

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug 8, 1991
ADMINISTRATIVE LAW DIVISION

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

AMENDMENT TO AN EXISTING RULE: YES NO

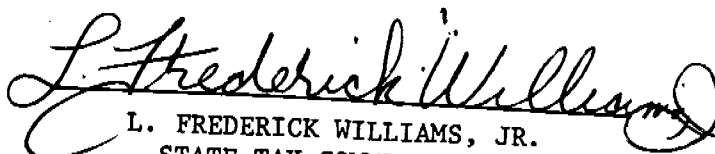
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 13D

TITLE OF RULE BEING PROPOSED: INDUSTRIAL EXPANSION AND REVITALIZATION CREDIT, RESEARCH AND DEVELOPMENT CREDIT, QUALIFIED HOUSING DEVELOPMENT CREDIT, MANAGEMENT INFORMATION SERVICES FACILITIES CREDIT AND COAL BASED LIQUIDS FOR SYNTHETIC FUELS CREDIT

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.


L. FREDERICK WILLIAMS, JR.
STATE TAX COMMISSIONER

AGENCY APPROVED
WEST VIRGINIA LEGISLATIVE REGULATIONS
DEPARTMENT OF TAX AND REVENUE
TITLE 110
SERIES 13D
1991

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug 8, 1991
ADMINISTRATIVE LAW DIVISION

INDUSTRIAL EXPANSION AND REVITALIZATION CREDIT, RESEARCH AND
DEVELOPMENT CREDIT, QUALIFIED HOUSING DEVELOPMENT CREDIT,
MANAGEMENT INFORMATION SERVICES FACILITIES CREDIT AND
COAL BASED LIQUIDS FOR SYNTHETIC FUELS CREDIT

§ 110-13D-1. General.

1.1 **Type of regulation.** - These regulations are agency approved legislative regulations as defined in W. Va. Code § 29A-3-1 et seq.

1.2 **Scope.** - These agency approved legislative regulations explain and clarify the West Virginia industrial expansion and revitalization tax credit, the West Virginia research and development tax credit, the West Virginia qualified housing development tax credit, the West Virginia management information services facilities tax credit and the West Virginia coal based liquids for synthetic fuels tax credit, as stated in W. Va. Code § 11-13D-1 et seq. The provisions of these regulations do not supersede, abrogate or nullify rulings of the Tax Commissioner issued prior to the issuance of these regulations, and these regulations shall be so construed without regard to the express applicability of any provision of these regulations to periods subsequent to their issuance. Specific written rules of the Tax Commissioner issued prior to the issuance of these regulations shall remain in full force and effect, and shall supersede any conflicting provisions of these regulations.

1.3 **Authority.** - These agency approved legislative regulations are issued under the authority of W. Va. Code § 11-10-5.

1.4 **Filing date.** -

1.5 **Effective date.** -

1.6 **Citation.** - These agency approved legislative regulations may be cited as 110 C.S.R. 13D, § ____ (1991).

§ 110-13D-2. Definitions.

2.1 Any term used in this article shall have the same meaning as when used in a comparable context in article thirteen of this chapter, unless a different meaning is clearly required by the context of its use or by definition in this article.

2.2 For purpose of this article, the term:

2.2.1 "Eligible investment" means that amount determined under either W. Va. Code § 11-13D-4, for investment in a new or expanded or revitalized industrial facility, or under W. Va. Code § 11-13D-5, in the case of an eligible research and development project, under W. Va. Code § 11-13D-5a for a qualified housing development project, or under W. Va. Code § 11-13D-5b for a management information services facility.

2.2.2 Eligible taxpayer.

2.2.2.1 "Eligible taxpayer" means an industrial taxpayer who purchases new property for the purpose of industrial expansion, or for the purpose of revitalizing an existing industrial facility in this State; or a taxpayer who purchases property or services, or both, for the purpose of conducting an eligible research and development project in this State or for the purpose of constructing a qualified housing development project in this State.

2.2.2.2 An eligible taxpayer for purposes of the management information services facility credit means a taxpayer fulfilling the requirements of Sections 2.2.2.3 or 2.2.2.4 of these regulations which has purchased, or leased, and placed into service or use in a management information services facility, qualified investment, as defined under W. Va. Code § 11-13D-5b of this article, of two million dollars or more over a time period of not more than three hundred sixty-five consecutive days and which operates such management information services facility, without regard to whether such taxpayer is an industrial taxpayer or engages in an industrial business or operates an industrial facility as herein defined.

2.2.2.3 An eligible taxpayer for purposes of the management information services facility credit is a person or entity which had no operations and owned or leased no property in West Virginia during the five year period prior to the creation of the management information services facility in West Virginia.

A person or entity shall not constitute an eligible taxpayer for purposes of the management information services facility credit if any related person (as defined in Section 267(b) of the Internal Revenue Code of 1986, as amended) had operations or owned or leased property in West Virginia during the five year period prior to the creation of the management information services facility in West Virginia or if any such related person is a successor in business to any person or entity which had operations or owned or leased property in West Virginia during the five year period prior to the creation of the management information services facility in West Virginia.

2.2.2.4 Notwithstanding Section 2.2.2.3 of these regulations, a person, entity, successor in business which would otherwise not constitute an eligible taxpayer under Section 2.2.2.3 of these regulations may nevertheless constitute an eligible taxpayer for purposes of this management information services facility credit if such person, entity or successor places qualified investment into service or use in West Virginia for the purpose of establishing in this State a management information services facility that is new to West Virginia and which services do not include any management information services previously conducted by such person, entity, successor, or a related person (as defined in Section 267(b) of the Internal Revenue Code of 1986, as amended) in West Virginia, or if such person, entity or successor places qualified

investment into service or use in West Virginia in a management information services facility for the purpose of consolidating or relocating significant existing national, regional or international management information services operations in West Virginia, and such consolidation or relocation results in the placement of at least two million dollars of qualified investment into service or use in West Virginia within the time periods described in Section 2.2.2.2 of these regulations, and such consolidation or relocation results in the relocation of significant management information services operations into West Virginia which did not previously exist in West Virginia, and the taxpayer otherwise constitutes an eligible taxpayer under such Section 2.2.2.2 of these regulations. For purposes of this section, the term "regional" means an area including more than one state or portions of more than one state of the United States.

2.2.3 "Eligible research and development project" means a research and development project engaged in or conducted within this State, by a person who is engaged in this State in the business of producing natural resources or in an industrial business when such research and development project is conducted for purposes relating to the technical, economic, financial, engineering or marketing aspects of expanding markets for, and increasing sales of, this State's natural resource products, or industrial products, or both.

2.2.4 "Industrial business" means any privilege formerly taxable under W. Va. Code §§ 11-13-2b or 2m, and includes a manufacturing service taxable under W. Va. Code § 11-13-2h: Provided, That on and after July 1, 1987, the term "industrial business" shall mean the business of manufacturing, compounding or preparing tangible personal property for sale, profit or commercial use, the business of generating electric power, and the business of providing a manufacturing service, which were taxable, respectively, under W. Va. Code §§ 11-13-2b, 2m and 2h, on January 1, 1985.

2.2.5 "Industrial facility" means any factory, mill, plant, refinery, warehouse, buildings or complex of buildings located within this State, including the land on which it is located, and all machinery, equipment and other real and tangible personal property located at or within such facility used in connection with the operation of such facility in an industrial business.

2.2.6 "Industrial revitalization" means capital investment in an industrial facility located in this State to replace or modernize buildings, equipment, machinery and other tangible personal property used in connection with the operation of such facility in an industrial business of the taxpayer, including the acquisition of any real property necessary to the industrial revitalization.

2.2.7 "Industrial expansion" means capital investment in a new or expanded industrial facility in this State.

2.2.8 "Industrial taxpayer" means any person formerly subject to business and occupation taxes under W. Va. Code article 13, chapter 11, exercising any privilege formerly taxable under W. Va. Code §§ 11-13-2b or 2m, or providing a manufacturing service taxable under W. Va. Code § 11-13-2h: Provided, That on and after July 1, 1987, "industrial taxpayer" shall mean any person subject to tax under W. Va. Code § 11-13-2m; or any person subject to tax

under W. Va. Code chapter 11, article thirteen-a or twenty-three engaging in any activity that was taxable under W. Va. Code § 11-13-2b, on January 1, 1985; or any person taxable under W. Va. Code chapter 11, article twenty-three providing a manufacturing service that was taxable under W. Va. Code §§ 11-13-2h on January 1, 1985.

2.2.8.1 Persons subject to, or formerly subject to, business and occupation taxes under Section 11-13-2b of the West Virginia Code are: persons engaging or continuing within the State of West Virginia in the business of manufacturing, compounding or preparing for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities, or newspaper publishing (including all gross income or proceeds of sales from circulation and advertising), except electric power produced by public utilities or others.

2.2.8.2 Persons subject to, or formerly subject to, business and occupation taxes under Section 11-13-2m of the West Virginia Code are: persons engaging or continuing within the State of West Virginia in the business of generating or producing electric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax or was not subject to tax under Section 11-13-2d of the West Virginia Code.

2.2.8.3 Persons subject to, or formerly subject to, business and occupation taxes for providing a manufacturing service taxable under Section 11-13-2h of the West Virginia Code are: persons engaging or continuing within the State of West Virginia in a service business or calling not otherwise specifically taxed under the West Virginia business and occupation tax statute and providing the service of manufacturing, compounding for sale, profit or commercial use, any article or articles, substance or substances, commodity or commodities, or newspaper publishing, except electric power produced by public utilities or others, which manufacturing, compounding or preparing for sale, profit or commercial use, is done for a person other than the person taxable under said Section 11-13-2h of the West Virginia Code who retains ownership of the article or articles, substance or substances, commodity or commodities so manufactured, compounded or prepared for sale, profit or commercial use.

2.2.9 "Management information services facility" means a building, or any part thereof, or a complex of buildings, or any part thereof, including the machinery and equipment located therein, that is exclusively dedicated to providing management information services to the owner or operator thereof or to another person.

2.2.10 "Management information services" means, and is limited to, data processing, data storage, data recovery and backup, programming recovery and backup, telecommunications, computation and computer processing, computer programming, electronic information, and data management activities, or any combination of such activities, when such activity, or activities, is not subject to regulation by the West Virginia public service commission and such activity, or activities, is for the purpose of managing, planning for, organizing or operating, any industrial or commercial business, or any enterprise, facility or facilities of an industrial or commercial business, whether such industrial or commercial business or enterprise, facility or

facilities of an industrial or commercial business is located within or without this State and without regard to whether such industrial or commercial business, or enterprise, facility or facilities of an industrial or commercial business is owned by the provider of the management information services or by a "related person," as defined in Section 267(b) of the Internal Revenue Code of 1986, as amended.

2.2.11 "Manufacturing service" means a privilege that would be taxable under W. Va. Code § 11-13-2b, if title to the raw materials used in the manufacturing process was vested in the taxpayer exercising the privilege taxable under W. Va. Code § 11-13-2h.

2.2.11.1 A privilege taxable under Section 11-13-2b is a privilege engaged in by a person continuing within the State of West Virginia in the business of manufacturing, compounding or preparing for sale, profit or commercial use, either directly or through the activity of others in whole or in part, any article or articles, substance or substances, commodity or commodities, or newspaper publishing, except electric power production by public utilities or others. The taxpayer exercising the privilege taxable under W. Va. Code § 11-13-2h, is a taxpayer engaging in a service business not otherwise specifically taxed under the business and occupation tax law, and particularly in a manufacturing service performed for another.

2.2.12 Subject to Section 2.2.1.5 below, "property purchased for an eligible research and development project" means real property, and improvements thereto, and tangible personal property, but only if such real or personal property is constructed or purchased on or after July 1, 1985, for use as a component part of an eligible research and development project which is located within this State on or after July 1, 1985. This term includes only tangible personal property with respect to which depreciation or amortization, in lieu of depreciation, is allowable in determining the personal income tax or corporation net income tax liability of the purchaser under article twenty-one or twenty-four of chapter eleven of the West Virginia Code. Property acquired by written lease for a term of ten years or longer, if used as a component part of an eligible research and development project, shall be included within this definition.

2.2.13 Subject to Section 2.2.15 below, "property purchased for industrial expansion" means real property, and improvements thereto, and tangible personal property, but only if such property was constructed, or purchased, on or after July 1, 1969, for use as a component part of a new or expanded industrial facility as defined in Section 2.2.5 of these regulations located within this State. This term includes only tangible personal property with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the personal income tax or corporation net income tax liability of the industrial taxpayer under articles twenty-one or twenty-four of chapter eleven of the West Virginia Code, and has a useful life, at the time such property is placed in service or use in this State, of four years or more. Property acquired by written lease, for a primary term of ten years or longer, if used as a component part of a new or expanded industrial facility, shall be included within this definition.

2.2.14 Subject to Section 2.2.15 below, "property purchased for industrial revitalization" means real property, and improvements thereto, and

new tangible personal property, but only if such property was constructed, or purchased, on or after July 1, 1981, for use as a component part of an ongoing industrial facility as defined in Section 2.2.5 of these regulations located within this State. This term includes only tangible personal property with respect to which depreciation is allowable in determining the personal income tax or corporation net income tax liability of the industrial taxpayer under article twenty-one or twenty-four of chapter eleven of the West Virginia Code, and has a useful life at the time the property is placed in service or use in this State of four years or more. Property acquired by written lease for a primary term of ten years or longer, if used as a component part of an industrial revitalization, shall be included within this definition.

2.2.15 "Property purchased for industrial expansion," "property purchased for industrial revitalization," "property purchased for an eligible research and development project," "property purchased for a qualified housing development project" and "property purchased or leased for a management information services facility" shall not include:

2.2.15.1 Repair costs including materials used in the repair, unless for federal income tax purposes, the cost of the repair must be capitalized and not expensed;

2.2.15.2 Motor vehicles licensed by the department of motor vehicles;

2.2.15.3 Airplanes;

2.2.15.4 Off-premise transportation equipment;

2.2.15.5 Property which is primarily used outside this State;
and

2.2.15.6 Property which is acquired incident to the purchase of the stock or assets of an industrial taxpayer, which property was or had been used by the seller in his industrial business in this State, or which property was previously designated "property purchased for industrial expansion," or "property purchased for industrial revitalization," or "property purchased for an eligible research and development project," or "property purchased for a qualified housing development project," and used to qualify for business and occupation tax credit for industrial expansion or revitalization, or for an eligible research and development project, or for a qualified housing development project, or property which was subject to or gave rise to the management information services facility credit in the hands of the transferor, except that successors in business shall have successor credit available pursuant to section seven of this article.

2.2.15.7 Property which is primarily used for purposes or activities not directly related to the credit qualifying activities of the taxpayer.

2.2.15.8 In the case of the mineral severance or mineral processing industry, qualified investment for purposes of the industrial expansion and revitalization credit shall constitute only that qualified investment used in a mineral processing activity formerly taxable as a

manufacturing activity under Section 11-13-2b of the West Virginia Code. Investment in equipment or property used in the mining of minerals or mineral severance formerly taxable under Section 11-13-2a of the West Virginia Code shall not constitute qualified investment. An activity formerly taxable as a manufacturing activity under Section 11-13-2b of the West Virginia Code is the activity of continuing within West Virginia in the business of manufacturing, compounding or preparing for sale, profit or commercial use, either directly or through the activity of others in whole or in part, any article or articles, substance or substances, commodity or commodities, or newspaper publishing, except electric power produced by electric utilities or others. The mining of minerals or mineral severance activity formerly taxable under Section 11-13-2a of the West Virginia Code is the privilege of engaging or continuing within the State of West Virginia in the business of severing, extracting, reducing to possession and producing for sale, profit or commercial use any natural resource products.

2.2.16 Subject to Section 2.2.15 above, property purchased for a qualified housing development project means real property, and improvements thereto, and tangible personal property incorporated into real property (whether or not attached thereto), but only if such real or tangible personal property was constructed, or purchased, on or after July 1, 1986, for use as a component part of a housing development project (as defined in Section 5a of these regulations) located within this State.

2.2.17 Subject to Section 2.2.15 above, "property purchased or leased for a management information services facility" means tangible personal property purchased from a West Virginia vendor in West Virginia or leased through or from a West Virginia vendor for a primary lease term of three years or more. For purposes of this section the term "tangible personal property" shall include prewritten or "canned" computer software, "custom" software and computer programming services which result in the production of custom software: **Provided**, That the term "property purchased or leased for a management information services facility" shall not include:

2.2.17.1 Land or building or any part thereof whether leased or purchased;

2.2.17.2 Natural resources in place;

2.2.17.3 Property, the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time such property is placed in service or use;

2.2.17.4 Property purchased or leased or placed in service or use prior to April 1, 1991 or property purchased or leased or placed in service or use after March 31, 1993; or

2.2.17.5 Property purchased for use in a management information services facility when such property is not purchased for the purpose of either:

2.2.17.5.a Expanding an existing management information services facility in West Virginia pursuant to a relocation or consolidation of significant national, regional or international management information services operation to West Virginia; or

2.2.17.5.b Establishing in this State a management information services facility that is new to West Virginia.

2.2.18 Property shall be deemed to have been purchased prior to a specified date only if:

2.2.18.1 The physical construction, reconstruction or erection of the property was begun prior to the specified date, or such property was constructed, reconstructed, erected or acquired pursuant to a written contract as existing and binding on the taxpayer prior to the specified date;

2.2.18.2 The machinery or equipment was owned by the taxpayer prior to the specified date or was acquired by the taxpayer pursuant to a binding purchase contract which was in effect prior to such date; or

2.2.18.3 In the case of leased property, there was a binding written lease or contract to lease identifiable property in effect prior to the specified date.

2.2.19 "Taxpayer" means any person taxable formerly under article thirteen of chapter eleven of the West Virginia Code: **Provided**, That on and after July 1, 1987, "taxpayer" shall mean any person taxable under article thirteen, thirteen-a or twenty-three of chapter eleven of the West Virginia Code.

§ 110-13D-3. Amount of credit allowed for industrial expansion or revitalization, for eligible research and development projects and for qualified housing development projects.

3.1 **Credit allowed.** - There shall be allowed to eligible taxpayers a credit against the taxes imposed by article thirteen, thirteen-a or twenty-three of this chapter, for industrial expansion or revitalization, and for eligible research and development projects and for qualified housing development projects. The amount of credit shall be determined as hereinafter provided in this section.

3.2 **Qualified investment for industrial expansion; July 1, 1969 - March 31, 1978.** - For property purchased for industrial expansion during the period beginning July 1, 1969, and ending March 31, 1978, the amount of allowable credit shall be equal to ten percent of the qualified investment (as determined in W. Va. Code § 11-13D-4 and Section 4 of these regulations) made for industrial expansion, and shall reduce the business and occupation tax liability of the industrial taxpayer under W. Va. Code article thirteen, chapter eleven, subject to the following conditions and limitations:

3.2.1 The amount of credit allowable shall be applied over a ten-year period, at the rate of one-tenth thereof per taxable year, beginning with the taxable year in which the qualified investment is first placed in service or use in this State.

3.2.2 The amount of annual credit allowed shall not reduce the business and occupation tax under W. Va. Code article thirteen, chapter eleven, below fifty percent of the amount which would be imposed for such taxable year

in the absence of this credit against tax, computed before application of the annual exemption allowed by W. Va. Code § 11-13-3.

3.2.3 No carryover to a subsequent taxable year or carryback to a prior taxable year shall be allowed for the amount of any unused portion of any annual credit allowance. Such unused credit shall be forfeited.

3.3 Qualified investment for industrial expansion; April 1, 1978 - February 28, 1985. - For property purchased for industrial expansion during the period beginning March 1, 1978, and ending February 28, 1985, the amount of allowable credit shall be equal to ten percent of the qualified investment (as determined in W. Va. Code § 11-13-4 and Section 4 of these regulations) made for industrial expansion, and shall reduce the business and occupation tax liability of the industrial taxpayer under W. Va. Code § 11-13-2b, 2h and 2m, subject to the following conditions and limitations:

3.3.1 The amount of credit allowable shall be applied over a ten-year period, at the rate of one tenth thereof per taxable year, beginning with the taxable year in which the qualified investment is first placed in service or use in this State.

3.3.2 The amount of annual credit allowed shall not reduce the business and occupation taxes imposed by W. Va. Code § 11-13-2, under W. Va. Code §§ 11-13-2b, 2h and 2m, below fifty percent of the amount which would be imposed for such taxable year, in the absence of this credit against tax, computed before application of the annual exemption allowed by W. Va. Code § 11-13-3: **Provided**, That the tax under W. Va. Code § 11-13-2h, shall not be reduced by more than fifty percent of the tax attributable to the privilege of manufacturing for another, which privilege would be taxable under W. Va. Code § 11-13-2b, if title to the raw materials involved in the manufacturing process were vested in the taxpayer exercising the privilege taxable under W. Va. Code § 11-13-2h.

3.3.3 No carryover to a subsequent taxable year or carryback to a prior taxable year shall be allowed for the amount of any unused portion of any annual credit allowance. Such unused credit shall be forfeited.

3.3.4 Eligible investment for industrial revitalization; July 1, 1981 - February 28, 1985. - For property purchased for industrial revitalization during the period beginning July 1, 1981, and ending February 28, 1985, the amount of allowable credit shall be equal to ten percent of the eligible investment (as determined under W. Va. Code § 11-13-4 and Section 4 of these regulations) made for industrial revitalization, and shall reduce the business and occupation tax under W. Va. Code §§ 11-13-2b and 2h subject to the following conditions and limitations:

3.3.4.1 The allowable credit shall be applied over a ten-year period at the rate of one tenth of the amount thereof per taxable year, beginning with the taxable year in which the eligible investment is first placed in service or use in this State.

3.3.4.2 The amount of annual credit allowed shall not reduce the business and occupation taxes imposed by W. Va. Code § 11-13-2, under W. Va. Code §§ 11-13-2b and 2h, below fifty percent of the amount which would be

imposed for the taxable year in the absence of this credit against tax, computed before application of the annual exemption allowed by W. Va. Code § 11-13-3: **Provided**, That the tax under W. Va. Code § 11-13-2h shall not be reduced by more than fifty percent of the tax attributable to the privilege of manufacturing for another, which privilege would be taxable under W. Va. Code § 11-13-2b, if title to the raw materials involved in the manufacturing process were vested in the taxpayer exercising the privilege taxable under W. Va. Code § 11-13-2h.

3.3.4.3 When in any taxable year the eligible industrial taxpayer is entitled to claim credit under both this Section 3.3.4 and under Section 3.3.2 or 3.3.3, or both, of these regulations, the total amount of all credits allowed under this Section 3.3 and the subsections thereof shall not exceed the fifty percent rule outlined in Section 3.3.4.2.

3.3.4.4 No carryover to a subsequent taxable year or carryback to a prior taxable year shall be allowed for the amount of any unused portion of any annual credit allowance. Any unused credit shall be forfeited.

3.3.4.5 No credit shall be allowed under this Section 3.3 for any property purchased for industrial revitalization prior to July 1, 1981.

3.3.5 Eligible investment for industrial expansion or revitalization after February 28, 1985. - For property purchased for industrial expansion or industrial revitalization on or after March 1, 1985, the amount of allowable credit shall be equal to ten percent of the eligible investment (as determined in W. Va. Code § 11-13-4 and Section 4 of these regulations) made for industrial expansion or industrial revitalization, and shall reduce the business and occupation tax imposed under W. Va. Code article thirteen, chapter eleven subject to the following conditions and limitations:

3.3.5.1 The amount of credit allowable shall be applied over a ten-year period, at the rate of one-tenth thereof per taxable year, beginning with the taxable year in which the eligible investment is first placed in service or use in this State.

3.3.5.2 The amount of annual credit allowed shall not reduce the business and occupation taxes imposed by W. Va. Code article thirteen, chapter eleven, below fifty percent of the amount which would be imposed for such taxable year in the absence of this credit against tax, computed before application of the annual exemption allowed by W. Va. Code § 11-13-3.

3.3.5.3 When in any taxable year the industrial taxpayer is entitled to claim credit under this Section 3.3.5 and under subsection 3.3.2, 3.3.3 or 3.3.4 of this section (or any combinations thereof), the total amount of all credits allowed under this section shall not exceed the fifty percent rule outlined in Section 3.3.5.2.

3.3.5.4 No carryover to a subsequent taxable year or carryback to a prior taxable year shall be allowed for the amount of any unused portion of any annual credit allowance. Such unused credit shall be forfeited.

3.3.5.5 When in any taxable year, or part thereof, between March 1, 1985 and June 30, 1987, inclusive, the industrial taxpayer is entitled to claim credit under W. Va. Code article thirteen-d, chapter eleven and W. Va.

Code article thirteen-e, chapter eleven, the total amount of all such credits allowable for the taxable year, or part thereof, shall not reduce the amount of business and occupation taxes imposed by W. Va. Code article thirteen, chapter eleven, below fifty percent of the amount which would be imposed for such taxable year, computed before allowance of the annual exemption allowed by W. Va. Code § 11-13-3. This limit applies with respect to the sum of credits under article thirteen-d and article thirteen-e of chapter eleven of the West Virginia Code only to tax periods prior to July 1, 1987.

3.3.5.6 No credit shall be allowed under this Section 3.3.5 for any property purchased on or after March 1, 1985, for which credit is allowed under W. Va. Code article thirteen-c, chapter eleven.

3.3.5.7 No credit shall be allowed under this Section 3.3.5 for any property purchased for industrial expansion or industrial revitalization prior to March 1, 1985.

3.3.6 **Eligible investment for research and development project after June 30, 1985.** - For property and services purchased for an eligible research and development project on or after July 1, 1985, the amount of allowable credit shall be equal to ten percent of the eligible investment (as determined in W. Va. Code § 11-13-5) made for an eligible research and development project, and shall reduce the business and occupation taxes under W. Va. Code §§ 11-13-2a, 2b, 2h and 2m to the following conditions and limitations:

3.3.6.1 The allowable credit shall be applied over a ten-year period at the rate of one tenth of the amount thereof per taxable year, beginning with the taxable year in which the eligible investment is first placed in service or use in this State, or is expensed for federal income tax purposes.

3.3.6.2 The amount of annual credit allowed shall not reduce the business and occupation taxes imposed by W. Va. Code § 11-13-2, under W. Va. Code § 11-13-2a, on the business of producing natural resources; under W. Va. Code § 11-13-2b, on the business or manufacturing, compounding or preparing tangible personal property for sale; W. Va. Code § 11-13-2h on the providing of a manufacturing service and under W. Va. Code § 11-13-2m, on the business of generating electric power, below fifty percent of the amount which would be imposed for the taxable year in the absence of this credit against tax, computed before application of the annual exemption allowed by W. Va. Code § 11-13-3.

3.3.6.3 When in any taxable year the eligible taxpayer is entitled to claim credit under both this Section 3.3.6 and subsection 3.3.2, 3.3.3, 3.3.4, or 3.3.5 of these regulations (or any combinations thereof), the total amount of all credits allowed under this section shall not exceed the fifty percent rule outlined in Section 3.3.6.2.

3.3.6.4 No carryover to a subsequent tax year or carryback to a prior taxable year shall be allowed for the amount of any unused portion of any annual credit allowance. Any unused credit shall be forfeited.

3.3.6.5 No credit shall be allowed under this Section 3.3.6 for any property purchased for an eligible research and development project, when such property is used to determine the eligible investment under W. Va. Code

§ 11-13d-4 and Section 4 of these regulations, or to determine the amount of credit allowable under W. Va. Code article thirteen-c, chapter eleven.

3.3.6.6 No credit shall be allowed under this Section 3.3.6 for any property purchased for research and development prior to July 1, 1985.

3.3.7 Eligible investment for qualified housing development project after June 30, 1986. - For property and services purchased for a qualified housing development project on or after July 1, 1986, the amount of allowable credit shall be equal to ten percent of the eligible investment (as determined in W. Va. Code § 11-13D-5a) made for a qualified housing development project, and shall reduce the business and occupation taxes under W. Va. Code §§ 11-13-2c or 2e, subject to the following conditions and limitations:

3.3.7.1 The allowable credit shall be applied over a ten-year period at the rate of one tenth of the amount thereof per taxable year, beginning with the taxable year in which any combination of residential housing units (as defined in W. Va. Code § 11-13D-5a) available for occupancy or occupied in the qualified housing development project is five or more residential housing units.

3.3.7.2 The amount of annual credit allowed shall not reduce the business and occupation taxes imposed by W. Va. Code § 11-13-2, under W. Va. Code § 11-13-2c on the business of selling tangible property and under W. Va. Code § 11-13-2e on the business of contracting below fifty percent of the amount which would be imposed for the taxable year in the absence of this credit against tax, computed before application of the annual exemption allowed by W. Va. Code § 11-13-3.

3.3.7.3 When in any taxable year the eligible taxpayer is entitled to claim credit under both this Section 3.3.7 and Section 3.3.2, 3.3.3, 3.3.4, 3.3.5 or 3.3.6 (or any combinations thereof), the total amount of all credits allowed under this section shall not exceed the fifty percent rule outlined in Section 3.3.7.2 of these regulations.

3.3.7.4 No carryover to a subsequent tax year or carryback to a prior taxable year shall be allowed for the amount of any unused portion of any annual credit allowance. Any unused credit shall be forfeited.

3.3.7.5 No credit shall be allowed under this Section 3.3.7 for any property purchased for an eligible housing development project, when such property is used to determine the eligible investment under W. Va. Code § 11-13D-4, or to determine the amount of credit allowable under W. Va. Code article thirteen-c, chapter eleven.

3.3.7.6 No credit shall be allowed under this Section 3.3.7 for any property purchased for a qualified housing development project prior to July 1, 1986.

3.3.7.7 The housing development credit shall only be made available for qualified investment made in a new qualified housing development project. Credit shall not arise from revitalization of existing housing, and credit shall not arise from the conversion of existing commercial or industrial buildings into residential property.

3.3.8 **Credit limitation.** - The aggregate amount of credit allowable under W. Va. Code article 13D and article thirteen-e, chapter eleven, against the taxes imposed by W. Va. Code article thirteen, chapter eleven, for the taxable year, shall in no event exceed fifty percent of the tax due for the taxable year, computed prior to application of the tax credits provided by W. Va. Code articles 13D, thirteen-c and thirteen-e, chapter eleven, and the annual exemption allowed provided by W. Va. Code § 11-13-3.

3.9 **Application of credit after June 30, 1987.** - On and after July 1, 1987, the credits allowed under subsections 3.3.2, 3.3.3, 3.3.4, 3.3.5, 3.3.6 and 3.3.7 of these regulations shall be applied to and reduce the taxes imposed by W. Va. Code articles thirteen, thirteen-a and twenty-three of chapter eleven: **Provided**, That this credit shall not reduce each of the net tax liabilities of the taxpayer for each tax imposed under W. Va. Code articles thirteen, thirteen-a and twenty-three of chapter eleven, for the taxable year below fifty percent of the amount thereof, determined before application of the credits allowed by W. Va. Code article thirteen-c, thirteen-d or thirteen-e, or any combination thereof, of chapter eleven.

§ 110-13D-3a. Application of credit after June 30, 1987.

3a.1 On and after July 1, 1987, the credits allowed under W. Va. Code § 11-13D-3 shall be applied to and reduce the taxes imposed by W. Va. Code articles thirteen, thirteen-a, fifteen, fifteen-a and twenty-three of chapter eleven: **Provided**, That this credit shall not reduce each of the net tax liabilities of the taxpayer under W. Va. Code articles thirteen, thirteen-a and twenty-three, chapter eleven, or under W. Va. Code articles fifteen and fifteen-a, chapter eleven on purchases directly used or consumed in taxpayer's qualified investment activity, for the taxable year below fifty percent of the amount of each, determined before application of the credits allowed by W. Va. Code article thirteen-c, thirteen-d or thirteen-e, or any combination thereof, of chapter eleven.

3a.2 When consumers sales and service tax or use tax is paid on property and services purchased for use or consumption which are not solely used or consumed in the qualified investment activity, the cost thereof shall be apportioned between such activities. Only that amount of consumers sales and service tax or use tax apportioned to purchases directly used or consumed in the qualified investment activity shall be offset (up to the 50% limitation) when applying the credit allowable under W. Va. Code §§ 11-13D-3, 3a or 3b.

3a.3 The term "directly used or consumed in a qualified investment activity" includes those things fairly related to the manufacturing activity that is the result of the actual investment.

For Example:

1. Where a new plant has been built and all activity is related to the new investment, then all consumers sales and service tax or use tax (up to the 50% limitation where applicable) would be eligible for the offset by investment credits.

2. Where a new manufacturing facility has been added to an old facility, then only consumers sales and service tax or use tax on goods purchased for use

in the new facility would be eligible for offset by investment credits. The determination of the amount of consumers sales and service tax or use tax subject to offset may require proration if the actual use of goods cannot be identified. This could be done on any rational basis acceptable to the Tax Commissioner: perhaps on the basis of gross income from each facility, quantity of goods produced in each facility, raw materials used in each facility, power usage at each facility, or on any of a number of other rational bases.

3. Where only some of the equipment has been replaced in a facility, only a portion of the consumers sales and service tax or use tax may be offset. Determining the amount of sales tax eligible for offset will require proration where the actual use of the goods in an activity related to the qualified investment cannot be identified. A possible proration method would be a comparison of the qualified investment to the total plant investment.

If one million dollars of qualified investment has been made in a plant where the total plant is worth five million dollars, then twenty percent of the consumers sales and service tax or use tax on items consumed in the facility that cannot be actually traced to the qualified investment can be offset.

$$\frac{\text{Qualified Investment}}{\text{Total Plant Investment}} = \frac{\$1,000,000}{\$5,000,000} = 20\%$$

3a.4 The tax credits provided in W. Va. Code article 13D, chapter 11, if available, against the consumers sales and service tax and use tax, under W. Va. Code §§ 11-13D-3, 3a or 3b, shall be used against the consumers sales and service tax and use tax liability only after such credits have been used against all other taxes against which the particular credit can be applied, i.e., business and occupation taxes, severance taxes, business franchise taxes, and, where appropriate, corporation net income taxes. The sales tax and use tax offsets shall be made subsequent to the offsets to these other taxes. Before the credit can be applied against the consumers sales and service tax and use tax liabilities, it is necessary that the annual liabilities of the preceding taxes and the amount of credit available against those taxes be determined. Therefore, the credits available under W. Va. Code §§ 11-13D-3, 3a or 3b must be taken against the consumers sales and service tax and the use tax liabilities through a request for refund filed with the Tax Department at the end of each tax year.

3a.4.1 Under the limitation on claims for refund set forth in W. Va. Code § 11-10-14(1) for refunds of tax where no return was filed by the taxpayer, the taxpayer must file his claim for refund within 2 years from the time the tax was paid. Because the taxpayer cannot assert his claim for refund of consumers sales and service tax or use tax to be offset by a tax credit under W. Va. Code article 13D, chapter 11, until the end of the tax year when liabilities for all other taxes to be offset by the credit have been calculated and offset by credit; the consumers sales and service tax and use tax shall, exclusively for the purpose of asserting credit under W. Va. Code article 13D, chapter 11, be deemed to have been paid at the close of the taxable year, rather than in a multitude of disparate transactions with various vendors throughout the year. Thus, the statute of limitations set forth at W. Va. Code § 11-10-14(1) shall run two years from the close of the taxable year for purposes of asserting this tax credit against the consumers sales and service tax and use tax through the claiming of a refund of such tax paid.

3a.5 In no case shall the credits arising under W. Va. Code article 13D, chapter 11 offset any amount of consumers sales and service tax or use tax which was included in the measure of investment in property purchased or leased and upon which qualified investment was based.

3a.6 The credit may offset only the consumers sales and service tax and use tax liabilities of the taxpayer claiming the credit. The credit shall never offset any portion of the consumers sales and service tax or use tax collected from customers of a taxpayer entitled to credit and held in trust by such taxpayer for remittance to the state.

3a.7 Application of the Qualified Housing Development Credit Against Consumers Sales and Service Tax and Use Tax. - The qualified housing development credit allowed under W. Va. Code § 11-13D-3(g) shall be allowed against the consumers sales and service tax and use tax liabilities of a taxpayer entitled to such credit (up to the 50% limitation) only against those consumers sales and service taxes and use taxes arising out of operation of a qualified housing development project. No such credit shall be allowed against the consumers sales and service tax or use tax arising from purchases of building materials or arising from other construction costs initially incurred in the creation of the qualified housing development project. In no case shall credit be allowed to offset any amount of sales or use tax which was included in the measure of investment in a qualified housing development project upon which credit is based.

3a.8 The qualified housing development credit shall become available in the first year when five or more qualified housing units are placed in service or use.

3a.9 Qualified housing development credit is only available to persons who make qualified investment in a qualified housing development and who continue to retain an interest in such qualified housing development during the ten years over which the qualified housing development credit is available. For example: If the builder of a qualified housing development leases housing development units to nontransients as residential property, then the builder and operator of that qualified housing development shall have credit available for those materials used in building those units and for other qualified investment in the housing development. If the builder of the qualified housing development sells qualified housing development units, then no credit based upon investment in the building materials for those units sold shall be allowable. However, if the builder continues to operate the development as a manager or housing development operator, then the qualified housing development credit may be available for that operator's qualified investment in streets, storm drains and sewage disposal apparatus even though the operator may have sold the housing units to residents.

3a.10 Where housing ostensibly part of a qualified housing development project is occupied by transients and nontransients, or occupied by a mix of part year residents as well as permanent residents or where a percentage of the units are sold whereas the remainder are leased by the qualified housing unit operator, only that percentage of investment in the qualified housing development units which are occupied by nontransient residents and which are operated and owned by the housing development project operator as lessor, will qualify as a base for the qualified housing development credit, along with

investment in streets, storm drains, sewage disposal apparatus and similar qualified housing development investment.

3a.11 Qualified housing development credit shall be available to successors in business who operate qualified housing development projects. Such credit will not be available to residential home owners who buy individual units investment in which may have qualified for the qualified housing development credit in the hands of a lessor or builder/operator prior to the sale of the housing unit to the resident.

§ 110-13D-3b. Application of credit after June 30, 1989.

For taxable years ending on and after July 1, 1989, the credits allowed under W. Va. Code § 11-13D-3 shall continue to be applied as provided in W. Va. Code § 11-13D-3a and Section 3a of these regulations. In addition, the credit allowed under W. Va. Code § 11-13D-3(f) and Section 3.3.6 of these regulations that remains after its application as provided in W. Va. Code § 11-13D-3a and Section 3a of these regulations shall be applied to reduce the tax imposed by W. Va. Code article twenty-four, chapter eleven: **Provided**, That this credit may not reduce by more than fifty percent the amount of the net tax liability of the taxpayer for the taxable year under W. Va. Code article twenty-four, chapter eleven, which amount of net tax liability shall be determined before application of the credit allowed by W. Va. Code article thirteen-c, chapter eleven.

§ 110-13D-3c. Amount of credit allowed and application of credit for qualified investment in a management information services facility.

3c.1 **Credit allowed.** - There shall be allowed to eligible taxpayers a credit against the taxes imposed by W. Va. Code articles twenty-three and twenty-four, chapter eleven for qualified investment in a management information services facility. The amount of credit shall be determined as hereinafter provided in this Section 3c and the subsections thereof.

3c.2 **Investment period limitations subject to extension upon legislative amendment.** - It is the finding of the Legislature that certain tax credits heretofore enacted have not effectively fulfilled the intended legislative purpose of increasing employment and economic growth and development in this State. Therefore, the time period over which qualified investment property may be purchased or leased and placed in service or use by eligible taxpayers at a management information services facility is expressly limited, for purposes of this credit, to two years under W. Va. Code §§ 11-13D-2(b)(17)(D), 11-13D-3c(C) and 11-13D-5b(c)(6)(C) and Section 2.2.17.4, Section 2.2.17.4, Section 3c.3 and Section 5b.3.6.3 of these regulations. If the Legislature subsequently finds that this credit for a management information services facility effectively fulfills the legislative purpose for which it was enacted, the Legislature may, in its discretion, extend, by statutory amendment, the time period over which qualified investment may be purchased, or leased, and placed in service or use.

3c.3 **Credit amount for qualified investment purchased and placed in service or use in a management information services facility after March 31, 1991 and prior to April 1, 1993.** - For property purchased or leased by an eligible taxpayer and placed in service or use after March 31, 1991, and prior to April 1, 1993, for use as a component part of a management information services facility, the amount of allowable credit shall be equal to one hundred percent

of the qualified investment, as determined under W. Va. Code § 11-13D-5b and Section 5b of these regulations, and shall reduce the business franchise tax under W. Va. Code article twenty-three, chapter eleven, and the corporation net income tax under W. Va. Code article twenty-four, chapter eleven, subject to the following conditions and limitations:

3c.3.1 Tax year time limitations for application of credit, credit forfeiture.

3c.3.1.1 The amount of this credit allowable shall be applied over a time period of up to ten tax years.

3c.3.1.2 This credit shall first be applied against the tax liabilities in the manner specified in Section 3c.3.2 and the subsections thereof beginning with the tax year during which the qualified investment was first placed in service or use in this State by the eligible taxpayer.

3c.3.1.3 Any amount of this credit remaining after application of this credit against tax as specified in Section 3c.3.1.2 shall then be applied against the tax liabilities in the manner specified in Section 3c.3.2 and the subsections thereof for the tax year immediately succeeding the tax year during which the qualified investment was first placed in service or use in this State and for each succeeding tax year thereafter up through the ninth tax year subsequent to the first tax year in which the qualified investment property was first placed in service or use.

3c.3.1.4 Any amount of this credit remaining after application of this credit against tax as specified in Section 3c.3.1.2 and then Section 3c.3.1.3 shall be forfeited and shall not carry forward to any subsequent tax year.

3c.3.1.5 No carryback of credit to a prior tax year shall be allowed.

3c.3.2 Tax liability percentage offset limitations.

3c.3.2.1 This credit for qualified investment in a management information services facility shall first be applied to reduce the annual West Virginia business franchise tax liability imposed under W. Va. Code article twenty-three, chapter eleven for the tax year by an amount such that this credit, in combined application with all other applicable credits allowable under W. Va. Code articles thirteen-c, thirteen-d and thirteen-e, chapter eleven and under W. Va. Code chapter five-e and all other tax credits provided in the West Virginia Code, shall not reduce the annual business franchise tax liability for such tax year below fifty percent of the amount of the annual tax liability which would otherwise be imposed for such tax year in the absence of this credit and all credits against such tax, except the credits set forth in W. Va. Code § 11-23-17.

3c.3.2.2 After application of this credit against business franchise tax as provided in Section 3c.3.2.1, remaining credit for qualified investment in a management information services facility, if any, shall then be applied to reduce the annual West Virginia corporation net income tax liability imposed under W. Va. Code article twenty-four, chapter eleven for the tax year

by an amount such that this credit in combined application with all other applicable credits allowable under W. Va. Code articles thirteen-c, thirteen-d, thirteen-f and thirteen-g, chapter eleven and under W. Va. Code §§ 11-24-10, 11, 11a, 12, 22 and 23a and under W. Va. Code, chapters five-e and eighteen-b and all other tax credits provided in the W. Va. Code, shall not reduce the annual corporation net income tax liability for such tax year below fifty percent of the amount of the annual tax liability which would otherwise be imposed for such tax year in the absence of this credit and all other credits against tax, except the credits set forth in W. Va. Code § 11-24-9 and 9a.

3c.3.2.3 After application of this credit against business franchise tax under Section 3c.3.2.1, and then against corporation net income tax under Section 3c.3.2.2; remaining credit for qualified investment in a management information services facility, if any, shall then be applied to further reduce the annual West Virginia business franchise tax liability imposed under W. Va. Code article twenty-three, chapter eleven for the tax year by an amount such that this credit shall not reduce the annual business franchise tax liability for such tax year below ten percent of the amount of the annual tax liability which would otherwise be imposed for such tax year in the absence of this credit and all other credits against such tax, except the credits set forth in W. Va. Code § 11-23-17.

3c.3.2.4 After application of this credit against business franchise tax under Section 3c.3.2.1 and then against corporation net income tax under Section 3c.3.2.2 and then against business franchise tax under Section 3c.3.2.3; remaining credit for qualified investment in a management information services facility, if any, shall then be applied to further reduce the annual West Virginia corporation net income tax liability imposed under W. Va. Code article twenty-four, chapter eleven for the tax year by an amount such that this credit shall not reduce the annual corporation net income tax liability for such tax year below ten percent of the amount of the annual tax liability which would otherwise be imposed for such tax year in the absence of this credit and all other credits against such tax, except the credits set forth in W. Va. Code §§ 11-24-9 and 91.

3c.4 Maximum annual credit allowance.

3c.4.1 Notwithstanding any other provision of Section 3c of these regulations, no taxpayer may take or apply more than one million dollars of this credit against all taxes, in the aggregate, against which this credit may apply in any taxable year, and no related person or persons as defined in Section 267(b) of the Internal Revenue Code of 1986, as amended, may, in the aggregate, take or apply more than one million dollars of this credit against all taxes, in the aggregate, against which this credit may apply in any taxable year.

3c.4.2 Notwithstanding any other provision of Section 3c of these regulations, the total amount of management information services facilities tax credit certified under this section for all taxpayers shall not exceed five million dollars per year. The Tax Commissioner shall allocate this credit to eligible taxpayers in the order that such taxpayers are certified under Section 3c.5: **Provided**, That no taxpayer or any related person to such taxpayer (as amended in section 267(b) of the Internal Revenue Code of 1986), as amended, shall be allocated more than five million dollars.

3c.4.2.1 Under W. Va. Code §§ 11-13D-2(b)(17)(D), 11-13D-3c(C) and 11-13D-5b(c)(6)(C) the time period over which qualified investment property may be purchased or leased or placed in service or use by eligible taxpayers at a management information services facility is limited to two years. Therefore, when the term "year" or "years" are referred to for purposes of the management information services facility credit, those years, unless expressly, or by the context are designated otherwise, shall be the years April 1, 1991 to March 31, 1992 and April 1, 1992 to March 31, 1993.

3c.4.2.2 The maximum amount of management information services facility credit which can be certified under W. Va. Code § 11-13D-3c is five million dollars per year. Thus, over the two years during which this management information services facility credit may be placed in service or use, April 1, 1991 to March 31, 1993, the total amount of credit certified may not exceed ten million dollars. Therefore, not more than ten million dollars of management information services facility credit may be asserted against and offset the tax revenues of the State of West Virginia over the entire life of the credit from April 1, 1991 to March 31, 2003.

3c.4.2.3 Because the management information services facilities credit is one hundred percent of qualified investment for qualified taxpayers, the amount of credit certified for any taxpayer shall be the amount of qualified investment which the taxpayer proposes to place into service or use in total.

3c.4.2.4 Certification for the management information services facility credit may be issued by the Tax Commissioner on and after March 9, 1991, and may relate to either of the two years of April 1, 1991 to March 31, 1992 or April 1, 1992 to March 31, 1993. It is not necessary that a taxpayer file the application for certification in the year that the taxpayer plans to place his investment into service or use. Certification shall be issued on a first come, first served basis beginning with those applications filed on and after March 9, 1991, and certification shall be issued until the entire ten million dollars maximum certifiable credit has been used up for the entire period of April 1, 1991 to March 31, 1993.

3c.5 Certification of credit required.

3c.5.1 **Application required.** - No management information services facilities tax credit shall be allowed or applied under W. Va. Code § 11-13D-3C for any investment in any management information services facility until the person asserting a claim for the allowance of credit under W. Va. Code article 13D, chapter eleven makes written application to the Tax Commissioner for allowance of credit as provided in this section and receives written certification of its claim from the Tax Commissioner. An application for credit shall be filed, in such form as the Tax Commissioner shall prescribe, prior to the first date when qualified investment property is first placed in service or use. All information required by such form shall be provided. No management information services facilities tax credit shall be taken by a taxpayer applicant or prospective applicant pursuant to this section and the exemption from tax set forth under W. Va. Code § 11-15-9(nn) shall not be available to a taxpayer applicant or prospective applicant until certification has been issued by the Tax Commissioner.

3c.5.1.1 Incomplete applications for certification shall be treated as not filed until such time as complete information is made available by the taxpayer for the application for certification. In determining which taxpayers have priority in the first come, first serve certification process, the filing of an incomplete application for certification will not count as a filing. The date of filing for purposes of certification shall be the date when a complete application for certification has been filed.

3c.5.2 **Failure to file.** - The failure to timely apply for certification under this Section 3c.5 shall result in the forfeiture of the credit otherwise allowable under this section.

3c.6 Forfeiture for reductions of employment.

3c.6.1 With the annual return for the tax imposed by W. Va. Code article twenty-three, chapter eleven filed for the taxable year in which the qualified investment is first placed in service or use in this State, and for each succeeding taxable year thereafter during which the taxpayer seeks to apply this credit against tax, the taxpayer shall file a statement with the Tax Commissioner certifying that no West Virginia jobs have been lost or terminated and no decrease of working hours or layoffs of employees holding West Virginia jobs have resulted from the making of the qualified investment upon which this management information services facilities tax credit is based or from the establishment or operation of the management information services facility upon which this credit is based.

3c.6.2 The taxpayer shall forfeit all annual management information services facilities tax credit otherwise available under W. Va. Code § 11-13D-3c during any year when West Virginia jobs have been lost or terminated or decreases of working hours or layoffs of employees holding West Virginia jobs have occurred as a result of the making of the qualified investment upon which this credit is based or the establishment or operation of the management information services facility upon which this credit is based, and the exemption from tax set forth in W. Va. Code § 11-15-9(nn) shall not be available to the taxpayer during such year of forfeiture.

3c.6.3 The Tax Commissioner shall conduct such audits or reviews of each taxpayer in any year a credit is asserted under W. Va. Code § 11-13D-3c to verify the accuracy of a taxpayer's statement certifying that no West Virginia jobs have been lost or terminated and that no decrease of working hours or layoffs of employees holding West Virginia jobs have resulted from the making of qualified investments upon which this credit is based or from the establishment or operation of the management information services facility upon which this credit is based. Such audits shall also verify that all other requirements applicable to the allowance of credit under W. Va. Code § 11-13D-3c continue to be met by the taxpayer.

3c.7 **Information disclosure.** - Pursuant to W. Va. Code § 11-13D-3c, providing that such disclosure can be made without directly or indirectly revealing the amount of credit available to any particular taxpayer or taxpayer return information other than the name and address of the taxpayer, and notwithstanding any other provision of the West Virginia Code to the contrary, the Tax Commissioner shall publish in the State register the name and address of every taxpayer receiving the management information services facilities credit

tax credit allowed under W. Va. Code § 11-13D-3c by December 31, 1992, and annually thereafter by December 30 of each year. The Tax Commissioner shall publish in the State register, the amount of the credit asserted, by amount category, for each taxpayer asserting such credit. The categories by dollar amount of credit received, shall be as follows:

- (1) More than \$1.00, but not more than \$50,000;
- (2) More than \$50,000 but not more than \$100,000;
- (3) More than \$100,000 but not more than \$250,000;
- (4) More than \$250,000 but not more than \$500,000; and
- (5) More than \$500,000 but not more than \$1,000,000.

§ 110-13D-3d. Amount of credit allowed and application of credit for qualified investment in a new industrial facility for producing coal-based liquids used to produce synthetic motor fuel or synthetic special fuel.

3d.1 Credit allowed. - There shall be allowed to eligible taxpayers which have made qualified investment of at least forty million dollars in a new industrial facility for producing coal-based liquids used to produce synthetic motor fuel or synthetic special fuel a credit against the taxes imposed by W. Va. Code articles twenty-three and twenty-four, chapter eleven for qualified investment in a new industrial facility for producing coal-based liquids used to produce synthetic motor fuel or synthetic special fuel. The amount of credit shall be determined as hereinafter provided in this section 3d of these regulations and the subsections thereof. Taxpayers who have not placed at least forty million dollars of qualified investment in service or use over a period of one year or less in a new industrial facility used to produce synthetic motor fuel or synthetic special fuel shall not be entitled to credit under this section.

3d.2 Credit amount for qualified investment purchased and placed in service or use in a new industrial facility for producing coal-based liquids used to produce synthetic motor fuel or synthetic special fuel, after June 30, 1991. - For property purchased or leased by an eligible taxpayer and placed in service or use after June 30, 1991, as part of a new industrial facility for producing coal-based liquids used to produce synthetic motor fuel or synthetic special fuel the amount of allowable credit shall be equal to one hundred percent of the qualified investment (as determined under W. Va. Code § 11-13D-4), and shall reduce that portion of the taxpayer's business franchise tax under W. Va. Code article twenty-three, chapter eleven, which is attributable to and the direct result of the taxpayer's qualified investment, and that portion of the taxpayer's corporation net income tax under W. Va. Code article twenty-four, chapter eleven, which is attributable to and the direct result of the taxpayer's qualified investment; subject to the following conditions and limitations:

3d.2.1 The total amount of credit allowable to all persons claiming credit under W. Va. Code § 11-13D-3d shall not exceed ten million dollars during any fiscal year of this State. If and to the extent credit is claimed under W. Va. Code § 11-13D-3d in excess of ten million dollars in any fiscal year of this State the amount in excess of ten million dollars is lost. In determining

which taxpayer or taxpayers loses credit under this section, the loss of credit shall apply first to qualified investment property most recently placed in service or use, going backwards in time, until the tax commissioner determines that the total amount of credit allowed under W. Va. Code § 11-13D-3d is not in excess of ten million dollars.

3d.2.2 The qualified investment must result in the creation of at least ten new jobs.

3d.2.3 If during any taxable year of the ten year tax credit allowance period, the average number of employees of the taxpayer, for the then current taxable year, employed in positions created because of and directly attributable to the qualified investment property is less than ten, the credit allowance for that taxable year is forfeited.

3d.2.4 Tax year time limitations for application of credit; credit forfeiture.

3d.2.4.1 The amount of this credit allowable shall be applied over a time period of up to ten tax years.

3d.2.4.2 This credit shall first be applied against tax liabilities in the manner specified in Section 3d.2.5 and the subsections, thereof, beginning with the tax year during which the qualified investment was first placed in service or use in this State by the eligible taxpayer.

3d.2.4.3 Any amount of this credit remaining after application of this credit against tax as specified in Section 3d.2.4.2 shall then be applied against the tax liabilities in the manner specified in Section 3d.2.5 and the subsections thereof for the tax year immediately succeeding the tax year during which the qualified investment was first placed in service or use in this State and for each succeeding tax year thereafter up through the ninth tax year subsequent to the first tax year in which the qualified investment property was first placed in service or use.

3d.2.4.4 Any amount of this credit remaining after application of this credit against tax as specified in Section 3d.2.4.2 and then Section 3d.2.4.3 of this subdivision shall be forfeited and shall not carry forward to any subsequent tax year.

3d.2.4.5 No carryback of credit to a prior tax year shall be allowed.

3d.2.5 Tax liability percentage offset limitations.

3d.2.5.1 This credit for qualified investment in a new industrial facility for producing coal-based liquids used to produce synthetic motor fuel or synthetic special fuel shall first be applied to reduce the annual West Virginia business franchise tax liability imposed under W. Va. Code article twenty-three, chapter eleven for the tax year by an amount such that this credit, in combined application with all other applicable credits allowable under W. Va. Code articles thirteen-c, thirteen-d and thirteen-e, chapter eleven and under W. Va. Code chapter five-e and all other tax credits provided in the West Virginia Code, shall not reduce the annual business franchise tax liability

for such tax year below fifty percent of the amount of the annual tax liability which would otherwise be imposed for such tax year in the absence of this credit and all credits against such tax, except the credits set forth in W. Va. Code § 11-23-17.

3d.2.5.2 After application of this credit against business franchise tax as provided in Section 3d.2.5.1, the remaining credit for qualified investment in a new industrial facility for producing coal-based liquids used to produce synthetic motor fuel or synthetic special fuel (if any) shall then be applied to reduce the annual West Virginia corporation net income tax liability imposed under W. Va. Code article twenty-four, chapter eleven for the tax year by an amount such that this credit in combined application with all other applicable credits allowable under W. Va. Code articles thirteen-c, thirteen-d, thirteen-f and thirteen-g, chapter eleven and under W. Va. Code §§ 11-24-10, 11, 11a, 12, 22 and 23, and under W. Va. Code chapters five-e and eighteen-b and all other tax credits provided in the West Virginia Code, shall not reduce the annual corporation net income tax liability for such tax year below fifty percent of the amount of the annual tax liability which would otherwise be imposed for such tax year in the absence of this credit and all other credits against tax, except the credits set forth in W. Va. Code §§ 11-24-9 and 9a.

3d.2.5.3 After application of this credit against business franchise tax under Section 3d.2.5.1, and then against corporation net income tax under Section 3d.2.5.2, the remaining credit for qualified investment in a new industrial facility for producing coal-based liquids used to produce synthetic motor fuel or synthetic special fuel (if any) shall then be applied to further reduce the annual West Virginia business franchise tax liability imposed under W. Va. Code article twenty-three, chapter eleven for the tax year by an amount such that this credit shall not reduce the annual business franchise tax liability for such tax year below ten percent of the amount of the annual tax liability which would otherwise be imposed for such tax year in the absence of this credit and all other credits against such tax, except the credits set forth in W. Va. Code § 11-23-17.

3d.2.5.4 After application of this credit against business franchise tax under Section 3d.2.5.1 and then against corporation net income tax under Section 3d.2.5.2, and then against business franchise tax under Section 3d.2.5.3, the remaining credit for qualified investment in new industrial facility for producing coal-based liquids used to produce synthetic motor fuel or synthetic special fuel (if any) shall then be applied to further reduce the annual West Virginia corporation net income tax liability imposed under W. Va. Code article twenty-four, chapter eleven for the tax year by an amount such that this credit shall not reduce the annual corporation net income tax liability for such tax year below ten percent of the amount of the annual tax liability which would otherwise be imposed for such tax year in the absence of this credit and all other credits against such tax, except the credits set forth in W. Va. Code §§ 11-24-9 and 9a.

3d.3 Application for credit required.

3d.3.1 **Application required.** - No credit shall be allowed or applied under W. Va. Code § 11-13D-3d for any investment in any new industrial facility for producing coal-based liquids used to produce synthetic motor fuel

or synthetic special fuel until the person asserting a claim for the allowance of credit makes written application to the Tax Commissioner for allowance of credit as provided in W. Va. Code § 11-13D-3d and receives written certification of its claim from the Tax Commissioner. An application for credit shall be filed, in such form as the Tax Commissioner shall prescribe, prior to the date when qualified investment property is first placed in service or use, and all information required by such form shall be provided. No credit shall be taken by a taxpayer applicant or prospective applicant pursuant to W. Va. Code § 11-13D-3d until certification has been issued by the Tax Commissioner.

3d.3.2 Failure to file. - The failure to timely apply for certification under Section 3d.3 and the subsections thereof shall result in forfeiture of the credit otherwise allowable under W. Va. Code § 11-13D-3d.

3d.4 Definitions. - For purposes of W. Va. Code § 11-13D-3d:

3d.4.1 "Synthetic motor fuel" means any product suitable for use in an internal combustion engine except special fuel as defined in W. Va. Code § 11-13D-3d, containing at least ten percent coal-based liquids blended to meet specifications.

3d.4.2 "Synthetic special fuel" means special fuel containing at least ten percent coal-based liquids blended to meet specifications.

3d.5 Report by the Governor's Office of Community and Industrial Development. - The Governor's Office of Community and Industrial Development shall produce a report to the Legislature to be presented during the regular legislative session of 1992. Such report shall state the identity of taxpayers who have received this credit and shall contain an analysis of the expansion and growth of facilities in this State producing coal based liquids used to produce synthetic fuels, the expansion of commerce resulting from the creation of this credit, and the number of jobs created as a result of this credit. The report of the Governor's Office of Community and Industrial Development shall not directly or indirectly reveal the amount of credit available to any particular taxpayer or taxpayer return information other than the names and addresses of taxpayers.

§ 110-13D-4. Eligible investment for industrial expansion or revitalization.

4.1 General. - The eligible or qualified investment in property purchased for industrial expansion or revitalization shall be the applicable percentage of the cost of each property purchased for the purpose of industrial expansion or revitalization, which is placed in service or use in this State, by the eligible taxpayer during the taxable year.

4.2 Applicable percentage. - For the purposes of Section 4.1, the applicable percentage for any property shall be determined under the following table:

If useful life is:	The applicable percentage is:
4 years or more but less than 6 years	33-1/3
6 years or more but less than 8 years	66-2/3

8 years or more..... 100

The useful life of any property for purposes of this section shall be determined as of the date such property is first placed in service or use in this State by the taxpayer, determined in accordance with federal income tax law.

4.3 Cost. - For purposes of Section 4.1, the cost of each property purchased for industrial expansion or revitalization, or for conduct of an eligible research and development project, shall be determined under the following rules:

4.3.1 Trade-ins. - Cost shall not include the value of property given in trade or exchange for the property purchased for industrial expansion or revitalization.

4.3.2 Damaged, destroyed or stolen property. - If property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, then the cost of replacement property shall not include any insurance proceeds received in compensation for the loss.

4.3.3 Rental property. - The cost of property acquired by lease for a term of ten years or longer shall be one hundred percent of the rent reserved for the primary term of the lease, not to exceed twenty years.

4.3.4 Property purchased for multiple use. - The cost of property purchased for multiple business use including use as a component part of a new or expanded or revitalized industrial business, together with some other business or activity not eligible for credit under W. Va. Code article 13D, chapter eleven, shall be apportioned between such businesses and occupations. The amount apportioned to the new or expanded or revitalized industrial business, shall be considered to be as an eligible investment, subject to the conditions and limitations of W. Va. Code § 11-13D-4.

4.3.5 Self-constructed property. - In the case of self-constructed property, the cost thereof shall be the amount properly charged to the capital account for purposes of depreciation.

§ 110-13D-5. Eligible investment for research and development.

5.1 General. - The eligible investment in a research and development project shall be the sum of the applicable percentage of the cost of land and depreciable property purchased for the conduct of an eligible research and development project, which is placed in service or use in this State during the taxable year, plus the amount of qualified research expenses (as defined in this section) deducted by the eligible taxpayer, for federal income tax purposes.

5.2 Applicable percentage of property. - For the purpose of Section 5.1, the applicable percentage for land and depreciable property shall be determined under the following table:

If useful life is:	The applicable percentage is:
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Less than 6 years.....	33-1/3
6 years or more but less than 8 years.....	66-2/3
8 years or more.....	100

The useful life of any property for purposes of this section shall be determined as of the date such property is first placed in service or use in this State by the taxpayer, determined in accordance with federal income tax law.

5.3 Cost of property. - For purposes of Section 5.1, the cost of each property purchased for the conduct of an eligible research and development project shall be determined under the following rules:

5.3.1 Trade-ins. - Cost shall not include the value of property given in trade or exchange for the property purchased for conduct of the research and development project.

5.3.2 Damaged, destroyed or stolen property. - If property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, then the cost of replacement property shall not include any insurance proceeds received in compensation for the loss.

5.3.3 Rental property. - The cost of property acquired by lease, for a term of ten years or longer shall be one hundred percent of the rent reserved for the primary term of the lease, not to exceed twenty years.

5.3.4 Property purchased for multiple use. - The cost of property purchased for multiple business use including direct use in the conduct of an eligible research and development project, together with some other business or activities. The amount apportioned to the conduct of the eligible research and development project shall be considered to be eligible investment subject to the conditions and limitations of this section.

5.4.5 Self-constructed property. - In the case of self-constructed property, the cost thereof shall be the amount property charged to the capital account for depreciation in accordance with federal income tax law.

5.5 Qualified research expenses. - For purposes of W. Va. Code § 11-13D-5:

5.4.1 "Qualified research expenses" means the sum of in-house and contract research expenses for qualified research allocated to this State, which are paid or incurred by the eligible taxpayer during the taxable year in carrying on any trade or business taxable under W. Va. Code §§ 11-13-2a, 2b and 2m, or under W. Va. Code § 11-13-2h (in the case of manufacturing services only): **Provided**, That on and after July 1, 1987, "qualified research expenses" shall mean the sum of in-house and contract research expenses for qualified research, allocated to this State, which are paid on incurred by the eligible taxpayer during the taxable year in carrying on any trade or business taxable under W. Va. Code article thirteen, thirteen-a or twenty-three, chapter eleven, that would have been taxable under W. Va. Code §§ 11-13-2a,2b,2m or 2h (in the case of manufacturing services only), as in effect on January 1, 1985.

In no event shall "qualified research expenses" include any expense that must be capitalized and depreciated for federal income tax purposes, or any

expenditure paid or incurred for the purpose of ascertaining the existence, location, extent or quality of any deposit of coal, limestone or other natural resource, including oil and natural gas.

5.4.2 "In-house research expenses" means:

5.4.2.1 Wages paid or incurred to an employee for qualified services performed in this State by such employee;

5.4.2.2 Amounts paid or incurred for supplies used in the conduct of qualified research in this State; and

5.4.2.3 Amounts paid or incurred to another person for the right to use personal property in the conduct of qualified research in this State.

5.4.3 "Qualified services" means services consisting of:

5.4.3.1 Engaging in qualified research in this State; or

5.4.3.2 Engaging in the direct supervision or direct support of research activities in this State, which constitute qualified research.

If substantially all of the services performed by an individual for the taxpayer during the taxable year consist of services meeting the requirements of Section 5.4.3.1 or Section 5.4.3.2, the term "qualified services" means all services performed by such individual for the taxable year.

5.4.4 "Supplies" means any tangible property other than:

5.4.4.1 Land or improvements to land; and

5.4.4.2 Property of a character subject to depreciation for federal income tax purposes.

5.4.5 "Wages" has the meaning given to such term by Section 3401(a) of the Internal Revenue Code of 1954, as amended. In the case of self-employed individuals and owner-employees (within the meaning of Section 401 (c)(1) of said Internal Revenue Code), the term "wages" includes the earned income (as defined in Section 401(c)(2) of said Internal Revenue Code) of such employee. The term "wages" shall not include any amount taken into account in determining the federal targeted jobs credit under Section 51(a) of said Internal Revenue Code.

5.4.6 "Contract research expenses" means:

5.4.6.1 In general, sixty-five percent of any amount paid or incurred by the taxpayer to any person (other than an employee of the taxpayer) for qualified research.

5.4.6.2 If any contract research expenses paid or incurred during any taxable year are attributable to qualified research to be conducted after the close of the taxable year, such amount shall be treated as paid or

incurred during the taxable year during which the qualified research is conducted.

5.4.7 "Qualified research" means research and development conducted for purposes relating to the technical, economic, financial, engineering or marketing aspects of expanding markets for and increasing sales of this State's natural resource products or manufactured products, or both: **Provided**, That it shall not include:

5.4.7.1 Research or development conducted outside this State;

5.4.7.2 Research or development not directly related to increasing the uses for and sales of this State's natural resource products and industrial products;

5.4.7.3 Research in the social sciences or humanities; or

5.4.7.4 Research and development to the extent funded by any grant, contract or otherwise by another person (or any governmental entity).

5.5 Research by colleges, universities and certain research organizations. - In general, sixty-five percent of the amount paid or incurred by a corporation to any nonprofit educational organization which is an institution of higher education (as defined in Section 3304(f) of the Internal Revenue Code of 1954, as amended), an institution of higher education subject to the jurisdiction of the West Virginia board of regents, or any other nonprofit organization exempt from federal income taxes which is organized and operated primarily to conduct scientific research and is not a private foundation for federal income tax purposes for research to be performed by such organization shall be treated as contract research expenses. The preceding sentence shall apply only if the amount is paid or incurred pursuant to a written research agreement between the corporation and the qualified organization.

5.6 Standards for determining qualified research expenses. - In prescribing standards for determining which research and development expenses are considered to be West Virginia qualified research expenses for purposes of this section, the Tax Commissioner may consider: (1) The place where the services are performed; (2) the residence or business location of the person or persons performing the services; (3) the place where qualified research supplies are consumed; and (4) other factors that the tax commissioner believes relevant in determining whether or not the research and development expenses, land and depreciable property were purchased and used for qualified research, as defined in this article, during the taxable year.

§ 110-13D-5a. Eligible investment for qualified housing development project.

5a.1 General. - The eligible investment in a qualified housing development project shall be the sum of the applicable percentage of the cost of land and depreciable property purchased for the construction of a qualified housing development project, which is placed in service or use in this State during the taxable year.

5a.2 Applicable percentage of property. - For the purpose of Section 5a.1, the applicable percentage for land and depreciable property shall be determined under the following table:

If useful life is:	The applicable percentage is:
Less than 4 years	0
4 years or more but less than 6 years.....	33-1/3
6 years or more but less than 8 years.....	66-2/3
8 years or more	100

The useful life of any property for purposes of this section shall be determined as of the date such property is first placed in service or use in this State by the taxpayer, determined in accordance with federal income tax law.

5a.3 Cost of property. - For purposes of Section 5a.1, the cost of each item of property purchased for the conduct of an eligible housing development project shall be determined under the following rules:

5a.3.1 Trade-ins. - Cost shall not include the value of property given in trade or exchange for the property purchased for construction of a qualified housing development project.

5a.3.2 Damaged, destroyed or stolen property. - If property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, then the cost of replacement property shall not include any insurance proceeds received in compensation for the loss.

5a.3.3 Self-constructed property. - In the case of self-constructed property, the cost thereof shall be the amount properly charged to the capital account for depreciation in accordance with federal income tax law.

5a.4 "Qualified housing development" or "qualified housing development project" means a residential housing development located in this State that contains five or more single-family contiguous residential housing units or multifamily residential buildings containing five or more residential housing units, which are contiguously located.

5a.5 "Residential housing unit" means any single-family dwelling or a single-family unit in a multifamily dwelling that is constructed for sale or lease to nontransients for use and occupancy as their primary permanent residence.

§ 110-13D-5b. Qualified investment for a management information services facility.

5b.1 General. - The qualified investment in property purchased or leased for use as a component part of a management information services facility shall be the applicable percentage of the cost of each property purchased for a management information services facility, which is placed in service or use in this State, by the eligible taxpayer during the tax year as determined under W. Va. Code § 11-13D-5b.

5b.2 Applicable percentage. - For the purposes of Section 5b.1, the applicable percentage for any property shall be determined under the following table:

If useful life or applicable lease term is:	The applicable percentage is:
3 years or more but less than 6 years	33-1/3
6 years or more but less than 8 years	66-2/3
8 years or more.....	100

The useful life of any property for purposes of this section shall be the actual economic useful life determined as of the date such property is first placed in service or use in this State by the taxpayer, determined for financial accounting purposes in accordance with generally accepted principles of accounting.

5b.3 Cost. - For purposes of Section 5b.1, the cost of each property purchased for a management information services facility, shall be the fair market value or the actual cost, whichever is less, and in no event shall the cost exceed the fair market value, furthermore the cost shall be determined under the following rules:

5b.3.1 Trade-ins. - Cost shall not include the value of property given in trade or exchange for the property purchased for management information services facility.

5b.3.2 Damaged, destroyed or stolen property. - If property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, then the cost of replacement property shall not include any insurance proceeds received in compensation for the loss.

5b.3.3 Rental property. - The cost of tangible personal property acquired by lease for a primary lease term of three or more years shall be seventy-five percent of the rent reserved for the shorter of:

5b.3.3.1 The first ten years of the primary lease term; or

5b.3.3.2 The primary lease term.

Such cost of leased tangible personal property shall then be multiplied by the applicable percentage determined under Section 5b.2 of these regulations based upon the shorter of the first ten years of the primary lease term or the primary lease term in order to determine qualified investment in such leased property.

5b.3.4 Property purchased for multiple use. - Investment in property purchased for use in a management information services facility together with some other use shall not qualify for purposes of this credit.

5b.3.5 Self-constructed property. - In the case of self-constructed property, the cost thereof shall be the amount properly charged to the capital account for purposes of depreciation for federal income tax purposes.

5b.3.6 Specific exclusions.

5b.3.6.1 Investment in land or buildings, whether purchased or leased, shall not qualify for purposes of this management information services facility credit.

5b.3.6.2 Investment by purchase or lease in natural resources in place; and investment by purchase or lease in property, the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time such property is placed in service or use, shall not qualify for purposes of this management information services facility credit.

5b.3.6.3 Investment in property purchased, or leased, or placed in service or use prior to April 1, 1991, or after March 31, 1993, shall not qualify for purposes of this management information services facility credit.

5b.3.6.4 Investment in property not purchased, or leased, either for the purpose of expanding an existing management information services facility in West Virginia pursuant to a national, regional or international relocation or consolidation of significant management information services in West Virginia; or for the purpose of establishing in this State a management information services facility that is new to West Virginia, shall not qualify for purposes of this management information services facility credit.

§ 110-13D-6. Forfeiture of unused tax credits; redetermination of credit required.

6.1 Disposition of property or cessation of use. - If during any taxable year, property with respect to which a tax credit has been allowed under W. Va. Code article 13D, chapter 11:

6.1.1 Is disposed of prior to the end of its useful life, as determined under W. Va. Code § 11-13D-4, 5, 5a or 5b; or

6.1.2 Ceases to be used in the new or expanded or revitalized industrial business, or in the eligible research and development project, or in the qualified housing development project, or in a management information services facility of the taxpayer in this State prior to the end of its useful life, as determined under said W. Va. Code § 11-13D-4, 5, 5a or 5b, then the unused portion of the credit allowed for such property shall be forfeited for the taxable year and all ensuing years. Additionally, except when the property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, the taxpayer shall redetermine the amount of credit allowed in all earlier years by reducing the applicable percentage of cost of such property allowed under said W. Va. Code § 11-13D-4, 5, 5a or 5b, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this State in the industrial business or management information services business of the taxpayer. Taxpayer shall then file a reconciliation statement with its annual business franchise tax return for the year in which the forfeiture occurs and pay any additional taxes owed due to reduction of the amount of credit allowable for such earlier years, plus interest and any applicable penalties.

6.2 Cessation of operation of industrial facility or eligible research and development project, qualified housing development project or management information services facility. - If during any taxable year, the taxpayer ceases operation of an industrial facility or a management information services facility in this State, or of an eligible research and development project, or a qualified housing development project, for which credit was allowed under W. Va. Code article 13D, or article 13C, chapter eleven prior to its repeal, before expiration of the useful life of the property with respect to which tax credit has been allowed under W. Va. Code article 13D or article 13C of chapter eleven prior to its repeal, then the unused portion of the allowed credit shall be forfeited for the taxable year and all ensuing years. Additionally, except when the cessation is due to fire, flood, storm or other casualty, the taxpayer shall redetermine the amount of credit allowed in earlier years by reducing the applicable percentage of cost of such property allowed under W. Va. Code § 11-13D-4, 5, 5a or 5b, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this State in the industrial business or management information services business of the taxpayer. Taxpayer shall then file a reconciliation statement with its annual business franchise tax return for the year in which the forfeiture occurs and pay any additional taxes owed due to reduction of the amount of credit allowable for such earlier years, plus interest and any applicable penalties.

§ 110-13D-7. Transfer of eligible investment to successors.

7.1 Mere change in form of business. - Property shall not be treated as disposed of under W. Va. Code § 11-13D-6, by reason of a mere change in the form of conducting the business as long as the property is retained in a similar industrial business or management information services business activity in this State and the taxpayer retains a controlling interest in the successor business. In this event, the successor business shall be allowed to claim the amount of credit still available with respect to the industrial facility or facilities transferred or to the eligible research and development project or management information services facility, and the taxpayer (transferor) shall not be required to redetermine the amount of credit allowed in earlier years.

7.2 Transfer or sale to successor. - Provided that the Tax Commissioner gives prior approval for a transfer or sale, property shall not be treated as disposed of under W. Va. Code § 11-13D-6 by reason of any transfer or sale to a successor business which continues to operate the industrial facility or management information services facility in this State. Upon transfer or sale, the successor shall acquire the amount of credit that remains available under W. Va. Code article 13D, chapter eleven for each taxable year subsequent to the taxable year of the transferor during which the transfer occurred, and, for the year of transfer, an amount of annual credit for such year in the same proportion as the number of days remaining in the transferor's taxable year bears to the total number of days in such taxable year, and the taxpayer (transferor) shall not be required to redetermine the amount of credit allowed in earlier years. In determining whether or not to approve a disposition pursuant to this section, the Tax Commissioner shall take into account the legislative findings and purpose contained in W. Va. Code § 11-13D-1 in making such decision.

§ 110-13D-8. Prior industrial expansion credit preserved.

Any tax credit which an industrial taxpayer was legally entitled to claim under W. Va. Code article 13C, chapter eleven prior to its repeal effective March 1, 1985, shall be fully and completely preserved under the provisions of W. Va. Code article 13D, chapter eleven for the remainder of the tax year credit period that was then in existence under said article thirteen-c.

§ 110-13D-9. Severability.

9.1 If any provision of W. Va. Code article 13D, chapter eleven or the application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgement shall not affect, impair or invalidate the remainder of said article, but shall be confined in its operation to the provision thereof directly involved in the controversy in which such judgment shall have been rendered, and the applicability of such provision to other persons or circumstances shall not be affected thereby.

9.2 If any provision of W. Va. Code article 13D, chapter eleven or the application thereof shall be made invalid or inapplicable by reason of the failure of the Legislature to enact any statute therein addressed or referred to, or by reason of the repeal of any other invalidation of any statute therein addressed or referred to, such failure to reenact on such repeal or invalidation of any such statute shall not affect, impair or invalidate the remainder of the said article, but shall be confined in its operation to the provision thereof directly involved with, pertaining to, addressing or referring to the said statute, and the application of such provision with regard to other statutes or in other instances not affected by any such invalid or repealed statute shall not be abrogated or diminished in any way.



State of West Virginia
Department of Tax and Revenue

Charleston 25305

GASTON CAPERTON
GOVERNOR

ADMINISTRATIVE LAW DIVISION
THIS DATE
FILED IN THE OFFICE OF
THE SECRETARY OF STATE
L. FREDERICK WILLIAMS, JR.
SECRETARY

CONSENT TO FILE RULE

August 2, 1991

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug 8, 1991
ADMINISTRATIVE LAW DIVISION

To Whom It May Concern:

Title of Rule: Industrial Expansion And Revitalization Credit,
Research And Development Credit, Qualified
Housing Development Credit, Management
Information Services Facilities Credit And
Coal Based Liquids For Synthetic Fuels Credit

Title Number: 110

Series Number: 13D

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

Signed this 2nd day of August, 1991.

L. Frederick Williams, Jr.
L. Frederick Williams, Jr.
Secretary, Tax and Revenue

FISCAL NOTE FOR PROPOSED RULES THIS DATE Aug 8, 1994

ADMINISTRATIVE LAW DIVISION

Rule Title: Industrial Expansion And Revitalization Credit, Research And Development Credit, Qualified Housing Credit, Management Information Services Facilities Credit And Coal Based Liquids For Synthetic Fuels 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 and Alterations	-0-	-0-	-0-	-0-	-0-
Equipment	-0-	-0-	-0-	-0-	-0-
Other	-0-	-0-	-0-	-0-	-0-

2. Explanation of above estimates:

There should be no fiscal impact other than that envisioned by the Legislature when it enacted W. Va. Code § 11-13D-1 et seq., and the amendments thereto.

3. Objectives of these rules:

These regulations explain and clarify the tax credits stated in the title.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There should be no economic impact beyond that envisioned by the Legislature when it enacted W. Va. Code § 11-13D-1 et seq., and the amendments thereto.

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

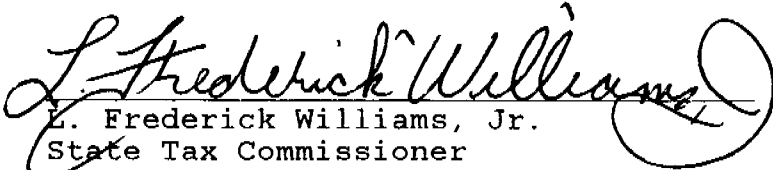
There should be no economic impact beyond that envisioned by the Legislature when it enacted W. Va. Code § 11-13D-1 et seq., and the amendments thereto.

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact beyond that envisioned by the Legislature when it enacted W. Va. Code § 11-13D-1 et seq., and the amendments thereto.

Date: August 2, 1991

Signature of Agency Head or Authorized Representative


L. Frederick Williams, Jr.
State Tax Commissioner
Department of Tax and Revenue



FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug 8, 1991
ADMINISTRATIVE LAW DIVISION

State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

L. FREDERICK WILLIAMS, JR.
SECRETARY

August 2, 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: STATE TAX DIVISION

LEGISLATIVE RULE TITLE: INDUSTRIAL EXPANSION AND REVITALIZATION CREDIT, RESEARCH AND DEVELOPMENT CREDIT, QUALIFIED HOUSING DEVELOPMENT CREDIT, MANAGEMENT INFORMATION SERVICES FACILITIES CREDIT, AND COAL BASED LIQUIDS FOR SYNTHETIC FUELS CREDIT

1. Authorizing statute(s) citation: W. Va. Code § 11-10-5
2.
 - a. Date filed in State Register with Notice of Public Comment Period: July 2, 1991
 - b. What other notice, including advertising, did you give of the hearing? None
 - c. Date of public comment period: July 2, 1991 through August 1, 1991
 - d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached No comments received
 - e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact) August 8, 1991
 - f. Name and phone number of agency person to contact for additional information: John Montgomery - 348-5330
Mark Morton - 348-5330
3. If the statute under which you promulgated the submitted rules requires certain findings and determination 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: _____



**State of West Virginia
Department of Tax and Revenue**

GASTON CAPERTON
GOVERNOR

Charleston 25305

L. FREDERICK WILLIAMS, JR.
SECRETARY

STATEMENT OF CIRCUMSTANCE

These regulations are a result of the legislative enactment amending
W.Va. Code § 11-13D-1 et seq.

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug 8, 1991
ADMINISTRATIVE LAW DIVISION

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
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ADMINISTRATIVE LAW DIVISION

**PUBLIC COMMENTS ON THE INDUSTRIAL EXPANSION AND
REVITALIZATION CREDIT, RESEARCH AND DEVELOPMENT CREDIT,
QUALIFIED HOUSING DEVELOPMENT CREDIT, MANAGEMENT INFORMATION
SERVICES FACILITIES CREDIT AND COAL BASED LIQUIDS FOR
SYNTHETIC FUELS CREDIT REGULATIONS, TITLE 110, SERIES 13D,
FILED JULY 2, 1991**

The following are public comments received by the Department of Tax and Revenue pertaining to the proposed industrial expansion and revitalization credit, research and development credit, qualified housing development credit, management information services facilities credit and coal based liquids for synthetic fuels credit regulations, Title 110, Series 13D, filed on July 2, 1991. In total, two missives commenting on the Title 110, Series 13D regulations were received by the Department of Tax and Revenue. Those missives were timely filed within the 30 day comment period. Seven main issues were addressed in the two comment missives received. For purposes of responding to the issues presented, the comments have been condensed, rather than repeated verbatim. Copies of the original missives containing comments are attached.

COMMENT 1: The definition of "industrial taxpayer" (§ 2.2.8) and the definition of "manufacturing service" (§ 2.2.11) refer back to definitions of business activities under the old business and occupation tax statute in effect prior to July 1, 1987. The commentator states that it may be appropriate to spell out these definitions rather than simply referring to certain statutory section numbers to refer to those activities taxable under the business and occupation tax statute prior to its repeal. The regulations and statute refer to Sections 11-13-2b, 2m and 2h of the West Virginia Code as they existed prior to the repeal of those sections.

RESPONSE TO COMMENT 1: Sections 2.2.8 and 2.2.11 have been amended to adopt the suggestions submitted by the commentator relating to the references to activities under former W. Va. Code §§ 11-13-2b, 2m and 2h.

COMMENT 2: The comment is submitted that certain severance taxpayers seem to be confused over the application of industrial expansion and revitalization credit to investment in the severance industry. The commentator suggests that the subject should be addressed in the regulations so as to distinguish between qualified investments in qualifying activities, such as manufacturing or processing of minerals, and nonqualifying activities such as the mere severance of minerals.

RESPONSE TO COMMENT 1: The regulations have been amended to adopt the recommendation of the commentator. These amendments are set forth at Section 2.2.15.8 of the regulations.

COMMENT 3: A commentator suggests that language should be added under Section 2.2.15 of the regulations to restrict credit applications to investments directly used in qualified investment activities. The commentator suggests the addition of the following subsections:

[Qualified property] shall not include:

2.2.15.7 Property which is primarily used for purposes or activities not directly related to the credit qualifying activities of the taxpayer.

The commentator suggests that this limitation may prevent taxpayers from attempting to claim industrial expansion credit on investments in pleasure boats, rocking chairs, furniture and similar nonqualified investments.

RESPONSE TO COMMENT 3: The regulations have been amended to adopt the language proposed by the commentator relating to this section and this issue.

COMMENT 4: A commentator suggests that Section 3.3.5.5 of the regulations applies only to tax periods prior to July 1, 1987, and that this should be clearly stated in the regulation so as not to conflict with the policy currently in place that the 50% limitation with respect to credits under Section 11-13D-1 et seq. and Section 11-13E-1 et seq. of the West Virginia Code applies to credits provided under each statutory article separately rather than in the aggregate, so that the 50% limitation applies in the aggregate only to those periods prior to July 1, 1987.

RESPONSE TO COMMENT 4: The regulations have been amended to adopt the suggestion of the commentator relating to this issue.

COMMENT 5: A commentator suggests that residential housing development credit regulations should be clarified to address the issue of whether credit arises from the revitalization of existing housing stock, and the issue of whether credit arises from the conversion of commercial or industrial buildings into residential property.

RESPONSE TO COMMENT 5: The regulations have been amended to adopt the suggestion of the commentator relating to these issues. These amendments can be found in Section 3.3.7.7 of the regulations.

COMMENT 6: A commentator states that the regulations exclude all West Virginia sales and use tax paid on purchases of building materials or other construction costs from taxes against which the qualified housing development credit can apply. The commentator contends that the taxable purchases are directly related to use or consumption in the qualified housing development activity, and that there is no support in the West Virginia Code for exclusion of those taxes from offset by the credit. The commentator contends that sales and use taxes paid on purchases of building materials and on other construction costs should be subject to offset by the housing development credit up to the 50% limitation provided by statute.

The commentator suggests that the building materials, as integral, essential, physical, structural components of housing units are directly used or consumed in the activity of building housing units, and should be subject to offset by the credit. The commentator states that at the time the credit was enacted, residential housing developers paid a substantial business and occupation tax on home sales, and they paid no sales tax on building materials. The commentator points out that the qualified housing development credit was allowed to offset up to one-half of the business and occupation tax paid. The commentator states that with the elimination of the business and occupation tax on residential real estate sales, there was a reduced incentive provided by the credit. The commentator contends that the Legislature amended W. Va. Code § 11-13D-3a, effective June 30, 1987, coinciding with the removal of the business and occupation tax, to allow the credit to be applied against consumers sales and service and use tax. The commentator suggests that this clearly demonstrates a legislative intent to provide a continuing meaningful stimulus to investment in residential housing in West Virginia.

The commentator states that to restrict the ability of the taxpayer to apply the credit against sales taxes paid on construction material severely increases the cost of construction and sale or rent of new residential housing units and is contrary to legislative intent.

Finally, the commentator suggests that in order to keep the credit base from including the sales tax against which the credit can be applied, with reference to Section 3a.7 of the regulations, the base should be defined to exclude any sales or use tax paid.

RESPONSE TO COMMENT 6: Consumer sales and service tax and use tax paid on building materials under the qualified housing development credit become part of the investment upon which the credit is based. To permit the taxpayer to obtain credit for having the sales tax, and then again apply that same credit against his taxes so that he could obtain a refund of the sales tax paid would essentially create a

"double dip" for the taxpayer and increase the amount of credit which ought to be available to him.

The commentator proposes to eliminate this problem by amending Section 3a.7 of the regulations so as to keep the credit base from including sales tax when initial purchases are made. This change is contrary to statute. The statute permits the credit base to include capitalized investment in property purchased for a qualified housing development project. The statute defines this credit base as the cost of such property purchased, including sales and use tax legitimately paid as a part of that cost. The commentator's proposal to exclude such costs under Section 3a.7 is utterly without statutory authority.

The commentator quite rightly states that at the time the credit was enacted, residential housing developers paid a substantial business and occupation tax on home sales, and they paid no sales tax on building materials. The commentator goes on to state that the Legislature amended the statute on June 30, 1987, to allow the credit to be applied against consumers sales and service and use taxes at precisely the same point in time that the business and occupation tax was repealed. The commentator, however, fails to note that at that time the consumers sales and service and use taxes were not applied against purchases of building materials by construction contractors. Thus, at the time the Legislature made the change whereby the credit could be applied against consumers sales and service and use taxes arising from the qualified activity, the very taxes which the commentator now proposes to have offset did not even exist. The Legislature subsequently enacted an amendment whereby the consumers sales and use tax would apply against building materials as of March 1, 1989. W. Va. Code § 11-15-8a. Significantly, the West Virginia Legislature did not see fit to amend the West Virginia housing development credit statute by either changing the credit base to exclude sales or use taxes paid on materials purchased, or changing the taxes subject to credit to expressly include consumers sales and service and use taxes paid on building materials. Certainly the Legislature did not intend to create a "double dip" whereby the taxpayer could potentially spend one dollar in investment and get a tax credit calculated and applied as if two dollars were spent.

The commentator's suggested changes with relation to the application of the credit against sales or use tax on construction materials must be rejected as inconsistent with the statute. Under Section 11-13D-3a of the West Virginia Code, the credit applies against the consumers sales and use tax "on purchases directly used or consumed in taxpayer's qualified investment activity." The qualified investment activity is the ownership and operation of a qualified housing development, not the mere building of such a development by a contractor or others. The commentator's suggestion with regard to this issue must be rejected.

COMMENT 7: A commentator states that the sale of a housing unit by a developer of a qualified housing development should not be treated as a "disposition" of the property which would trigger recapture of credit otherwise available on such property. The commentator argues that it is the selling of the housing unit to a permanent resident which places the property into service or use and ultimately satisfies the purpose underlying the credit.

RESPONSE TO COMMENT 7: The qualified housing development credit is only available to persons who make qualified investment in a qualified housing development and who continue to retain an interest in that qualified housing development during the 10 years over which the qualified housing development is available. Thus, if the developer leases housing development units to non-transients as residential property, then the developer and operator of that qualified housing development should have the credit available for having invested in those housing units and for other qualified investment in the development. If the developer sells qualified housing development units, then no credit based upon investment in the building materials and construction for those units is allowable. The taxpayer would no longer continue to operate those units. However, the taxpayer might continue to operate the development as a manager or housing development operator when some units have been sold whereas others have been leased to residents, in which case the developer should have credit available for his qualified investment in streets, storm drains, sewage disposal apparatus and any rental housing units in the development.

Section 11-13D-6 of the West Virginia Code clearly states that disposition of property or cessation of use during any taxable year with respect to which a tax credit has been allowed will result in forfeiture of all remaining credit available on such property, and recapture of credit in circumstances where the disposition of property or cessation of use of property in a qualified activity has resulted from anything except fire, flood, storm or other casualty. The statute is clear and unambiguous on this point, and the commentator's suggestion with regard to this issue must be rejected.



**State of West Virginia
Department of Tax and Revenue**

GASTON CAPERTON
GOVERNOR

Charleston 25305
July 16, 1991

L. FREDERICK WILLIAMS, JR.
SECRETARY

1991 AUG -2 AM 2:00

Memo To: Rich Boyle
Director, Legal Division

Memo From: Mark Muchow *MBM*
Chief Tax Analyst, Research and Development

RE: Comments on 11-13D Regulations

The following represent my comments concerning the proposed Chapter 11 Article 13D credit regulations:

- * The definitions of "Industrial taxpayer" (2.2.8) and "Manufacturing service" (2.2.11) refer us back to definitions of business activities under the old B&O Statute in effect prior to 7/1/87. We may want to spell out these definitions, instead of simply referring to them as activities taxable under 2b, 2m, and 2h.
- * Some severance taxpayers seem to be confused over the application of industrial expansion and revitalization credit to investments in the severance industry. We could expound on this subject in the regulations distinguishing between qualified investments (processing equipment) and non-qualifying activities.
- * Under 2.2.15, the following could be added in an effort to restrict credit applications to investments directly used in the qualified activities:
 - 2.2.15.7 Property which is primarily used for purposes or activities not directly related to the credit qualifying activities of the taxpayer.

This additional limitation may prevent taxpayers from trying to claim industrial expansion credit on investments in pleasure boats, rocking chairs, office furniture and like investments.

- * Proposed section 3.3.5.5 of the regulations and corresponding sections of the West Virginia Code seem to be in conflict with current internal policy, unless the 50% limit with respect to the sum of credits under 13D and 13E applies only

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to tax periods prior to 7/1/87.

* Over the past few months, the following questions have been asked concerning the Residential Housing Development Projects Credit:

1. Does credit arise from the revitalization of existing housing stock?
2. Does credit arise from the conversion of commercial or industrial buildings into residential property?

The tax code is rather vague with regard to the provisions of the Residential Housing Credit. Therefore, the regulations may be the place to address the above mentioned questions.

If you have any questions with regard to these comments and suggestions, please feel free to contact me.

cc: Lydia McKee
Mark Morton
Dale Steager



RECEIVED
1991 JUL 31 AM 2:00
STATE TAX DEPARTMENT
LEGAL DIVISION

July 30, 1991

State of West Virginia
Legal Division
Department of Tax and Revenue
P.O. Box 1005
Charleston, WV 25324-1004

RE: WV Code 11-10-5
Legislative Rule
Title 110

Gentlemen:

Enclosed please find our comments concerning proposed legislative rule, "Industrial Expansion and Revitalization Credit, Research and Development Credit, Qualified Housing Development Credit, Management Information Services Credit and Coal Based Liquids for Synthetic Fuels Credit," which was filed July 2, 1991.

The stated purpose of the proposed rule is to clarify and explain these credits contained in the WV Code; yet the effect of these proposed regulations with respect to the Qualified Housing Development Credit is to make changes in the law, not supported by any provision of the WV Code. Briefly, we object to two components of these proposed regulations and we desire to comment as follows:

1. The proposed regulations arbitrarily exclude from credit all WV sales and use tax paid on purchases of building materials or other construction costs incurred by a taxpayer in the creation of the qualified housing development project; yet by Code definition, no other taxable purchases could be more directly related to use or consumption in said activity. There is no code support for excluding taxes paid on these purchases from being eligible for up to 50% credit.
2. The stated purpose of the housing credit is to encourage capital investment in non-transient residential units for sale or lease. The proposed regulations erroneously define the sale of a housing unit as a "disposition" of such property, thus triggering "recapture" of any credit. The sale of a housing unit, the very act which culminates in placing such property in use, satisfying the Code's purpose of this credit, cannot possibly have been intended to also be the same event which would deny or cause forfeiture of the credit!

MEMBERS: AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS


P.O. Box 1207A • 101 N. Spring Street • Martinsburg, West Virginia 25401
Phone: 304/263-0891 • Fax: 304/263-0997

We respectfully request that the enclosed comments be considered and that we be given an opportunity to provide oral testimony during your deliberations about these proposed regulations.

If you desire additional information, please call or write.

Very truly yours,

COX ALLEMONG NICHOLS, CPAs


by: Philip P. Cox, CPA
Partner

PPC/cms

Enclosure

Cox Allemong Nichols, CPAs
Martinsburg, WV

July 30, 1991

State Tax Division
Comments on Proposed Legislation filed July 2, 1991

Proposed Legislative Rule "Industrial Expansion and Revitalization Credit, Research and Development Credit, Qualified Housing Development Credit, Management Information Services Credit and Coal Based Liquids for Synthetic Fuels Credit."

1. The proposed regulations arbitrarily exclude from credit all sales, service and use taxes arising from "purchases of building materials or . . . from other construction costs initially incurred in the creation of the qualified housing development project". (3a.7, p.13)

a) The Code 11-13 D-3a expressly allows credit arising from sales, service and use taxes on "purchases directly used or consumed in taxpayer's qualified investment activity". The meaning of "directly used or consumed" is defined by the Code in 11-15-2(n)(1), in reference to other industries, as being an "integral and essential" part of the activity as contrasted with incidental, convenient, or remote. Code 11-15-2(n)(2)(A) articulates a "physical incorporation of property into the finished product". The Code provides no reason for a different definition to apply to the residential housing industry. In its Technical Assistance Advisory 88-002, the State Tax Commissioner interpreted WV Code 11-13D-3a to "allow taxpayer credit against their consumer sales and use tax liabilities on purchases and leases of tangible personal property and on purchases of services when such purchases are directly used or consumed in taxpayer's qualified investment activity meaning (emphasis supplied) that activity of the taxpayer which but for the qualified investment taxpayer would not now be doing." By definition and by the expressed interpretation cited above, there could not be anything more directly used or consumed in the activity of building housing units than the building materials themselves - the integral, essential, physical, structural components.

b) The legislative finding and purpose of this credit, as contained in Code 11-13-d1, is that the "construction of residential housing is in the public interest" and this credit is a means "to encourage capital investment in this state and thereby increase employment and economic development." At the time this credit was enacted, residential housing developers paid a substantial Business & Occupation tax on home sales, and they paid no sales tax on building materials. The Qualified Housing Development Credit was allowed to offset up to one-half of the "B & O" tax paid. With the elimination of the B & O tax on residential real estate sales,

there was a reduced incentive provided by this credit. However, the legislature amended Code 11-13d-3a on June 30, 1987, coinciding with the repeal of the B & O tax, to allow this credit to be applied against consumer sales and service and use taxes, clearly intending to provide a continuing, meaningful stimulus to investment in residential housing in West Virginia.

To restrict the ability to apply this credit against sales taxes paid on construction materials severely increases the costs of construction and sale (or rent) of new residential housing units and is contrary to the intent of the Code. The Code states that the credit is applicable against the sales/use tax liability of the taxpayer, without any distinction as to why the taxes arise, save for the "activity" of creating a qualified housing development.

c) So as to keep the credit base from including the sales tax against which the credit can be applied (para. 3a.7, p. 14), the base can be defined to exclude any sales/use tax paid. This would then be the same base as originally anticipated by the legislature when the housing credit was enacted before repeal of the B & O tax.

2. The stated purpose of the housing credit is to encourage capital investment in non-transient residential units for sale or lease. The proposed regulations erroneously define the sale of a housing unit as a "disposition" of such property, thus triggering "recapture" of any credit.

a) Since a qualified housing development project is residential housing built for sale or lease, a sale to one as a primary and permanent residence should not cause a "disposition" which requires forfeiture or redetermination of the credit.

In fact, it is the selling of a housing unit to a permanent resident which culminates the act of placing such property into service, qualifying the taxpayer for the credit. The same event, sale of a housing unit, cannot both qualify and simultaneously disqualify a taxpayer for this credit, since the credit would then become an impossibility.

The effect of the "recapture" section of these regulations would be to allow the credit for rental units, but to eliminate it for housing units sold as residences.



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