

# **WEST VIRGINIA LEGISLATURE**

**2023 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 151**

BY SENATORS OLIVERIO, NELSON, MARTIN, TRUMP, AND

MARONEY

[Originating in the Committee on Finance; reported on

February 14, 2023]



1 A BILL to amend and reenact §11-21-3 of the Code of West Virginia, 1931, as amended; to amend  
2 said code by adding thereto a new section, designated §11-21-3a; and to amend and  
3 reenact §11-21-20 of said code, all relating to levying a tax on a pass-through entity's  
4 income apportioned to West Virginia for pass-through entities that elect to pay West  
5 Virginia income tax at the entity level; defining terms; imposing a tax on pass-through  
6 entities which elect to pay West Virginia income tax at the entity level; authorizing an  
7 income tax credit for an owner for such tax paid; providing for a tax credit for income tax  
8 paid to 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  
3 every 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  
6 to be subject to the tax levied under this section for a taxable year pursuant to §11-21-3a of this  
7 code. Persons carrying on business as partners or owners of a pass-through entity shall be liable  
8 for tax under this article only in their separate or individual capacities, unless the partnership or  
9 other 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  
16 subject 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 2019 2023 shall apply to taxable years  
27 beginning on and after January 1, ~~2018~~ 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  
29 the 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  
32 the due date for filing the applicable return, including any extensions that have been granted.  
33 Such 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  
39 or 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  
41 pass-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 W.Va. Code § 11-21-20 of this code:  
45 Provided, That a qualifying pass-through entity's taxable income shall be adjusted to eliminate  
46 any federal 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 W. Va. Code § 11-10-1 et seq. of this code: Provided, That shareholders, owners, and partners  
53 shall be jointly and severally liable for any underpayment of tax not paid by, or collected from, the  
54 pass-through 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 adopt rules to administer the tax levied under this section.  
61 Such rules shall include a description of how the adjustments to income and the credit allowed  
62 under this section apply to direct or indirect owners of an electing pass-through entity based on  
63 various ownership structures.

64 (g) There is hereby allowed a credit against a taxpayer's aggregate tax liability under this  
65 article for a taxpayer who is an owner of an electing pass-through entity. The credit shall equal  
66 the owner's proportionate share of the tax levied under this article remitted by the owner's electing  
67 pass-through entity for the taxable year. The credit shall be claimed for the taxpayer's taxable  
68 year that includes the last day of the electing pass-through entity's taxable year for which the tax  
69 levied under this section was paid. If the credit exceeds the aggregate amount of tax otherwise  
70 due, the excess may be carried forward by the taxpayer for up to five taxable years. The Tax  
71 Commissioner may request that a taxpayer claiming a credit under this section furnish information  
72 as is necessary to support the claim for the credit under this section, and no credit shall be allowed  
73 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  
2 this article for any income tax ~~imposed~~ paid to another state of the United States or by the District  
3 of Columbia for the taxable year, either directly paid by the individual or paid by a pass-through  
4 entity in accordance with §11-21-3a of this code and passed through by the entity to the individual  
5 taxpayer, ~~by another state of the United States or by the District of Columbia~~ upon income both  
6 derived therefrom and subject to tax under this article. As used in this subsection, "pass-through  
7 entity tax" refers to a state net income tax imposed by another state on a pass-through entity that  
8 is substantially similar to the tax imposed by §11-21-3a of this code. Solely for purposes of this  
9 section, an owner of a pass-through entity shall be considered liable for tax paid to another state  
10 by the pass-through entity pursuant to a pass-through entity tax imposed by the state (whether  
11 elected or otherwise) in an amount equal to that portion of the pass-through entity tax representing  
12 the owner's share of the pass-through entity's income subject to the tax, and the owner shall be  
13 considered to have paid that portion of the tax paid by the pass-through entity. The owner of a  
14 pass-through entity shall also be considered liable for and to have paid state income taxes to  
15 another state paid by the pass-through entity on behalf of an owner through withholding, a

16 composite return, or otherwise. If an owner receives a refund or credit for overpayment of all or  
17 part of a pass-through entity tax imposed by another state, the amount paid by the owner shall be  
18 reduced by the refund or credit.

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

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

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

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

31 (1) The West Virginia adjusted gross income of an individual, ~~or;~~

32 (2) The amount of the income of an estate or trust, determined as if the estate or trust  
33 were an individual computing his or her West Virginia adjusted gross income under ~~section twelve-~~  
34 §11-21-12 of this article; or

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

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