

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 2026

BY DELEGATES HANSHAW (MR. SPEAKER) AND SKAFF

(BY REQUEST OF THE EXECUTIVE)

[Passed March 30, 2021; in effect ninety days from passage.]

1 AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §11-21-31; and to amend and reenact §11-24-7, all relating to the collection
3 of income taxes generally; excluding compensation of certain temporary nonresident
4 employees from state source income; changing the allocation of multi-state income from
5 a four factor formula to a single sales factor; removing requirement that certain sales of
6 tangible personal property be excluded when allocating sales of tangible personal property
7 to this state; replacing the income-producing activity methodology for allocating sales of
8 services and intangible property to this state with a market-based sourcing methodology;
9 and providing effective dates.

Be it enacted by the Legislature of West Virginia:

ARTICLE 21. PERSONAL INCOME TAX.

§11-21-31. Mobile employee exclusion from state source income.

1 (a) As used in this section:

2 (1) "Professional athlete" means an athlete who performs services in a professional
3 athletic event for compensation.

4 (2) "Professional entertainer" means a person who performs services in the professional
5 performing arts for compensation on a per-event basis.

6 (3) "Public figure" means a person of prominence who performs services at discrete
7 events, such as speeches, public appearances, or similar events, for compensation on a per-
8 event basis.

9 (b) Compensation subject to withholding pursuant to §11-21-1 *et seq.* of this code, without
10 regard to any withholding tax exception set forth in §11-21-71a of this code, paid to a nonresident
11 individual is exempt from the tax levied under §11-21-1 *et seq.* of this code if all of the following
12 conditions apply:

13 (1) The compensation is paid for employment duties performed by the individual in this
14 state on thirty or fewer days in the calendar year;

15 (2) The individual performed employment duties in more than one state during the
16 calendar year;

17 (3) The compensation is not paid for employment duties performed by the individual in the
18 individual's capacity as a professional athlete, professional entertainer, or public figure; and

19 (4) The nonresident individual's state of residence:

20 (A) Provides a substantially similar exclusion; or

21 (B) Does not impose an individual income tax; or

22 (C) The individual's income is exempt from taxation by this state under the United States
23 Constitution or federal statute.

24 (c) Except as otherwise provided in this article, an employer is not required to withhold
25 taxes under §11-21-1 *et seq.* from compensation that is paid to an employee described in
26 subsection (b) of this section: *Provided*, That if, during the calendar year, the number of days an
27 employee spends performing employment duties in this state exceeds the thirty-day threshold
28 described in subsection (b) of this section, an employer shall withhold and remit tax to this state
29 for every day in that calendar year, including the first thirty days, on which the employee performs
30 employment duties in this state.

31 (d) *Special rule for determining liability* – For purposes of determining compensation paid
32 and subject to withholding under this section:

33 (1) If an employer maintains a time and attendance system that tracks where employees
34 perform services on a daily basis, then data from the time and attendance system shall be used.
35 For purposes of this section, time and attendance system means a system:

36 (A) In which the employee is required, on a contemporaneous basis, to record the work
37 location for every day worked outside of the State where the employment duties are primarily
38 performed; and

39 (B) That is designed to allow the employer to allocate the employee's wages for income
40 tax purposes among all states in which the employee performs services.

41 (2) In all other cases, the employer shall obtain a written statement from the employee of
42 the number of days reasonably expected to be spent performing services in this State during the
43 taxable year. Absent the employer's actual knowledge of fraud or gross negligence by the
44 employee in making the determination or collusion between the employer and the employee to
45 evade tax, the certification so made by the employee and maintained in the employer's books
46 and records shall be prima facie evidence and constitute a rebuttable presumption of the number
47 of days spent performing services in this State.

48 (e) For purposes of this section, an employee shall be considered present and performing
49 employment duties within this state for a day if the employee performs more of the employee's
50 employment duties in this state than in any other state during that day. Any portion of the day
51 during which the employee is in transit shall not be considered in determining the location of an
52 employee's performance of employment duties.

53 (f) The provisions of this section shall be effective on January 1, 2022.

ARTICLE 24. CORPORATION NET INCOME TAX.

§11-24-7. Allocation and apportionment.

1 (a) General. — Any taxpayer having income from business activity which is taxable both
2 in this state and in another state shall allocate and apportion its net income as provided in this
3 section. For purposes of this section, the term "net income" means the taxpayer's federal taxable
4 income adjusted as provided in section six of this article.

5 (b) "Taxable in another state" defined. — For purposes of allocation and apportionment of
6 net income under this section, a taxpayer is taxable in another state if:

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

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

11 (c) Business activities entirely within West Virginia. — If the business activities of a
12 taxpayer take place entirely within this state, the entire net income of the taxpayer is subject to
13 the tax imposed by this article. The business activities of a taxpayer are considered to have taken
14 place in their entirety within this state if the taxpayer is not “taxable in another state”: *Provided*,
15 That for tax years beginning before January 1, 2009, the business activities of a financial
16 organization having its commercial domicile in this state are considered to take place entirely in
17 this state, notwithstanding that the organization may be “taxable in another state”: *Provided*,
18 *however*, That for tax years beginning on or after January 1, 2009, the income from the business
19 activities of a financial organization that are taxable in another state shall be apportioned
20 according to the applicable provisions of this article.

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

30 (1) Net rents and royalties. —

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

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

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

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

37 (C) The extent of utilization of tangible personal property in a state is determined by
38 multiplying the rents and royalties by a fraction, the numerator of which is the number of days of
39 physical location of the property in the state during the rental or royalty period in the taxable year
40 and the denominator of which is the number of days of physical location of the property
41 everywhere during all rental or royalty periods in the taxable year. If the physical location of the
42 property during the rental or royalty period is unknown or unascertainable by the taxpayer,
43 tangible personal property is utilized in the state in which the property was located at the time the
44 rental or royalty payer obtained possession.

45 (2) Capital gains. —

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

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

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

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

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

55 (D) Gains pursuant to Section 631 (a) and (b) of the Internal Revenue Code of 1986, as
56 amended, from sales of natural resources severed in this state shall be allocated to this state if
57 they are nonbusiness income.

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 (5) Corporate partner's distributive share. —

75 (A) Persons carrying on business as partners in a partnership, as defined in Section 761
76 of the Internal Revenue Code of 1986, as amended, are liable for income tax only in their separate
77 or individual capacities.

78 (B) A corporate partner's distributive share of income, gain, loss, deduction or credit of a
79 partnership shall be modified as provided in section six of this article for each partnership. For
80 taxable years beginning on or after December 31, 1998, the distributive share shall then be
81 allocated and apportioned as provided in this section using the partnership's property, payroll and
82 sales factors. The sum of that portion of the distributive share allocated and apportioned to this
83 state shall then be treated as distributive share allocated to this state; and that portion of
84 distributive share allocated or apportioned outside this state shall be treated as distributive share
85 allocated outside this state, unless the taxpayer requests or the Tax Commissioner, under
86 subsection (h) of this section requires that the distributive share be treated differently.

87 (C) This subdivision shall be null and void and of no force or effect for tax years beginning
88 on or after January 1, 2009.

89 (e) Business activities partially within and partially without this state; apportionment of
90 business income. — All net income, after deducting those items specifically allocated under
91 subsection (d) of this section, shall be apportioned to this state by multiplying the net income by
92 a fraction, the numerator of which is the property factor plus the payroll factor plus two times the
93 sales factor and the denominator of which is four, reduced by the number of factors, if any, having
94 no denominator: *Provided*, That for tax years beginning on or after January 1, 2022, all net
95 income, after deducting those items specifically allocated under subsection (d) of this section,
96 shall be apportioned to this state by multiplying the net income by the sales factor described in
97 this subsection.

98 (1) Property factor. — The property factor is a fraction, the numerator of which is the
99 average value of the taxpayer's real and tangible personal property owned or rented and used by
100 it in this state during the taxable year and the denominator of which is the average value of all the
101 taxpayer's real and tangible personal property owned or rented and used by the taxpayer during
102 the taxable year, which is reported on Schedule L Federal Form 1120, plus the average value of
103 all real and tangible personal property leased and used by the taxpayer during the taxable year.

104 (2) Value of property. — Property owned by the taxpayer shall be valued at its original
105 cost, adjusted by subsequent capital additions or improvements thereto and partial disposition
106 thereof, by reason of sale, exchange, abandonment, etc.: *Provided*, That where records of original
107 cost are unavailable or cannot be obtained without unreasonable expense, property shall be
108 valued at original cost as determined under rules of the Tax Commissioner. Property rented by
109 the taxpayer from others shall be valued at eight times the annual rental rate. The term "net annual
110 rental rate" is the annual rental paid, directly or indirectly, by the taxpayer, or for its benefit, in
111 money or other consideration for the use of property and includes:

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

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

120 (3) Movable property. — The value of movable tangible personal property used both within
121 and without this state shall be included in the numerator to the extent of its utilization in this state.
122 The extent of the utilization shall be determined by multiplying the original cost of the property by
123 a fraction, the numerator of which is the number of days of physical location of the property in this
124 state during the taxable period and the denominator of which is the number of days of physical
125 location of the property everywhere during the taxable year. The number of days of physical
126 location of the property may be determined on a statistical basis or by other reasonable method
127 acceptable to the Tax Commissioner.

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

132 (5) Average value of property. — The average value of property shall be determined by
133 averaging the values at the beginning and ending of the taxable year: *Provided*, That the Tax
134 Commissioner may require the averaging of monthly values during the taxable year if substantial
135 fluctuations in the values of the property exist during the taxable year, or where property is
136 acquired after the beginning of the taxable year, or is disposed of, or whose rental contract
137 ceases, before the end of the taxable year.

138 (6) Payroll factor. — The payroll factor is a fraction, the numerator of which is the total
139 compensation paid in this state during the taxable year by the taxpayer for compensation and the
140 denominator of which is the total compensation paid by the taxpayer during the taxable year, as

141 shown on the taxpayer's federal income tax return as filed with the Internal Revenue Service, as
142 reflected in the schedule of wages and salaries and that portion of cost of goods sold which
143 reflects compensation or as shown on a pro forma return.

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

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

152 (A) Any officer of a corporation; or

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

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

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

157 (B) The employee's service is performed both within and without this state, but the service
158 performed without the state is incidental to the individual's service within this state. The word
159 "incidental" means any service which is temporary or transitory in nature or which is rendered in
160 connection with an isolated transaction; or

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

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

164 (ii) The base of operations or the place from which the service is directed or controlled is
165 not in any state in which some part of the service is performed, but the employee's residence is
166 in this state.

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

174 (10) Sales factor. — The sales factor is a fraction, the numerator of which is the gross
175 receipts of the taxpayer derived from transactions and activity in the regular course of its trade or
176 business in this state during the taxable year (business income), less returns and allowances.
177 The denominator of the fraction is the total gross receipts derived by the taxpayer from
178 transactions and activity in the regular course of its trade or business during the taxable year
179 (business income) and reflected in its gross income reported and as appearing on the taxpayer’s
180 Federal Form 1120 and consisting of those certain pertinent portions of the (gross income)
181 elements set forth: *Provided*, That if either the numerator or the denominator includes interest or
182 dividends from obligations of the United States government which are exempt from taxation by
183 this state, the amount of such interest and dividends, if any, shall be subtracted from the
184 numerator or denominator in which it is included.

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

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

187 (i) The property is received in this state by the purchaser, other than the United States
188 government, regardless of the f.o.b. point or other conditions of the sale. In the case of delivery
189 by common carrier or other means of transportation, the place at which the property is ultimately
190 received after all transportation has been completed is the place at which the property is received
191 by the purchaser. Direct delivery in this state, other than for purposes of transportation, to a
192 person or firm designated by the purchaser, is delivery to the purchaser in this state and direct

193 delivery outside this state to a person or firm designated by the purchaser is not delivery to the
194 purchaser in this state, regardless of where title passes or other conditions of sale; or

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

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

200 (C) For sales made on or after January 1, 2022, the provisions of paragraph (B) of this
201 subdivision shall no longer apply.

202 (12) Allocation of other sales. — Sales, other than sales of tangible personal property,
203 made before January 1, 2022, are in this state if:

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

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

208 (C) The sale constitutes business income to the taxpayer, or the taxpayer is a financial
209 organization not having its commercial domicile in this state, and in either case the sale is a receipt
210 described as attributable to this state in §11-24-7b of this code.

211 (13) Allocation of other sales beginning 2022 – market-based sourcing. – Sales, other
212 than sales of tangible personal property, made on or after January 1, 2022, are in this state if:

213 (A) In the case of sale of a service, if and to the extent the service is delivered to a location
214 in this state; and

215 (B) In the case of intangible property:

216 (i) That is rented, leased, or licensed, if and to the extent the property is used in this state,
217 provided that intangible property utilized in marketing a good or service to a consumer is “used in
218 this state” if that good or service is purchased by a consumer who is in this state; and

219 (ii) That is sold, if and to the extent the property is used in this state, provided that:

220 (I) A contract right, government license, or similar intangible property that authorizes the
221 holder to conduct a business activity in a specific geographic area is “used in this state” if the
222 geographic area includes all or part of this state;

223 (II) Receipts from intangible property sales that are contingent on the productivity, use, or
224 disposition of the intangible property shall be treated as sales receipts from the rental, lease or
225 licensing of such intangible property under subparagraph (i) of this paragraph; and

226 (III) All other receipts from a sale of intangible property shall be excluded from the
227 numerator and denominator of the sales factor.

228 (14) Financial organizations and other taxpayers with business activities partially within
229 and partially without this state. — Notwithstanding anything contained in this section to the
230 contrary, in the case of financial organizations and other taxpayers, not having their commercial
231 domicile in this state, the rules of this subsection apply to the apportionment of income from their
232 business activities except as expressly otherwise provided in §11-24-7b of this code.

233 (f) Income-producing activity. — The term “income-producing activity” applies to each
234 separate item of income and means the transactions and activity directly engaged in by the
235 taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gain
236 or profit. The activity does not include transactions and activities performed on behalf of the
237 taxpayer, such as those conducted on its behalf by an independent contractor. “Income-producing
238 activity” includes, but is not limited to, the following:

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

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

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

243 (4) The sale, licensing or other use of intangible personal property.

244 The mere holding of intangible personal property is not, in itself, an income-producing
245 activity: *Provided*, That the conduct of the business of a financial organization is an income-
246 producing activity.

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

250 (h) Other methods of allocation and apportionment. —

251 (1) General. — If the allocation and apportionment provisions of subsections (d) and (e)
252 of this section do not fairly represent the extent of the taxpayer’s business activities in this state,
253 the taxpayer may petition for or the Tax Commissioner may require, in respect to all or any part
254 of the taxpayer’s business activities, if reasonable:

255 (A) Separate accounting;

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

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

259 (D) The employment of any other method to effectuate an equitable allocation or
260 apportionment of the taxpayer’s income. The petition shall be filed no later than the due date of
261 the annual return for the taxable year for which the alternative method is requested, determined
262 without regard to any extension of time for filing the return and the petition shall include a
263 statement of the petitioner’s objections and of the alternative method of allocation or
264 apportionment as it believes to be proper under the circumstances with detail and proof as the
265 Tax Commissioner requires.

266 (2) Alternative method for public utilities. — If the taxpayer is a public utility and if the
267 allocation and apportionment provisions of subsections (d) and (e) of this section do not fairly
268 represent the taxpayer’s business activities in this state, the taxpayer may petition for, or the Tax
269 Commissioner may require, as an alternative to the other methods provided in subdivision (1) of

270 this subsection, the allocation and apportionment of the taxpayer's net income in accordance with
271 any system of accounts prescribed by the Public Service Commission of this state pursuant to
272 the provisions of §24-2-8 of this code: *Provided*, That the allocation and apportionment provisions
273 of the system of accounts fairly represent the extent of the taxpayer's business activities in this
274 state for the purposes of the tax imposed by this article.

275 (3) Burden of proof. — In any proceeding before the Tax Commissioner or in any court in
276 which employment of one of the methods of allocation or apportionment provided in subdivision
277 (1) or (2) of this subsection is sought, on the grounds that the allocation and apportionment
278 provisions of subsections (d) and (e) of this section do not fairly represent the extent of the
279 taxpayer's business activities in this state, the burden of proof is:

280 (A) If the Tax Commissioner seeks employment of one of the methods, on the Tax
281 Commissioner; or

282 (B) If the taxpayer seeks employment of one of the other methods, on the taxpayer.

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

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Chairman, House Committee

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Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

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Clerk of the House of Delegates

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Clerk of the Senate

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Speaker of the House of Delegates

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President of the Senate

The within this the.....
day of, 2021.

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Governor