

# **WEST VIRGINIA LEGISLATURE**

**2023 REGULAR SESSION**

**ENROLLED**

**Committee Substitute**

**for**

**Senate Bill 151**

By Senators Oliverio, Nelson, Martin, Trump, and

Maroney

[Passed March 10, 2023; in effect 90 days from  
passage]

1 AN ACT to amend and reenact §11-21-3 of the Code of West Virginia, 1931, as amended; to  
2 amend said code by adding thereto a new section, designated §11-21-3a; and to amend  
3 and reenact §11-21-20 of said code, all relating to West Virginia income tax paid by pass-  
4 through entities; authorizing certain entities to elect to pay West Virginia income tax;  
5 defining terms; imposing a tax on pass-through entities which elect to pay West Virginia  
6 income tax at the entity level; authorizing an income tax credit for an owner for such tax  
7 paid; providing rulemaking authority; providing for a tax credit for income tax paid to  
8 another state; and providing effective dates.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 21. PERSONAL INCOME TAX.**

**§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 every  
3 individual, estate, electing pass-through entity, and trust.

4 (b) *Partners and partnerships.* — A partnership or other pass-through entity as such shall  
5 not be subject to tax under this article, unless the partnership or other pass-through entity elects to  
6 be subject to the tax levied under this section for a taxable year pursuant to §11-21-3a of this code.  
7 Persons carrying on business as partners or owners of a pass-through entity shall be liable for tax  
8 under this article only in their separate or individual capacities, unless the partnership or other  
9 pass-through entity elects to be subject to the tax levied under this section for a taxable year  
10 pursuant to §11-21-3a of this code. However, partnerships and other pass-through entities are  
11 subject to the tax imposed by this article to the extent they elect to pay additional West Virginia  
12 income taxes owed that are attributable to final federal partnership audit adjustments under §11-  
13 21A-3 of this code.

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

16 to tax under this article.

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

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

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

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

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

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

26 (f) *Effective date.* — This section as amended in 2023 shall apply to taxable years  
27 beginning on and after January 1, 2022.

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

1 (a) *Definitions.* — As used in this section, or §11-21-3 of this code, or both, the following  
2 terms have the following meanings. Any term used in this section that is not defined in this section  
3 has the same meaning as when used elsewhere in this article. Any term undefined in this article  
4 has the same meaning as when used in a comparable context in the laws of the United States  
5 relating to income taxes, in accordance with §11-21-9 of this code, unless a different meaning is  
6 clearly required.

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

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

11 (d) "Income" means the sum of:

12 (1) The owners' distributive shares of the income, gain, expense, or loss of an electing  
13 pass-through entity for the taxable year, as reported for federal income tax purposes; and

14           (2) The resident owner's distributive share of the electing pass-through entity's income or  
15 loss not attributable to West Virginia.

16           (e) "Tax Commissioner" means the Tax Commissioner of the State of West Virginia or his  
17 or her delegate, as provided in §11-1-1 *et seq.* of this code.

18           (f) "Pass-through entity" means any partnership or other business entity that is not subject  
19 to tax under §11-24-1 *et seq.* of this code.

20           (g) "Entity" means any person that is not an individual.

21           (h) A pass-through entity that is not a disregarded entity for federal income tax purposes  
22 may elect to be subject to the tax levied under this section by filing with the Tax Commissioner a  
23 form prescribed by the commissioner making such election on or before the deadline to file the  
24 return, as specified in §11-21-51 of this code. Such election applies only to the taxable year for  
25 which the election is made and, once made, is irrevocable for that year.

26           (i) For taxable years beginning on and after January 1, 2022, an electing pass-through  
27 entity may make an election, in a format and according to such requirements and procedures  
28 established by the Tax Commissioner, to pay the tax levied by this article at the entity level for the  
29 taxable year.

30           (j) An electing pass-through entity required to file a return under this article shall make an  
31 election for the taxable period covered by such return. The election must be made on or before the  
32 due date for filing the applicable return, including any extensions that have been granted. Such  
33 election applies only to the taxable year for which the election is made and, once made, is  
34 irrevocable for that year.

35           (k) A tax equal to the top marginal rate on individuals under this article on the West Virginia  
36 taxable income of an electing pass-through entity that makes the election provided under this  
37 section, is hereby annually imposed.

38           (l) The tax levied under this section shall be calculated without regard to any deductions or  
39 credits otherwise permitted to be claimed by an owner or member of the electing pass-through

40 entity in computing the owner's aggregate tax liability under this article and not utilized by the pass-  
41 through entity in determining its taxable income.

42 (m) An electing pass-through entity that elects to pay the tax under this section may be  
43 eligible for credits, deductions, or other adjustments to taxable income provided by any applicable  
44 sections of this code including the credit provided in §11-21-20 of this code: *Provided*, That a  
45 qualifying pass-through entity's taxable income shall be adjusted to eliminate any federal  
46 deduction for state and local income taxes.

47 (n) The full amount of the tax payable as shown on the return of the electing pass-through  
48 entity must be paid to the state within the time allowed for filing the return. In the case of any  
49 overpayment of the tax imposed under this section, only the electing pass-through entity may  
50 request a refund of the overpayment. In the case of any underpayment of tax imposed under this  
51 section, the Tax Commissioner may collect the tax from the electing pass-through entity pursuant  
52 to §11-10-1 *et seq.* of this code: *Provided*, That shareholders, owners, and partners shall be jointly  
53 and severally liable for any underpayment of tax not paid by, or collected from, the pass-through  
54 entity.

55 (o) With respect to an electing pass-through entity that pays the tax imposed under this  
56 section, the tax shall be treated as a tax imposed on the pass-through entity itself. The tax levied  
57 under this section is intended to comply with the provisions of Internal Revenue Service Notice  
58 2020-75 in which such tax paid by an electing pass-through entity is deductible to the entity for  
59 federal income tax purposes.

60 (p) The Tax Commissioner shall propose rules for legislative approval in accordance with  
61 the provisions of §29A-3-1 *et seq.* of this code to administer the tax levied pursuant to the  
62 provisions of this section. These rules must include a description of how the adjustments to  
63 income and the credit authorized by this section apply to direct or indirect owners of an electing  
64 pass-through entity based upon various ownership structures.

65 (q) There is hereby allowed a credit against a taxpayer's aggregate tax liability under this

66 article for a taxpayer who is an owner of an electing pass-through entity. The credit shall equal the  
67 owner's proportionate share of the tax levied under this article remitted by the owner's electing  
68 pass-through entity for the taxable year. The credit shall be claimed for the taxpayer's taxable year  
69 that includes the last day of the electing pass-through entity's taxable year for which the tax levied  
70 under this section was paid. If the credit exceeds the aggregate amount of tax otherwise due, the  
71 excess may be carried forward by the taxpayer for up to five taxable years. The Tax Commissioner  
72 may request that a taxpayer claiming a credit under this section furnish information as is  
73 necessary to support the claim for the credit under this section, and no credit shall be allowed  
74 unless information requested from the taxpayer is provided to the Tax Commissioner.

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

1 (a) *General.* — A resident shall be allowed a credit against the tax otherwise due under this article  
2 for any income tax paid to another state of the United States or by the District of Columbia for the  
3 taxable year, either directly paid by the individual or paid by a pass-through entity in accordance  
4 with §11-21-3a of this code and passed through by the entity to the individual taxpayer, upon  
5 income both derived therefrom and subject to tax under this article. As used in this subsection,  
6 "pass-through entity tax" refers to a state net income tax imposed by another state on a pass-  
7 through entity that is substantially similar to the tax imposed by §11-21-3a of this code. Solely for  
8 purposes of this section, an owner of a pass-through entity shall be considered liable for tax paid to  
9 another state by the pass-through entity pursuant to a pass-through entity tax imposed by the state  
10 (whether elected or otherwise) in an amount equal to that portion of the pass-through entity tax  
11 representing the owner's share of the pass-through entity's income subject to the tax, and the  
12 owner shall be considered to have paid that portion of the tax paid by the pass-through entity. The  
13 owner of a pass-through entity shall also be considered liable for and to have paid state income  
14 taxes to another state paid by the pass-through entity on behalf of an owner through withholding, a  
15 composite return, or otherwise. If an owner receives a refund or credit for overpayment of all or

16 part of a pass-through entity tax imposed by another state, the amount paid by the owner shall be  
17 reduced by the refund or credit.

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

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

25 (c) *Exception.* — No credit shall be allowed under this section for a tax of a jurisdiction  
26 which allows residents of this state a credit against the taxes imposed by such other jurisdiction for  
27 the tax under this article, if such other credit is substantially similar to the credit granted by §11-21-  
28 40 of this code.

29 (d) *Definition.* — For purposes of this section West Virginia income means:

30 (1) The West Virginia adjusted gross income of an individual;

31 (2) The amount of the income of an estate or trust, determined as if the estate or trust were  
32 an individual computing his or her West Virginia adjusted gross income under §11-21-12 of this  
33 code; or

34 (3) The taxable income of an electing pass-through entity for which election is made and  
35 determined in accordance with §11-21-3a of this code.

36 (e) *Effective date.* — This section as amended in 2023 shall apply to taxable years  
37 beginning on and after January 1, 2022.