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NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: State Tax Division TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code §§ 11-10-5 and 11-13C-5(j)

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 13C

TITLE OF RULE BEING AMENDED: Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit.

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

James H. Paige III

James H. Paige III
State Tax Commissioner

18.60

GASTON CAPERTON
GOVERNOR

State of West Virginia
Department of Tax and Revenue
TAX DIVISION
P. O. Box 2389
Charleston, WV 25328-2389

JAMES H. PAIGE III
SECRETARY

CONSENT TO FILE RULE

August 16, 1993

To Whom It May Concern:

Title of Rule: Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credits

Title Number: 110

Series Number: 13C

Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 16th day of August, 1993.

James H. Paige, III
Secretary, Tax and Revenue

STATEMENT OF CIRCUMSTANCES

The Legislature when it enacted S.B. 463 amended W. Va. Code § 11-13C-5 by requiring the Tax Commissioner to promulgate rules for an alternate method to determine tax under certain circumstances. This amendment accomplishes that purpose.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit.

Type of Rule: X Legislative _____Interpretive ____Procedural

Agency: State Tax Division
Address: State Capitol
Charleston, WV 25305

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$	$	$	$	$
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

The costs should not vary from that envisioned by the Legislature when it amended W. Va. Code § 11-13C-5.

3. Objectives of these rules:

Regulate the use of the alternative method for determining tax under certain situations.

Rule Title: Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

While there may be an economic impact, there is not sufficient information to calculate its extent.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

Those businesses authorized to take the subject tax credits may be affected.

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact from this amendment.

Date: August 16, 1993

Signature of Agency Head or Authorized Representative

James H. Paige III
State Tax Commissioner

DATE: August 16, 1993

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: State Tax Division

LEGISLATIVE RULE TITLE: Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit.

1. Authorizing statute(s) citation W.Va. Code §§ 11-10-5, and 11-13C-5(j)

2. a. Date filed in State Register with Notice of Public Comment Period: July 9, 1993

   b. What other notice, including advertising, did you give of the public comment period?

   None

   c. Date of Public Comment Period: July 9, 1993 - August 9, 1993

   d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

   Attached X No Comments received ____

   e. Date you filed in State Register the agency approved proposed Legislative Rule following public comment period: (be exact)

   August 16, 1993

   f. Name and phone number(s) of agency person(s) to contact for additional information:

   Mark Morton - 558-5330

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

   a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

      N/A

   b. Date of hearing:

   c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

   d. Attach findings and determinations and reasons:

      Attached

PUBLIC COMMENTS
ON THE BUSINESS INVESTMENT AND JOBS EXPANSION TAX CREDIT,
CORPORATION HEADQUARTERS RELOCATION TAX CREDIT,
SMALL BUSINESS TAX CREDIT REGULATIONS
FILED ON JULY 9, 1993

Set forth below are public comments received by the Department of Tax and Revenue pertaining to the Emergency Business Investment and Jobs Expansion Tax Credit, Corporation Headquarters Relocation Tax Credit, Small Business Tax Credit Regulations filed on July 9, 1993. Three comment letters were received by the Department of Tax and Revenue relating to this particular filing of the regulations.

For purposes of responding to the issues presented, the comments have been condensed, rather than repeated verbatim. Copies of the original correspondence containing comments are attached for your review.

COMMENT: One comment was received suggesting that, for multiple participant business investment and jobs expansion tax projects, the requirement that an alternate apportionment method be used instead of the payroll factor for determining tax attributable to qualified investment should be made for the entire group of project participants, rather than for each individual taxpayer.

RESPONSE: Adoption of the commentator's suggestion would open the business investment and jobs expansion tax credit to a serious potential for abuse and gross distortions of the amount of credit available to taxpayers when compared to the amount of investment made. The regulations specifically allow the Tax Commissioner to prescribe alternative tax apportionment methods for individual taxpayers which are participants in a multiple party project. If the Tax Commissioner were prevented from applying alternative apportionment in this way, it would be entirely possible for taxpayers to create arrangements which would essentially constitute credit "selling" whereby a taxpayer could (with or without substantial payments to the other participants by the newcomer) become a project participant in a multiple party project for a minimal investment or a token employment of one or more project employees, and in return gain entitlement to credit in amounts vastly greater than the particular participant's investment.

The commentators cite no authority for their position one commentator states that, "[a]s set out in the statute . . . these . . . . determinations should be made for all . . . [project participants]." Presumably, the commentator refers to § 11-13C-4b(c)(2) of the West Virginia Code, which states a general

The regulation should not be changed to adopt the commentators' suggestion.

COMMENT: One comment was received which referred to the example set forth in section 5.16.1.2 of the regulations. The example states that use of an alternative apportionment method may be necessary where use of a payroll factor or other method of allocation results in the tax credit being made available to offset tax liabilities of the taxpayer in an amount larger than the amount of qualified investment made by the taxpayer.

The commentator alleges that this provision is somehow violative of section 11-13C-4(b) [sic] of the West Virginia Code relating to certification projects. Presumably the commentator meant to refer to Section 11-13C-4b of the West Virginia Code, which addresses certified projects.

The commentator also alleges that section 5.16.1.2 contradicts section 11-13C-5(j) of the West Virginia Code, which authorizes use of the alternative apportionment methods. The commentator quotes a segment of statutory language stating that section 11-13C-5(j) of the West Virginia Code:

> Provides for alternative apportionment only when the supercredit is used to offset taxes not "solely attributable to and a direct result of qualified investment of the taxpayer and all project participants." Emphasis added by the commentator.

The commentator states that, in the coal industry, multiple participant projects are the norm, and that, in many cases, the participant which has made qualified investment in a project is not the participant responsible for paying the taxes incurred as a result of the project.

This is a simplification. It is, however, quite possible that larger tax liabilities may be incurred by some participants and smaller liabilities by other participants. In the case of severance taxpayers, it would not be unusual for one participant to incur severance tax liability while other participants would not.

The commentator goes on to point out that the West Virginia Code and the Business Investment and Jobs Expansion Tax Credit Regulations authorize project participants to allocate the tax credit among themselves in a manner unrelated to their respective portions of qualified investment.

RESPONSE: The regulation, section 5.16.1.2 against which the commentator protests is sound. The commentator perceives that

arrangements among project participants for the sharing of credit could very well result in the allocation of credit to some participants in an amount distortional to the pro rata amount of qualified investment contributed by each of those participants to the project, and, indeed, sometimes in an amount greater than the amount qualified investment.

The commentator expresses a concern that if a project participant's contribution to total project investment is comparatively small, this rule might operate to deprive that participant of credit, if the participant were to attempt to assert credit in an amount greater than the amount of participant's investment, even though such an application of credit might be a legitimate application of credit against tax solely attributable to and the direct result of qualified investment.

This should not occur. The example set forth in section 5.16.1.2 of the regulations is an example of a situation which may give rise to a requirement that alternative apportionment be used. It does not positively require the application of an alternative apportionment method in every case. The fundamental concept underlying the entire series of regulations set forth in section 5.16 et seq., including section 5.16.1.2, is that the taxpayer's tax liability which can be offset by the Article 13C, Chapter 11 credits is tax solely attributable to and the direct result of qualified investment. Section 5.16 et seq. provides a flexible series of rules and procedures for allocation of a taxpayer's total tax liability into the categories of tax so attributable and tax <u>not</u> so attributable.

If the rule were to work in a particular case to prevent a project participant from legitimately applying the credit against tax solely attributable to and the direct result of qualified investment, then the rule would not be applied. By its own terms, where application of the rule would not give a fair and accurate determination of tax solely attributable to and the direct result of qualified investment, then the rule would not be applied.

Should it happen that the Department of Tax and Revenue would erroneously seek to apply the rule in such a way that a project participant would be deprived of the right to apply the credit against tax solely attributed to and the direct result of qualified investment, the taxpayer would have a legitimate action in the Department of Tax and Revenue Office of Hearings and Appeals and, in turn, the courts, to have such an application terminated under authority of the statute and of the regulation itself.

The potential problem perceived by the commentator is prevented by the literal terms of the statute and the regulations from developing into an actual problem. The fundamental and overriding principle which controls application of the regulation

is that the regulation must be applied to determine the amount of tax solely attributable to and the direct result of qualified investment. It is this principle which would entirely obviate the commentator's concern. This principle, which is soundly and expressly set forth in the statute and regulations, effectively eliminates any potential for misapplication for the rule.

The rule is a useful and significant tool for preventing abuse of the credit. Section 5.16.1.2. of the regulations should not be amended or deleted.

COMMENT: A comment was received that the term "tax liability actually generated by the project, facility or operation," as set forth in Section 5.16.1 [sic] (probably 5.16.1.1) of the regulations, and the term "payroll factor manipulation or mismatch," as set forth in Section 5.16.3 [sic] (the Section referred to here should probably be 5.16.1.3) of the regulations should be defined.

The commentator states that without such definitions, it will be impossible for the Department of Tax and Revenue to be consistent in determining when the use of an alternative apportionment method is appropriate.

RESPONSE: The terms designated by the commentator were not defined by the Department of Tax and Revenue in its promulgated draft of the regulations because the meanings of these terms appear to be clear, unambiguous and self-evident.

The Department of Tax and Revenue has no strong objection to defining these terms, but it is the position of the Department of Tax and Revenue that to do so is unnecessary.

COMMENT: One comment was received suggesting that, where it is determined that the payroll factor alone does not accurately reflect tax solely attributable to and the direct result of qualified investment, then specific accounting, among the three specific alternative methods specifically allowed by the statute, will be the mandated method unless "it is unworkable." Presumably, the commentator views the term "specific accounting" as being synonymous with the statutory term "separate accounting."

The commentator alleges that methods other than "specific" accounting are "less accurate and more difficult" than the "specific" accounting method.

The commentator proposes:

(1) The regulation should state that, until required by the Tax Commissioner to use one of the alternative methods, taxpayers will use the payroll factor;

(2) A procedure by which taxpayers can obtain a determination regarding the appropriate method for apportioning their taxes should be provided, which will be binding on both the taxpayer and the Tax Commissioner for future years; and

(3) The regulation should provide that, if the Tax Commissioner requires the use of an alternative method, that method will continue to be used until such time as the Tax Commissioner prospectively requires use of a different method.

RESPONSE: The statute, Section 11-13C-5(j) of the West Virginia Code expressly authorizes the Tax Commissioner to require use of any of three specific alternative apportionment methods, and it authorizes use of other nonspecific methods as prescribed by the Tax Commissioner.

The Department of Tax and Revenue disputes the commentator's contention that methods other than "specific," i.e., separate accounting are "less accurate and more difficult" than the "specific" accounting method. The accuracy and difficulty of given methods can vary widely depending on the facts and circumstances applicable to a particular taxpayer. This is precisely why the statute provides three particular alternative methods, in addition to a general authorization for the Tax Commissioner to prescribe other methods.

The separate accounting method in some circumstances may be no more accurate than other methods, and in many cases it is much more difficult to use in terms of marshalling and tabulating the economic and accounting data necessary to construct a separate accounting, than would be other methods.

The Department of Tax and Revenue accepts the principles underlining the commentator's first two numbered suggestions set forth above. With regard to item (1), the statutory and regulatory scheme plainly contemplate that a taxpayer use a payroll factor until such time as the Tax Commissioner prescribes an alternative method.

It is the position of the Department of Tax and Revenue that the first two paragraphs of Section 5.16.1 of the regulations

effectively do as the commentator suggests, and that no further statements of this disposition need be made in the regulation.

With regard to item (2), a taxpayer may seek a letter ruling of the Tax Commissioner or a declaratory judgement relating to the issue of what apportionment method is appropriate. Although a letter ruling is advisory in nature, the Department of Tax and Revenue seldom if ever has renounced such rulings or acted in a manner contrary to its letter rulings without some change in fact or law giving rise to such a treatment.

The Department of Tax and Revenue must reject the commentator's suggestion that "specific," i.e., separate accounting be mandated as the one and only priority alternative apportionment method. This treatment is not consistent with the statute. It would burden taxpayers with a method which in many instances would prove more expensive and more difficult to use than other methods, with no particular improvement in accuracy over other methods.

It is in the best interests of all taxpayers to retain the flexibility in selection of alternative apportionment methods reflected in the statute and in the regulations as promulgated.

The Department of Tax and Revenue cannot accede to the changes to Section 5.16.2 proposed by the commentator.

COMMENT: One comment was received to the effect that the authorization set forth in Section 5.16.2.2 for use of a modified payroll factor which includes all or part of the payroll of contractors or other entities which operate facilities or otherwise produce income for the taxpayer should be exercised only as a last resort when no other method achieves a reasonable result.

RESPONSE: The regulation allowing use of a modified payroll factor which includes all or part of the payroll of contractors or other entities which operate facilities or otherwise produce income for the taxpayer is not overbroad. The regulation is subject to some interpretation, and must be so in order to remain flexible enough to apply to the various situations which characterize the industries and business enterprises in which the business investment and jobs expansion tax credit and other Article 13C, Chapter 11 tax credits may be applied.

The regulation clearly and specifically states that the payroll of contractors which operate facilities or otherwise produce income for the taxpayer may be included in the modified payroll factor. This language contemplates application of the regulation to ongoing operating, productive contractors, and not to occasional contractor consultants or contractors doing specialized,

temporary or other jobs which are not part of the day-to-day business undertakings of the taxpayer.

This regulation is vitally important. It prevents a payroll factor manipulation which could prove ruinously costly to the state in unauthorized and unwarranted tax credits. It is necessary to prevent abuse of the tax credit statute.

The statute allows use of a payroll factor for the purpose of determining the amount of tax solely attributable to and the direct result of qualified investment. This factor is typically a fraction, the numerator of which is payroll attributable to qualified investment, and the denominator of which is all West Virginia payroll.

It is possible for a taxpayer with old noncredit operations in West Virginia to make a comparatively small credit generating investment in West Virginia and to then take all of its old noncredit West Virginia jobs and farm out the jobs to independent contractors, or to terminate noncredit employees and have contractors take over noncredit operations. This manipulation would reduce the denominator of the payroll factor so that only West Virginia jobs attributable to qualified investment would remain. The payroll factor would become 100%. The taxpayer could thus offset 100% of its tax liability with the credit (subject now to an 80% limitation added by recent statutory amendments), even though the old facility, which generates much or most of that tax liability was built long years ago, generated no new jobs, and was never meant to have a tax credit applied against the tax liabilities arising from it.

This manipulation and abuse of the tax credit would be prevented by use of the modified payroll factor allowed under Section 5.16.2.2 of the regulations and Section 11-13C-5(j) of the West Virginia Code or some other alternative apportionment method, as appropriate.

The Department of Tax and Revenue cannot accede to the commentator's suggested restriction. This method will be used with discretion by the Department of Tax and Revenue and in conformity with the controlling principle of the statute and regulations that alternative apportionment is to be used to fairly and accurately determine tax solely attributable to and the direct result of qualified investment.

COMMENT: One comment was received to the effect that the property factor which, under Section 5.16.2.3.1 of the regulations may be used in addition to, or in lieu of, the payroll factor is defined too narrowly to approximate the actual tax liability directly attributable to a supercredit project.

RESPONSE: The comment results from the disparity between the definitions of property purchased or leased for business expansion as set forth in Section 11-13C-3(b) of the West Virginia Code, and as set forth in Section 11-13C-14(e) of the West Virginia Code.

The Department of Tax and Revenue agrees with the commentator's proposed inclusion of property qualified under both sections if such property constitutes qualified investment assets.

The Section has been rewritten in the draft of agency approved regulations to clarify the regulation and to adopt the position advocated by the commentator on this point.

COMMENT: Section 5.16.1 of the Emergency Regulations sets forth reasons for applying an apportionment method other than the payroll factor for determining tax attributable to qualified investment. The regulation section describes those circumstances where alternative apportionment is appropriate.

Two comments were received to the effect that the language used in Section 5.16.1 and other sections of the regulation which provide that an alternative apportionment method may be appropriate not only in situations where the taxes being offset by the credit are not attributable to the qualified investment, but also where such taxes are not directly attributable to new jobs.

The commentators characterized this as a substantial and unauthorized narrowing of the scope of the business investment and jobs expansion tax credit. The commentators suggest that the references to new jobs contained in those sections be omitted.

RESPONSE: The tax credit statute makes the Article 13C, Chapter 11 tax credits available only if a certain number of jobs are created. Absent an alternative apportionment formula, the amount of tax attributable to qualified investment is determined under the statute by use of the payroll factor which is ordinarily a fraction, the numerator of which is payroll of jobs attributable to qualified investment, and the denominator of which is all West Virginia payroll.

The example in Section 5.16.1.3 of the regulations discusses how the taxpayer can manipulate this factor, throwing all of its employment except those jobs attributable to qualified investment into contract employment, so that the number in the denominator is decreased to match the numerator number. This would create a factor that would falsely attribute 100% of the tax liability to qualified investment, even though only a small percentage of the tax would actually arise out of the qualified investment. The regulations identify this as one of the circumstances where use of an alternative apportionment method would be appropriate. One of

the alternatives that might be appropriate in this situation would be to prescribe an alternative payroll factor which would include payroll of all West Virginia contract employment generating income for the taxpayer and payroll of all direct West Virginia employment of the taxpayer in the denominator, and all payroll of jobs attributable to qualified investment in the numerator. Use of such a factor would give a comparatively accurate reflection of tax attributable to qualified investment.

Determination of the amount of tax liability which can be offset by credit, i.e., tax attributable to qualified investment and attributable to jobs created by new investment is an integral part of the tax credit structure. Determination of tax attributable to qualified investment through use of measurements relating to payroll and the new jobs created by the investment is recognized by the statute as a valid means (among others) of making that measurement. Given statutory recognition of new jobs as a determinant of the amount of credit available and the amount of tax that can be offset by the credit, the Department of Tax and Revenue must retain the references to new jobs set forth in the regulations.

COMMENTS: One comment was received to the effect that the regulations should explicitly state for what tax years the Department of Tax and Revenue may depart from the payroll factor and prescribe alternative apportionment methods.

The commentator advocates adoption of a regulation which would allow only prospective adoption of alternative methods of allocation.

RESPONSE: Section 11-13C-5(j) of the West Virginia Code expressly states that "[f]or tax years beginning after the thirty-first day of December, one thousand nine hundred ninety-two, and thereafter," the alternative allocation apportionment methods may be applied by the Tax Commissioner. The Department of Tax and Revenue views this section as dispositive of the issue discussed in the comment.

The comment addresses only application of alternative apportionment pursuant to the regulation. Therefore, the Department of Tax and Revenue makes no representation as to the express or implied powers of the Tax Commissioner regarding alternative apportionment for periods prior to the statutory authorization.

LD:MM/lr

COPY

WEST VIRGINIA COAL ASSOCIATION

August 9, 1993

Mr. Robert Hoffman, Director
Legal Division
WV Department of Tax and Revenue
P. O. Box 1005
Charleston, WV 25324-1005

Re: Comments of the West Virginia Coal Association Regarding the Proposed Amendments to the Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Credit Regulations, Title 110, Series 13C

Dear Mr. Hoffman:

We have reviewed the proposed Emergency Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Credit Regulations ("Supercredit") filed by the West Virginia Department of Tax and Revenue ("Department") with the Secretary of State's office on July 9, 1993. We appreciate the opportunity to participate in the rule-making process and offer the following comments and suggestions regarding the revised Regulations.

We would like to briefly review the changes made to the Supercredit by the Legislature in Senate Bill 463 ("S.B. 463"). From a coal industry perspective, S.B. 463 made four significant changes to the Supercredit, as follows:

1. Effective April 9, 1993, a one-year moratorium on making qualified investments in Supercredit projects was established, unless application for credit or application for project certification were filed prior to the effective date of the Bill;

its taxes which can be offset by the Supercredit, where the wage apportionment formula required in W. Va. Code §§ 11-13C-5(c) through (i) does not fairly reflect the taxes solely attributable to and a direct result of a taxpayer's qualified investment.

§ 5.16.1 - Reasons for Alternate Apportionment.

This section attempts to set forth the circumstances in which alternative apportionment is appropriate. We agree that it is critical that the Regulations clearly specify those circumstances under which an alternative apportionment method may be required, yet we are concerned by several provisions contained in this subsection.

First, both Section 5.16.1 itself and the example in Section 5.16.1.1 contain language which provides that an alternative apportionment method may be appropriate not only in situations where the taxes being offset by the credit are not directly attributable to the qualified investment but where such taxes are not directly attributable to "new jobs". This appears to be a substantial and unauthorized narrowing of the scope of the Supercredit. W. Va. Code §§ 11-13C-4 and 5 clearly authorizes taxpayers to offset taxes attributable to qualified investment and makes no mention of new jobs. We suggest the reference to new jobs contained in these sections be omitted to make them consistent with the statute and the clearly expressed intent of the Legislature.

Second, in several places, the examples in Sections 5.16.1 to 5.16.3 refer to "taxpayer" when describing the circumstances in which alternative apportionment may be appropriate. As set out in the statute, for multi-participant projects, these types of determinations should be made for all of the participants in the project considered as a group rather than for each individual taxpayer. We suggest the words "and all other project participants" be added in these sections after the word "taxpayer" to ensure that these examples are not misinterpreted.

Third, example number 2 contained in Section 5.16.1.2 provides that use of a payroll factor is inappropriate if credit is made available to offset liabilities of a taxpayer in an amount larger than the amount of its qualified investment. This example appears to directly contradict the provisions of W. Va. Code § 11-13C-4(b) relating to certified projects and to the enabling statute, W. Va. Code § 11-13C-5(j), which provides for alternative apportionment only when the Supercredit is used to offset taxes not "solely attributable to and a direct result of the qualified investment of the taxpayer and all other project participants".

In the coal industry, multiple participant projects are the norm and in many cases, the participant which has made qualified investments in a project is not the participant which is responsible for paying the taxes incurred as a result of the project. The Code and the Regulations specifically authorize participants in such projects to allocate the credit among themselves in a manner unrelated to their respective portions of qualified investment. In such cases, the law provides that all participants are required to determine that portion of their tax liability which can be offset by the credit using a payroll factor which includes the employment of all participants, considered as a group. W. Va. Code §11-13C-5(j) was not intended to change this method of claiming the credit resulting from multi-participant projects. Therefore, we suggest example number 2 be deleted from the proposed Regulations.

Fourth, the Regulations should specifically defined what is meant by the term "tax liability actually generated by the project, facility or operation" as used in Section 5.16.1 and by the term "payroll factor manipulation or mismatch" as used in Section 5.16.3. Without such definitions it will be impossible for taxpayers or the Department to be consistent in determining when the use of an alternate apportionment method is appropriate.

Section 5.16.2 - Alternate Methods of Apportionment.

In order to comply with the tax laws, taxpayers must be able to understand the law and predict their tax liability. Taxpayers must also be capable of filing accurate and timely tax returns. In W. Va. Code § 11-13C-5(j), the Legislature has established three alternate apportionment methods. To aid in compliance, we suggest that the Regulations provide that where it is determined that the payroll factor alone does not accurately predict taxes solely attributable to and the direct result of the qualified investment of a taxpayer and all other project participants, that specific accounting is the alternative method which will be preferred unless it is unworkable. The other methods are less accurate and more difficult with which to comply. Moreover, to aid in the predictability of the law, we suggest the following: 1) the Regulations should state that until required by the Tax Commissioner to use one of the alternative methods, taxpayers will use the payroll factor; 2) a procedure by which taxpayers can obtain a determination regarding the appropriate method for apportioning their taxes should be provided, which will be binding on both the taxpayer and the Tax Commissioner for future years; and 3) the Regulations should provide that if the Tax Commissioner requires the use of an alternate method, that method

will continue to be used until such time as the Tax Commissioner prospectively requires use of a different method.

Section 5.16.2.2 authorizes the use of a modified payroll factor which includes all or part of the payroll of contractors or other entities which operate facilities or otherwise produce income for the taxpayer. The Coal Association believes that this provision is so overly broad that it may make it impossible for taxpayers to comply with the law. For example, if a coal company uses an outside engineering firm to survey its property or an outside firm to perform repairs on its equipment, such firms would clearly be contributing to the production of the coal company's income. Under this Regulation, the coal company could be required to include the wages of these firms in its payroll factor. In most cases, the coal company would have no access to wage information from such entities, and without such information, the taxpayer could not compute its tax liability or file its returns. We suggest that it is unworkable to attempt to require the inclusion of wages of non-participant firms in the payroll factor unless affiliated with project participants. Accordingly, the Regulations should provide that this alternative will be used only as a last resort when no other method achieves a reasonable result.

Section 5.16.2.3.1 establishes a method for use of a property factor in addition to, or in lieu of, the payroll factor.

> "The property factor is a fraction, the numerator of which is the average value of the individual taxpayer's or project participant's real and tangible personal property owned or rented by it in this State during the taxable year which constitutes property purchased or leased for business expansion as defined in Section 11-13C-3(b), and redefined in Section 11-13C-14(e) of the West Virginia Code; and the denominator of which is the average value of the individual taxpayer's or project participant's real and tangible personal property owned or rented and used by it in this State during the taxable year."

The property factor defined in this manner is too narrow to approximate the actual tax liability directly attributable to a Supercredit project. In 1990, the Legislature removed mineral reserves and certain leases from the list of assets constituting qualified investments. Nevertheless, these types of assets should be included in the numerator of the property factor if that factor

is to be used in whole or in part to apportion tax liability which can be offset by the Supercredit. We suggest that the "property factor" definition be modified to include such assets in the numerator.

Section 5.16.3 - Grandfather Rule.

When the House Finance Committee was considering S.B. 463, a member of the Coal Association submitted a number of its Supercredit ruling requests and responses from the Department to the Committee for its review. This taxpayer requested that the Committee make the alternative apportionment rule applicable only to those taxpayers who had not previously received rulings from the Department governing how its credit was to be applied. After reviewing this taxpayer's rulings, the Committee determined that this taxpayer was entitled to rely upon its prior rulings and adopted the following provision:

> "With regard to investment placed in service prior to the passage of this provision, taxpayers having a specific written determination from the tax commissioner that the taxpayer is authorized or required to take credit against tax not attributable to qualified investment shall not be subject to the alternative allocation of credit provided for under this subsection."

While the interpretation of the grandfather rule as set out in Section 5.16.3.1 may be one plausible interpretation, it is contrary to the context within which the statute was drafted. We therefore request that this Section 5.16.3.1 be deleted from the proposed rule or rewritten to conform to the Legislative intent.

In conclusion, the Supercredit is an extremely complicated statute and we believe that the Regulations promulgated to administer it should accurately reflect the law so as to provide a tool for taxpayers to aid in compliance with, and to the Department to aid in the administration of, the law. Accordingly, we hope the Department will consider these comments and adopt the changes suggested above regarding the alternative apportionment provisions.

The West Virginia Coal Association and its members would be pleased to work with the Department to timely address the changes contained in S.B. 463 so that the Regulations reflect the

current law and can be submitted to the Rule Making Review Committee during the 1994 Legislative session.

Please feel free to contact me if I may be of further assistance.

Very truly yours,

Mark Polen

1301 Laidley Tower
Charleston, West Virginia 25301
WEST VIRGINIA COAL ASSOCIATION

Mr. Robert Hoffman, Director
Legal Division
WV Department of Tax & Revenue
PO Box 1005
Charleston WV 25324-1005

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August 9, 1993

WRITER'S DIRECT DIAL NO.
340-1230

Mr. Robert Hoffman, Director
Legal Division
WV Department of Tax and Revenue
P. O. Box 1005
Charleston, WV 25324-1005

Re: Comments of Laurel Run Mining Company Regarding the Proposed Amendments to the Supercredit Regulations

Dear Mr. Hoffman:

I am writing on behalf of Laurel Run Mining Company ("Laurel Run") to offer the following comments and suggestions regarding the proposed Emergency Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Credit Regulations ("Supercredit") filed by the West Virginia Department of Tax and Revenue ("Department") with the Secretary of State's office on July 9, 1993.

When the House Finance Committee was considering S. B. 463, Laurel Run requested that the Committee include language in the Bill which would exempt Laurel Run from the alternative apportionment rules which were being proposed as new subsection 11-13C-5(j). Laurel Run had previously requested and received rulings from the Department governing how it was to apply its Supercredits. At the Committee's request, Laurel Run supplied the Committee with copies of various ruling requests which it had filed with the Department relating to its Supercredit projects and the Department's responses thereto. After reviewing these rulings, the Committee determined that Laurel Run was entitled to rely on its prior rulings and inserted the following grandfather provision into this subsection to protect Laurel Run:

> Provide, with regard to investment placed in service prior to the passage of this provision, taxpayers having a specific written determination from the tax commissioner that the taxpayer is authorized or required to take credit against tax not attributable to

qualified investment shall not be subject to the alternative allocation of credit provided for under this subsection."

Regulation § 5.16.3.1. appears to adopt a very narrow interpretation of the statute, by requiring that the exception will only apply if taxpayer has a ruling which specifically states that the credit be applied against "tax not attributable to qualified investment". As written, this provision can be interpreted so that it does not even apply to Laurel Run, the specific company for which it was inserted. If that is the case, we believe the Department's interpretation is contrary to the intention of the Legislature and contrary to the context in which the statute was drafted. Accordingly, we respectfully request that the Department either delete Section 5.16.3.1 from the Regulations or rewrite it in such a fashion that it will apply to Laurel Run's situation.

We appreciate the opportunity to provide our comments regarding the proposed Emergency Supercredit Regulations. If you have any questions or if we may be of further assistance in modifying the Regulations to conform with the intent of the Legislature, please advise.

Very truly yours,

John A. Mairs

JAM:m

cc: Mr. James E. Addleton

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MR. ROBERT HOFFMAN
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August 9, 1993

Hand Delivery

The Honorable James H. Paige III
Secretary and Tax Commissioner
West Virginia Department of Tax and Revenue
State Capitol Building
West Wing Room 300
P.O. Box 963
Charleston, WV 25324-0963

Re: *Comments to Proposed 1993 Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit Regulations*

Dear Secretary Paige:

I am writing on behalf of North Side Land Corporation ("North Side") to provide written comments respecting the proposed Business Investment and Jobs Expansion Tax Credit, et al. ("Supercredit") Regulations (Title 110, Series 13C) filed in the State Register July 9, 1993. North Side is the managing participant of a certified multi-party, multi-year Supercredit project and is concerned with the allocation rules set forth in the Regulations.

While the Regulation raise a number of issues worthy of discussion and comment, this letter does not attempt to provide detailed commentary on every aspect of the Regulations. Instead, it offers comments on two issues of particular interest to North Side's current project:

(1) For what tax years may the Department of Tax and Revenue ("Department") reject the payroll factor as the proper method of apportioning taxes to be offset by Supercredit?

(2) In those circumstances where the payroll factor is inappropriate and the Department is authorized to reject the payroll factor, what is the alternative apportionment method or formula?

These two issues are discussed below.

A. When May the Department Reject the Payroll Factor?

The Regulations do not explicitly state for what tax years the Department may depart from the payroll factor in determining what "tax liability is attributable to and the direct result of the taxpayer's qualified investment." In recent administrative action, the Department seems to take the position that it was always allowed to reject the payroll factor. For the Regulations to be meaningful and to carry out the clear legislative intent of W.Va. Code § 11-13C-5(j), the Regulations should contain a statement as follows:

> For tax years beginning before January 1, 1993, the payroll factor (subject to modification and adjustment under sections 4b.3.4, 5.13 and 5.14.3 of these regulations to the extent in effect during such tax years) is the exclusive method by which a taxpayer determines what tax liability is attributable to and the direct result of the taxpayer's qualified investment unless the tax commissioner issued a prospective ruling to the contrary. The provisions of this section 5.16 are effective only for tax years beginning after December 31, 1992.

This language comports with the express language of W.Va. Code § 11-13C-5(j). Moreover, this suggested language recognizes what the House Finance Committee Chairman stated more than once when describing this provision as it was being considered by the Committee: "Until now, the sole method for applying credit against taxes is the payroll factor."

The Chairman emphasized that the Committee was supplying the Department a "powerful, but dangerous tool". In crafting § 11-13C-5(j), the statute with unusual force emphasizes that "in order to effectuate the purposes of this subsection, the commissioner shall propose for promulgation legislative rules... [and] initial promulgation may be emergency rule. The rule shall set forth the standards by which this subsection will be implemented and enforced."

The importance of prospective treatment cannot be overemphasized. The Legislature expected the payroll factor to apply for tax years beginning before 1993 and the new allocation rules to apply to taxpayers (other than grandfathered taxpayers) for tax years beginning 1993 and beyond under uniform standards

promulgated by regulation. The Department's recent administrative actions ignoring these limitations and the Regulation's silence on the issue reject the clear legislative intent and result in unfair treatment of taxpayers. Accordingly, we request that the Regulations be amended to add language similar to that set forth above.

B. Alternative Method or Formula to be Used

The Regulations list at least three alternative methods for determining whether tax is attributable to qualified investment. 110 C.S.R. 13C, § 5.16.2 (1993). No guidance is provided as to what method should be used under what circumstances. To provide guidance regarding the use of the alternatives, the Regulations should contain the following language:

> When the payroll factor results in credit being used to offset taxes not directly attributable to qualified investment as determined in accordance with 5.16.1, the separate accounting or identification method shall be utilized. In the event the separate accounting or identification method is impossible or unworkable under the circumstances, another method or combination of methods set forth in this section 5.16.2 shall be utilized to fairly enable the taxpayer to offset those taxes attributable to and a direct result of qualified investment by the taxpayer (and other participants in the project).

A reasonable separate accounting method should be preferred in lieu of other potentially distorting methods if precision (and not simplicity) is the goal. Accordingly, we recommend that separate accounting be ranked above all other alternatives when and if the payroll factor (with its administrative simplicity) is properly abandoned.

Finally, it would be useful for the Regulations to designate a procedure to enable taxpayers to seek a ruling (that would be binding on the Department until prospectively changed) regarding these alternative apportionment issues. This procedure might be similar to the procedure utilized in Sales and Use Tax allocation disputes regarding country club dues. The obvious advantage here is that the Department and taxpayers would have some certainty as to the application of the credit for budgeting purposes.

North Side believes that the above-mentioned topics warrant your immediate attention. We thank you and appreciate this opportunity to provide written comments to these Proposed Regulations. If you have any questions or desire any additional information, please feel free to contact me.

Very truly yours,

Charles O. Lorensen

COL

cc: J. Steven Ferguson

FIRST CLASS MAIL

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