous credit has been established, he or she may proceed to
74 investigate and make an assessment within the period prescribed in §11-10-15 of this code or
75 institute civil action to recover the amount of the refund or credit, within two years from the date
76 the erroneous refund was paid or the erroneous credit was established, except that the
77 assessment may be issued or civil action brought within two years from the date if it appears that
78 any portion of the refund or credit was induced by fraud or misrepresentation of a material fact.

79 (l) *Limitation on claims for refund or credit.* —

80 (1) *General rule.* — Whenever a taxpayer claims to be entitled to a refund or credit of any
81 tax (or fee), additions to tax, penalties or interest imposed by this article, or any article of this
82 chapter, or of this code, administered under this article, paid into the treasury of this state, the
83 taxpayer shall, except as provided in subsection (d) of this section, file a claim for refund, or credit,
84 within three years after the due date of the return in respect of which the tax (or fee) was imposed,
85 determined by including any authorized extension of time for filing the return, or within two years
86 from the date the tax (or fee) was paid, whichever of the periods expires the later, or if no return

87 was filed by the taxpayer, within two years from the time the tax (or fee) was paid, and not
88 thereafter.

89 (2) *Extensions of time for filing claim by agreement.* — The Tax Commissioner and the
90 taxpayer may enter into a written agreement to extend the period within which the taxpayer may
91 file a claim for refund or credit, which period shall not exceed two years. The period agreed upon
92 may be extended for additional periods not in excess of two years each by subsequent
93 agreements in writing made before expiration of the period previously agreed upon.

94 (3) *Special rule where agreement to extend time for making an assessment.* —
95 Notwithstanding the provisions of subdivisions (1) and (2) of this subsection, if an agreement is
96 made under §11-10-15 of this code extending the time period in which an assessment of tax can
97 be made, then the period for filing a claim for refund or credit for overpayment of the same tax
98 made during the periods subject to assessment under the extension agreement are also extended
99 for the period of the extension agreement plus 90 days.

100 (4) *Overpayment of federal tax.* — Notwithstanding the provisions of subdivisions (1) and
101 (2) of this subsection, in the event of a final determination by the United States Internal Revenue
102 Service or other competent authority of an overpayment in the taxpayer's federal income or estate
103 tax liability, the period of limitation upon claiming a refund reflecting the final determination in
104 taxes imposed by §11-21-1 *et seq.*, §11-21A-1 *et seq.*, and §11-24-1 *et seq.* of this code may not
105 expire until six months after the determination is made by the United States Internal Revenue
106 Service or other competent authority.

107 (5) *Tax paid to the wrong state.* — Notwithstanding the provisions of subdivisions (1) and
108 (2) of this subsection, when an individual, or the fiduciary of an estate, has in good faith
109 erroneously paid personal income tax, estate tax or sales tax, to this state on income or a
110 transaction which was lawfully taxable by another state and, therefore, not taxable by this state,
111 and no dispute exists as to the jurisdiction to which the tax should have been paid, then the time

112 period for filing a claim for refund, or credit, for the tax erroneously paid to this state does not
113 expire until 90 days after the tax is lawfully paid to the other state.

114 (6) *Exception for gasoline and special fuel excise tax, motor fuel excise tax and motor*
115 *carrier road tax.* — This subsection does not apply to refunds or credits of gasoline and special
116 fuel excise tax, motor carrier road tax, or motor fuel excise tax sought under §11-14-1 *et seq.*,
117 §11-14A-1 *et seq.*, or §11-14C-1 *et seq.* of this code.

§11-10-15. Limitations on assessment.

1 (a) *General rule.* — The amount of any tax, additions to tax, penalties, and interest
2 imposed by this article or any of the other articles of this chapter to which this article is applicable
3 shall be assessed within three years after the date the return was filed (whether or not such return
4 was filed on or after the date prescribed for filing): *Provided*, That in the case of a false or
5 fraudulent return filed with the intent to evade tax, or in case no return was filed, the assessment
6 may be made at any time: *Provided, however*, That if a taxpayer fails to disclose a listed
7 transaction, as defined in Section 6707A of the Internal Revenue Code, on the taxpayer's state
8 or federal income tax return, an assessment may be made at any time not later than six years
9 after the due date of the return required under §11-21-1 *et seq.*, or §11-24-1 *et seq.*, or §11-21A-
10 1 *et seq.* of this code for the same taxable year or after such return was filed, or not later than
11 three years after an amended return is filed, whichever is later.

12 (b) *Time return deemed filed.* —

13 (1) *Early return.* — For purposes of this section, a return filed before the last day prescribed
14 by law, or by rules promulgated by the Tax Commissioner for filing thereof, shall be considered
15 as filed on such last date;

16 (2) *Returns executed by Tax Commissioner.* — The execution of a return by the Tax
17 Commissioner pursuant to the authority conferred by §11-10-5c of this code shall not start the
18 running of the period of limitations on assessment and collection.

19 (c) *Exceptions.* — Notwithstanding subsection (a) of this section:

20 (1) *Extension by agreement.* — The Tax Commissioner and the taxpayer may enter into
21 written agreements to extend the period within which the Tax Commissioner may make an
22 assessment against the taxpayer which period shall not exceed two years. The period so agreed
23 upon may be extended for additional periods not in excess of two years each by subsequent
24 agreements in writing made before the expiration of the period previously agreed upon;

25 (2) *Deficiency in federal tax.* — Notwithstanding subsection (a) of this section, in the event
26 of a final determination by the United States Internal Revenue Service or other competent
27 authority of a deficiency in the taxpayer's federal income tax liability, the period of limitation, upon
28 assessment of a deficiency reflecting such final determinations in the taxes imposed by §11-21-
29 1 *et seq.*, §11-21A-1 *et seq.*, and §11-24-1 *et seq.* of this code, may not expire until 90 days after
30 the Tax Commissioner is advised of the determination by the taxpayer as provided in §11-21-59
31 and §11-24-20 of this code, or until the period of limitations upon assessment provided in
32 subsection (a) of this section has expired, whichever expires the later, and regardless of the tax
33 year of the deficiency;

34 (3) *Special rule for certain amended returns.* — Where, within the 60-day period ending
35 on the day on which the time prescribed in this section for the assessment of any tax for any
36 taxable year would otherwise expire, the Tax Commissioner receives a written document signed
37 by the taxpayer showing that the taxpayer owes an additional amount of such tax for such taxable
38 year, the period for the assessment of such additional amount shall not expire before the day 60
39 days after the day on which the Tax Commissioner receives such document;

40 (4) *Net operating loss or capital loss carrybacks.* — In the case of a deficiency attributable
41 the application by the taxpayer of a net operating loss carryback or a capital loss carryback
42 (including that attributable to a mathematical or clerical error in application of the loss carryback)
43 such deficiency may be assessed at any time before expiration of the period within which a
44 deficiency for the taxable year of the net operating loss or net capital loss which results in such
45 carryback may be assessed;

46 (5) *Certain credit carrybacks.* — In the case of a deficiency attributable to the application
47 to the taxpayer of a credit carryback (including that attributable to a mathematical or clerical error
48 in application of the credit carryback) such deficiency may be assessed at any time before
49 expiration of the period within which a deficiency for the taxable year of the unused credit which
50 results in such carryback may be assessed, or with respect to any portion of a credit carryback
51 from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other
52 credit carryback from a subsequent taxable year, at any time before expiration of the period within
53 which a deficiency for such subsequent taxable year may be assessed. The term “credit
54 carryback” means any carryback allowed under §5E-1-8 of this code;

55 (6) *Overpayment of tax credited against payment of another tax.* — In the event of a final
56 determination that a taxpayer owes less tax than the amount paid by the taxpayer, and the amount
57 paid was allowed as a credit against a tax administered under this article, the period of limitation
58 upon assessment of a deficiency in the payment of such other tax due to the overstating of the
59 allowable credit, may not expire until 90 days after the Tax Commissioner receives written notice
60 from the taxpayer advising the Tax Commissioner of the final determination reducing the
61 taxpayer’s liability for a tax allowed as a credit against a tax administered under this article, or
62 until the period of limitations upon assessment provided in subsection (a) of this section has
63 expired, whichever expires the later, and regardless of the tax year of the deficiency.

64 (d) *Cases under bankruptcy code.* — The running of limitations provided in subsection (a)
65 of this section, on the making of assessments, or provided in §11-10-16 of this code, on collection,
66 shall, in a case under Title 11 of the United States Code, be suspended for the period during
67 which the Tax Commissioner is prohibited by reason of such case from making the assessment
68 or from collecting the tax and:

- 69 (1) For assessment, 60 days thereafter; and
70 (2) For collection, six months thereafter.

§11-10-16. Limitations on collection.

1 (a) *Where assessment is issued.* — Every proceeding instituted by the Tax Commissioner
2 for the collection of the amount found to be due under an assessment which has become final of
3 any tax, additions to tax, penalties or interest imposed by this article or any of the other articles of
4 this chapter to which this article is applicable, irrespective of whether the proceeding is instituted
5 in a court or by utilization of other methods provided by law for the collection of such tax, additions
6 to tax, penalty or interest, shall be brought or commenced within 10 years after the date on which
7 such assessment has become final.

8 (b) *Where assessment is not issued.* — Every proceeding instituted by the Tax
9 Commissioner for the collection of the amount determined to be due by methods provided by law
10 other than the issuance of an assessment, of any tax, additions to tax, penalties, or interest
11 imposed by this article or any of the other articles of this chapter to which this article is applicable,
12 irrespective of whether the proceeding is instituted in a court or by utilization of other methods
13 provided by law for the collection of such tax, additions to tax, penalties or interest, shall be
14 brought or commenced within 10 years after the date on which the taxpayer filed the annual return
15 required to be filed by any of the articles of this code to which §11-10-1 *et seq.* of this code is
16 applicable and, if no annual return is required, such 10-year period shall begin on the day after
17 the latest periodical return required to be filed in any year is filed.

18 (c) *Extension of time for institutions of collection proceedings by agreement.* — The Tax
19 Commissioner and the taxpayer may enter into written agreement to extend the period within
20 which the Tax Commissioner may institute proceedings for the collection of the amount found to
21 be due under an assessment which has become final, or the amount determined to be due by
22 methods provided by law other than the issuance of the assessment, of any tax, additions to tax,
23 penalties or interest imposed by this article or any of the other articles of this code to which this
24 article is applicable. This period may not exceed two years. The period so agreed upon may be
25 extended for additional periods not in excess of two years each by subsequent agreements in
26 writing made before the expiration of the period previously agreed upon.

27 An extension of a tax lien, including an extension agreed to in writing by the taxpayer and
28 the Tax Commissioner, beyond 10 years is not effective under the provisions of this section unless
29 the extension is docketed by the Tax Commissioner in the office of the county commission as is
30 required under §38-10C-1 *et seq.* of this code for docketing tax liens.

§11-10-18c. Failure to file partnership return or report.

1 (a) *General rule.* — In addition to the additions to tax imposed by §11-10-18 of this code
2 (relating to failure to file return, supply information, or pay tax), if any partnership required to file
3 a return under §11-21A-3 of this code, or a partnership adjustment report under §11-21A-3 of this
4 code for any taxable year:

5 (1) Fails to file such return or report at the time prescribed therefor (determined with regard
6 to any extension of time for filing); or

7 (2) Files a return or report which fails to show the information required under §11-21A-3
8 of this code, the partnership shall be liable for a penalty determined under §11-10-18c(b) of this
9 code for each month (or fraction thereof) during which such failure continues (but not to exceed
10 12 months), unless it is shown that such failure is due to reasonable cause.

11 (b) *Amount per month.* — For purposes of §11-10-18c(a) of this code, the amount
12 determined under §11-10-18c(b) of this code for any month is the product of:

13 (1) \$195, multiplied by

14 (2) The number of persons who were partners in the partnership during any part of the
15 taxable year.

16 (c) *Assessment of penalty.* — The penalty imposed by §11-10-18c(a) of this code shall be
17 assessed against the partnership.

18 (d) *Deficiency procedures not to apply.* — The deficiency procedures set forth in §11-10A-
19 1 *et seq.* of this code may not apply in respect of the assessment or collection of any penalty
20 imposed by §11-10-18c(a) of this code.

21 (e) *Adjustment for inflation.* —

22 (1) *In general.* — In the case of any return required to be filed in a calendar year beginning
23 after 2017, the \$195 amount under 11-10-18c(b)(1) of this section shall be increased by such
24 dollar amount multiplied by the cost-of-living adjustment determined under IRC §1(f)(3)
25 determined by substituting “calendar year 2017” for “calendar year 2016” in subparagraph (A)(ii)
26 thereof.

27 (2) *Rounding.* — If any amount adjusted under §11-10-18c(e)(1) of this code is not a
28 multiple of \$5, such amount shall be rounded to the next lowest multiple of \$5.

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

ARTICLE 21. PERSONAL INCOME TAX ACT.

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

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

4 (b) *Partners and partnerships.* — A partnership as such shall not be subject to tax under
5 this article. Persons carrying on business as partners shall be liable for tax under this article only
6 in their separate or individual capacities. However, partnerships and other pass-through entities
7 are subject to the tax imposed by this article to the extent they elect to pay additional West Virginia
8 income taxes owed that are attributable to final federal partnership audit adjustments under §11-
9 21A-3 of this code.

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

13 (d) *Exempt trusts and organizations.* — A trust or other unincorporated organization which
14 by reason of its purposes or activities is exempt from federal income tax shall be exempt from tax

15 under this article (regardless of whether subject to federal income tax on unrelated business
16 taxable income).

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

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

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

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

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

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

**§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 which
64 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, and
133 any other form of remuneration paid to employees for personal services. Payments made to an
134 independent contractor or to any other person not properly classifiable as an employee shall be
135 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, are
189 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) *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) *Cost of performance*. — The term “cost of performance” means direct costs determined
211 in a manner consistent with generally accepted accounting principles and in accordance with
212 accepted conditions or practices in the trade or business of the taxpayer.

213 (h) *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 taxpayer’s
221 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 (i) *Effective date.* — This section added in 2019 shall apply to taxable years beginning on
239 and after January 1, 2018.

§11-21-37b. Special apportionment rules.

1 (a) *General.* — The Legislature hereby finds that the general formula set forth in §11-21-
2 37a of this code for apportioning the business income of individuals, partnerships, other pass-
3 through entities, and small business corporations taxable in this as well as in another state is
4 inappropriate for use by certain businesses due to the particular characteristics of those
5 businesses or the manner in which such businesses are conducted. Accordingly, the general
6 formula set forth in §11-21-37a of this code may not be used to apportion business income when
7 a specific formula established under this section applies to the business of the taxpayer. The

8 Legislature further finds that the Tax Commissioner has the authority under §11-1-1 *et seq.* of this
9 code to promulgate by legislative rules special formula or formulae by which a specified
10 classification of taxpayers is required to apportion its business income. Accordingly, this section
11 may not be construed as prohibiting the Tax Commissioner from exercising his authority to
12 promulgate legislative rules which set forth such other special formula or formulae and in that
13 regulation requiring a specified classification of taxpayers to apportion their business income as
14 provided in that special formula, instead of apportioning their business income employing the
15 general formula set forth in §11-21-37a of this code, when the commissioner believes that the
16 formula or formulae will more fairly and more reasonably allocate and apportion to this state the
17 adjusted federal taxable income of the taxpayer. Additionally, nothing in this section may prevent
18 the Tax Commissioner from requiring the use, or the taxpayer from petitioning to use, as the case
19 may be, some other method of allocation or apportionment as provided in §11-21-37a(h) of this
20 code. Permission granted to a taxpayer under §11-21-37a(h) of this code to use another method
21 of allocation or apportionment shall be valid for a period of five consecutive taxable years,
22 beginning with the taxable year for which such authorization is granted, provided there is no
23 material change of fact or law which materially affects the fairness and reasonableness of the
24 result reached under such other method of allocation or apportionment. Upon expiration of any
25 such authorization the taxpayer may again petition under §11-21-37a of this code to use another
26 method of apportionment. A material change of fact or law which materially affects the fairness
27 and reasonableness of the result reached under such other method of allocation or apportionment
28 automatically revokes authorization to use that other method beginning with the taxable year in
29 which the material change of fact occurred or the taxable year for which a material change in law
30 first takes effect, whichever occurs first.

31 (b) *Motor carriers.* — Motor carriers of property or passengers shall apportion the business
32 income component of their adjusted federal taxable income to this state by the use of the ratio
33 which their total vehicle miles in this state during the taxable year bears to total vehicle miles of

34 the corporation everywhere during the taxable year, except as otherwise provided in this
35 subsection.

36 (1) *Definitions.* — For purposes of this subsection:

37 (A) “Motor carrier” means any person engaging in the transportation of passengers or
38 property or both, for compensation by motor propelled vehicle over roads in this state, whether
39 traveling on a scheduled route or otherwise.

40 (B) “Vehicle mile” means the operation of a motor carrier over a distance of one mile,
41 whether owned or operated by a corporation.

42 (2) The provisions of this subsection may not apply to a motor carrier:

43 (A) Which neither owns nor rents real or tangible personal property located in this state,
44 which has made no pick-ups or deliveries within this state, and which has traveled less than
45 50,000 vehicle miles in this state during the taxable year; or

46 (B) Which neither owns nor rents any real or tangible personal property located in this
47 state, except vehicles, and which makes no more than 12 trips into or through this state during a
48 taxable year.

49 (3) The mileage traveled under 50,000 miles or the mileage traveled in this state during
50 the 12 trips into or through this state may not represent more than five percent of the total motor
51 vehicle miles traveled in all states during the taxable year.

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

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

1 (a) *General.* — The Legislature hereby finds that the general formula set forth in §11-21-
2 37a of this code for apportioning the business income of persons taxable in this state as well as
3 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 of this code, by multiplying the amount
92 thereof by the special gross receipts factor determined as provided in subsection (g) of this
93 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) 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.

§11-21-51a. Composite returns.

1 (a) Nonresident individuals who are required by this article to file a return and who are:

2 (1) Partners in a partnership deriving income from a West Virginia source or sources; or

3 (2) Shareholders of a corporation having income from a West Virginia source or sources
4 and which made an election under Section 1362(a) of the Internal Revenue Code (S corporations)
5 for the taxable year; or

6 (3) Beneficiaries who received a distribution (actual or deemed) from an estate or trust
7 having income from a West Virginia source or sources may, upon payment of a composite return
8 processing fee of \$50, file a composite return in accordance with the provisions of this section.

9 (b) In filing a composite return and determining the tax due thereon, no personal
10 exemptions may be utilized, and the rate of tax shall be six and one-half percent. The entity or
11 entities, to which the composite return relates are responsible for collection and remittance of all
12 income tax due at the time the return is filed.

13 (c) The composite return shall be filed in a manner and form acceptable to and in
14 accordance with instructions from the commissioner, and need not be signed by all nonresident
15 individuals on whose behalf the return is filed: *Provided*, That the return is signed by a partner, in
16 the case of a partnership, an equity owner of any other pass-through entity a corporate officer, in
17 the case of a corporation, by a trustee, in the case of a trust or by an executor or administrator in
18 the case of an estate.

19 (d) For the purposes of this section, a composite return means a return filed on a group
20 basis as though there was one taxpayer, and sets forth the name, address, taxpayer identification
21 number and percent ownership or interest of each nonresident individual who consents to be
22 included in the composite return in addition to return information as that term is defined in §11-
23 10-5d of this code; the term includes block filing: *Provided*, That nothing in this section may
24 prohibit a nonresident from also filing a separate nonresident personal income tax return for the

25 taxable year and a separate return shall be filed if the nonresident has income from any other
26 West Virginia source. If a separate return is also filed for the taxable year, the nonresident shall
27 be allowed credit for his or her share of the tax remitted with the composite return for that taxable
28 year.

29 (e) This section, as amended in the year 2019, shall apply to composite returns filed after
30 December 31, 2018.

§11-21-59. Report of change in federal taxable income.

1 (a) Unless the provision of §11-21A-1 *et seq.* of this code apply, if the amount of a
2 taxpayer's federal taxable income reported on his or her federal income tax return for any taxable
3 year is changed or corrected by the United States Internal Revenue Service or other competent
4 authority, or as the result of a renegotiation of a contract or subcontract with the United States,
5 the taxpayer shall report such change or correction in federal taxable income within 90 days after
6 the final determination of such change, correction, or renegotiation, or as otherwise required by
7 the Tax Commissioner, and shall concede the accuracy of the determination or state wherein it is
8 erroneous. Any taxpayer filing an amended federal income tax return shall also file within 90 days
9 thereafter an amended return under this article, and shall give such information as the Tax
10 Commissioner may require. The Tax Commissioner may by rule prescribe such exceptions to the
11 requirements of this section as he or she determines appropriate.

12 (b) (1) If a change or correction is made or allowed by the Commissioner of Internal
13 Revenue or other officer of the United States, or other competent authority, a claim for credit or
14 refund resulting from the adjustment may be filed by the taxpayer within two years from the date
15 of the final federal determination, or within the period provided in §11-10-14 of this code,
16 whichever period expires later.

17 (2) Within two years of the date of the final determination, or within the period provided in
18 §11-10-14 of this code, whichever period expires later, the Tax Commissioner may allow a credit,

19 make a refund, or mail to the taxpayer a notice of proposed overpayment resulting from the final
20 federal determination.

21 (c) For the purposes of this section, assessments under a partial agreement, closing
22 agreement covering specific matters, jeopardy or advance payment are considered part of the
23 final determination and must be submitted to the Tax Commissioner with the final determination.

24 (d) If a partial agreement, a closing agreement covering specific matters or any other
25 agreement with the United States Treasury Department would be final except for a federal
26 extension still open for flow-through adjustments from other entities or other jurisdictions, the final
27 determination is the date the taxpayer signs the agreement. Flow-through adjustments include,
28 but are not limited to, items of income gain, loss and deduction that flow through to equity owners,
29 of a partnership, or other pass-through entity. Flow-through adjustments are finally determined
30 based on criteria specified in §11-21-59(g) of this code.

31 (e) The Tax Commissioner is not required to issue refunds based on any agreement other
32 than a final determination.

33 (f) If a taxpayer has filed an amended federal return, and no corresponding West Virginia
34 amended return has been filed with the Tax Commissioner, then the period of limitations for
35 issuing a notice of assessment shall be reopened and shall not expire until three years from the
36 date of delivery to the Tax Commissioner by the taxpayer of the amended federal return. However,
37 upon the expiration of the period of limitations as provided in §11-10-15 of this code, then only
38 those specific items of income, deductions, gains, losses, or credits, which were adjusted in the
39 amended federal return shall be subject to adjustment for purposes of recomputing West Virginia
40 income, deductions, gains, losses, credits, and the effect of such adjustments on West Virginia
41 allocations and apportionments.

42 (g) For the purposes of this section, “final determination” means the appeal rights of both
43 parties have expired or have been exhausted relative to the tax year for federal income tax
44 purposes.

45 (h) The amendments made to this section in the year 2019 shall apply, without regard to
46 taxable year, to federal determinations that become final on or after the effective date of the
47 amendments to this section in the year 2019.

§11-21-59a. Report of change in taxes paid to other states.

1 (a) If the amount of any individual taxpayer’s income tax reported on a return filed with any
2 other state for any taxable year is changed or corrected by such state as a result of an examination
3 conducted by a competent authority of the state, and the taxpayer previously claimed a credit for
4 such tax pursuant to §11-21-20 of this code, the taxpayer shall file an amended return, or such
5 other form as the Tax Commissioner may prescribe, reporting the effects of the change or
6 correction on the taxpayer’s West Virginia personal income tax within one year after the final
7 determination of the change or correction, or as otherwise required by the Tax Commissioner,
8 and shall concede the accuracy of such determination, or declare wherein it is erroneous.
9 However, if the Tax Commissioner has sufficient information from which to compute the proper
10 additional tax and the taxpayer has paid the tax, then the taxpayer is not required to file an
11 amended West Virginia personal income tax return. Any taxpayer filing an amended income tax
12 return with any other state that results in a change to the taxpayer’s West Virginia personal income
13 tax shall also file an amended return within one year thereafter under this article and shall provide
14 such information as the Tax Commissioner may require. The Tax Commissioner may by rule
15 prescribe such exceptions to the requirements of this section as the commissioner considers
16 appropriate.

17 (b) For the purposes of this section, “final determination” means the appeal rights of both
18 parties have expired or have been exhausted relative to the tax year.

19 (c) This section amended in the year 2019 shall apply, without regard to the taxable year,
20 to federal determinations that become final on or after the effective date of this section enacted
21 in the year 2019.

**§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 may 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 that 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 §11-24-1 *et seq.* of this code; or

35 (2) On distributions to a corporation which is exempt from the tax imposed by §11-24-1 *et*
36 *seq.* of this code. For purposes of this subdivision, a corporation is exempt from the tax imposed
37 by §11-24-1 *et seq.* of this code only if the corporation, by reason of its purpose or activities is
38 exempt from paying federal income taxes on the corporation's West Virginia source income. The
39 pass-through entity may rely on the written statement of the person claiming to be exempt from
40 the tax imposed by §11-24-1 *et seq.* of this code provided the pass-through entity discloses the
41 name and federal taxpayer identification number for all such corporations in its return for the
42 taxable year filed under this article or §11-24-1 *et seq.* of this code; 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 §11-21-58(c) of this code, under
60 such rules and in such form and manner as the Tax Commissioner may prescribe, setting forth:
61 (A) The amount of fixed or determinable gains, profits, and income; and (B) the name, address
62 and taxpayer identification number of persons receiving fixed or determinable gains, profits or
63 income from the nonpartnership venture.

64 (5) *Publicly traded partnerships.* — A publicly traded partnership, as defined in §11-21A-
65 1 of this code, that is treated as a partnership for federal income tax purposes for the taxable
66 year, is exempt from the withholding requirements of §11-21-71a of this code, if the following
67 information is provided to the Tax Commissioner: The name, address, taxpayer identification
68 number, and West Virginia source income of each partner that had an interest in the publicly
69 traded partnership during the taxable year. This information shall be provided in an electronic
70 format approved by the Tax Commissioner.

71 (d) *Payment of withheld tax.* —

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

75 (A) *S corporations.* — The 15th day of the third month following the close of the taxable
76 year of the S corporation along with the annual information return due under §11-24-1 *et seq.* of
77 this code, unless paragraph (C) of this subdivision applies.

78 (B) *Partnerships, estates, and trusts.* — The 15th day of the fourth month following the
79 close of the taxable year of the partnership, estate or trust, with the annual return of the
80 partnership, estate or trust due under this article, unless paragraph (C) of this subdivision applies:
81 *Provided,* That for tax years beginning after December 31, 2015, partnerships shall pay the
82 amount required to be withheld to the Tax Commissioner, along with the annual return of the
83 partnership due under this article, on the 15th day of the third month following the close of the
84 taxable year of the partnership, unless paragraph (C) of this subdivision applies.

85 (C) *Composite returns.* — The 15th day of the fourth month of the taxable year with the
86 composite return filed under §11-21-51a of this code: *Provided,* That for tax years beginning after
87 December 31, 2015, partnerships or partners in a partnership filing composite returns under §11-
88 21-51a of this code shall pay the amount required to be withheld to the Tax Commissioner, along
89 with the annual return due under this article, on the 15th day of the third month following the close
90 of the taxable year.

91 (2) *Special rules.* —

92 (A) *Where there is extension of time to file return.* — An extension of time for filing the
93 returns referenced in subdivision (1) of this subsection does not extend the time for paying the
94 amount of withholding tax due under this section. In this situation, the pass-through entity shall
95 pay, by the date specified in subdivision (1) of this subsection, at least 90 percent of the
96 withholding tax due for the taxable year, or 100 percent of the tax paid under this section for the
97 prior taxable year, if such taxable year was a taxable year of 12 months and tax was paid under
98 this section for that taxable year. The remaining portion of the tax due under this section, if any,

99 shall be paid at the time the pass-through entity files the return specified in subdivision (1) of this
100 subsection. If the balance due is paid by the last day of the extension period for filing the return
101 and the amount of tax due with such return is 10 percent or less of the tax due under this section
102 for the taxable year, no additions to tax may be imposed under §11-10-1 *et seq.* of this code with
103 respect to balance so remitted. If the amount of withholding tax due under this section for the
104 taxable year is less than the estimated withholding taxes paid for the taxable year by the pass-
105 through entity, the excess shall be refunded to the pass-through entity or, at its election,
106 established as a credit against withholding tax due under this section for the then current taxable
107 year.

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

112 (e) *Effectively connected taxable income.* — For purposes of this section, the term
113 “effectively connected taxable income” means the taxable income or portion thereof of a
114 partnership, S corporation, estate or trust, as the case may be, which is derived from or
115 attributable to West Virginia sources as determined under §11-21-32 of this code and such rules
116 as the Tax Commissioner may prescribe, whether the amount is actually distributed or is
117 determined to have been distributed for federal income tax purposes.

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

120 (1) *Allowance of credit.* — Each nonresident partner, nonresident shareholder, or
121 nonresident beneficiary shall be allowed a credit for such partner’s or shareholder’s or
122 beneficiary’s share of the tax withheld by the partnership, S corporation, estate or trust under this
123 section: *Provided,* That when the distribution is to a corporation taxable under §11-24-1 *et seq.* of

124 this code, the credit allowed by this section shall be applied against the distributee corporation's
125 liability for tax under §11-24-1 *et seq.* of this code.

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

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

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

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

138 (h) *Information statement.* —

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

147 (2) A copy of the information statements required by this subsection shall be filed with the
148 West Virginia return filed under this article (or §11-24-1 *et seq.* of this code for S corporations) by
149 the pass-through entity for its taxable year to which the distribution relates. This information

150 statement shall be furnished to each nonresident distributee on or before the due date of the pass-
151 through entity's return under this article or §11-24-1 *et seq.* of this code for the taxable year,
152 including extensions of time for filing such return, or such later date as may be allowed by the Tax
153 Commissioner.

154 (i) *Liability for withheld tax.* — Every person required to deduct and withhold tax under this
155 section is hereby made liable for the payment of the tax due under this section for taxable years
156 (of such persons) beginning after December 31, 1991, except as otherwise provided in this
157 section. The amount of tax required to be withheld and paid over to the Tax Commissioner shall
158 be considered the tax of the partnership, estate, or trust, as the case may be, for purposes of §11-
159 9-1 *et seq.* and §11-10-1 *et seq.* of this code. Any amount of tax withheld under this section shall
160 be held in trust for the Tax Commissioner. No partner, S corporation shareholder, or beneficiary
161 of a trust or estate, may have a right of action against the partnership, S corporation, estate, or
162 trust, in respect to any moneys withheld from the person's distributive share and paid over to the
163 Tax Commissioner in compliance with or in intended compliance with this section.

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

170 (k) *Distributee agreements.* —

171 (1) The Tax Commissioner shall permit a nonresident distributee to file with a pass-through
172 entity, on a form prescribed by the Tax Commissioner, the agreement of the nonresident
173 distributee: (A) To timely file returns and make timely payment of all taxes imposed by this article
174 or §11-24-1 *et seq.* of this code in the case of a C corporation, on the distributee with respect to
175 the effectively connected taxable income of the pass-through entity; and (B) to be subject to

176 personal jurisdiction in this state for purposes of the collection of any unpaid income tax under
177 this article (or §11-24-1 *et seq.* of this code in the case of a C corporation), together with related
178 interest, penalties, additional amounts and additions to tax, owed by the nonresident distributee.

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

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

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

193 (5) The pass-through entity shall file with the Tax Commissioner a copy of all distributee
194 agreements received by the pass-through entity during any taxable year with this annual
195 information return filed under this article, or §11-24-1 *et seq.* of this code if S corporations. If the
196 pass-through entity fails to timely file with the Tax Commissioner a copy of an agreement executed
197 by a distributee and furnished to the pass-through entity in accordance with this section, then the
198 pass-through entity shall remit to the Tax Commissioner an amount equal to the amount that
199 should have been withheld under this section from the nonresident distributee. The pass-through
200 entity may recover payment made pursuant to the preceding sentence from the distributee on
201 whose behalf the payment was made.

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

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

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

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

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

214 (3) *Internal Revenue Code.* — The term “Internal Revenue Code” means the Internal
215 Revenue Code of 1986, as amended, through the date specified in §11-21-9 of this code.

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

219 (5) *Partner.* — The term “partner” includes a member of a partnership as that term is
220 defined in this section, and an equity owner of any other pass-through entity.

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

227 (7) “Pass-through entity” means any partnership or other business entity, that is not
228 subject to tax under §11-24-1 *et seq.* of this code, imposing tax on C corporations or other entities
229 taxable as a C corporation for federal income tax purposes.

230 (8) *Taxable period.* — The term “taxable period” means, if an S corporation, any taxable
231 year or portion of a taxable year during which a corporation is an S corporation.

232 (9) *Taxable year of the pass-through entity.* — The term “taxable year of the pass-through
233 entity” means the taxable year of the pass-through entity for federal income tax purposes. If a
234 pass-through entity does not have a taxable year for federal tax purposes, its tax year for purposes
235 of this article shall be the calendar year.

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

238 (n) This section as amended in the year 2019 shall apply, without regard to the taxable
239 year, to taxes owed attributable to federal determinations that become final on or after the effective
240 date of this section enacted in the year 2019.

ARTICLE 21A. ADDITIONAL INCOME TAXES DUE TO FEDERAL PARTNERSHIP ADJUSTMENTS.

§11-21A-1. Definitions.

1 The following definitions apply for the purposes of this article:

2 (1) “Administrative adjustment request” means an administrative adjustment request filed
3 by a partnership under I.R.C. § 6227.

4 (2) “Audited partnership” means a partnership subject to a federal adjustment resulting
5 from a partnership level audit resulting in a federal adjustment.

6 (3) “C corporation” means any corporation that is taxed separately from its owners for
7 federal income tax purposes and included a pass-through entity that elects to be treated as a
8 corporation for federal income tax purposes.

9 (4) "Composite return partner" means a partner in a partnership that was required to be
10 included in a West Virginia composite income tax return filed pursuant to §11-21-51a of this code
11 in the reviewed year.

12 (5) "Corporate partner" means a partner that is subject to tax under §11-24-1 *et seq.* of
13 this code.

14 (6) "Date of each final federal determination" means the date on which each adjustment
15 or resolution resulting from an Internal Revenue Service (IRS) examination is assessed pursuant
16 to I.R.C. § 6203.

17 (7) "Direct partner" means a partner that holds an interest directly in a partnership or pass-
18 through entity.

19 (8) "Entity" means any person that is not an individual.

20 (9) "Exempt partner" means a partner that is exempt from taxation under §11-21-1 *et seq.*
21 or §11-24-1 *et seq.* of this code except on unrelated business taxable income.

22 (10) "Federal adjustment" means a change to an item or amount determined under the
23 Internal Revenue Code that is used by a taxpayer to compute West Virginia tax owed whether
24 that change results from action by the IRS, including a partnership level audit, or the filing of an
25 amended federal return, federal refund claim, or an administrative adjustment request by the
26 taxpayer. A federal adjustment is positive to the extent that it increases state taxable income as
27 determined under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code, as applicable, and is negative
28 to the extent that it decreases state taxable income as determined under §11-21-1 *et seq.* or §11-
29 24-1 *et seq.* of this code, as applicable.

30 (11) "Federal adjustments report" includes methods or forms required by the Tax
31 Commissioner for use by a taxpayer to report federal adjustments, including an amended West
32 Virginia tax return, information return, or a uniform multistate report.

33 (12) "Federal election for alternative payment" refers to the election described in I.R.C. §
34 6226, relating to the alternative to payment of the imputed underpayment by partnership.

35 (13) "Federal partnership representative" means the person the partnership designates,
36 for the taxable year, as the partnership's representative, or the person the IRS has appointed to
37 act as the federal partnership representative pursuant to I.R.C. § 6223(a).

38 (14) "Final determination date" means the following:

39 (A) Except as provided in §11-21A-1(14)(B) and (C) of this code, if the federal adjustment
40 arises from an IRS audit, or other action by the IRS, the final determination date is the first day
41 on which no federal adjustments arising from that audit, or other action remain to be finally
42 determined, whether by IRS decision with respect to which all rights of appeal have been waived
43 or exhausted, by agreement, or, if appealed or contested, by a final decision with respect to which
44 all rights of appeal have been waived or exhausted. For agreements required to be signed by the
45 IRS and the taxpayer, the final determination date is the date on which the last party signed the
46 agreement.

47 (B) For federal adjustments arising from an IRS audit or by other action of the IRS, if the
48 taxpayer was included in a combined report filed under §11-24-13a of this code, the final
49 determination date means the first day on which no related federal adjustments arising from that
50 audit remain to be finally determined, as described in §11-21A-1(14)(A) of this code for the entire
51 group.

52 (C) If the federal adjustment results from filing an amended federal return, a federal refund
53 claim, or an administrative adjustment request, or if a federal adjustment reported is on an
54 amended federal return or other similar report filed pursuant to I.R.C. § 6225(c), the final
55 determination date is the day on which the amended return, refund claim, or administrative
56 adjustment request or other similar report was filed.

57 (15) "Final federal adjustment" means a federal adjustment after the final determination
58 date for that federal adjustment has passed.

59 (16) "Indirect partner" means a partner in a partnership or other pass-through entity that
60 itself holds an indirect interest directly, or through another indirect partner, in a partnership or
61 other pass-through entity.

62 (17) "Interest" in an entity means an ownership or beneficial interest in an entity.

63 (18) "Internal Revenue Code" or "I.R.C." means the Internal Revenue Code of 1986, as
64 codified at 26 United States Code (U.S.C.) Section 1, *et seq.*, as defined in §11-21-9 or §11-24-
65 3 of this code, as applicable, for the taxable year, and any applicable regulations as promulgated
66 by the United States Department of the Treasury.

67 (19) "Internal Revenue Service" or "IRS" means the Internal Revenue Service of the United
68 States Department of the Treasury.

69 (20) "Nonresident partner" means an individual, trust or estate partner that is not a resident
70 as defined in §11-21-7 of this code.

71 (21) "Partner" means a person that holds an interest directly or indirectly in a partnership
72 or other pass-through entity.

73 (22) "Partnership" means an entity subject to taxation under Subchapter K of the Internal
74 Revenue Code.

75 (23) "Partnership adjustment" means any adjustment to a partnership-related item.

76 (24) "Partnership level audit" means an examination by the IRS at the partnership level
77 pursuant to Subchapter C of Title 26, Subtitle F, Chapter 63 of the I.R.C., as enacted by the
78 Bipartisan Budget Act of 2015, Public Law 114-74, which results in federal adjustments.

79 (25) "Partnership-related item" means:

80 (A) Any item or amount with respect to the partnership (without regard to whether or not
81 the item or amount appears on the partnership's return and including an imputed underpayment
82 and any item or amount relating to any transaction with, basis in, or liability of, the partnership)
83 which is relevant (determined without regard to this article) in determining the tax liability of any
84 person under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code; and

85 (B) Any partner's distributive share of any item of amount described in paragraph (A) of
86 this subdivision.

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

90 (27) "Person" means and includes, but is not limited to, any individual, firm, partnership,
91 limited partnership, copartnership, limited liability company, other pass-through entity, joint
92 venture, association, corporation, municipal corporation, organization, receiver, estate, trust,
93 guardian, executor, administrator, any other group or combination acting as a unit, and also any
94 officer, employee or member of any of the foregoing who, as an officer, employee or member, is
95 under a duty to perform or is responsible for the performance of an act prescribed by the
96 provisions of §11-21-1 *et seq.*, §11-21A-1 *et seq.*, or §11-24-1 *et seq.* of this code.

97 (28) "Publicly traded partnership" means either of the following:

98 (A) A publicly traded partnership within the meaning of I.R.C. § 7704; or

99 (B) Any other partnership where more than 10 percent of the profits or capital interest is
100 owned directly or indirectly by a partnership described in §11-21A-1(28)(A) of this code.

101 (29) "Reallocation adjustment" means a federal adjustment resulting from a partnership
102 level audit, or an administrative adjustment request, that changes the shares of one or more items
103 of partnership income, gain, loss, expense or credit allocated to direct partners. A positive
104 reallocation adjustment means the portion of a reallocation adjustment that would increase federal
105 taxable income for one or more direct partners, and a negative reallocation adjustment means
106 the portion of a reallocation adjustment that would decrease federal income for one or more direct
107 partners pursuant to regulations under I.R.C. § 6225.

108 (30) "Resident partner" means an individual, trust, or estate partner that has his or her
109 domicile in this state or is a resident of this state for tax purposes, as defined in §11-21-7 of this
110 code, for the relevant period.

111 (31) "Reviewed year" means the taxable year of a partnership that is subject to a
112 partnership level audit from which federal adjustments arise.

113 (32) "S corporation" means a corporation or pass-through entity that makes a valid election
114 to be taxed under Subchapter S of Chapter 1 of the Internal Revenue Code.

115 (33) "State imputed underpayment" means the netting of all final adjustments to
116 partnership-related items at the entity level for the reviewed year (excluding any reallocations of
117 income, expenses, gains, and losses among partners), apportioned and allocated to West Virginia
118 at the entity level, and multiplied by the applicable West Virginia income tax rate(s) set forth in
119 §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code, as applicable, for the taxable year.

120 (34) "State partnership adjustment report" means a form prescribed by Tax Commissioner
121 that identifies the partnership's direct partners, each partner's share of adjustments to
122 partnership-related items, and any reallocations of income, expenses, gains, and losses among
123 such partners, that arise directly or indirectly from a partnership level audit.

124 (35) "State partnership audit" means an examination by the Tax Commissioner at the
125 partnership or pass-through entity level which results in adjustments to partnership or pass-
126 through entity related items or reallocations of income, expenses, gains, losses, credits, and other
127 attributes among the partners for the reviewed year.

128 (36) "State partnership representative" means the person the partnership designates to
129 be the partnership's representative for West Virginia tax purposes for the reviewed year pursuant
130 to §11-21A-3 of this code and shall be the federal partnership representative in absence of the
131 partnership designating a West Virginia partnership representative.

132 (37) "Subsequent affected year" means a tax year subsequent to the reviewed year in
133 which a federal adjustment arising from an audit of that reviewed year affects the West Virginia
134 income tax owed by a taxpayer.

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

137 (39) "Taxpayer" means any person subject to the tax imposed by §11-21-1 *et seq.* or §11-
138 24-1 *et seq.* of this code, as applicable, unless the context clearly indicates otherwise, including
139 a partnership subject to a partnership level audit or a partnership that has made an administrative
140 adjustment request, as well as a tiered partner of that partnership.

141 (40) "This state" or "state" means the State of West Virginia.

142 (41) "Tiered partner" means any partner that is a partnership or other pass-through entity.

143 (42) "Tiered partnership" means any partnership or other pass-through entity that has one
144 or more tiered partners.

145 (43) "Unrelated business taxable income" has the same meaning as defined in I.R.C. §
146 512.

147 (44) "West Virginia tax" means the tax imposed by §11-21-1 *et seq.* or §11-24-1 *et seq.* of
148 this code, as applicable, plus interest and additions to tax imposed pursuant to §11-10-1 *et seq.*
149 of this code.

150 (45) "Withholding partner" means a partner in a partnership for whom the partnership was
151 required to withhold West Virginia tax pursuant to §11-21-71a of this code or administrative
152 authority for the reviewed year.

§11-21A-2. Reporting adjustments to federal taxable income – General rule.

1 (a) Except in the case of final federal adjustments which are required to be reported by a
2 partnership and its partners using the procedures in §11-21A-3 of this code, and final federal
3 adjustments required to be reported for federal purposes under I.R.C. §6225(a)(2), a taxpayer
4 shall report and pay any West Virginia income tax due with respect to final federal adjustments
5 arising from an audit or other action by the IRS or reported by the taxpayer on a timely filed
6 amended federal income tax return including a return or similar document filed pursuant to I.R.C.
7 §6225(c), or federal claim for refund by filing a federal adjustments report with the Tax
8 Commissioner for the reviewed year and, if applicable, pay the additional West Virginia tax owed
9 by the taxpayer not later than 180 days after the final determination date.

10 (b) Notwithstanding §11-21-59 and §11-24-20 of this code, if any item required to be
11 shown on a federal partnership return, including any gross income, deduction, penalty, credit, or
12 tax for any year of any partnership, including any amount of any partner's distributive share, is
13 changed or corrected by the Commissioner of Internal Revenue or other officer of the United
14 States or other competent authority, and the partnership is issued an adjustment under I.R.C. §
15 6225, or makes a federal election for alternative payment, by the Internal Revenue Service as
16 part of a partnership level audit, the partnership shall report each change or correction with the
17 Tax Commissioner for the reviewed year within six months after the date of each final federal
18 determination. The report of adjustments or return reporting the adjustments shall be sufficiently
19 detailed to allow computation of the West Virginia tax change under §11-21-1 *et seq.* or §11-24-
20 1 *et seq.* of this code, as applicable, resulting from the federal adjustment and shall be reported
21 in the form and manner as prescribed by the Tax Commissioner.

**§11-21A-3. Reporting federal adjustments — partnership level audit and administrative
adjustment request.**

1 (a) *General.* — Except for adjustments required to be reported for federal purposes
2 pursuant to I.R.C. § 6225(a)(2), and the distributive share of adjustments that have been reported
3 as required by §11-21A-2 of this code, partnerships and partners shall report final federal
4 adjustments arising from a partnership level adjustment, or an administrative adjustment request,
5 and make payments as required by this section of the code.

6 (b) *State partnership representative.* —

7 (1) With respect to an action required or permitted to be taken by a partnership under this
8 section of the code and a proceeding under §11-10A-1 *et seq.* of this code with respect that action,
9 the state partnership representative for the reviewed year has the sole authority to act on behalf
10 of the partnership, and its direct partners and indirect partners shall be bound by those actions.

11 (2) The state partnership representative for the reviewed year is the partnership's federal
12 partnership representative unless the partnership designates in writing another person as its state
13 partnership representative.

14 (3) The Tax Commissioner may establish reasonable qualifications for and procedures for
15 designating a person, other than the federal partnership representative, to be the state partnership
16 representative.

17 (c) *Reporting and payment requirements for partnerships subject to a final federal*
18 *adjustment and direct partners.* — Final federal adjustments subject to the requirements of §11-
19 21A-3 of this code, except for those subject to a properly made election under §11-21A-3(d) of
20 this code, shall be reported as follows:

21 (1) No later than 90 days after the final determination date, the partnership shall:

22 (A) File a completed federal adjustment report with the Tax Commissioner, including
23 information as required by the Tax Commissioner; and

24 (B) Notify each of its direct partners of their distributive share of the final federal
25 adjustments including information as required by the Tax Commissioner; and

26 (C) File an amended composite return for direct partners as permitted under §11-21-51a
27 of this code and/or an amended withholding return for direct partners under §11-21-71a of this
28 code and pay the additional amount due under §11-21-1 *et seq.* and §11-24-1 *et seq.* of this code,
29 as applicable, that would have been due had the final federal adjustments been reported properly
30 as required.

31 (2) Except as provided in §11-21A-4 of this code for minimal tax liabilities, no later than
32 180 days after the final determination date, each direct partner that is taxed under §11-21-1 *et*
33 *seq.* or §11-24-1 *et seq.* of this code, as applicable, shall:

34 (A) File a federal adjustment report reporting their distributive share of the adjustments
35 reported to them under §11-21A-3(c)(1)(B) of this code as required by West Virginia law; and

36 (B) Pay any additional amount of tax due as if final federal adjustments had been properly
37 reported, plus any additions to tax and interest due under §11-10-1 *et seq.* of this code and less
38 any credit for related amounts paid or withheld and remitted on behalf of the direct partner under
39 §11-21A-3(c)(1)(C) of this code.

40 (d) *Election — partnership pays.* — Subject to the limitations in this subsection, an audited
41 partnership making an election under §11-21A-3(d) of this code shall:

42 (1) No later than 90 days after the final determination date, file a completed federal
43 adjustment report, including information as required by rule or instruction of the Tax
44 Commissioner, and notify the Tax Commissioner that it is making the election under §11-21A-
45 3(d) of this code;

46 (2) No later than 180 days after the final determination date, pay an amount, determined
47 as follows, in lieu of taxes owed by its direct partners and indirect partners:

48 (A) Exclude from final federal adjustments the distributive share of these adjustments
49 reported to a direct exempt partner not subject to tax under § 11-21-1 *et seq.* or §11-24-1 *et seq.*
50 of this code;

51 (B) For the total distributive shares of the remaining final federal adjustments reported to
52 direct corporate partners subject to tax under §11-24-1 *et seq.* of this code, and to direct exempt
53 partners subject to tax under §11-24-1 *et seq.* of this code, apportion and allocate the adjustments
54 as provided in §11-24-7 of this code, as applicable, and multiply the resulting amount by the
55 highest tax rate under §11-24-1 *et seq.* of this code;

56 (C) For the total distributive shares of the remaining final federal adjustments reported to
57 nonresident direct partners subject to tax under §11-21-1 *et seq.* of this code, determine the
58 amount of the adjustments which is West Virginia source income under §11-21-30 of this code,
59 and multiply the resulting amount by the highest tax rate under §11-21-1 *et seq.* of this code;

60 (D) For the total distributive shares of the remaining final federal adjustments reported to
61 tiered partners:

62 (i) Determine the amount of the adjustments which is of a type that it would not be subject
63 to sourcing to West Virginia under §11-21-1 *et seq.* of this code; allocate and apportion the income
64 as provided in §11-21-1 *et seq.* of this code; and then determine the portion of this amount that
65 would be sourced to this state applying these rules.

66 (ii) Determine the amount of such adjustments which is of a type that it would not be
67 subject to sourcing to West Virginia by a nonresident under §11-21-30 of this code.

68 (iii) Determine the portion of the amount determined in §11-21A-3(c)(2)(D)(ii) of this code
69 that can be established under rule issued by the Tax Commissioner, to be properly allocable to
70 nonresident indirect partners or other partners not subject tax on the adjustments; or that can be
71 excluded under procedures for modified reporting and payment method allowed under §11-21A-
72 3(f) of this code.

73 (E) Multiply the total of the amounts determined in §11-21A-3(d)(2)(D)(i) and (ii) of this
74 code reduced by the amount determined in §11-21A-3(d)(2)(D)(iii) of this code by the highest tax
75 rate under §11-21-1 *et seq.* of this code that applies to individuals and/or estates and trusts;

76 (F) For the total distributive shares of the remaining final federal adjustments reported to
77 resident direct partners subject to tax under §11-21-1 *et seq.* of this code, multiply that amount
78 by the highest tax rate under §11-21-1 *et seq.* of this code that applies to individuals and/or estates
79 and trusts;

80 (G) Add the amounts determined in §11-21A-3(d)(2)(B), (D), (E), and (F) of this code;

81 (3) Final federal adjustments subject to this election exclude:

82 (A) The distributive share of final audit adjustments that under §11-24-1 *et seq.* of this
83 code must be included in the unitary business income of any direct or indirect corporate partner,
84 provided that the audited partnership can reasonably determine this amount; and

85 (B) Any final federal adjustments resulting from an administrative adjustment request.

86 (4) An audited partnership not otherwise subject to any reporting or payment obligation to
87 this state that makes an election under §11-21A-3(d) of this code consents to be subject to this

88 state's laws related to reporting, assessment, payment, and collection of West Virginia income
89 tax calculated under the election.

90 (e) *Tiered partners.* — The direct and indirect partners of an audited partnership that are
91 tiered partners, and all of the partners of those tiered partners that are subject to tax under §11-
92 21-1 *et seq.* or §11-24-1 *et seq.* of this code, as appropriate, are subject to the reporting and
93 payment requirements of §11-21A-3(b) of this code and the tiered partners are entitled to make
94 the elections provided in §11-21A-3(c) and (e) of this code. The tiered partners or their partners
95 shall make required reports and payments no later than 90 days after the time for filing and
96 furnishing statements to tiered partners and their partners as established under I.R.C. Section
97 6226 and the regulations thereunder. The Tax Commissioner may promulgate rules under §29A-
98 3-1 *et seq.* of this code to establish procedures and interim time periods for the reports and
99 payments required by tiered partners and their partners and for making the elections under §11-
100 21A-3 of this code.

101 (f) *Modified reporting and payment method.* — Under procedures adopted by and subject
102 to the approval of the Tax Commissioner in his or her sole discretion, an audited partnership or
103 tiered partner may enter into an agreement with the Tax Commissioner to utilize an alternative
104 reporting and payment method, including applicable time requirements or any other provision of
105 §11-21A-3 of this code, if the audited partnership or tiered partner demonstrates that the
106 requested method will reasonably provide for the reporting and payment of taxes, additions to tax,
107 and interest due under the provisions of §11-21A-3 of this code. Application for approval of an
108 alternative reporting and payment method shall be made by the audited partnership or tiered
109 partner within the time for election as provided in §11-21A-3(d) or §11-21A-3(e) of this code as
110 appropriate.

111 (g) *Effect of election by audited partnership or tiered partner and payment of amount due.*
112 — (1) The election made pursuant to §11-21A-3(d) or §11-21A-3(f) of this code is irrevocable,
113 unless the Tax Commissioner, in his or her sole discretion, determines otherwise.

114 (2) If properly reported and paid by the audited partnership or tiered partner, the amount
115 determined in §11-21A-3(c) of this code, or similarly under an optional election under §11-21A-
116 3(f) of this code, will be treated as paid in lieu of taxes owed by its direct and indirect partners, to
117 the extent applicable, on the same final federal adjustments. The direct partners or indirect
118 partners may not take any deduction or credit for this amount or claim a refund of this amount in
119 this state. Nothing in §11-21A-3(f) of this code may preclude a direct resident partner from
120 claiming a credit against taxes paid to this state pursuant to §11-21-1 *et seq.* of this code, any
121 amounts paid by the audited partnership or tiered partner on the resident partner's behalf to
122 another state in accordance with the provisions of §11-21-1 *et seq.* of this code allowing credit for
123 taxes paid to another state.

124 (h) *Failure of audited partnership or tiered partner to report or pay.* — Nothing in §11-21A-
125 3 of this code prevents the Tax Commissioner from assessing direct partners, or indirect partners,
126 for taxes they owe, using the best information available to the commissioner, if a partnership or
127 tiered partner fails to timely make any report or payment required by §11-21A-3 of this code for
128 any reason.

§11-21A-4. De minimis exception.

1 The Tax Commissioner, in his or her discretion, may promulgate rules, as provided in
2 §29A-3-1 *et seq.* of this code, to establish a de minimis amount upon which a taxpayer shall not
3 be required to comply with §11-21A-2 and §11-21A-3 of this code.

**§11-21A-5. Assessments of additional West Virginia tax, interest, and additions to tax
arising from adjustments to federal taxable income; statute of limitations.**

1 The Tax Commissioner will assess additional West Virginia tax, interest, and additions to
2 tax arising from federal adjustments arising from an audit by the Internal Revenue Service,
3 including a partnership level audit, or reported by the taxpayer on an amended federal income tax
4 return or as part of an administrative adjustment request by the following dates:

5 (1) *Timely reported federal adjustments.* — If a taxpayer files with the Tax Commissioner
6 a federal adjustments report or an amended West Virginia tax return as required within the period
7 specified in §11-21A-2 or §11-21A-3 of this code, the Tax Commissioner may assess any West
8 Virginia amounts, including in-lieu-of amounts, of taxes, interest, and additions to tax arising from
9 those federal adjustments if the Tax Commissioner issues a notice of the assessment to the
10 taxpayer by a date which is the latest of the following:

11 (A) The expiration of the limitations period specified in §11-10-15 of this code setting forth
12 normal limitations period; or

13 (B) The expiration of the one-year period following the date of filing with the Tax
14 Commissioner of the federal adjustments report under §11-21A-3 of this code.

15 (2) *Untimely reported federal adjustments.* — If the taxpayer fails to file the federal
16 adjustments report within the period specified in §11-21A-2 or §11-21A-3 of this code, as
17 appropriate, or the federal adjustments report filed by the taxpayer omits federal adjustments or
18 understates the correct amount of West Virginia tax owed, the Tax Commissioner may assess
19 amounts or additional amounts including in-lieu-of amounts, taxes, interest, and additions to tax
20 arising from the final federal adjustments, if the Tax Commissioner mails a notice of the
21 assessment to the taxpayer by a date which is the latest of the following:

22 (A) The expiration of the limitations period specified in §11-10-15 of this code setting forth
23 limitations periods; or

24 (B) The expiration of the one-year period following the date the federal adjustments report
25 was filed with the Tax Commissioner; or

26 (C) Absent fraud, the expiration of the six-year period following the final determination
27 date.

§11-21A-6. Estimated West Virginia tax payments during course of federal audit.

1 A taxpayer may make estimated payments to the Tax Commissioner, following the
2 process prescribed by the Tax Commissioner, of the tax expected to result from a pending Internal

3 Revenue Service audit, prior to the due date of the federal adjustments report, without having to
4 file the report with the Tax Commissioner. The estimated tax payments shall be credited against
5 any tax liability ultimately found to be due to West Virginia (final West Virginia tax liability) and
6 shall limit the accrual of further statutory interest on that amount. If the estimated tax payments
7 exceed the final tax liability and statutory interest ultimately determined to be due, the taxpayer is
8 entitled to a refund or credit for the excess, provided the taxpayer files a federal adjustments
9 report or claim for refund or credit of tax pursuant to §11-10-14 or §11-21A-7 of this code, no later
10 than one year following the final determination date.

§11-21A-7. Claims for refund or credits of West Virginia tax arising from federal adjustments made by the IRS.

1 (a) Notwithstanding the reporting requirement contained in §11-21A-2 or §11-21A-3 of this
2 code, except for final federal adjustments required to be reported for federal income tax purposes
3 under I.R.C. § 6225(a)(2), a taxpayer may file a claim for refund or credit of West Virginia tax
4 arising from federal adjustments made by the Internal Revenue Service on or before the later of:

5 (1) The expiration of the last day for filing a claim for refund or credit of West Virginia tax
6 pursuant to §11-10-14 of this code, including any extensions; or

7 (2) One year from the date a federal adjustments report prescribed in §11-21A-2 or §11-
8 21A-3 of this code, as applicable, was due to the Tax Commissioner, including any extensions
9 pursuant to §11-21A-8 of this code.

10 (b) The federal adjustments report shall serve as the means for the taxpayer to report
11 additional West Virginia tax due, report a claim for refund or credit of tax, and make other
12 adjustments (including, but not limited to, its net operating losses) resulting from adjustments to
13 the taxpayer's federal taxable income.

§11-21A-8. Scope of adjustments and extensions of time.

1 (a) Unless otherwise agreed in writing by the taxpayer and the Tax Commissioner, any
2 adjustments by the Tax Commissioner or by the taxpayer made after the expiration of the statute

3 of limitations for refund and assessment set forth in §11-10-14 and §11-10-15 of this code,
4 respectively, are limited to changes to the taxpayer's tax liability arising from federal adjustments.

5 (b) The time periods provided for in this section may be extended:

6 (1) Automatically, upon written notice to the Tax Commissioner, by 60 days for an audited
7 partnership, or tiered partner, which has 10,000 or more direct partners; or

8 (2) By written agreement between the taxpayer and the Tax Commissioner pursuant to
9 any rule issued under this section.

10 (c) An extension granted under §11-21A-8 of this code for filing the federal adjustment
11 report extends the last day prescribed by law for assessing any additional tax arising from the
12 adjustments to federal taxable income, as provided in §11-21A-1 *et seq.* of this code, and the
13 period for filing a claim for refund of credit of taxes pursuant to §11-21A-1 *et seq.* of this code.

§11-21A-9. Effective date.

1 This article enacted in 2019 shall apply to any adjustments to a taxpayer's federal taxable
2 income with a final determination date occurring for a tax year beginning after December 31,
3 2018.

§11-21A-10. Legislative, interpretive, and procedural rules.

1 The Tax Commissioner may propose for promulgation pursuant to the provisions of §29A-
2 3-1 *et seq.* of this code such legislative, interpretive, and procedural rules as may be necessary
3 to carry out the purposes of this article including, but not limited to, rules to determine the West
4 Virginia share of federal audit adjustments.

§11-21A-11. General procedure and administration.

1 Every provision of the West Virginia Tax Procedure and Administration Act set forth in
2 §11-10-1 *et seq.* of this code applies to the taxes imposed by this article, except as otherwise
3 expressly provided in this article, with like effect as if that act were applicable only to the taxes
4 imposed by this article and were set forth in extenso in this article.

§11-21A-12. Crimes and penalties.

1 Every provision of the West Virginia Tax Crimes and Penalties Act set forth in §11-9-1 *et*
2 *seq.* of this code applies to the taxes imposed by this article with like effect as if that act were
3 applicable only to the taxes imposed by this article and were set forth in extenso in this article.

ARTICLE 24. CORPORATION NET INCOME TAX.

§11-24-20. Report of change in federal taxable income.

1 (a) Unless the provision of §11-21A-1 *et seq.* of this code apply, if the amount of a
2 taxpayer's federal taxable income reported on its federal income tax return for any taxable year
3 is changed or corrected by the United States internal revenue service or other competent
4 authority, or as the result of a renegotiation of a contract or subcontract with the United States,
5 the taxpayer shall report the change or correction in federal taxable income within 90 days after
6 the final determination of the change, correction or renegotiation, or as otherwise required by the
7 Tax Commissioner, and shall concede the accuracy of the determination or state wherein it is
8 erroneous. Any taxpayer filing an amended federal income tax return shall also file within 90 days
9 thereafter an amended return under this article, and shall give such information as the Tax
10 Commissioner may require. The Tax Commissioner may by rule prescribe such exceptions to the
11 requirements of this section as he or she deems appropriate.

12 (b) (1) If a change or correction is made or allowed by the Commissioner of Internal
13 Revenue or other officer of the United States, or other competent authority, a claim for credit or
14 refund resulting from the adjustment may be filed by the taxpayer within two years from the date
15 of the final federal determination (as defined in §11-21A-2 of this code), or within the period
16 provided in §11-10-14 of this code, whichever period expires later.

17 (2) Within two years of the date of the final determination (as defined in §11-21A-2 of this
18 code) or within the period provided in §11-10-14 of this code, whichever period expires later, the
19 Tax Commissioner may allow a credit, make a refund, or mail to the taxpayer a notice of proposed
20 overpayment resulting from the final federal determination.

21 (c) For the purposes of this section, assessments under a partial agreement, closing
22 agreement covering specific matters, jeopardy or advance payment are considered part of the
23 final determination and must be submitted to the Tax Commissioner with the final determination.

24 (d) If a partial agreement, a closing agreement covering specific matters, or any other
25 agreement with the United States Treasury Department would be final except for a federal
26 extension still open for flow-through adjustments from other entities or other jurisdictions, the final
27 determination is the date the taxpayer signs the agreement. Flow-through adjustments include,
28 but are not limited to, items of income gain, loss, and deduction that flow through to equity owners
29 of a partnership, or other pass-through entity. Flow-through adjustments are finally determined
30 based on criteria specified in §11-24-20(g) of this code.

31 (e) The Tax Commissioner is not required to issue refunds based on any agreement other
32 than a final determination.

33 (f) If a taxpayer has filed an amended federal return, and no corresponding West Virginia
34 amended return has been filed with the Tax Commissioner, then the period of limitations for
35 issuing a notice of assessment shall be reopened and shall not expire until three years from the
36 date of delivery to the Tax Commissioner by the taxpayer of the amended federal return. However,
37 upon the expiration of the period of limitations as provided in §11-10-15 of this code, then only
38 those specific items of income, deductions, gains, losses, or credits which were adjusted in the
39 amended federal return shall be subject to adjustment for purposes of recomputing West Virginia
40 income, deductions, gains, losses, credits, and the effect of such adjustments on West Virginia
41 allocations and apportionments.

42 (g) For the purposes of this section, "final determination" means the appeal rights of both
43 parties have expired or have been exhausted relative to the tax year for federal income tax
44 purposes.

45 (h) The amendments made to this section in the year 2019 shall apply, without regard to
46 taxable year, to federal determinations that become final on or after the effective date of the
47 amendments to this section in the year 2019.

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

.....
Chairman, House Committee

.....
Chairman, Senate Committee

Originating in the House.

To take effect July 1, 2019.

.....
Clerk of the House of Delegates

.....
Clerk of the Senate

.....
Speaker of the House of Delegates

.....
President of the Senate

The within this the.....
day of, 2019.

.....
Governor