

WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

Form #3

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JUN 23 PM 1:47

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

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

AGENCY: State Tax Department TITLE NUMBER: 110

CITE AUTHORITY W.Va. Code §§ 11-10-5 and 29A-3-15

AMENDMENT TO AN EXISTING RULE: YES  NO

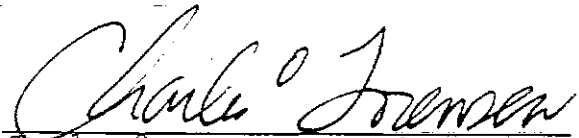
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 21 (Repealed and Reenacted)

TITLE OF RULE BEING AMENDED: Personal Income Tax

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

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



Charles O. Lorenson  
State Tax Commissioner

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FISCAL NOTE FOR PROPOSED RULES

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Rule Title: Personal Income Tax

Type of Rule: X Legislative          Interpretive          Procedural

Agency: Tax Department Address: State Capital; 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:

This rule should have no cost as it does not envision any expenditures by the State.

3. Objectives of these rules:

This rule is necessary to provide necessary guidance to taxpayers relative to the imposition of the personal income tax.

DATE: JUNE 23, 1989  
TO: LEGISLATIVE RULE-MAKING COMMITTEE  
FROM: STATE TAX DEPARTMENT  
EMERGENCY RULE TITLE: PERSONAL INCOME TAX

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

1. Date of filing: June 23, 1989
2. Statutory authority for promulgating the emergency rule: W. Va. Code §§ 11-10-5 and 29A-3-15
3. Date of filing of proposed legislative rule: June 23, 1989
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?  
Yes. This rule repeals and reenacts 110 C.S.R. 21, the rule governing personal income tax.
5. Has the same or similar emergency rule previously been filed and expired?  
No
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.  
None
7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.  
N/A
8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.  
With the exception of Sections 110-21-55 and 56, the current personal income tax rule, 110 C.S.R. 21, is the same as the rule filed in 1964. While there have been changes in the personal income tax statutes since 1964, the changes which occurred in the 1987 and 1988 legislative sessions

BRIEF SUMMARY OF PROPOSED RULE

PERSONAL INCOME TAX

The current regulations governing the personal income tax are repealed and reenacted by this emergency legislative regulation. These emergency legislative regulations incorporate the many changes in the referenced tax which were enacted by the legislature in the 1987, 1988 and 1989 regular or special sessions.

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SECRETARY OF STATE

were so substantial as to require a completely new rule. Because it is necessary for an accurate rule to be in effect to guide taxpayers, and reliance on the current rule would result in erroneous tax liabilities and the imposition of penalties on taxpayers, the new rule is necessary to protect and preserve the public welfare and prevent substantial harm to the public interest.

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1988 JUN 23 PM 1:52

EMERGENCY  
WEST VIRGINIA LEGISLATIVE REGULATIONS  
STATE TAX DEPARTMENT  
TITLE 110  
SERIES 21  
1988

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Filed: November 30, 1988

§ 110-21-1. General.

1.1 Type Of Regulation.-These regulations are emergency legislative regulations as defined in West Virginia Code §§ 29A-1-1(d) and 29A-3-15.

1.2 Scope.-These emergency legislative regulations explain and clarify the West Virginia Personal Income Tax Act as stated in West Virginia Code § 11-21-1 et seq. These emergency legislative regulations govern taxable periods beginning on or after January 1, 1988 and become effective immediately upon filing. For taxable periods beginning on or after January 1, 1988, these emergency legislative regulations repeal the Personal Income Tax Regulations, 110 C.S.R. 21, which were filed May 15, 1985 and effective June 14, 1985.

1.3 Authority.-These emergency legislative regulations are issued under the authority of West Virginia Code § 29A-3-15 and West Virginia Code § 11-21-1 et seq.

1.4 Filing Date.-These emergency legislative regulations were filed in the State Register on November 30, 1988. A public comment period commenced on November 30, 1988 and terminated at 5:00 p.m. on December 30, 1988. These emergency legislative regulations were refiled in the State Register on May 22, 1989.

1.5 Citation.-These emergency legislative regulations may be cited as 110 C.S.R. 21, § \_\_\_\_\_ (1988). <sup>JUN 23</sup>

PART I. IN GENERAL.

§ 110-21-2. Legislative Findings.

2.1 It is the intent of the Legislature that this State for purposes of its personal income tax adopt the provisions of the laws of the United States relating to the determination of income for federal income tax purposes in order to simplify preparation of State income tax returns by taxpayers, to improve enforcement of the State income tax through use of information obtained from federal income tax audits and to aid in the interpretation of the State tax law through use of federal judicial and administrative

determinations and precedents. To facilitate this intent, the West Virginia Personal Income Tax Act as set forth under West Virginia Code § 11-21-1 et seq. shall be construed to accomplish the foregoing purposes.

§ 110-21-3. Imposition Of Tax; Minimum Tax; Persons Subject To Tax.

3.1 Imposition Of Tax.

3.1.1 Primary Tax.-The West Virginia Personal Income Tax Act, Article 21, Chapter 11 of the West Virginia Code, imposes a personal income tax on the West Virginia taxable income of every individual, estate and trust in accordance with the rates set forth therein.

3.1.2 Minimum Tax.-In addition to the primary tax, there is imposed, pursuant to West Virginia Code § 11-21-3(a)(3), a minimum tax. This minimum tax is the excess, if any, by which an amount equal to twenty-five percent (25%) of any federal minimum tax or alternative minimum tax for the taxable year exceeds the sum of the primary tax imposed for the taxable year.

3.1.2.1 In determining the amount of the West Virginia minimum tax, taxpayers whose federal base income, for purposes of computing any federal minimum tax or alternative minimum tax, includes items of income which the states are prohibited under federal law from taxing or items of income specifically exempt from personal income taxation by the West Virginia Code must subtract such items of income from their federal base income and recompute their federal minimum tax before calculating the amount of West Virginia minimum tax.

3.2 Partners And Partnerships.-A partnership is not subject to the personal income tax, although individuals carrying on business as partners are liable for this tax in their separate or individual capacities. (See regulation 58.2 as to the filing of returns by partnerships).

3.3 Associations Taxable As Corporations.-A corporation is not a taxable entity within the purview of the West Virginia Personal Income Tax Act. An association, trust or other unincorporated organization which is taxable as a corporation for federal income tax purposes is not subject to the personal income tax. A corporation, association, trust or unincorporated organization must be so taxed under Subchapter C of the Internal Revenue Code of 1986, as amended, in order to be beyond the purview of the West Virginia Personal Income Tax Act.

3.4 Exempt Trusts And Organizations.-A trust or other unincorporated organization which by reason of its purposes or

activities is exempt from federal income tax is exempt from the personal income tax, regardless of whether such organization is subject to federal income tax on unrelated business taxable income. Thus, for such an unincorporated organization, there is no unrelated business income tax in West Virginia.

### 3.5 Cross References.

3.5.1 For definition of the West Virginia taxable income of resident individuals, see Section 11 of these regulations.

3.5.2 For definition of the West Virginia taxable income of resident estates and trusts, see Section 18 of these regulations.

3.5.3 For definition of the West Virginia taxable income of nonresident individuals, see Section 31 of these regulations.

3.5.4 For definition of the West Virginia taxable income of nonresident estates and trusts, see Section 38 of these regulations.

### § 110-21-4. Rate Of Tax.

4.1 Rate Of Tax On Individuals (Except Married Individuals Filing Separate Returns), Individuals Filing Joint Returns, Heads Of Households, Estates And Trusts.-The tax imposed by the West Virginia Personal Income Tax Act on the West Virginia taxable income of every individual (except married individuals filing separate returns), every individual who is a head of household in the determination of his or her federal income tax for the taxable year, every husband and wife who file a joint return, every individual who is entitled to file his or her federal income tax return for the taxable year as a surviving spouse, and every estate and trust shall be determined in accordance with the applicable rates set forth under Article 21, Chapter 11 of the West Virginia Code.

4.2 Rate Of Tax On Married Individuals Filing Separate Returns.-The tax imposed by the West Virginia Personal Income Tax Act on the West Virginia taxable income of a husband and wife filing separate returns for the taxable year shall be determined in accordance with the applicable rates set forth under Article 21, Chapter 11 of the West Virginia Code.

### § 110-21-5. Effect Of Rate Changes During Taxable Year.

5.1 If the rate of personal income tax imposed by the West Virginia Personal Income Tax Act is changed to be effective after

the thirty-first (31st) day of December of a calendar year, and if a taxpayer subject to the West Virginia Personal Income Tax Act has a taxable year which includes the effective date of the change of rate (unless that date is the first (1st) day of the taxable year), then the following rules shall be observed in computing such taxpayer's rate of tax:

5.1.1 Tentative taxes shall be computed by applying the rate for the period before the effective date of the change, and the rate for the period on and after such date, to the taxable income for the entire taxable year;

and

5.1.2 The tax for such taxable year shall be the sum of that proportion of each tentative tax which the number of months in each period bears to the number of months in the entire taxable year.

5.1.3 For purposes of this Section:

5.1.3.1 If the rate changes for taxable years beginning after or ending after a certain date, the following day shall be considered the effective date of the change; and

5.1.3.2 If a rate changes for taxable years beginning on or after a certain date, that date shall be considered the effective date of the change of rate.

§ 110-21-6. Accounting Periods And Methods.

6.1 Accounting Periods.-A taxpayer's taxable year under these regulations shall be the same as his taxable year for federal income tax purposes.

6.2 Change Of Accounting Periods.-If a taxpayer's taxable year is changed for federal income tax purposes, his taxable year, for purposes of these regulations, shall be changed so that it is identical to that used by the taxpayer for federal income tax purposes. If a taxable year of less than twelve (12) months results from a change of taxable year, the West Virginia personal exemptions, and any applicable credits allowed under the West Virginia Code, shall be prorated to reflect the portion of the year which is being covered by the return being filed due to the change of accounting periods.

6.3 Accounting Methods.-A taxpayer's method of accounting for West Virginia income tax purposes shall be the same as that used for federal income tax purposes. In the absence of any method for federal tax purposes, his taxable income for West

Virginia tax purposes shall be computed under a method which will clearly reflect income.

#### 6.4 Change Of Accounting Methods

6.4.1 If a taxpayer's method of accounting is changed for federal tax purposes, his method of accounting shall be changed for West Virginia tax purposes so that the accounting method is identical to that used by the taxpayer for federal income tax purposes.

6.4.2 If a taxpayer's method of accounting is changed, other than from an accrual to an installment method, any additional tax which results from adjustments determined to be necessary solely by reason of the change shall not be greater than if such adjustments were ratably allocated and included for the taxable year of the change and the preceding taxable years, not in excess of two (2), during which the taxpayer used the method of accounting from which the change is made.

6.4.3 If a taxpayer's method of accounting is changed from an accrual to an installment method, any additional tax for the year of such change of method, and for any subsequent year which is attributable to the receipt of installment payments properly accrued in a prior year, shall be reduced by the portion of tax for any prior taxable year attributable to the accrual of such installment payments.

6.4.4 Example.-A, a sole proprietor, has been engaged in a service oriented business and uses the cash basis method of accounting. A decides to expand his business so that in addition to providing services, A will also make sales from inventory. As a result of A's use of inventory, current federal income tax law requires A to adopt the accrual method of accounting. A must change to the accrual method of accounting for purposes of West Virginia's personal income tax as well.

#### § 110-21-7. Resident And Nonresident Defined.

7.1 Resident Individual.-An individual may be a resident of West Virginia for income tax purposes, and be taxable as a resident, even though such individual would not be deemed a resident for other purposes.

7.1.1 As used in these regulations, the term "resident individual" means and includes;

7.1.1.1 All persons domiciled in West Virginia with the exception of those domiciliary residents who maintain no permanent place of abode in this State, maintain a permanent

place of abode elsewhere and spend in the aggregate not more than thirty (30) days of the taxable year in this State.

or

7.1.1.2 Any person, other than a member of the Armed Forces of the United States, who is not domiciled in West Virginia but who maintains a permanent place of abode in this State and spends in the aggregate more than one hundred eighty-three (183) days of the taxable year in this State.

7.1.2 Domicile Defined.-Domicile, in general, is the place that an individual intends to be his permanent home and the place to which he intends to return whenever he may be absent from such place.

7.1.2.1 A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making his fixed and permanent home there.

7.1.2.2 No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time even if the individual has sold or disposed of his former home.

7.1.2.2.a The burden is upon any person asserting a change of domicile to show that the necessary intention to change domicile existed.

7.1.2.2.b In determining an individual's intention regarding a change of domicile, his declarations will be given due weight but will not be conclusive if such declarations are contradicted by his conduct.

7.1.2.2.c The fact that a person registers to vote and does vote in one place is an important indication of domicile but not necessarily determinative, especially if the facts indicate that such actions were merely undertaken to escape taxation in a particular jurisdiction.

7.1.2.3 Domicile is not dependent on citizenship. For example, an alien who has permanently established his home in West Virginia is domiciled in this State regardless of whether he has become a citizen of the United States or has applied for citizenship. A citizen of the United States, however, will not ordinarily be deemed to have changed his domicile by going to a foreign country unless it is clearly established that he intends to remain there permanently. A citizen of the United States domiciled in West Virginia who goes abroad because of an assignment by his employer or for study, research or recreation, does not lose his West Virginia domicile

unless it is clearly shown that such individual intends to remain abroad permanently and not return.

7.1.2.4 An individual can have only one domicile. Where an individual has two or more homes, his domicile is at the home he regards as principal and permanent. In determining his intention in this matter, the length of time customarily spent at each location is important but not conclusive. A person who maintains a permanent place of abode in West Virginia and spends more than one hundred eighty-three (183) days of the taxable year in this State is taxable as a resident, regardless of domicile.

7.1.2.5 A wife's domicile generally follows that of her husband unless a separate domicile has been established by her. A child's domicile generally follows that of his father, or of his mother after the father's death, until the child reaches the age of self-support and actually establishes his own separate domicile. The domicile of a child of divorced parents ordinarily follows that of the custodial parent.

7.1.3 Permanent Place Of Abode Defined. - A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse.

7.1.3.1 A mere camp or cottage, or other similar site or dwelling, which is suitable and used only for vacation purposes does not constitute a permanent place of abode.

7.1.3.2 A place of abode, whether in West Virginia or elsewhere, will not be deemed permanent if such abode is maintained only during a temporary stay for the accomplishment of a particular purpose.

7.1.3.2.a Where an individual domiciled in another state is assigned to his employer's West Virginia office for a fixed and limited period after which he is to return to his permanent location, and said individual takes an apartment or other dwelling in West Virginia during the fixed and limited period, he will not be deemed a resident for income tax purposes even if he spends more than one hundred eighty-three (183) days of the taxable year in this State, because his place of abode here is not permanent. This person, however, will be taxable as a nonresident for income tax purposes on his income from West Virginia sources, including his salary or other compensation for services performed in West Virginia.

7.1.3.2.b If an individual's assignment to his employer's West Virginia office is not for a fixed and limited period, but is for an indefinite period, the individual's

West Virginia place of abode will be deemed a permanent place of abode, and he will be a resident for income tax purposes if he spends more than one hundred eighty-three (183) days of the year in West Virginia.

7.1.3.3 In the case of a person domiciled in West Virginia, the maintenance of a permanent place of abode in this State is alone sufficient to make him a resident for income tax purposes, even though he remains outside the State for the entire year because the one hundred eighty-three (183) day rule applies only to taxpayers not domiciled in West Virginia.

7.1.4 Rules For Days Within And Without West Virginia.-In counting the number of days spent within and without West Virginia, presence within the State for any part of a calendar day constitutes a day spent within the State, except that such presence within the State may be disregarded if it is solely for the purpose of boarding a plane, train or bus for travel to a destination outside West Virginia, or while traveling by motor vehicle, plane or train through West Virginia to a destination outside the State. Any person domiciled outside this State who maintains a permanent place of abode within this State during any taxable year and claims to be a nonresident must keep and have available for examination by the Tax Commissioner adequate records to substantiate the fact that he did not spend more than one hundred eighty-three (183) days of such taxable year within the State.

7.1.5 Certain Persons Not Deemed Residents Although Domiciled In West Virginia.-Any individual domiciled in West Virginia is a resident for income tax purposes for a specific taxable year, unless for such year he satisfies all three (3) of the following conditions:

- (1) he maintains no permanent place of abode in West Virginia,
- (2) he maintains a permanent place of abode elsewhere, and
- (3) he spends in the aggregate not more than thirty (30) days of the taxable year in West Virginia.

7.1.5.1 Example.-An individual, although retaining his West Virginia domicile, maintains his only permanent place of abode in the State of New York. As long as this individual continues to meet all three (3) conditions set forth under Subsection 7.1.5 above, he will be a nonresident of West Virginia for income tax purposes. If, however, for any taxable year there is a failure to meet any one (1) of the three

(3) Subsection 7.1.5 conditions, the individual is subject to West Virginia's personal income tax as a resident for that year.

7.1.5.2 Where an individual domiciled in West Virginia claims to be a nonresident for any taxable year, the burden is upon said individual to show that during the year in question all three (3) Subsection 7.1.5 conditions had been satisfied.

7.2 Nonresident Individual.-For personal income tax purposes, a nonresident individual is any person who is not a resident as defined under Subsection 7.1 of this regulation.

7.2.1 All references in these regulations to nonresidents are equally applicable to nonresident aliens unless otherwise specifically provided.

7.3 Resident Estate Or Trust.-A resident estate or trust means and includes:

(1) The estate of a decedent who at the date of his death was domiciled in West Virginia;

(2) A trust created by will of a decedent who at the date of his death was domiciled in West Virginia; or

(3) A trust created by, or consisting of property of, a person domiciled in West Virginia.

7.3.1 Examples.

Example 1.-An individual who is domiciled in Canada creates a trust with a bank in Charleston, West Virginia as trustee. The corpus of this trust consists of securities of American corporations which are actively traded by the trustee on the several Stock Exchanges and also consists of rental property located in West Virginia. The beneficiaries of the trust are all West Virginia residents. Regardless of whether the trust is held to be a resident of the United States for federal income tax purposes, it is, for purposes of this State's personal income tax law, a nonresident trust.

Example 2.-An individual who is a domiciliary resident of West Virginia creates a trust with a bank in Pittsburgh, Pennsylvania as trustee. The trust corpus consists of West Virginia rental property and Pennsylvania rental property. The beneficiaries of this trust are all residents of Pennsylvania. The trust is a resident trust for West Virginia personal income tax purposes.

7.4 Nonresident Estate Or Trust.-A nonresident estate or trust is an estate or trust which is not a resident estate or trust as defined in Subsection 7.3 of this regulation.

7.5 Cross Reference.-For the effect of a change of an individual's resident status, see Section 54 of these regulations.

§ 110-21-8. Credits Against Tax.

8.1 Business And Occupation Tax Credit.-If a taxpayer is subject to the business and occupation tax imposed under West Virginia Code § 11-13-1 et seq., said taxpayer may be entitled to a credit against his West Virginia personal income tax. The amount of this credit shall not exceed the amount of personal income tax attributable to West Virginia taxable income for the taxable year derived from the business or activity subjected to such other tax. If the West Virginia taxable income of the taxpayer includes income from a partnership, estate, trust or S corporation, a part of any business and occupation tax liability of the partnership, estate, trust or S corporation shall be allowed in computing the credit, in an amount proportionate to the income of such partnership, estate, trust or S corporation which is included in the taxpayer's West Virginia taxable income.

8.1.1 For purposes of Subsection 8.1 above, the tax imposed under Article 13, Chapter 11 of the West Virginia Code shall be the amount of the liability of the taxpayer for such tax under said Article 13 computed without reduction for the tax Industrial Expansion Or Revitalization tax credit and the Capital Company tax credit allowed for such year.

8.1.2 Credit Limitations.-The business and occupation tax credit allowed under West Virginia Code § 11-21-8 and this regulation shall be limited to the smallest of the following:

(1) The amount of business and occupation tax imposed after all credits except the Industrial Expansion Or Revitalization tax credit and the Capital Company tax credit; or

(2) The amount of West Virginia personal income tax before credits; or

(3) The amount of West Virginia personal income tax imposed on income from the business subject to the business and occupation tax.

8.1.2.1 The limitation set forth under Subsection 8.1.2(3) is placed upon the amount of the credit to

preclude exempting from personal income tax such of the taxpayer's income as is not derived from a business subject to business and occupation tax. Stated another way, the credit for business and occupation tax cannot offset the income tax imposed on income derived from sources which are not subject to business and occupation tax.

8.1.2.2 There can be no credit against personal income tax for business and occupation tax imposed on a business which operated at a loss, because no income from a business which operates at a loss enters into a taxpayer's West Virginia taxable income. Likewise, there can be no credit against personal income tax for business and occupation tax imposed, unless the West Virginia taxable income of a taxpayer includes business income. The West Virginia taxable income of a taxpayer is determined by offsetting business losses against business gains.

8.1.2.3 Who May Claim The Credit.-The credit is allowable to taxpayers engaged in activities subject to the business and occupation tax in their capacities as proprietors, members of partnerships, beneficiaries and fiduciaries of estates and trusts, and stockholders of corporations, if and only if, such corporations elected to be taxed under Subchapter S of the Internal Revenue Code. The credit allowed these taxpayers is based on their share of the business and occupation tax imposed, and is limited to the amount of personal income tax imposed on business income derived from the proprietorship, partnership, S corporation, estate or trust. Salaries that are not, in fact, part of the distributive share of the partnership income, (for example, salaries guaranteed to partners by the articles of partnership), and salaries paid to stockholders of S corporations, are not income of partnerships or S corporations for the purpose of computing the credit.

8.1.2.3.a Examples.

Example 1.-The taxpayer is engaged in a sole proprietorship which is subject to the business and occupation tax. The amount of business and occupation tax liability imposed for the taxable year was seventy-five dollars (\$75). The taxpayer's net income from the business was twelve thousand dollars (\$12,000). He received no other income during the year. The taxpayer filed a joint return and claimed two (2) personal exemptions. Presuming a West Virginia income tax liability before credits would be two hundred and forty dollars (\$240), the business and occupation tax credit would be limited to seventy-five dollars (\$75), the amount of business and occupation tax imposed.

Example 2.-Assume the same facts as in Example 1 except that the amount of business and occupation tax

imposed was three hundred dollars (\$300). The West Virginia personal income tax before credits is two hundred forty dollars (\$240), therefore, the business and occupation tax credit is limited to two hundred forty dollars (\$240), the amount of income tax before credits. No carry over of this credit is available.

Example 3.-The taxpayer was engaged in a business (partnership) subject to the business and occupation tax. His share of the distributive profits was eight thousand dollars (\$8,000) and his share of the business and occupation tax liability was four hundred dollars (\$400). In addition to his business income, the taxpayer received a salary of four thousand dollars (\$4,000) from a local bank; therefore, his total income for the taxable year was twelve thousand dollars (\$12,000). Presuming a personal income tax liability of three hundred dollars (\$300) before credits, the business and occupation tax credit would be limited to two hundred dollars (\$200), which is the amount of personal income tax imposed on income from the business subject to the business and occupation tax credit.

8.1.2.4 No credit shall be allowed against the West Virginia personal income tax unless the West Virginia taxable income of a taxpayer includes positive amounts of income from a business subject to the business and occupation tax. In computing the business income for purposes of applying the ratio of income from business subject to the business and occupation tax to the total West Virginia adjusted gross income for determining the limitation of credit, business losses must be offset against business gains to reflect the positive amount of business income subject to business and occupation tax in determining West Virginia taxable income. The purpose of the business and occupation tax credit is to avoid the imposition of income tax, and not to relieve the taxpayer from the imposition of income tax on income not subject to the business and occupation tax that would otherwise have been imposed in the absence of business activity.

8.1.2.4.a Example 1.-Taxpayer is engaged in a business subject to the business and occupation tax. Business and occupation tax in the amount of five hundred dollars (\$500) was imposed on gross receipts of forty thousand dollars (\$40,000). His business operated at a loss of ten thousand dollars (\$10,000). The taxpayer had income, from a source other than his business, in the amount of thirty thousand dollars (\$30,000) for the taxable year. This taxpayer is not entitled to a business and occupation tax credit on his personal income tax return because his West Virginia taxable income does not include a positive amount of income from business subject to the business and occupation tax.

8.1.2.5 In determining the income from a business or occupation which is subject to the business and occupation tax, the net income from such business or occupation, as reported in federal adjusted gross income without reference to the component items of income from the business or occupation, shall be considered prima facie evidence of the income of the subject business. For purposes of determining net income, gross income may include, but is not limited to: gross income from sales, interest income, bad debt recoveries, rents and royalties, earned discounts and miscellaneous income.

8.1.2.5.a Salaries which have been deducted as a business expense for federal income tax purposes, in determining net income from the business or occupation subject to the business and occupation tax, shall not thereafter be included as income from the business in determining the individual's business and occupation tax credit.

8.1.2.6 Partnerships. - In determining the income from a partnership which is subject to the business and occupation tax, the salaries paid to the partners which are not considered a draw against the distributive share of profits shall be deducted in arriving at the net income of the partnership, and such salaries shall not be included in the basis for computing the business and occupation tax credit of the individual partner. If the salary is not a guaranteed salary, provided in the articles of partnership, the Tax Commissioner will accept as prima facie evidence that the salary is considered a draw against distributive share of profits; therefore, the salary will be allowed in the basis for computing the business and occupation tax credit of the individual partner.

8.1.2.7 S Corporations. - In determining the income from S corporations which are subject to the business and occupation tax, salaries paid to stockholders shall be deducted in arriving at the net income of such corporations. The taxpayer who is a stockholder and receives a salary from such corporation is not permitted to use said salary in the computation of his or her business and occupation tax credit on his or her West Virginia Personal Income Tax Return because such salaries are not income of S corporations but are expenses of S corporations deductible in arriving at their net income.

8.1.2.7.a Example 1. - Mr. X is a stockholder in an S corporation and is also an employee of the corporation. Mr. X receives a salary of six thousand dollars (\$6,000) from the corporation. At the end of the corporation's taxable year, Mr. X receives two thousand dollars (\$2,000) as his distributive share of profits from the corporation. In computing his business and occupation tax credit on his West Virginia Personal Income Tax

Return, Mr. X is permitted to use only his distributive share of profits, two thousand dollars (\$2,000), as his basis.

8.2 Carrier Income Tax Credit.-If a taxpayer is subject to the carrier income tax imposed under West Virginia Code § 11-12A-1 et seq., said taxpayer may be entitled to a credit against his West Virginia personal income tax. The amount of this credit shall not exceed the amount of personal income tax attributable to West Virginia taxable income for the taxable year derived from the activities subjected to such other tax. If the West Virginia taxable income of the taxpayer includes income from a partnership, estate, trust or S corporation, a part of any carrier income tax liability of the partnership, estate, trust or S corporation shall be allowed in computing the credit in an amount proportionate to the income of such partnership, estate, trust or S corporation which is included in the taxpayer's West Virginia taxable income.

8.2.1 The West Virginia Carrier Income Tax was repealed effective July 1, 1987. A carrier income tax credit may, however, still be applicable in cases where said tax is paid subsequent to July 1, 1987.

8.2.2 Credit Limitations.-The provisions regarding limitations on the business and occupation tax credit which are set forth under Subsection 8.1.2 of this regulation are equally applicable to the carrier income tax credit.

8.3 Severance Tax Credit.-If a taxpayer is subject to the severance tax imposed under West Virginia Code § 11-13A-1 et seq., said taxpayer may be entitled to a credit against his West Virginia personal income tax. The amount of this credit shall not exceed the amount of personal income tax attributable to West Virginia taxable income for the taxable year derived from the activities subjected to such other tax. If the West Virginia taxable income of the taxpayer includes income from a partnership, estate, trust or S corporation, a part of any severance tax liability of the partnership, estate, trust or S corporation shall be allowed in computing the credit in an amount proportionate to the income of such partnership, estate, trust or S corporation which is included in the taxpayer's West Virginia taxable income.

8.3.1 Credit Limitations.-The provisions regarding limitations on the business and occupation tax credit which are set forth under Subsection 8.1.2 of this regulation are equally applicable to the severance tax credit.

§ 110-21-9. Meaning Of Terms.

9.1 Any term used in the West Virginia Personal Income Tax Act and these regulations shall have the same meaning as when used in a comparable context in the laws of the United States relating to personal income taxes, unless a different meaning is clearly required.

9.2 Any reference in the West Virginia Personal Income Tax Act and these regulations to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1986, as amended, and such other provisions of the laws of the United States which relate to the determination of income for federal income tax purposes. See West Virginia Code § 11-21-9 for the most recent updating of terms used in Article 21 to those used in the Internal Revenue Code.

9.3 Only to the extent provided under Article 21 shall amendments made to the laws of the United States be given effect in determining the taxes imposed under the West Virginia Personal Income Tax Act. No amendment made to the laws of the United States relating to personal income taxes on or after January 1, 1988, shall be given effect, until such time as the provisions of Article 21 are amended accordingly.

9.3.1 Example.-If on February 6, 1988, Congress passed a law making life insurance proceeds payable to a named beneficiary subject to federal income tax, the law will have no effect on the West Virginia Personal Income Tax Act for tax year 1988 and subsequent tax years until such time as Article 21 has been amended accordingly.

§ 110-21-9a. Pledge Of Credit Or Collateral By Endorser, Guarantor Or Accommodator Not To Constitute Investment In Borrower.

9a.1 Any person pledging his credit or collateral as an endorser, guarantor, or accommodator to another person or corporation for the purpose of assisting another in obtaining credit shall not be, or construed to be, an investor in said borrower as to the amount so borrowed, nor shall any payments by said borrower on the indebtedness be, or construed to be, dividend to the endorser, guarantor or accommodator.

§ 110-21-10. Reserved For Future Use.

PART II. RESIDENTS

§ 110-21-11. West Virginia Taxable Income Of Resident Individual.

11.1 General.-The tax rates referred to in Section 4 of these regulations are applied against the taxpayer's West

Virginia taxable income. The taxpayer's federal adjusted gross income is the actual starting point each year for computing the West Virginia taxable income on which his West Virginia personal income tax liability is based. The West Virginia taxable income of a resident individual means his federal adjusted gross income with the modifications stated in Sections 12, 12a and 12b of these regulations, less his West Virginia personal exemptions.

#### 11.2 West Virginia Taxable Income Of Husband And Wife.

11.2.1 If a husband and wife file separate federal income tax returns for a particular year, they must also file separate West Virginia income tax returns for that year.

11.2.2 If a husband and wife file a joint federal income tax return for a particular year, or if neither files a federal return:

(1) They may file a joint West Virginia income tax return, or

(2) They may file separate West Virginia income tax returns; Provided, that they comply with the requirements of the Tax Commissioner in setting forth information on a single form or on separate forms as the Tax Commissioner may require.

11.2.3 If both spouses are residents of West Virginia and elect to file separate West Virginia returns, each must determine his or her West Virginia income and exemptions as if his or her total federal income and exemptions had been determined separately.

#### 11.3 West Virginia Taxable Income Of Husband And Wife Having Different Resident Status.

11.3.1 If either the husband or wife is a resident of West Virginia and the other is a nonresident, they must file separate returns unless they file a joint federal return and elect to file a joint State return, computing their joint West Virginia taxable income as if both spouses were residents of West Virginia.

11.3.1.1 Subsection 11.3.1 applies only in those cases where one spouse was a resident of West Virginia for the entire taxable year and the other spouse was a nonresident for the entire taxable year.

11.3.1.2 Subsection 11.3.1 does not apply in cases where either the husband or wife separately changed his or her residence during the taxable year. (For change of resident

status during the taxable year, see Section 54 of these regulations).

11.3.1.3 Where an election to file a joint return is made under Subsection 11.3.1, the spouses shall file a resident West Virginia Personal Income Tax Return and will be treated in all respects as residents for purposes of West Virginia's personal income tax. Thus, said spouses are entitled to claim the number and amount of personal exemptions allowed resident individuals as set forth under West Virginia Code § 11-21-16 and Section 16 of these regulations and any applicable credit for personal income tax paid another state as provided in West Virginia Code § 11-21-20 and Section 20 of these regulations.

§ 110-21-12. West Virginia Adjusted Gross Income Of Resident Individual.

12.1 General.-The West Virginia adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year with certain modifications. These modifications relate to items which are treated differently under the West Virginia Personal Income Tax Act than under the United States Internal Revenue Code of 1986, as amended. Subsection 12.2 below lists the modifications which increase West Virginia adjusted gross income in comparison with federal adjusted gross income, while Subsection 12.3 below lists the modification items which in such comparison reduce the West Virginia adjusted gross income. When the net amount of all applicable modifications, as set forth under West Virginia Code § 11-21-12 and § 11-21-12a and Section 12b of these regulations, is added to or subtracted from federal adjusted gross income, the result is the taxpayer's West Virginia adjusted gross income.

12.1.1 Depreciation.-West Virginia follows the federal rules of depreciation; therefore, the depreciation of property for federal income tax purposes by methods permitted under the laws of the United States relating to the determination of income will be reflected automatically in West Virginia adjusted gross income, without modification, to the extent reflected in the taxpayer's federal adjusted gross income.

12.2 Modifications Increasing Federal Adjusted Gross Income.-The following items are to be added to federal adjusted gross income, unless already included therein, in arriving at the West Virginia adjusted gross income of a resident individual:

12.2.1 Interest income on obligations of any state other than the State of West Virginia, or interest income on obligations of a political subdivision of any state other than

the State of West Virginia unless created by compact or agreement to which West Virginia is a party.

12.2.1.1 The amount to be added to federal adjusted gross income for the purposes of Subsection 12.2.1 is the gross amount of such interest, without reduction for incidental expenses incurred by the taxpayer, including, but not limited to custodian fees, investment advisory fees and other related expenses.

12.2.1.2 Example.-The gross amount of interest received by a resident individual on bonds of the State of California must be added to his federal adjusted gross income in arriving at his West Virginia adjusted gross income because this interest is subject to West Virginia income taxation but not to income taxation under federal law. If a resident individual receives interest income on obligations of the State of West Virginia, the interest is not subject to West Virginia income taxation because interest income on West Virginia obligations is specifically excluded from taxation by the provisions of the West Virginia Personal Income Tax Act.

12.2.1.3 Interest On Zero Coupon Bonds.-The amount to be added to federal adjusted gross income in the case of a zero coupon bond issued by any state other than the State of West Virginia, or interest on obligations of a political subdivision of any state other than the State of West Virginia shall be accrued ratably over the time period to maturity.

12.2.1.3.a Example.-X, a resident of Elkins, West Virginia, purchases zero coupon public purpose bonds issued by the City of Columbus, Ohio. These bonds were purchased for fifteen hundred dollars (\$1500) and mature in twenty (20) years at which time these bonds will pay their face value of four thousand dollars (\$4000) to the investor. These bonds are tax-exempt for federal income tax purposes. For purposes of West Virginia's personal income tax, the holder of these bonds must recognize interest income through the following formula:

$$\frac{\text{Face Value Less Purchase Price}}{\text{Years To Maturity}}$$

Thus, X will have an increasing modification of one hundred twenty-five dollars (\$125)  $(\$4,000 - \$1,500) \div 20 = \$125$ .

12.2.2 Interest or dividend income on obligations or securities of any authority, commission or instrumentality of the United States, which the laws of the United States exempt from federal income tax but not from state income taxes.

12.2.3 Interest on indebtedness incurred or continued to purchase or carry obligations or securities the income from which is exempt from West Virginia personal income tax, to the extent deductible in determining federal adjusted gross income.

12.2.4 The amount of a lump sum distribution received after December 31, 1989 for which the taxpayer has elected under Section 402(e) of the Internal Revenue Code of 1986, as amended, to be separately taxed for federal income tax purposes.

12.3 Modifications Reducing Federal Adjusted Gross Income.-The following items are to be subtracted from federal adjusted gross income in order to properly compute the West Virginia adjusted gross income of a resident individual:

12.3.1 Interest income on obligations of the United States and its possessions, to the extent includible in gross income for federal income tax purposes.

12.3.1.1 Example.-Interest on United States savings bonds is subject to federal income tax but not to state income tax. Therefore, the amount of such interest should be subtracted from federal adjusted gross income in computing West Virginia adjusted gross income.

12.3.2 Interest or dividend income on obligations or securities of any authority, commission or instrumentality of the United States or of the State of West Virginia to the extent includible in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States or of the State of West Virginia, including federal interest or dividends paid to shareholders of a regulated investment company under Section 852 of the Internal Revenue Code.

12.3.2.1 Example.-Dividend income received from Federal Reserve Banks for stock issued before March 28, 1942 should be subtracted from federal adjusted gross income. Also, interest on obligations of the Home Owner's Loan Corporation should be subtracted from federal adjusted gross income as a modification item in computing West Virginia adjusted gross income of a resident individual because an Act of Congress exempts this interest from state income taxation but not from federal income taxation. However, interest income received from a Federal Savings and Loan Association is not a proper modification and is taxable by West Virginia.

12.3.3 The amount of any refund or credit for overpayment of income taxes imposed by West Virginia, or any

other taxing jurisdiction, to the extent properly included in gross income for federal income tax purposes.

12.3.3.1 This modification applies to any refund of income taxes which was actually included in federal adjusted gross income, whether the refund represented West Virginia income taxes, or the income taxes of another state, a political subdivision of any state or any foreign government.

12.3.3.2 This modification does not include any portion of the total refund which represents interest received. Such interest whether received in connection with a state, federal or other tax refund, is not exempt from tax because it is paid on a claim against the particular government, rather than paid on an obligation thereof arising from the exercise of its borrowing powers.

12.3.4 To the extent includible in gross income for federal income tax purposes, the first (1st) two thousand dollars (\$2,000) of annuities, retirement allowances, returns of contributions and any other benefit received under the West Virginia Public Employees Retirement System, the West Virginia State Teachers Retirement System, all forms of military retirement, including regular armed forces, reserves and national guard and any federal retirement system to which Title 4 U.S.C. § 111 is applicable, including survivorship annuities derived from any of the foregoing.

12.3.5 To the extent includible in gross income for federal income tax purposes, all retirement income received in the form of pensions and annuities under any West Virginia police, West Virginia firemen's retirement system or the West Virginia Department of Public Safety Death, Disability and Retirement fund, including any survivorship annuities derived from any of the foregoing.

12.3.6 Federal adjusted gross income in the amount of eight thousand dollars (\$8,000) received from any source by any person who has obtained the age of sixty-five (65) on or before the last day of the taxable year or by any person certified by proper authority as permanently and totally disabled, regardless of age, on or before the last day of the taxable year, to the extent includible in federal adjusted gross income for federal tax purposes: Provided, That if a person has a medical certification from a prior year and is still permanently and totally disabled, the Tax Commissioner shall accept as proof of disability either a copy of the original medical certification or a copy of the form filed for the federal disability income tax exclusion.

12.3.6.1 Limitations On Application Of Subsection 12.3.6 Modification.-No eight thousand (8,000) dollar deduction for having attained the age of sixty-five (65), or for disability, shall be allowed where any one or combination of the item modifications set forth in the following Subsections 12.3.6.1.a through 12.3.6.1.d total eight thousand dollars (\$8,000) or more per person. Where the total of the item modifications set forth in the following Subsections 12.3.6.1.a through 12.3.6.1.d is less than eight thousand dollars (\$8,000) per person, the total deduction allowed for all gross income received by such person for age, or disability, shall be limited to the difference between eight thousand dollars (\$8,000) and the sum total of the specified item modifications.

12.3.6.1.a The modification for interest income on obligations of the United States and its possessions as detailed under Subsection 12.3.1 of this regulation.

12.3.6.1.b The modification for interest or dividend income on obligations or securities of any authority, commission or instrumentality of the United States, or of the State of West Virginia, as detailed under Subsection 12.3.2 of this regulation.

12.3.6.1.c The two thousand (2,000) dollar modification for annuities, retirement allowances, returns of contributions and any other benefit received under the West Virginia Public Employees Retirement System, the West Virginia State Teachers Retirement System, all forms of military retirement and any federal retirement system to which Title 4 U.S.C. § 111 is applicable, including survivorship annuities derived from any of the foregoing, as detailed under Subsection 12.3.4 of this regulation.

12.3.6.1.d The modification for all retirement income received in the form of pensions and annuities under any West Virginia police or firemen's retirement system or the West Virginia Department of Public Safety Death, Disability and Retirement Fund, including survivorship annuities derived from any of the foregoing, as detailed under Subsection 12.3.5 of this regulation.

12.3.6.2 Examples Of Limitations On Application Of Subsection 12.3.6 Modification.

Example 1.-The taxpayer, a resident of West Virginia for income tax purposes, is a retired police officer, sixty-nine (69) years of age, who, during tax year 1989, received a twelve thousand (12,000) dollar pension from a West Virginia police retirement system. This taxpayer is entitled to exclude his total pension income in determining his West Virginia

adjusted gross income pursuant to West Virginia Code § 11-21-12(c)(6) and Subsection 12.3.5 of this regulation. Because the taxpayer's retirement income exceeds eight thousand dollars (\$8,000), he is not permitted any decreasing modification for having attained the age of sixty-five (65).

Example 2.-The taxpayer, a resident of West Virginia for income tax purposes, is a retired teacher who qualifies as permanently and totally disabled. This taxpayer's income for tax year 1989 consists of twelve thousand dollars (\$12,000) in retirement income from the West Virginia State Teachers Retirement System, and three thousand dollars (\$3,000) in interest income from United States Savings Bonds. In computing this taxpayer's West Virginia adjusted gross income two thousand dollars (\$2,000) of the twelve thousand (12,000) dollar teachers retirement system income will be excluded pursuant to West Virginia Code § 11-21-12(c)(5) and Subsection 12.3.4 of this regulation and all of the three thousand dollars (\$3,000) of interest income will be excluded pursuant to Subsection 12.3.2 of this regulation. Because this taxpayer is disabled, he is potentially entitled to modify his adjusted gross income by eight thousand dollars (\$8,000). The amount of the decreasing modification for disability is, however, restricted for this taxpayer by the application of the limitation set forth under Subsection 12.3.6.1 of this regulation. Therefore, the taxpayer's disability modification is three thousand dollars (\$3,000) because this is the difference between eight thousand dollars (\$8,000) and the sum of the modifications for retirement income and interest income.

12.3.7 Federal adjusted gross income in the amount of eight thousand dollars (\$8,000) received from any source by the surviving spouse of any person who had attained the age of sixty-five (65) or who had been certified as permanently and totally disabled to the extent includible in federal adjusted gross income for federal income tax purposes.

12.3.7.1 Limitations On Application Of Subsection 12.3.7 Modification.-No eight thousand (8,000) dollar deduction for being the surviving spouse of a person who had attained the age of sixty-five (65) or who had been qualified as disabled shall be allowed where any one or combination of the item modifications set forth in the following Subsections 12.3.7.1.a through 12.3.7.1.e total eight thousand dollars (\$8,000) or more. Where the total of the item modifications set forth in the following Subsections 12.3.7.1.a through 12.3.7.1.e is less than eight thousand dollars (\$8,000) per person, the total deduction allowed for all gross income received by such surviving spouse shall be limited to the difference between eight thousand dollars (\$8,000) and the sum of the specified item modifications.

12.3.7.1.a The modification for interest income on obligations of the United States and its possessions as detailed under Subsection 12.3.1 of this regulation.

12.3.7.1.b The modification for interest or dividend income on obligations or securities of any authority, commission, or instrumentality of the United States, or of the State of West Virginia, as detailed under Subsection 12.3.2 of this regulation.

12.3.7.1.c The two thousand (2,000) dollar modification for annuities, retirement allowances, returns of contributions and any other benefit received under the West Virginia Public Employees Retirement System, the West Virginia State Teachers Retirement System, all forms of military retirement and any federal retirement system to which Title 4 U.S.C. § 111 is applicable, including survivorship annuities derived from any of the foregoing as detailed under Subsection 12.3.4 of this regulation.

12.3.7.1.d The modification for all retirement income received in the form of pensions and annuities under any West Virginia police or firemen's retirement system or the West Virginia Department of Public Safety Death, Disability and Retirement Fund, including survivorship annuities derived from any of the foregoing, as detailed under Subsection 12.3.5 of this regulation.

12.3.7.1.e The eight thousand (8,000) dollar modification for any person who has attained the age of sixty-five (65) or qualified as disabled as detailed under Subsection 12.3.6 of this regulation.

12.3.7.2 Surviving Spouse Defined.-For purposes of West Virginia Code § 11-21-12 and Section 12 of these regulations, surviving spouse means a taxpayer whose spouse died during the taxable year prior to the taxable year for which the annual return is being filed, and who has not remarried at any time before the end of the taxable year for which the annual return is being filed.

12.3.7.2.a During the tax year in which the death of a spouse occurs, either a joint income tax return or separate income tax returns will be filed, and any applicable modifications to be claimed will not be affected by the death of the spouse.

12.3.7.2.b The surviving spouse modification is a one time modification which is to be claimed on the annual income tax return in the year following the year in which the death of the spouse occurs.

12.3.7.2.c No modification is permitted under Subsection 12.3.7 of this regulation where a spouse remarries at any time prior to December 31 of the tax year in which the surviving spouse modification may be claimed.

12.3.7.3 Examples Of Limitations On Application Of Surviving Spouse Modification.

Example 1.-The taxpayer, a resident of West Virginia for income tax purposes, is a surviving spouse (as defined in Subsection 12.3.7.2) of a person who had attained the age of sixty-five (65). This taxpayer's income for tax year 1989, the year in which the one time surviving spouse modification is applicable, consists of a survivorship annuity in the amount of nine thousand dollars (\$9,000) from a West Virginia firemen's retirement system and wages in the amount of twelve thousand dollars (\$12,000). This taxpayer is entitled to exclude the total amount of the West Virginia firemen's retirement system survivorship annuity in determining her West Virginia adjusted gross income pursuant to West Virginia Code § 11-21-12(c)(6) and Subsection 12.3.5 of this regulation. Because the taxpayer's decreasing modification for the survivorship annuity exceeds eight thousand dollars (\$8,000), no modification is permitted for being the surviving spouse of a person who had attained the age of sixty-five (65).

Example 2.-The taxpayer, a resident of West Virginia for income tax purposes, is a surviving spouse (as defined in Subsection 12.3.7.2) of a person who had been certified as permanently and totally disabled. This taxpayer's income for tax year 1989, the year in which the one time surviving spouse modification is applicable, consists of thirty thousand dollars (\$30,000) in wages and two thousand dollars (\$2,000) of interest income from United States Savings Bonds. In computing West Virginia adjusted gross income, a two thousand (2,000) dollar decreasing modification will be made pursuant to Subsection 12.3.1 of this regulation for the interest income. Thus, the taxpayer is entitled to a six thousand (6,000) dollar decreasing modification for being the surviving spouse of a disabled person because this is the difference between eight thousand dollars (\$8,000) and the sum of the decreasing modification for interest income on obligations of the United States.

12.3.8 The amount of any lottery prize awarded by the West Virginia State Lottery Commission to the extent properly included in gross income for federal income tax purposes.

12.3.9 Any other income which West Virginia is prohibited from taxing under the laws of the United States.

12.4 Modification For West Virginia Fiduciary Adjustment.-Where a resident individual is a beneficiary of an estate or trust, his federal adjusted gross income shall be increased or decreased (as the case may be) by his share of the West Virginia fiduciary adjustment applicable to the estate or trust.

12.4.1 This fiduciary adjustment is the net amount of modifications relating to estate or trust items of income, gain, loss or deduction as computed by the fiduciary on the return for the estate or trust. The fiduciary is responsible for allocating to each beneficiary his proportionate share of the fiduciary adjustment. (See Section 19 of these regulations).

12.4.2 Each beneficiary, on his individual West Virginia Personal Income Tax Return is required to apply his share of the fiduciary adjustment as a modification of his federal adjusted gross income in order to determine his West Virginia adjusted gross income.

12.5 Partners And S Corporation Shareholders.-For the amounts of modifications to be made by a resident partner or resident S corporation shareholder which relate to items of income, gain, loss or deduction of a partnership or S corporation in determining West Virginia adjusted gross income, see Sections 17 and 17a of these regulations.

12.6 Husband And Wife.-Where a husband and wife determine their federal income tax liability on a joint return but determine their West Virginia income tax liability for a particular tax year on separate returns, they shall determine their West Virginia adjusted gross incomes in the same manner as if the federal adjusted gross income of each had been determined on separate federal returns.

§ 110-21-12a. Additional Modification Reducing Federal Adjusted Gross Income.

12a.1 In addition to amounts authorized to be subtracted from federal adjusted gross income pursuant to West Virginia Code § 11-21-12(c), any payment made under a tuition prepayment contract or tuition trust account, as provided under West Virginia Code § 18-30-14, shall also be allowed as a modification reducing federal adjusted gross income to the extent that the amount of such payment is included therein.

12a.1.1 Under West Virginia Code §§ 11-21-12a and 18-30-14, a purchaser is entitled to a modification decreasing federal adjusted gross income for State personal income tax purposes for the following payments made by such purchaser in the tax year:

(1) The amount of payment made under a tuition prepayment contract or tuition trust account contract, or both; and

(2) The amount of payment made under a contract with a private sector investment manager, broker-dealer or agent, approved by the Securities Division of the West Virginia State Auditor or the federal Securities and Exchange Commission, for the private placement of contracts under Article 30, Chapter 18 of the West Virginia Code, when such contract has been certified and approved by the West Virginia Education Tuition Trust Board of Directors.

12a.1.2 The West Virginia Higher Education Tuition Trust is not authorized to enter into any tuition prepayment contracts or tuition trust account contracts until such time as it has received a ruling or opinion from the Internal Revenue Service regarding the federal tax consequences of any benefits or refunds received from the Trust under the applicable contract. In the event that the Internal Revenue Service determines that any benefits or refunds received from the Trust arising from either type of contract must be included in federal adjusted gross income and thus subject to federal taxation, such benefits and refunds will likewise be subject to State personal income taxation. Payments, however, made to the Trust are exempt from State personal income taxation as provided under Subsection 12a.1.1 of this regulation.

**§ 110-21-12b. Modification For The Purchase Of Revenue Bonds Under An Individual Higher Education Savings Plan Program.**

12b.1 Pursuant to West Virginia Code § 18-9D-5, the State School Building Authority is authorized to offer to the general public one or more individual higher education savings plan programs. The amount which an individual invests during his or her taxable year in the purchase of revenue bonds issued under West Virginia Code § 18-9D-5 shall be allowed as a modification decreasing federal adjusted gross income, to the extent such amount is included therein, in order to arrive at West Virginia taxable income, except as provided under Subsection 12b.1.2.

12b.1.1 The interest which an individual earns on revenue bonds issued under West Virginia Code § 18-9D-5 shall not be subject to the imposition of personal income tax under Article 21, Chapter 11 of the West Virginia Code, except as provided in Subsection 12b.1.2.

12b.1.2 If the owner of a bond purchased under West Virginia Code § 18-9D-5 sells such bond during a taxable year and does not spend the entire amount for tuition and fees, books, reasonable room and board, and child care to attend an

institution which is accredited to award higher education degrees by the West Virginia Board of Regents, or any successor thereto, or by its equivalent in another state, the proceeds of the sale not so spent shall be taxed under Article 21, Chapter 11 of the West Virginia Code, by application of the highest marginal rate applicable to the taxpayer to the amount not so spent.

12b.1.2.1 Penalty.-Where the owner of a bond purchased under West Virginia Code § 18-9D-5 sells such bond and does not spend the entire amount for the purposes set forth in Subsection 12b.1.2. of this regulation, there is imposed, in addition to any personal income tax otherwise due, a penalty equal to ten percent (10%) of the tax due.

12b.1.2.1.a This penalty may be waived by the Tax Commissioner if the taxpayer shows that any failure to spend the sale proceeds of the bond in accordance with Subsection 12b.1.2. was due to reasonable cause and not due to willful neglect.

12b.1.3 The amount of tax and penalty, where applicable, shall be due and payable on the fifteenth (15th) day of the fourth (4th) month of the taxable year immediately succeeding the taxable year in which the bond was sold.

12b.2 Reports.-The West Virginia School Building Authority and the trustee of an individual higher education savings plan program shall make such reports regarding such bonds to the Tax Commissioner and to the individuals of record who own the bonds with respect to bond principal and interest (and the years to which they relate) and such other matters as the Tax Commissioner may require. The reports required under West Virginia Code § 18-9D-5(f) shall be filed with the Tax Commissioner at least annually, at such time and in such manner as the Tax Commissioner may require.

§ 110-21-13. West Virginia Deduction Of Resident Individual Abolished.-The West Virginia Personal Income Tax Act, as set forth under West Virginia Code § 11-21-1 et seq., contains no provision for the allowance of either a standard deduction or itemized deductions for a resident individual.

§§ 110-21-14 to 110-21-15. Reserved For Future Use.

§ 110-21-16. West Virginia Personal Exemptions Of A Resident Individual.

16.1 In General.-A resident individual is allowed a West Virginia exemption of two thousand dollars (\$2,000) for each exemption for which said individual is entitled to a deduction for the taxable year for federal income tax purposes. The number

of personal exemptions to be claimed on a resident individual's State income tax return shall be the same as the number of personal exemptions claimed on his or her federal income tax return unless otherwise provided in this regulation.

#### 16.2 Husband And Wife.

16.2.1 Where a husband and wife determine their federal income tax liability by filing a joint federal return and also determine their West Virginia income tax liability by filing a joint State return, they shall be entitled to claim the same number of personal exemptions on their joint State return as claimed on their joint federal return for the taxable year.

16.2.2 Where a husband and wife determine their federal income tax liability by filing separate federal returns and also determine their West Virginia income tax liability by filing separate State returns, each spouse shall be entitled to claim the same number of personal exemptions on his or her separate State return as claimed on the respective separate federal return for the taxable year.

16.2.3 Where a husband and wife determine their federal income tax liability by filing a joint federal return but determine their West Virginia income tax liability by filing separate State returns, each spouse shall be entitled to claim a West Virginia personal exemption for each federal exemption to which he or she would have been entitled to claim had their federal income taxes been determined on separate federal returns for the taxable year.

16.2.4 The amount of each West Virginia exemption allowed under Subsections 16.2.1, 16.2.2 or 16.2.3 shall be two thousand dollars (\$2,000).

#### 16.3 Surviving Spouse.

16.3.1 Additional Exemption.-A surviving spouse shall be allowed one additional exemption of two thousand dollars (\$2,000) for each of the two (2) taxable years which follow the year in which the death of the spouse occurred.

16.3.2 Surviving Spouse Defined.-For purposes of West Virginia Code § 11-21-16 and this regulation surviving spouse means a taxpayer whose spouse died during the taxable year prior to the taxable year for which the annual return is being filed and who has not remarried at any time before the end of the taxable year for which the annual return is being filed.

16.3.3 Example.-Taxpayer's spouse dies on January 15, 1988. As of December 31, 1989, the taxpayer has not

remarried. For tax year 1989 this taxpayer is entitled to claim an additional exemption as provided under Subsection 16.3.1. This additional exemption will also be available for tax year 1990 provided that this taxpayer has not remarried as of December 31, 1990.

16.4 \$500 Exemption For Certain Dependents.-Notwithstanding any provision in this regulation to the contrary, a resident individual whose exemption for federal income tax purposes is zero by virtue of Section 151(d)(2) of the Internal Revenue Code of 1986, as amended, is entitled to claim a single West Virginia exemption in the amount of five hundred dollars (\$500).

16.4.1 As a general rule, a resident individual is entitled to claim the same number of exemptions on his or her State income tax return as claimed on the federal income tax return for the taxable year. Under Section 151(d)(2) of the Internal Revenue Code of 1986, as amended, an individual with respect to whom a deduction is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins is prohibited from claiming an exemption for himself or herself on his or her federal return. Where Section 151(d)(2) of the Internal Revenue Code is applicable, a West Virginia exemption of five hundred dollars (\$500) shall be allowed.

**§ 110-21-17. Resident Partners.**

17.1 Definition.-For purposes of Article 21, Chapter 11 of the Code of West Virginia, 1931, as amended, a resident partner with respect to a taxable year is an individual, trust, or estate which is domiciled in the State of West Virginia, and otherwise qualifies both as a resident individual under West Virginia Code § 11-21-7 and is a partner in a partnership.

17.2 Partner's Modifications.-In determining the West Virginia adjusted gross income of a resident partner, any modification referred to in West Virginia Code § 11-21-12 and in Section 12 of these regulations which relates to a partnership item of income, gain, loss or deduction must be made with respect to the distributive share of the resident partner in such item as determined for federal tax purposes and filed upon such partner's federal income tax return for the tax year. Such modification, if applicable, must be made regardless of whether in the partner's federal return the partnership item is reflected on his distributive share of partnership income or is one of the items separately reported.

17.2.1 The modifications covered by this regulation do not apply to any item which, for federal income tax purposes, is not treated as a partnership item.

17.2.2 In determining West Virginia adjusted gross income, a resident partner combines the modification relating to his share of any partnership item with the modification relating to any similar item from sources other than the partnership. For example, if a portion of the partnership income constitutes interest on bonds of another state, and the nonpartnership income of a resident member of the partnership also includes similar bond interest, the resident partner must make an increasing modification to his federal adjusted gross income for both his distributive share of the partnership income from such bonds and the interest from similar bonds which he received individually.

17.2.3 If a modification relates to an item that is not taken into account for federal income tax purposes, and consequently does not appear in federal adjusted gross income, such as interest on bonds of another state, each partner's modification relating to that item is governed by the rules of this Subsection. In such cases, the partner's modification is determined by his distributive share of the partnership's ordinary income or loss.

17.2.3.1 Example.-X and Y are partners in a motorcycle sales and repair business. The Articles of Partnership provide that X is entitled to seventy-five percent (75%) and Y is entitled to twenty-five percent (25%) of the partnership profits or losses. In 1989, the partnership received four thousand dollars (\$4,000) of interest income on United States obligations (Series E Bonds). This item is subject to a decreasing modification as such income is in federal adjusted gross income and is prohibited from being subjected to state income taxation by federal law. The amount of each partner's modification is computed by allowing seventy-five percent (75%) of the interest income to X and twenty-five percent (25%) to Y; therefore, the modification is to be distributed in the same proportion as is profit and loss. Each partner is entitled to his allocable share of the modification and claims the modification on his individual return. X will claim a three thousand (3,000) dollar decreasing modification on his West Virginia Personal Income Tax Return, and Y will claim a one thousand (1,000) dollar decreasing modification on his West Virginia Personal Income Tax Return.

17.2.4 The West Virginia Personal Income Tax Return provides the appropriate spaces to make the applicable additions and subtractions of modification items to or from federal adjusted gross income to arrive at an individual's West Virginia adjusted gross income.

17.3 Character Of Items.-In order that the modifications may be properly applied to partnership items of income, gain, loss or deduction, whenever applicable, each of such partnership items

shall have the same character for a partner for purposes of the West Virginia Personal Income Tax Act as that item did for that partner for federal income tax purposes. Where an item is not characterized for federal income tax purposes but is reflected in the computation of the income of the partnership, such item, if a gain or a loss, shall have the same character for a partner as if realized directly from the source from which realized by the partnership or, if an expense, incurred in the same manner as incurred by the partnership. If a partnership item is not required to be taken into account for federal tax purposes (such as interest on bonds of a state or of Puerto Rico), the character of the item for a partner for West Virginia income tax purposes is the same as if he, or she, had individually realized or incurred the item directly.

17.4 West Virginia Tax Avoidance Or Evasion Through Partnership Form Of Business.

17.4.1 If a partnership agreement provides for a special allocation among the partners of any item of partnership income, gain, loss or deduction, and federal law or regulations require that such provision with respect to partners' distributive shares be disregarded, for federal income tax purposes, because the principal purpose of such provision is the avoidance or evasion of federal income tax, as such special allocation otherwise lacks substantial economic effect as that term is defined and applied in Treasury Regulation § 1.704-1, each partner's distributive share of such item must be determined in accordance with his share of the partnership's ordinary income or loss as is determined for federal income tax purposes. This treatment and distribution of the item is reflected in each partner's federal adjusted gross income and is therefore already in his or her West Virginia adjusted gross income, even though in a particular case no West Virginia tax avoidance or evasion may be involved.

17.4.2 In certain cases, however, a provision for special allocation does not have as its principal purpose the avoidance or evasion of federal income tax, but has as its principal purpose the avoidance or evasion of West Virginia income tax. In such an instance, any such provision shall be disregarded and each partner's share of the pertinent item of partnership income, gain, loss or deduction shall be determined in accordance with his share of the partnership's ordinary income or loss.

17.4.3 Whether the principal purpose of a special allocation of an item is the avoidance or evasion of West Virginia income tax depends upon all surrounding facts and circumstances. Among the relevant circumstances to be considered are: whether the partnership, or a partner individually, has a

business purpose for the allocation; whether the allocation has "substantial economic effect", that is, whether the allocation may actually affect the dollar amount of the partner's shares of the total partnership income or loss independently of West Virginia income tax consequences; whether the related items of income, gain, loss or deduction from the same source are subject to the same allocation; whether the allocation was made without recognition of normal business factors and only after the amount of the specially allocated item could reasonably be estimated; the duration of the allocation; and the overall tax consequences of the allocation and any other factors from Treasury Regulation § 1.704-1.

17.4.4 Example.-A and B are equal partners in a cleaning business. However, the partnership agreement allocates to A, who is in a higher West Virginia income tax bracket than B, all interest on bonds of the State of West Virginia held by the partnership and allocates to B all interest on bonds of other states. The partnership agreement also provides that any difference in the amounts of such interest allocated to each partner is to be equalized out of other partnership income. Since the purpose and effect of this allocation is solely to reduce the West Virginia income tax of A without actually affecting the shares of A and B in partnership income, such allocation is not recognized. Accordingly, in determining their West Virginia adjusted gross income, A and B will each add to his federal adjusted gross income one-half ( $\frac{1}{2}$ ) of the interest from bonds of states other than West Virginia under Section 12 of these regulations.

§ 110-21-17a. Resident Shareholders Of S Corporations.

17a.1 Resident Shareholder Defined.-For purposes of Article 21, Chapter 11 of the Code of West Virginia, 1931, as amended, a resident shareholder is, for any taxable year, an individual, trust or estate which is domiciled in the State of West Virginia, and which qualifies as a resident individual under West Virginia Code § 11-21-7 and who is also a shareholder in a small business corporation for which a valid election under Section 1362 of the Internal Revenue Code is in effect for such year.

17a.2 S Corporation Shareholder's Modifications.-In determining West Virginia adjusted gross income and West Virginia taxable income of a resident S corporation shareholder any modification described in West Virginia Code § 11-21-12 (b), (c) or (d), which relates to an item of income, gain, loss or deduction shall be made in accordance with the S corporation shareholder's pro rata share, for federal income tax purposes, of the items to which the modifications relate. Where a shareholder's pro rata share of any such item is not required to

be taken into account separately for federal income tax purposes, the shareholder's pro rata share of such item shall be the pro rata share that such shareholder showed on his or her federal tax return for the tax year in question for S corporation taxable income or loss generally.

17a.2.1 Example.-Wilson is a shareholder in an S corporation, owning sixty percent (60%) of the outstanding shares. In 1989, the S corporation received one thousand dollars (\$1,000) interest income on United States obligations and five hundred dollars (\$500) interest income on West Virginia bonds. These items are subject to modification. The amount of Wilson's modification is computed by allowing him sixty percent (60%) of the fifteen hundred dollars (\$1,500) of the interest income. Each shareholder is entitled to his or her allocable share of modification based upon their ownership percentage.

17a.3 Character Of Items.-Each item of S corporation income, gain, loss or deduction has the same character for an S corporation shareholder on his or her West Virginia Personal Income Tax Return as that item did on such shareholder's federal income tax return for any given taxable year. Where an item is not characterized for federal income tax purposes, it shall have the same character for the S corporation shareholder as if realized by such shareholder directly from the source from which realized by the S corporation, or as if it was incurred by the shareholder in the same manner as incurred by the S corporation.

§ 110-21-18. West Virginia Taxable Income Of Resident Estate Or Trust.

18.1 General.-The income of a resident estate or trust is subject to taxation under the provisions of the West Virginia Personal Income Tax Act. The rates referred to in Subsection 4.1 of these regulations are to be applied against the taxable income of the estate or trust in determining the personal income tax liability of such estate or trust.

18.1.1 The West Virginia taxable income of a resident estate or trust means its federal taxable income as defined pursuant to the laws of the United States for the taxable year with certain modifications. Thus, the federal taxable income of the estate or trust is the starting point for computing the West Virginia taxable income. This method of computing the West Virginia taxable income of an estate or trust applies, for example, in:

(1) the computation of the West Virginia taxable income of an estate for the first taxable period thereof starting with the day following the decedent's death, and

(2) the computation of the West Virginia taxable income for the final taxable period of an estate or trust ending at the date of termination thereof.

18.1.1.1. The computation of the taxable income of a resident decedent on the final return ending with the date of his death is computed in the same manner as the taxable income of a resident individual.

18.2 Modification Of Federal Taxable Income.-In order to determine the West Virginia taxable income of a resident estate or trust, two (2) modifications must be made. These modifications are the exemption modification and the fiduciary adjustment.

18.2.1 Exemption Modification.-Each estate or trust is allowed a West Virginia exemption of six hundred dollars (\$600). An estate or trust is not allowed any exemption for dependents.

18.2.1.1 In computing the West Virginia taxable income of a resident estate or trust six hundred dollars (\$600) shall be subtracted from the estate's or trust's federal taxable income and there shall be added to the estate's or trust's federal taxable income the amount of its federal deduction for a personal exemption.

18.2.2 Fiduciary Adjustment.-The applicable modifications as described in Subsections 12.2 and 12.3 of these regulations relating to items of income, gain or deduction may be applicable against the federal taxable income of the estate or trust when computing its West Virginia taxable income. These modifications shall be first combined in a single net amount. This amount, which may be a positive or negative, constitutes the fiduciary adjustment. After this amount is computed, it is then allocated in the manner described under West Virginia Code § 11-21-19 and Section 19 of these regulations. The amount, which is allocable to the fiduciary, is added to or subtracted from the federal taxable income of the estate or trust (depending on whether it is a positive or negative number) to arrive at the West Virginia taxable income of such estate or trust.

§ 110-21-19. Share Of Resident Estate, Trust, Or Beneficiary In West Virginia Fiduciary Adjustment.

19.1 General.-Whenever a resident estate or trust realizes items of income or gain, or incurs items of loss or deduction, which give rise to one or more of the modifications described in Subsections 12.2 and 12.3 of these regulations, an adjustment must be made in order to determine the West Virginia taxable income of the resident estate or trust. An adjustment must also

be made in order to determine the West Virginia adjusted gross income of a resident beneficiary of any estate or trust in the amount of the share of each in the West Virginia fiduciary adjustment. For example, where an estate or trust receives interest on obligations of the United States, such interest is includible in federal gross income but is not subject to West Virginia personal income tax by reason of the modification provided under West Virginia Code § 11-21-12(c)(1). Where such modification is made, it becomes necessary to determine how much of the modification is to be taken into account in determining the West Virginia taxable income of the estate or trust taxable to the fiduciary and how much of the modification is to be allocated to the resident beneficiaries.

19.1.1 This regulation prescribes the methods to be employed in dividing among the fiduciary and the beneficiaries, on an equitable basis, the particular items of income, gain, loss and deduction which give rise to modifications for West Virginia personal income tax purposes.

19.1.2 These modifications are combined into a single net number. This number, which may be a negative or positive, is termed the "West Virginia Fiduciary Adjustment". After this number is computed, it is then divided among the fiduciary and the beneficiaries in the manner described in Subsection 19.3 of this regulation.

19.1.3 The share of a resident estate or trust in the West Virginia fiduciary adjustment is then added to or subtracted from the federal taxable income of the estate or trust in arriving at its West Virginia taxable income. Similarly, the share of a resident beneficiary in the West Virginia fiduciary adjustment is then added to or subtracted from his federal adjusted gross income in arriving at his West Virginia adjusted gross income.

19.1.4 A nonresident trust, estate or beneficiary must compute West Virginia taxable income in accordance with the provisions of West Virginia Code § 11-21-39 and Section 39 of these regulations.

19.2 Definition Of West Virginia Fiduciary Adjustment.-The West Virginia fiduciary adjustment is the net amount of the modifications described in Subsections 12.2 and 12.3 of these regulations which relate to items of income, gain, loss or deduction of the estate or trust.

19.2.1 Example.-A resident trust had the following modifications for 1988:

Additions:

(1) Interest income on bonds of the State of California. (See Subsection 12.2.1). . . \$2,000

Total Additions Modification. . . . . \$2,000

Subtractions:

(1) Interest income on United States Series E Savings Bonds. (See Subsection 12.3.1). . \$500

(2) Interest income on bonds of the State of West Virginia. (See Subsection 12.3.2). . \$200

Total Subtractions Modification. . . . . \$700

West Virginia Fiduciary Adjustment. . . . . \$1,300

19.2.1.1 Because the additions are in excess of the subtractions, the West Virginia fiduciary adjustment is a "positive number" and is allocated between the trust and its beneficiaries as provided in Subsections 19.3 or 19.4 of this regulation.

19.2.1.2 If, in the example above, the subtractions had exceeded the additions, the West Virginia fiduciary adjustment would be a negative number and would be similarly allocated.

19.3 Allocation Of West Virginia Fiduciary Adjustment Between The Trust And Its Beneficiaries.

19.3.1 In General.-As a general rule, the percentage share of each beneficiary and of a fiduciary of an estate or trust in the West Virginia fiduciary adjustment is equal to the percentage share of the beneficiary of the fiduciary in the federal distributable net income of the estate or trust. Exceptions to this general rule are set forth under Subsections 19.3.2 and 19.4 of this regulation.

19.3.1.1 Example.-The West Virginia fiduciary adjustment with respect to an estate is a positive number which equals one thousand dollars (\$1,000). The estate has federal distributable net income of five thousand dollars (\$5,000) and makes distributions of three thousand dollars (\$3,000) to A and fifteen hundred dollars (\$1,500) to B, both of whom are resident beneficiaries. The foregoing distributions are considered to be made from distributable net income for federal income tax purposes. The estate makes no other distributions during the taxable year. Since the distributions to A represent sixty percent (60%) of federal distributable net income, A is required to report sixty percent (60%) of the West Virginia fiduciary adjustment of the estate, or six hundred dollars (\$600) on his

West Virginia Personal Income Tax Return. Similarly, B is required to report thirty percent (30%) of the West Virginia fiduciary adjustment, or three hundred dollars (\$300), on his West Virginia return. The remaining ten percent (10%) of the West Virginia fiduciary adjustment, or one hundred dollars (\$100), is required to be reported by the fiduciary on the West Virginia Fiduciary Income Tax Return for the estate.

19.3.1.1.a If in the foregoing example, B was a nonresident beneficiary, the computation of the shares of the resident beneficiary A and of the fiduciary in the West Virginia fiduciary adjustment would remain the same, but the thirty percent (30%) allocated to B would be reported by him only to the extent provided in Section 39 of these regulations.

19.3.1.1.b Where the separate shares of beneficiaries of a trust are to be treated, for federal income tax purposes, as separate trusts for the purpose of determining the amount of federal distributable net income allocable to the beneficiary and to the fiduciary, such separate shares of federal distributable net income shall determine the percentage shares of the beneficiaries and of the fiduciary in the West Virginia fiduciary adjustment.

19.3.2 Special Rule Where Estate Or Trust Has No Federal Distributable Net Income. - If the federal distributable net income of an estate or trust for the taxable year is zero or a negative number, the share of each beneficiary in the West Virginia fiduciary adjustment is in proportion to his share of the income of the estate or trust for the taxable year, determined under local law or the governing instrument. The beneficiary's share of such income consists of the amount thereof which is required to be distributed to him during the taxable year, or which is distributed to him during the taxable year although not required to be distributed currently. Any balance of the West Virginia fiduciary adjustment not so allocable to the beneficiary is allocable to the estate or trust.

19.3.2.1 Examples.

Example 1. - A trust has income for trust accounting purposes of ten thousand dollars (\$10,000). The West Virginia fiduciary adjustment with respect to the trust is a "positive" number which equals five thousand dollars (\$5,000). The trust pays trustee's commissions and other expenses of a formal accounting chargeable to principal which, for the purpose of this example, are deductible for federal and West Virginia income tax purposes and have the effect of reducing federal distributable net income exactly to zero.

Under the trust instrument, four thousand dollars (\$4,000) of income is required to be distributed to A. An additional three thousand dollars (\$3,000) is paid to A, pursuant to the discretionary authority of the trustee out of the balance of the total income of ten thousand dollars (\$10,000); and the remaining three thousand dollars (\$3,000) is accumulated by the trust. A's seven thousand (7,000) dollar share is therefore seventy percent (70%) of the income for trust accounting purposes. Accordingly, A is required to add seventy percent (70%) of the West Virginia fiduciary adjustment of five thousand dollars (\$5,000), or thirty-five hundred dollars (\$3,500), to his federal adjusted gross income in determining his West Virginia adjusted gross income, as provided in Subsection 12.4. The remaining fifteen hundred dollars (\$1,500) is the trust's share in the West Virginia fiduciary adjustment, which is required to be added to the federal taxable income of the trust in determining its West Virginia taxable income, as provided under Subsection 18.2.

Example 2.—The facts are the same as in Example 1 except that the West Virginia fiduciary adjustment is a "negative" number which equals five thousand dollars (\$5,000). In computing his West Virginia adjusted gross income, the beneficiary is therefore permitted to subtract thirty-five hundred dollars (\$3,500) which is his share in the West Virginia fiduciary adjustment, from his federal adjusted gross income. The trust is permitted to subtract fifteen hundred dollars (\$1,500), which is its share in the West Virginia fiduciary adjustment, from its federal taxable income. In this particular case, the trust will derive no West Virginia taxable benefit from this subtraction except in a case where it has nondistributable capital gains or extraordinary dividends allocated to principal.

19.4 Alternative Apportionment Of West Virginia Fiduciary Adjustment Between The Estate Or Trust And Its Beneficiaries.—Where the methods provided under Subsection 19.3 will not result in a fair and equitable apportionment of the West Virginia fiduciary adjustment, the fiduciary may, upon application, adopt and use on a return for the taxable year of the estate or trust, any other method which is equitable, subject to such terms and conditions as the State Tax Commissioner may require.

19.4.1 No alternative method shall be approved which results in the inclusion in the West Virginia adjusted gross income of the beneficiary an amount greater than the amount of the trust income paid, credited, or required to be distributed to such beneficiary for the taxable year.

19.4.2 Any fiduciary whose alternative method of apportionment under West Virginia Code § 11-21-19(d) and this

regulation is approved, must attach to the West Virginia Fiduciary Income Tax Return for the particular year a signed statement containing a summary of the facts relied upon and used to support the position that the alternative allocation, rather than the allocation prescribed in Subsection 19.3 is fair and equitable.

§ 110-21-20. Credit For Income Tax Of Another State.

20.1 General.-A West Virginia resident may be allowed a credit against his West Virginia personal income tax for any personal income tax imposed for the taxable year by another state of the United States or the District of Columbia, upon income derived from sources within the other state or the District. Where a resident estate or trust receives income from another state of the United States or the District of Columbia, then the estate or trust is entitled to a similar credit, computed in the same manner and subject to the same exceptions and limitations as in the case of a resident individual. No credit, however, shall be allowed for personal income taxes imposed by a county, municipality, borough, township or any other political subdivision of a state or for any taxes other than personal income taxes.

20.1.1 The amount of the credit allowed under West Virginia Code § 11-21-20(a) and Subsection 20.1 above shall be determined in accordance with forms and instructions provided by the Tax Commissioner.

20.1.1.1 The Tax Commissioner may by instruction or otherwise require any resident individual, estate or trust to provide evidence, including but not limited to, a copy of the completed and signed nonresident personal income tax return filed with the other taxing jurisdiction for the taxable year, in order to establish that the individual, estate or trust is entitled to claim a credit under the provisions of West Virginia Code § 11-21-20.

20.1.1.1.a No credit shall be allowed under West Virginia Code § 11-21-20 unless the taxpayer has proved to the satisfaction of the Tax Commissioner the amount of tax paid to the other taxing jurisdiction. A Form W-2 indicating personal income tax withheld for another jurisdiction shall not be sufficient to establish credit under this Section. The mere fact that tax was withheld does not establish the fact that the taxpayer has been liable for the payment of tax to another jurisdiction. Therefore, when claiming a credit for taxes paid to another jurisdiction, the taxpayer must file with his West Virginia Personal Income Tax Return a signed copy of the personal income tax return filed with the other jurisdiction. Such return

shall be considered as prima facie evidence of the amount of personal income tax, if any, paid to the jurisdiction.

20.2 Limitation.—The amount of the credit allowed to a resident individual is subject to the following limitations:

(1) The credit allowed shall not exceed the amount of tax actually payable to the other jurisdiction on income also subject to West Virginia tax.

(2) The credit shall not exceed the percentage of the West Virginia personal income tax determined by dividing the portion of the taxpayer's West Virginia income subject to taxation in such other jurisdiction by the total amount of the taxpayer's West Virginia income. For example, if the total income of a resident was five thousand dollars (\$5,000) and two thousand dollars (\$2,000) thereof was subject to tax by another jurisdiction, the amount of the West Virginia tax credit would be limited to forty percent (40%) (\$2,000 divided by \$5,000) of the West Virginia tax.

(3) The credit shall not reduce the West Virginia personal income tax otherwise due to an amount less than would have been due if the income subject to taxation by the other jurisdiction were excluded from the taxpayer's West Virginia income. If in the example above, the West Virginia personal income tax would have been twenty dollars (\$20) less by eliminating the other jurisdiction's income from the income subject to West Virginia personal income tax, the credit shall be limited to twenty dollars (\$20).

20.3 Exception.—Where there exists a written reciprocal credit agreement between West Virginia and another taxing jurisdiction as authorized under the provisions of West Virginia Code § 11-21-40, no credit shall be allowed for a tax levied by such other jurisdiction against personal income taxes imposed by this State.

20.3.1 The resident credit allowed under West Virginia Code § 11-21-20(a) and Subsection 20.1 of this regulation is only applicable where another taxing jurisdiction has not by written agreement with this State consented to grant nonresidents a credit for personal income taxes imposed by the state of residence. In such cases, the taxpayer must look to West Virginia for the applicable credit and must claim the credit on the West Virginia Personal Income Tax Return.

20.3.1.1 Example.—X, a resident West Virginia taxpayer, earns income in Virginia during the taxable year. Presuming this State and Virginia are operating under a written reciprocal credit agreement whereby Virginia grants nonresidents

a credit for personal income tax imposed by the state of residence on the income earned in Virginia, this taxpayer who receives a credit by Virginia on his nonresident Virginia return for West Virginia personal income taxes paid is not entitled to a credit on his West Virginia resident return for personal income tax imposed by Virginia.

20.4 Definitions.-For purposes of West Virginia Code § 11-21-20 and this regulation, the terms and phrases set forth below shall have the following meaning.

20.4.1 "West Virginia income" means the West Virginia adjusted gross income of an individual or the amount of the income of an estate or trust determined as if the estate or trust were an individual computing his West Virginia adjusted gross income as described in Section 12 of these regulations.

20.4.2 "West Virginia tax" means the total tax payable on the West Virginia taxable income of the resident individual under the West Virginia Personal Income Tax Act excluding any amounts representing penalties or interests.

20.4.3 "Tax of the other jurisdiction" means the total tax imposed for the taxable year by a state of the United States other than West Virginia or by the District of Columbia as provided under Subsection 20.1 of this regulation, exclusive of any penalty or interest.

20.4.4 "Income derived from sources within" means compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction and income from the ownership of real or tangible personal property situated in the other jurisdiction but not income from intangibles, except where such income is from property employed in a business, trade or profession carried on in the other jurisdiction.

§ 110-21-21 to 110-21-30. Reserved For Future Use.

### PART III. NONRESIDENTS.

#### § 110-21-31. West Virginia Taxable Income Of Nonresident Individual.

31.1 General.-The West Virginia taxable income of a nonresident individual shall be his West Virginia adjusted gross income less his personal exemptions, said exemptions to be computed in accordance with West Virginia Code § 11-21-36 and Section 36 of these regulations.

31.1.1 The West Virginia taxable income of a nonresident individual includes those items of income, gain, loss and deduction included in his federal adjusted gross income which are derived from or connected with West Virginia sources.

31.1.2 The same tax rates which are applicable to a resident individual's taxable income are likewise applicable to a nonresident individual's taxable income.

### 31.2 Husband And Wife.

31.2.1 Where a husband and wife, both of whom are nonresidents, compute their federal taxable incomes separately by filing separate federal income tax returns, they shall also file separate West Virginia returns and compute their West Virginia taxable incomes separately for such year.

31.2.2 Where a husband and wife (both of whom are nonresidents) compute their federal taxable income on a joint federal return, or if neither files a federal return, they may either determine their West Virginia taxable income jointly or they may determine their West Virginia taxable incomes separately provided that they comply with the requirements of the Tax Commissioner in setting forth information on a single form.

31.3 Different Resident Status Of Husband And Wife.-If either the husband or the wife is a resident of West Virginia and the other is a nonresident, the West Virginia taxable income of each spouse must be separately computed and stated by the filing of separate personal income tax returns.

31.3.1 Exception.-Notwithstanding Subsection 31.3 above, in the case where one spouse is a resident and the other is a nonresident, they may compute a joint West Virginia taxable income by filing a joint West Virginia return so long as they compute their federal taxable income on a joint federal return and they elect to compute their joint combined West Virginia taxable income as if both the husband and wife were residents of West Virginia.

31.3.1.1 The exception provision of Subsection 31.3.1 does not apply in any case where either the husband or the wife separately changed his or her residence during the taxable year. Subsection 31.3.1 applies only where one spouse was a resident of West Virginia for the full taxable year and the other spouse was a nonresident for such full taxable year.

31.3.1.2 Where an election is made under Subsection 31.3.1, the spouses shall file a resident West Virginia Personal Income Tax Return and will be treated in all respects as residents for purposes of West Virginia's personal

income tax. Thus, said spouses are entitled to claim the number and amount of personal exemptions allowed resident individuals as set forth under West Virginia Code § 11-21-16 and Section 16 of these regulations and any applicable credit for personal income tax paid another state as provided in West Virginia Code § 11-21-20 and Section 20 of these regulations.

§ 110-21-32. West Virginia Adjusted Gross Income Of A Nonresident Individual.

32.1 General.-The computation of the West Virginia adjusted gross income of a nonresident requires a separate determination of those items of income, gain, loss and deduction entering into said individual's federal adjusted gross income which are derived from or connected with West Virginia sources. The items thus determined are subject to the same modifications as are applicable for a resident individual under Subsection 12.2 and 12.3 and Sections 12a and 12b of these regulations.

32.1.1 Items Included In West Virginia Adjusted Gross Income.-The West Virginia adjusted gross income of a nonresident individual includes the net amount of income, gain, loss and deduction which enter into said individual's federal adjusted gross income, but limited to the portions of such items derived from or connected with West Virginia sources as determined under Subsection 32.2 of this regulation.

32.1.1.1 In addition to items received or accrued directly by the taxpayer, a nonresident individual's West Virginia adjusted gross income includes: (1) his or her distributive share of partnership income, gain, loss and deduction described under Section 37 of these regulations, (2) his or her distributive share of S corporation income, gain, loss and deduction described under Section 37a of these regulations, and (3) his or her share of estate or trust income, gain, loss and deduction described under Section 39 of these regulations.

32.1.2 Example.-A, a nonresident, received during 1988 the following items of income:

- (1) Income from salary paid in West Virginia. . . \$10,000.00

During 1988, eighty percent (80%) of A's working days were required to be worked inside West Virginia.

- (2) Distributive share of income from a partnership carrying on business both within and without West Virginia. . . . . \$35,000.00

Seventy percent (70%) of the partnership

income is properly allocated to West Virginia as seventy percent (70%) of the partnership business was transacted in West Virginia.

- (3) Net rental income from an apartment house located in Ohio. . . . . \$ 3,000.00
- (4) A's share as a beneficiary under a testamentary trust. The trustee is Wheeling National Bank and all of the trust corpus is located within West Virginia. Income of the trust includes:
  - Net rentals from medical office building located in Wheeling. . . \$10,000
  - A's share as 50% beneficiary. . . . . \$ 5,000.00
- (5) Dividends from stock of a West Virginia corporation. . . . . \$ 6,000.00

The net amount of A's items of income and gain entering into his federal adjusted gross income derived from or connected with West Virginia sources is determined as follows:

- (A) Salaries (determined with regard to days worked in West Virginia but not where payment was made) (80% X \$10,000.00 = \$8,000.00). . . . . \$ 8,000.00
- (B) Partnership income (determined on the basis of the partnership's allocation) (70% X \$35,000.00 = \$24,500.00). . . . . \$24,500.00
- (C) Income from an apartment house (entirely excluded, because it is Ohio rental property). \$ -0-
- (D) Income from trust (limited to income from real or tangible personal property, see Subsection 32.2). . . . . \$ 5,000.00
- (E) Dividend from stock of a West Virginia corporation (entirely excluded, see Subsection 32.2). . . . . -0-

Total (A's West Virginia adjusted gross income).. \$37,500.00

32.2 Income And Deductions From West Virginia Sources.

32.2.1 General.-A nonresident individual's items of income, gain, loss and deduction derived from or connected with West Virginia sources are the items attributable to:

- (1) the ownership of any interest in real or tangible personal property in this State; or

- (2) a business, trade, profession or occupation carried on in this State; or
- (3) personal services performed in this State. The determination as to whether items of income, gain, loss and deduction are derived or connected with West Virginia sources is made in accordance with Subsections 32.2.1.1 and 32.2.1.2 of this regulation.

32.2.1.1 Items Attributable To Real Or Tangible Personal Property In This State.—The West Virginia adjusted gross income of a nonresident individual includes items of income, gain, loss and deduction entering into his or her federal adjusted gross income which are attributable to the ownership of any interest in real or tangible personal property in this State. Thus, West Virginia adjusted gross income includes rental income from real or tangible personal property in this State after deducting ordinary and necessary expenses attributable to the ownership, operation or maintenance of such property. Income and deductions attributable to a lease-hold interest in property in this State are included, as well as income and deductions attributable to ownership in fee.

32.2.1.1.a Interest income received from an installment sale of West Virginia real or tangible personal property must to the extent included in federal adjusted gross income be included in the West Virginia adjusted gross income of a nonresident individual because such income is source income.

32.2.1.1.b The West Virginia adjusted gross income of a nonresident individual does not include items of income, gain, loss and deduction attributable to the ownership of any interest in real or tangible personal property located outside this State, even though rental payments or installment payments in respect of the property may be made from a point within this State by a resident individual, partnership or corporation.

32.2.1.2. Business, Trade, Profession Or Occupation Carried On In This State.—The West Virginia adjusted gross income of a nonresident individual includes items of income, gain, loss and deduction entering into his federal adjusted gross income which are attributable to a business, trade, profession or occupation carried on in this State.

32.2.1.2.a The West Virginia adjusted gross income of a nonresident individual rendering services as an employee includes the compensation for services entering into his federal adjusted gross income, but only if, and to the extent that, his or her services were rendered within this State.

Compensation for services rendered by a nonresident individual wholly without the State is not included in his or her West Virginia adjusted gross income, regardless of the fact that payment may be made from a point within the State or that the employer is a resident individual, partnership or corporation.

32.2.1.2.b The West Virginia adjusted gross income of a nonresident individual includes the income of a West Virginia corporation which is an electing small business corporation for federal income tax purposes (S corporation).

32.2.1.2.c If services are performed within West Virginia whether or not as an employee, the compensation for such services includible in federal adjusted gross income constitutes income from West Virginia sources.

32.2.1.2.d Prizes, awards, and similar payments are derived from or connected with West Virginia sources so long as such gains are incident to the nonresident's presence or other activities within West Virginia.

32.2.1.2.e If services were performed in part within West Virginia and in part without West Virginia, the portion of the compensation attributable to the services performed within West Virginia is determined in accordance with the ratio of days worked within West Virginia to the total days worked over the period during which the compensation was earned.

32.2.1.2.e.1 Example.-X, a nonresident individual, is a salaried employee of a North Carolina construction company. X works partly within West Virginia and partly within North Carolina. X earns twenty thousand dollars (\$20,000) during tax year 1988. The amount allocable to West Virginia sources is that portion of X's salary income which the number of days worked in West Virginia bears to the total days worked during the year (excluding non-working days; such as, Saturdays, Sundays, holidays, vacations, sick leave, etc.) both within and without West Virginia. Out of the total of two hundred eighty (280) working days, X worked seventy (70) days within West Virginia. X determines his West Virginia income in the following manner:

Days actually worked during year in West Virginia. . . . .	70
Total days worked during the year. . . . .	280

Since the number of days worked within West Virginia amounts to twenty-five percent (25%) of X's total working days, X multiplies his total salary by twenty-five percent (25%) to arrive at the amount of his West Virginia

income. His West Virginia income is five thousand dollars (\$5,000) ( $25\% \times \$20,000 = \$5,000$ ).

32.2.1.2.f Pensions and retirement pay which are eligible for federal tax treatment under Section 72 of the Internal Revenue Code as "amounts received as an annuity" under an annuity, endowment or life insurance contract shall be considered to be income from annuities and not taxable to nonresidents.

32.2.2 Income From Intangible Personal Property.-Items of income, gain, loss and deduction attributable to intangible personal property of a nonresident individual, including annuities, dividends, interest, and gains and losses from the disposition of intangible personal property, do not constitute items of income, gain, loss and deduction derived from or connected with West Virginia sources except to the extent attributable to property employed in a business, trade, profession, or occupation carried on in this State. For a nonresident individual who is a shareholder of a corporation which is an electing small business corporation for federal income tax purposes (S corporation shareholders), undistributed taxable income of such corporation does constitute income or gain derived from West Virginia sources and a net operating loss of such corporation does constitute a loss or deduction derived from or connected with West Virginia sources.

32.2.3 Deductions with respect to capital losses, net long-term capital gains and net operating losses shall be based solely on income, gain, loss and deduction derived from or connected with West Virginia sources, but otherwise shall be determined in the same manner as the corresponding federal deductions.

32.3 Income And Deductions Partly From West Virginia Sources.-Because the West Virginia adjusted gross income of a nonresident individual takes into account only items of income, gain, loss and deduction derived from or connected with West Virginia sources, an apportionment and allocation of items of income, gain, loss and deduction are required when a nonresident individual carries on a business, trade, profession or occupation partly within and partly without the State.

32.3.1 Record Keeping.-If the taxpayer does not maintain books and records which clearly and accurately reflect the amount of business conducted within West Virginia, he may employ any method which is fair and equitable; however, the taxpayer must make a full disclosure and explanation of such method when filing his return. If the Tax Commissioner deems such method of allocation and apportionment to be inequitable, the Tax Commissioner may prescribe any method which clearly and

accurately reflects the proportion of the net amount of the items of income, gain, loss and deduction attributable to the activities of the business carried on in West Virginia.

32.4 Purchase And Sale For Own Account.-A nonresident individual, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, is not deemed to be carrying on a business, trade, profession or occupation in this State solely by reason of the purchase and sale of property for his own account.

32.5 Husband And Wife.-Where a husband and wife determine their federal income tax on a joint return but determine their West Virginia personal income taxes separately, their West Virginia adjusted gross incomes must be determined separately, as if they had filed separate federal income tax returns and their federal adjusted gross incomes had been determined separately.

32.6 Military Pay.-Compensation paid for service in the Armed Forces of the United States, performed during active duty by an individual not domiciled in this State, shall not constitute income derived from West Virginia sources. Accordingly, if an individual not domiciled in this State is a member of the Armed Forces of the United States during active duty, such compensation received by him does not constitute income derived from West Virginia sources even though the service is performed in whole or in part within this State.

§ 110-21-33. West Virginia Deduction Of A Nonresident Individual.-The West Virginia Personal Income Tax Act contains no provision for the allowance of either a standard deduction or for itemized deductions for a nonresident individual.

§§ 110-21-34 to 110-21-35. Reserved For Future Use.

§ 110-21-36. West Virginia Personal Exemptions Of A Nonresident Individual.

36.1 A nonresident individual is allowed the same number of personal exemptions for State income tax purposes as for federal income tax purposes. A nonresident individual shall be permitted the same West Virginia exemptions as are permitted under West Virginia Code § 11-21-16 and Section 16 of these regulations provided that such exemptions shall be the product of the amount allowed as a personal exemption for a West Virginia resident multiplied by the ratio which the nonresident's West Virginia source income bears to that nonresident individual's federal adjusted gross income for the taxable year.

36.1.1 Example.-X, a taxpayer entitled to claim one (1) federal exemption, has West Virginia source income of ten

thousand dollars (\$10,000) and federal adjusted gross income of fifty thousand dollars (\$50,000). Pursuant to West Virginia Code § 11-21-16(a) and Subsection 16.1 of this regulation the amount of the personal exemption to be multiplied by the ratio of the nonresident's West Virginia source income is two thousand dollars (\$2,000). Thus, the amount of personal exemption to be claimed on the nonresident return equals four hundred dollars (\$400) ( $\$2000 \times \$10,000 / \$50,000 = \$400$ ).

36.2 Husband And Wife (Both Nonresidents).—Where a husband and wife file a joint federal return and also a joint State return, the same number of personal exemptions are allowed on the joint State return as on the joint federal return. Similarly, where a husband and wife file separate federal returns, the same number of personal exemptions are allowed on the separate State nonresident returns of each spouse as on the respective separate federal returns. If, however, a husband and wife file a joint federal return but separate State returns, each of them is entitled to a West Virginia exemption for each federal exemption to which he or she would be separately entitled had they filed separate federal returns.

36.3 In no event shall the amount per exemption allowed for a nonresident individual under West Virginia Code § 11-21-36 and this regulation exceed the amount allowed per exemption for a resident individual under West Virginia Code § 11-21-16 and Section 16 of these regulations.

§ 110-21-37. Nonresident Partners.

37.1 Nonresident Partner Defined.—A nonresident partner is an individual who is a partner in a West Virginia partnership or a partner in any partnership doing business in West Virginia where that individual does not qualify as a resident individual under the provisions of West Virginia Code 11-21-7.

37.2 Partnership Doing Business In West Virginia Defined.—A partnership is doing business in West Virginia if it has any revenue from West Virginia sources, or if it engages in any purposeful revenue generating activity with the object of direct or indirect gain or economic benefit in West Virginia.

37.3 Partnership Income And Deductions Derived From West Virginia Sources.—The West Virginia adjusted gross income of a nonresident partner of any partnership shall include his or her distributive share of all partnership items of income, gain, loss and deduction which entered into his or her federal adjusted gross income as filed for the taxable year in question to the extent that the amount or amounts of such items are derived from or connected with West Virginia sources; that is, from real or tangible personal property having an actual situs in West

Virginia or from a business, trade, profession, or occupation carried on in this State, as determined under Section 32 of these regulations.

37.4 Special Rules As To West Virginia Sources.-In determining the sources of a nonresident partner's share of partnership income, as either within or without West Virginia the following shall apply:

37.4.1 No recognition or tax effect shall be given to a provision in the partnership agreement which characterizes payments to the partner as being employee compensation or other consideration paid or distributable for the use of capital of a partner.

37.4.2 Similarly, no tax effect shall be given to a provision in the partnership agreement which allocates to the nonresident partner, as income or gain from sources outside West Virginia, a greater proportion of his distributive share of partnership income or gain than the ratio of partnership income or gain from sources outside West Virginia to partnership income or gain from all sources.

37.4.2.1 Example.-X is a nonresident partner of a partnership located in West Virginia, sixty percent (60%) of the business of which is from West Virginia sources. X's total distributive share of partnership income from all sources is five thousand dollars (\$5,000). X is required to report on his West Virginia nonresident income tax return three thousand dollars (\$3,000) (60% of \$5,000), as his partnership distributive share, even though, under special provisions of the partnership agreement, his share of the total West Virginia income of the partnership may have been fixed at less than three thousand dollars (\$3,000).

37.4.3 Similarly, no tax effect shall be given to a provision in the partnership agreement which allocates to the nonresident partner a greater proportion of a particular partnership item of loss or deduction connected with West Virginia sources than his proportionate share for federal income tax purposes of partnership loss or deduction generally. If, for example, the proportionate share of a nonresident partner of partnership losses is generally fifty percent (50%) for federal income tax purposes, he is not permitted to deduct on his West Virginia income tax return more than fifty percent (50%) of any particular partnership loss or deduction connected with West Virginia sources, irrespective of any special provision of the partnership agreement allocating a larger percentage of the specific loss or deduction to him.

37.5 Partner's Modifications.

37.5.1 In determining the West Virginia adjusted gross income of a nonresident partner, any modification described in West Virginia Code § 11-21-12 and Section 12 of these regulations which relates to a partnership item of income, gain, loss or deduction shall be made with respect to such partner's distributive share of the partnership. The modifications covered by these Sections do not apply to any item a nonresident himself receives or incurs directly, and these Sections do not apply to any item which, for federal income tax purposes, is not treated as a partnership item.

37.5.2 The total applicable modification of any partnership item of income, gain, loss, or deduction shall be set forth on the partnership return, together with the respective portion thereof distributable to each partner. Where any particular modification pertains to an item includible in federal adjusted gross income, the partnership return shall show each nonresident's portion thereof derived from or connected with West Virginia sources.

37.6 Alternate Methods.—Upon written application, the Tax Commissioner may authorize the use of such other methods of determining a nonresident partner's portion of partnership items derived from or connected with West Virginia sources as he deems to be appropriate and equitable. Whenever a nonresident partner's distributive share of partnership items of income, gain, loss or deduction are so determined, any of the modifications relating thereto shall be similarly determined.

§ 110-21-37a. Nonresident S Corporation Shareholders.

37a.1 Definition.—A nonresident S corporation shareholder is a nonresident individual who holds stock in a corporation that was formed in West Virginia, or that transacts business in West Virginia, and has in effect a valid election under Section 1362 of the Internal Revenue Code, 26 U.S.C. 1362.

37a.2 Definition—An S Corporation Doing Business In West Virginia.—An S corporation is doing business in West Virginia if it has any revenue from West Virginia sources, or if it engages in any purposeful revenue generating activity with the object of direct or indirect gain or economic benefit.

37a.3 In determining West Virginia adjusted gross income of a nonresident shareholder of any S corporation, such shareholder may only include in his or her West Virginia adjusted gross income such shareholder's pro rata share of the portion of the S corporation's income that was derived from or connected with West Virginia sources, that entered into such shareholder's federal adjusted gross income as filed by that shareholder on his or her federal income tax return for the taxable year.

§ 110-21-38. West Virginia Taxable Income Of Nonresident Estate Or Trust.

38.1 General.-Certain income of a nonresident estate or trust (like certain income of a nonresident individual) is subject to taxation under the West Virginia Personal Income Tax Act. Nonresident estates and trust are defined in Section 7 of these regulations. The rates referred to in Section 4 of these regulations are applied against the taxable income of the estate or trust. The taxable income of a nonresident estate or trust does not include the amount distributable or properly paid or credited to the beneficiaries because beneficiaries are taxed on their distributive shares of the estate or trust and the estate or trust is taxed on the remaining balance of the income not distributed.

38.1.1 The West Virginia taxable income of a nonresident estate or trust is its federal taxable income to the extent derived from or connected with West Virginia sources subject to the applicable West Virginia exemption. Thus, subject to the applicable West Virginia exemption, the West Virginia taxable income of a nonresident estate or trust includes its share of federal distributable income and, in addition thereto, any other items of income, gain, loss or deduction of the estate or trust recognized for federal income tax purposes but not included in federal distributable net income to the extent that such share and other items are derived from or connected with West Virginia sources.

38.1.2 Items In Distributable Net Income.-The share of a nonresident estate or trust in the items of income, gain, loss and deduction, derived from or connected with West Virginia sources, which enter into the federal definition of distributable net income is the amount, if any, by which such items exceed the aggregate of all the beneficiaries' shares therein. The share of the nonresident estate or trust is determined in accordance with West Virginia Code § 11-21-39 and Section 39 of these regulations.

38.1.3 Items Not In Distributable Net Income.-The amount of any West Virginia connected items of income, gain, loss and deduction recognized for federal income tax purposes but excluded from the federal definition of distributable net income, must be added to or subtracted from, as the case may be, the estate's or trust's share of items reflected in distributable net income. The determination of the source of such items is made in accordance with the applicable rules of Sections 32 of these regulations and the provisions of West Virginia Code § 11-21-32.

38.1.4 Exemption.-Each estate or trust is allowed a West Virginia exemption of six hundred dollars (\$600), regardless

of the amount of the federal exemption. An estate or trust is not allowed any exemption for dependents. The West Virginia exemption of six hundred dollars (\$600) is allowed an estate or trust even though the particular return filed may be for a taxable period of less than twelve (12) calendar months where the election is allowable federally.

38.2 West Virginia Source Rules.-For the purpose of this regulation, an item of income, gain, loss or deduction is considered derived from or connected with West Virginia sources when any such item is attributable to the ownership by the estate or trust of any interest in real or tangible personal property in this State or when the item is attributable to a business, trade, profession or occupation carried on in West Virginia by the estate or trust, in accordance with the applicable rules set forth in Section 32 of these regulations pertaining to nonresident individuals. Deductions with respect to capital losses, net long-term capital gains, and net operating losses shall be based solely on income, gains, losses and deductions derived from or connected with West Virginia sources, but such West Virginia items shall otherwise be computed or determined in the same manner as the corresponding federal items.

§ 110-21-39. Share Of Nonresident Estate, Trust Or Beneficiary In Income From West Virginia Sources.

39.1 General.-The share of a nonresident estate or trust and the share of a nonresident beneficiary of any estate or trust, in estate or trust income, gain, loss and deduction from West Virginia sources shall be determined in accordance with West Virginia Code § 11-21-39 and this regulation.

39.1.1 Items Of Distributable Net Income From West Virginia Sources.-There shall be determined the items of income, gain, loss and deduction derived from or connected with West Virginia sources which enter into the definition of federal distributable net income of the estate or trust for the taxable year (including such items from another estate or trust of which the first (1st) estate or trust is a beneficiary). Items of federal distributable net income from West Virginia sources represent items of income, gain, loss and deduction which are either attributable to the ownership by the estate or trust of any interest in real or tangible personal property in West Virginia or attributable to a business, trade, profession or occupation carried on in this State by the estate or trust. Such determination of items from West Virginia sources shall be made in accordance with West Virginia Code § 11-21-32 and the rules prescribed in Section 32 of these regulations.

39.1.2 Modifications.-The applicable modifications, described in Subsections 12.2 and 12.3 of these regulations,

pertaining to items from West Virginia sources shall be first combined into a single net number. This number, which may be a positive or negative number, constitutes the net modification. After this number is computed, it is then allocated in the manner prescribed in Subsection 39.1.3 of this regulation for allocating distributable net income from West Virginia sources. When, however, a West Virginia item which would be treated as a modification is already included in federal distributable net income, no modification which in effect would duplicate the item shall be made.

39.1.3 Allocation Among Estate Or Trust And Beneficiaries. -The distributable net income of an estate or trust from West Virginia sources shall be allocated between the nonresident estate or trust and its nonresident beneficiaries in proportion to their respective shares of federal distributable net income, including, solely for the purpose of this allocation, any share of resident beneficiaries. The share of the estate or trust in federal distributable net income is the amount, if any, by which the federal distributable net income exceeds the aggregate of the shares therein of all its beneficiaries.

39.1.3.1 Character Of Items. -Each of the estate or trust items of income, gain, loss or deduction shall have the same character for West Virginia income tax purposes as for federal income tax purposes. Where such an item is not characterized for federal income tax purposes, the item shall have the same character as if realized directly from the source from which realized by the estate or trust, or incurred in the same manner as incurred by the estate or trust. The same is true if an estate or trust item is not required to be taken into account for federal income tax purposes.

39.2 Alternate Methods Of Determining Shares. -If the estate or trust has no federal distributable net income for the taxable year, the share of each beneficiary (including, solely for the purpose of this allocation, resident beneficiaries) in the net amounts determined under Subsection 39.1 (distributable net income and net modification) shall be in proportion to his share of the estate or trust income for such year, under local law or the governing instrument, which is required to be distributed currently and any other amounts of such income distributed in such year. Any balance of such net amounts shall be allocated to the estate or trust.

39.2.1 The Tax Commissioner may allow the use of other methods of determining the respective shares of the beneficiaries and of the estate or trust in its income derived from West Virginia sources, and the modifications related thereto, if such other methods are fair and equitable to all.

parties concerned, and if a full disclosure of the adopted method is made to the Tax Commissioner.

§ 110-21-40. Credit For Income Tax Of State Of Residence.

40.1 General.-A nonresident individual, who has income derived from West Virginia sources, shall be allowed a credit against his West Virginia personal income tax imposed on his West Virginia income for any income tax imposed by another state of the United States or by the District of Columbia of which the taxpayer is a resident where there exists between West Virginia and the nonresident's state of residence a written reciprocal credit agreement authorized under West Virginia Code § 11-21-40(c).

40.1.1 If a nonresident estate or trust is in receipt of income derived from West Virginia sources, then the estate or trust is entitled to a similar credit computed in the same manner and subject to the same limitations and exceptions as in the case of a nonresident individual.

40.1.2 No credit shall be allowed for personal income taxes imposed by a county, borough, township, or any other political subdivision of a state.

40.1.3 The amount of the credit allowed under West Virginia Code § 11-21-40 and this regulation shall be determined in accordance with forms and instructions provided by the Tax Commissioner.

40.1.3.1 The Tax Commissioner may by instruction or otherwise require any nonresident individual, estate or trust to provide evidence, including but not limited to, a copy of the completed and signed resident income tax return filed with the other taxing jurisdiction for the taxable year, in order to establish that the individual, estate or trust is entitled to claim a credit under the provisions of West Virginia Code § 11-21-40.

40.1.4 Where the provisions of West Virginia Code § 11-21-41 and Section 41 of these regulations are applicable a nonresident will not be required to file an income tax return with West Virginia for the taxable year.

40.2 Limitations.-The amount of the credit for any taxable year is subject to the following limitations:

(1) The credit allowed shall not exceed the amount of tax actually payable to the other state or the District on income also subject to West Virginia tax.

(2) The credit shall not exceed the percentage of the other tax determined by dividing the portion of the taxpayer's West Virginia income subject to taxation in such other state or the District by the total amount of the taxpayer's income subject to such other tax. If, for example, the total income subject to such other tax was five thousand dollars (\$5,000) and two thousand (2,000) thereof was derived from West Virginia sources, the amount of the credit would be limited to forty percent (40%) (\$2,000 divided by \$5,000 of such other state's tax).

(3) The credit shall not exceed the percentage of the West Virginia tax otherwise due, determined by dividing the portion of the taxpayer's West Virginia income subject to taxation in such other state or the District by the total amount of the taxpayer's income subject to West Virginia tax. If, for example, the taxpayer's West Virginia income subject to such other tax was eighteen thousand dollars (\$18,000) and the total amount of the taxpayer's income subject to West Virginia tax was twenty-thousand dollars (\$20,000), the amount of the West Virginia credit would be limited to ninety percent (90%) (18,000 divided by 20,000) of the West Virginia tax.

40.3 Definitions. - For purposes of West Virginia Code § 11-21-40 and this regulation, the terms and phrases set forth below shall have the following meaning.

40.3.1 "West Virginia income" means the West Virginia adjusted gross income of a nonresident individual or the income derived from West Virginia sources by a nonresident estate or trust determined in accordance with the applicable rules of West Virginia Code § 11-21-32 as in the case of a nonresident individual.

40.3.2 "West Virginia tax" means the total tax payable on the West Virginia taxable income of the nonresident under the West Virginia Personal Income Tax Act excluding any amounts representing penalties or interest.

40.3.3 "Tax of the other state or the District" means the total tax imposed for the taxable year exclusive of any penalty or interest.

40.3.4 "Income derived from sources within this State" means compensation for services performed in West Virginia, income from a business, trade or profession carried on within this State and income from the ownership of real or tangible personal property situated here but not income from intangibles, except where such income is from property employed in a business, trade or profession carried on in West Virginia.

**§ 110-21-41. Special Case In Which Nonresident Need Not File West Virginia Income Tax Return.**

41.1 A nonresident individual who at no time during the taxable year was a resident of West Virginia will not be required to file an income tax return to this State for that taxable year provided that all four (4) of the following conditions exist:

(1) The nonresident's only income from sources within West Virginia was from salaries, wages or compensation for personal services performed within this State.

(2) Such salaries, wages or compensation for personal services were subject to income taxation by the state of his residence under a net income tax law substantially similar in principle to the West Virginia Personal Income Tax Act.

(3) The other state and West Virginia are operating under a written reciprocal credit agreement as detailed under West Virginia Code § 11-21-40.

(4) The laws of such other state afford like treatment to a resident of West Virginia who earned salaries, wages or compensation for personal services performed in such other state in that a resident of this State is not required to file a nonresident income tax return for the taxable year in such other state.

**§ 110-21-42. Veterans Incentive Tax Credit.**

42.1 General.-Certain employers may be entitled to a credit against their personal income tax liability for the employment of economically disadvantaged Vietnam era and Korean conflict veterans, and disabled veterans generally, as provided under West Virginia Code § 21A-2C-1 et seq.

**42.2 Tax Credit, Eligibility, Amount.**

42.2.1 Each person or partnership which employs an economically disadvantaged Vietnam era or Korean conflict veteran, or a disabled veteran, for a continuous period of one (1) year, except as otherwise provided under West Virginia Code § 21A-2C-5 and Subsection 42.3 of this regulation, will be entitled to an appropriate tax credit for such veteran so employed which credit shall be applied against the employer's personal income tax liability. This tax credit is nonassignable and may not exceed an employer's total personal income tax liability.

42.2.2 The amount of the tax credit allowed under Subsection 42.2.1 shall be an amount equal to the following and

shall be computed in accordance with such forms and instructions as the Tax Commissioner may prescribe.

42.2.2.1 For each economically disadvantaged Vietnam era veteran or Korean conflict veteran, as those terms are defined under West Virginia Code § 21A-2C-3, who is employed as provided under Subsection 42.2.1, the amount of the tax credit against personal income tax liability allowed shall be thirty percent (30%) of the employee's wage base. For purposes of this regulation, the employee's wage base is the first (1st) two thousand dollars (\$2,000) in wages or compensation actually paid to the employee by the employer.

42.2.2.1.a The maximum credit for each "disadvantaged" veteran under Subsection 42.2.2.1 above is limited to the smallest of the percentage calculation or six hundred dollars (\$600).

42.2.2.2 For each disabled veteran as defined under West Virginia Code § 21A-2C-3 who is employed as provided under Subsection 42.2.1, the amount of the tax credit against personal income tax liability shall be a percentage equal to the percentage of disability suffered by the veteran multiplied by the employee's wage base. For purposes of this regulation, the employee's wage base is the first (1st) two thousand dollars (\$2,000) in wages or compensation actually paid to the employee by the employer and the percentage of disability is the percentage of compensation for service-connected disability as defined by the Veterans Administration of the United States.

42.2.2.2.a The maximum credit for each "disabled" veteran under Subsection 42.2.2.2 above is limited to the smallest of the percentage calculation or two thousand dollars (\$2,000).

#### 42.3 Restrictions And Limitations Regarding Tax Credit.

42.3.1 An employer may not claim a credit against personal income tax for any veteran employed for less than a continuous period of one (1) year unless the veteran voluntarily leaves employment with the employer, the veteran becomes totally disabled and unable to continue his employment, or the veteran is terminated for good cause shown.

42.3.2 In the event that the veteran is employed for less than a one(1)-continuous-year period due to any circumstance enumerated in Subsection 43.3.1, the employer shall be entitled to a partial tax credit in a proportional amount corresponding to the ratio of the time period during which the veteran was actually employed to the one(1)-year period required for a full tax credit multiplied by the amount of the full tax credit which

would have accrued to the employer had the veteran's employment continued for a full year.

42.3.3 An employer may not claim credit against personal income tax for any veteran who is employed and displaces a person already employed. In addition, no such credit may be claimed for the employment of any veteran for whom the employer is receiving job training payments from either the federal or state government. Nothing, however, prohibits an employer from receiving tax credits from both the federal and state governments under similar targeted jobs programs if the employer is otherwise qualified to receive both.

#### 42.4 Employer Certification.

42.4.1 Each year, the Commissioner of the West Virginia Department of Employment Security must certify to the Tax Commissioner a list of employers who may be qualified to receive a Veterans Incentive Tax Credit. Any employer not properly certified by the Department of Employment Security will not be entitled to claim the tax credit set forth under West Virginia Code § 11-21-42 and this regulation.

42.4.2 Where an employer has been certified and desires to claim the Veterans Incentive Tax Credit he must complete the appropriate schedule for credit computation, as prescribed by the Tax Commissioner, and he must attach the completed schedule to his West Virginia Personal Income Tax Return for the taxable year for which the credit is claimed.

#### § 110-21-43. Credit For Consumers Sales And Service Tax And Use Tax Paid.

43.1 General.-Any person having a right or claim to certain exemptions from the consumers sales and service tax or use tax, as detailed under West Virginia Code § 11-15-9b or § 11-15A-3b, who has paid to the vendor the consumers sales and service tax or use tax imposed, may be entitled to exercise or assert such exemption from consumers sales or use taxes by filing a claim for credit of the consumers sales or use tax overpayments against taxes otherwise due under the West Virginia Personal Income Tax Act.

43.2 Filing Claim For Credit.-If in lieu of filing a claim for refund of consumers sales and service or use tax overpayments, the taxpayer elects to file a claim for credit, which claim must be filed within one (1) year from the date of the payment of consumers sales or use tax, the taxpayer may file a claim for credit on such form and in such manner as the Tax Commissioner requires and credit may be allowed for the amount of sales and service tax and use tax overpayments against personal

income tax liability, so long as such credit is applied in accordance with the requirements set forth in this regulation.

43.2.1. A credit may not be claimed unless the taxpayer has submitted a properly completed application for credit to the Tax Commissioner. For purposes of claiming this credit, the completed application must accompany the appropriate personal income tax form, return, or report.

43.2.1.1. An application for credit is required each time a taxpayer seeks to obtain this credit.

43.2.1.2. Any credit may be disallowed as the result of Tax Department audits of the taxpayer's records.

43.3 Method Of Applying Credit. - The credit provided under Subsection 43.1 of this regulation may only be taken in the following order:

43.3.1. If the taxpayer is a vendor who is subject to Consumers Sales and Service Tax on certain purchases, he may credit the amount of sales and service tax and use tax overpayments made against the sales and service tax liability accrued through the use of his direct pay permit and apply any remaining tax liability against his quarterly or monthly remittance of the Consumers Sales and Service Tax imposed and otherwise due; or

43.3.2. If the taxpayer is a vendor who is subject to the Use Tax on certain purchases, he may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing Subsection 43.3.1 against the use tax liability accrued through the use of his direct pay permit and apply the remaining tax liability against his monthly remittance of the Use Tax imposed and otherwise due; or

43.3.3. If the taxpayer is subject to Consumers Sales and Service Tax, he may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing Subsections 43.3.1 and 43.3.2 against his quarterly or monthly remittance of the Consumers Sales and Service Tax imposed and otherwise due; or

43.3.4. If the taxpayer is subject to the Use Tax, he may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing Subsections 43.3.1 through 43.3.3 against his quarterly remittance of the Use Tax imposed and otherwise due; or

43.3.5. If the taxpayer is subject to the Business and Occupation Tax imposed under West Virginia Code § 11-13-1 et

seq., he may credit the amount of sales and service tax and use tax overpayments after application of the foregoing Subsections 43.3.1 through 43.3.4 against his quarterly or monthly remittance of the Business and Occupation Tax imposed and otherwise due; or

43.3.6 If the taxpayer is subject to the Annual Tax On Incomes Of Certain Carriers imposed under West Virginia Code § 11-12A-1 et seq., he may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing Subsections 43.3.1 through 43.3.5 against his annual or semi-annual remittance of the tax imposed under West Virginia Code § 11-12A-1 et seq. and otherwise due; or

43.3.7 If the taxpayer is subject to the Severance Tax imposed under West Virginia Code § 11-13A-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing Subsections 43.3.1 through 43.3.6 against the taxpayer's quarterly or monthly remittance of the Severance Tax imposed and otherwise due; or

43.3.8 If the taxpayer is subject to the Telecommunications Tax imposed under West Virginia Code § 11-13B-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing Subsections 43.3.1 through 43.3.7 against the taxpayer's quarterly or monthly remittance of the Telecommunications Tax imposed and otherwise due; or

43.3.9 If the taxpayer is subject to the Corporation Net Income Tax imposed under West Virginia Code § 11-24-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing Subsections 43.3.1 through 43.3.8 against the taxpayer's installment of estimated tax for the Corporation Net Income Tax imposed and otherwise due under West Virginia Code § 11-24-17; or

43.3.10 If the taxpayer is subject to the Personal Income Tax imposed under West Virginia Code § 11-21-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing Subsections 43.3.1 through 43.3.9 against the taxpayer's installment of estimated tax for the Personal Income Tax imposed and otherwise due under West Virginia Code § 11-21-56; or

43.3.11 If the taxpayer is subject to the Business Franchise Tax imposed under West Virginia Code § 11-23-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing Subsections 43.3.1 through 43.3.10 against the taxpayer's annual

remittance of the Business Franchise Tax imposed and otherwise due; or

43.3.12 If the taxpayer is required to deduct and withhold Personal Income Tax under West Virginia Code § 11-21-1 et seq., the taxpayer may credit the amount of sales and service tax and use tax overpayments remaining after application of the foregoing Subsections 43.3.1 through 43.3.11 against the taxpayer's monthly remittance of the Personal Income Tax withheld under said West Virginia Code § 11-21-1 et seq. and otherwise due.

43.4 Documents Supporting Claim.-Any person asserting or exercising a claim of credit arising from an exemption from the consumers sales and service tax or use tax under Subsection 43.2 of this regulation shall file with the Tax Commissioner an application for such credit in such form as the Tax Commissioner shall prescribe, and shall file such affidavits, invoices, sales slips, records or documents as the Tax Commissioner may require to prove or verify the taxpayer's right and entitlement to such credit. The Tax Commissioner may inspect or examine the records, books, papers, documents, affidavits, sales slips and invoices of a taxpayer or any other person to verify the truth and accuracy of any report or return or to ascertain whether the sales and service tax or the use tax has been paid.

43.4.1 In addition to the powers of the Tax Commissioner set forth in West Virginia Code § 11-10-1 et seq., as a further means of obtaining the records, books, papers, documents, affidavits, sales slips or invoices of a taxpayer or any other person and ascertaining the amount of sales and services taxes or use taxes paid or due under West Virginia Code § 11-15-1 et seq. or West Virginia Code § 11-15A-1 et seq. or under any report, form, document or affidavit required, the Tax Commissioner shall have the power to examine witnesses under oath; and if any witness shall fail or refuse at the request of the Tax Commissioner to grant access to the books, records, papers, documents, affidavits, sales slips or invoices requested by the Tax Commissioner, the Tax Commissioner shall certify the facts and the names to the circuit court of the county having jurisdiction over the party, and such court shall thereupon issue a subpoena duces tecum to such party to appear before the Tax Commissioner, at a place designated within the jurisdiction of such court, on a day fixed.

43.5 Time Limit For Filing Claim For Credit.-Any credit of sales and service tax or use tax overpayments against taxes imposed under the West Virginia Personal Income Tax Act shall be taken within one (1) year after the payment of consumers sales and or use taxes by the taxpayer to the vendor. Any such credit or claim of entitlement to such credit made or asserted more than

one (1) year after the payment of such tax by the taxpayer to the vendor shall be null and void, and such tax overpayments shall be forfeited.

43.6 Assignment Of Right To Credit.-Any assignment of the right or entitlement to a credit arising under either West Virginia Code § 11-15-9b or West Virginia Code § 11-15A-3b shall be subject to strict proof. Any assignee claiming a right or entitlement to an assigned credit shall submit to the Tax Commissioner and in the form prescribed by him, an affidavit signed by the assignor and acknowledging the assignment. The assignee shall attest to the assignment and the terms thereof in his signed application for credit. The assignee will be subject to the penalties provided under West Virginia law for perjury for any falsehood set forth in his signed application. The assignee also will be subject to the penalties set forth in West Virginia Code § 11-9-1 et seq. for any violation thereof.

43.7 No credit shall be allowed unless the taxpayer or assignee shall have filed a claim for credit, as appropriate, with the Tax Commissioner in accordance with this regulation.

43.8 Any claim for a tax credit for sales and service tax or use tax overpayments which is not timely filed or not filed in proper form or in accordance with the requirements of this regulation shall not be construed to constitute an obligation of the State of West Virginia for such credit. No overpayment of sales and service tax or use tax shall be subject to either West Virginia Code §§ 11-10-17(d) or 11-10-17(e)(1).

§§ 110-21-44 to 110-21-50. Reserved For Future Use.

#### PART IV RETURNS, DECLARATIONS AND PAYMENT OF TAX.

##### § 110-21-51. Returns And Liabilities.

51.1 General.-On or before the fifteenth (15th) day of the fourth (4th) month following the close of a taxable year, a West Virginia income tax return shall be made and filed by or for:

(1) Every resident individual required to file a federal income tax return for the taxable year, or having West Virginia adjusted gross income for the taxable year, determined under West Virginia Code § 11-21-12 and Section 12 of these regulations, in excess of the sum of his West Virginia personal exemptions;

(2) Every resident estate or trust required to file a federal income tax return for the taxable year, or having any West Virginia taxable income for the taxable year as determined

under West Virginia Code § 11-21-18 and Section 18 of these regulations;

(3) Every nonresident individual having any West Virginia adjusted gross income for the taxable year, determined under West Virginia Code § 11-21-32 and Section 32 of these regulations, in excess of the sum of his personal exemptions;

(4) Every nonresident estate or trust having items of income or gain derived from West Virginia sources, determined in accordance with West Virginia Code § 11-21-32 and the applicable rules of Section 32 of these regulations as in the case of a nonresident individual, in excess of its West Virginia exemption; and

(5) Every resident or nonresident individual who is entitled to claim and who claims an overpayment of income tax for the taxable year regardless of whether he would not otherwise be required to file a return under this regulation.

51.1.1 A taxpayer who has had West Virginia income tax withheld from his wages, or who has paid estimated tax during the taxable year, but whose West Virginia adjusted gross income for such taxable year does not exceed his exemptions must file a West Virginia income tax return in order to obtain a refund.

51.1.2 Any taxpayer required to file a West Virginia income tax return must file a return even if such return, after modifications, exemptions and credits, shows no tax liability.

#### 51.2 Returns Of Husband And Wife.

51.2.1 Separate Federal Returns.-If a husband or wife files and determines their tax liability on separate federal returns, they must file separate West Virginia income tax returns.

51.2.2 Joint Federal Returns.-If a husband and wife, other than a husband and wife described in Subsection 51.2.3 of this regulation, file and determine their tax liability on a joint federal return, or if neither spouse files a federal return, they may either:

(1) File a joint West Virginia income tax return in which event their tax liabilities shall be joint and several and each is liable for the entire tax on such joint return regardless of whether only one spouse had income, or

(2) File separate West Virginia income tax returns where their tax liabilities shall be separate.

51.2.3 If either the husband or wife is a resident and the other is a nonresident of West Virginia, they shall file separate West Virginia income tax returns without regard to their method of filing for federal income tax purposes, in which event their West Virginia tax liabilities shall be separate. Provided, however, that a West Virginia joint resident return may be filed by such husband and wife where all three (3) of the following requirements are met:

(1) they are otherwise entitled to file a joint return,

(2) each spouse maintained his or her status as a resident or nonresident during the entire taxable year, and

(3) they elect to determine their West Virginia taxable income on a joint return as if both were residents for the entire taxable year.

51.2.3.1 Where the husband and wife qualify under the above requirements and file a joint resident return, their tax liabilities shall be joint and several.

51.3 Returns For Decedents.-In general, the rules set forth in this regulation pertaining to the filing of returns apply to decedents as well as other taxpayers.

51.3.1 The executor or administrator of the estate of a taxpayer who died during the taxable year, or other person charged with the property of a decedent, shall make and file the return of income required in respect of such decedent on the form which would have been appropriate had such taxpayer lived. For a decedent's taxable year which ends with the date of the taxpayer's death, the return shall cover the period during which said taxpayer was alive. For purposes of this Subsection, the term "executor or administrator" means the person who is actually appointed to and qualifies for such office and not a person who is merely in charge of the property of the decedent.

51.3.2 Joint Return After Death.-Where one or both spouses die during the year, a joint West Virginia income tax return may be made if the following conditions are met:

(1) a joint federal return was made for the taxable year;

(2) the taxable year of both decedents or of the decedent and the surviving spouse, as the case may be, began on the same day and ended on different days only because of the death of either or both;

(3) neither taxpayer was reporting for a fractional part of a year as a result of a change in accounting; and

(4) the surviving spouse had not remarried before the end of the taxable year.

51.4 Individuals Under A Disability.-The return required for an individual who is unable to make a return by reason of minority, insanity or other disability shall be made and filed by his guardian, committee, fiduciary or other person charged with the care of his person or property (other than a receiver in possession of only a part of his property), or by his duly authorized agent. In such case, the fiduciary, duly authorized agent, or other person charged with the care of his person or property shall be liable for the tax.

51.5 Estates And Trusts.-The return for an estate or trust shall be made and filed by the fiduciary.

51.6 Joint Fiduciaries.-If two (2) or more fiduciaries are acting jointly, the return may be made by either of them. When the fiduciary is a trustee of two (2) or more trusts, he must make a separate return for each trust, even though such trusts were created by the same grantor for the same beneficiary or beneficiaries.

51.7 Tax A Debt.-Any tax imposed by the West Virginia Personal Income Tax Act, and any additions, interest or penalty thereon, shall, from the time it is due and payable be a personal debt of the person or persons (including fiduciaries of estates or trusts) liable to pay the same, to the State of West Virginia.

51.8 Cross Reference.-For provisions as to information returns by partnerships, employers, and other persons, see Section 58 of these regulations.

**§ 110-21-51a. Composite Returns.**

51a.1 Any return required under the West Virginia Personal Income Tax Act for nonresident individuals who are: (1) partners in a partnership deriving income from a West Virginia source or sources, (2) shareholders of a corporation which made an election under 26 U.S.C. § 1362(a) (S corporations) for the taxable year, or (3) who have received a distribution from an estate or trust having income from a West Virginia source or sources, may, upon payment of a composite return processing fee of fifty dollars (\$50), file a composite return in accordance with the provisions of this regulation. The fifty (50) dollar filing fee must accompany the composite return.

51a.2 When filing a composite return and determining the tax due thereon, no personal exemptions may be utilized and the rate of tax shall be six and one-half (6.5) percent of the taxable income determined in accordance with the applicable provisions of the West Virginia Personal Income Tax Act.

51a.2.1 The entity or entities, to which the composite return relates are responsible for collection and remittance of all income tax due at the time the return is filed.

51a.2.2 Although no exemptions are to be utilized in determining the tax due on a composite return, a credit is allowed for severance taxes paid by the partnership, trust, estate, or corporation electing S status under 26 U.S.C. § 1362(a) for the taxable year.

51a.3 The composite return shall be filed on the form prescribed by the Tax Commissioner and completed according to the instructions contained therewith.

51a.3.1 The composite return need not be signed by all nonresident individuals on whose behalf the return is filed: Provided, That the return is signed by a partner in case of a partnership, a corporate officer in the case of a corporation, by a trustee in the case of a trust, or by an executor or administrator in the case of an estate.

51a.4 For purposes of this regulation a composite return means a return filed on a group basis as though there was only one (1) taxpayer and which sets forth the name, address, taxpayer identification number and percent ownership or interest of each nonresident individual in addition to return information as that term is defined in Section 5d, Article 10 of the West Virginia Code. The term "composite return" also includes block filing.

51a.5 Nothing in this regulation shall be construed to prohibit a nonresident individual from filing a separate nonresident personal income tax return for the taxable year and a nonresident personal income tax return shall be filed where the nonresident has income from any other West Virginia source.

§ 110-21-52. Time And Place For Filing Returns And Paying Tax.

52.1 Time For Filing Returns.

52.1.1 General Rule.—The returns of individuals, trusts, estates or partnerships required to be made under these regulations shall be filed on or before the fifteenth (15th) day of the fourth (4th) month following the close of the taxable year (April 15th in the case of a calendar year taxpayer), except that where a later due date has been fixed for filing the federal

return (without regard to any extension of time granted for this purpose), such later date shall apply for West Virginia tax purposes. However, in the last instance, a statement must be attached to the West Virginia return setting forth the circumstances and the authority under which the federal return was permitted to be filed on a date other than the fifteenth (15th) day of the fourth (4th) month following the close of the taxable year. The words "close of the taxable year" refer to and shall have the same meaning for West Virginia income tax purposes as when used for federal income tax purposes.

52.1.2 Mailing Of Returns.-If a return is placed in the mail, it must be postmarked on or before the fifteenth (15th) day of the fourth (4th) month following the close of the taxable year (April 15th in the case of calendar year taxpayer) to be timely filed. See West Virginia Code § 11-10-5f(b) regarding timely mailing.

52.1.3 Return Of A Decedent.-The West Virginia income tax return of a decedent for a fractional part of a year shall be due on or before April fifteenth (15th), following the close of the year which began with the first (1st) day of such fractional part of the year. The due date is the same as if the decedent had lived until the end of his normal taxable year.

52.1.4 Last Day On A Saturday, Sunday, Or Legal Holiday.-When the last day prescribed in these regulations, determined by including any authorized extension of time, for filing a return, making a payment, or performing any act, falls on Saturday, Sunday, or a day which is a legal holiday in the State of West Virginia, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a legal holiday, Saturday or Sunday. See West Virginia Code § 11-10-5g.

52.2 Place For Filing Returns Or Other Documents.-The personal income tax return or declaration of estimated income tax for resident and nonresident individuals, partnerships, resident and nonresident estates and trusts, must be delivered to the Tax Commissioner or mailed to the West Virginia State Tax Department, Accounting Division, Charleston, West Virginia 25324. For requirements regarding delivery or mailing of returns and other documents, see West Virginia Code § 11-10-5f.

### 52.3 Payment Of Taxes.

52.3.1 Any tax under the West Virginia Personal Income Tax Act becomes due and payable on the day immediately following the close of the person's taxable year, whether the latter be the fiscal or calendar year, but remains due and

payable unless paid on or before the due date fixed for filing the return thereof. Except as otherwise provided herein, a person required to make and file a return under the provisions of the West Virginia Personal Income Tax Act shall, without assessment, notice or demand, pay in full the tax due thereon to the State Tax Commissioner on or before the due date fixed for filing such return.

52.3.2 Method Of Paying Tax Due.-The remittance, whether check or money order, for the balance of the tax shown to be due on the return must be made payable to the State Tax Commissioner or to the State Tax Department. A remittance by check or money order should contain thereon the taxpayer's social security number or taxpayer identification number.

52.3.2.1 Postage stamps will not be accepted in payment of personal income tax.

52.3.2.2 A cash register receipt will be issued for any payment of tax made in cash by the taxpayer which is presented in person at a location duly authorized by the Tax Commissioner, if so requested.

52.3.2.3 Where payment in person is made by check or money order, the cancelled remittance is considered sufficient receipt and an official receipt will only be issued upon specific request by the taxpayer.

52.3.2.4 Uncertified checks or drafts in payment of income taxes are acceptable subject to the condition that such checks or drafts may be presented for payment in accordance with the practice of the State Tax Commissioner, the State Treasurer's Office, and the collection bank or banks.

52.3.2.4.a Payment will not be deemed to have been made unless the full amount of an uncertified check or draft is received by the State Treasurer's Office.

52.3.2.5 The date on which a hand delivered remittance is received will be considered the date of payment so far as the taxpayer is concerned unless the check is returned because it was dishonored upon presentment, except when it was dishonored because of the death of the taxpayer. See West Virginia Code § 11-10-5n regarding payment by check or money order.

§ 110-21-53. Signing Of Returns And Other Documents.

53.1 General.-Each individual, including a fiduciary, shall sign any return, declaration, statement or other document which he is making or filing pursuant to requirements stated in these

regulations, except that the return, declaration, statement or other document may be signed for such individual by an agent who is duly authorized to act for such person. The fact that an individual's name is signed to a return, declaration, statement or other document shall be prima facie evidence for all purposes that the return, declaration, statement or other document was actually signed by him.

53.1.1 Signature By Agent. -When by reason of illness, absence, minority, or otherwise, the person required to make or file any return, declaration, statement or other document is unable to do so, such return, declaration, statement or other document may be made and signed by an agent, or by a guardian or other person charged with the care of the person or property of such taxpayer. Such agent assumes responsibility for making and signing the return or other document, and incurs liability for the penalties provided for erroneous, false or fraudulent returns, declarations, statements or other documents.

53.1.2 Signatures Of Husband And Wife.

53.1.2.1 A return or declaration of a husband and wife (if not made by an agent) shall be signed by both spouses. If signed by one spouse, individually and as agent for the other, authorization for such action must accompany the return or declaration.

53.1.2.1.a The spouse acting as agent for the other shall, with the principal, assume responsibility for making the return and declaration and incur liability for the penalties provided for erroneous, false or fraudulent returns or declarations.

53.1.2.1.b Where the signature or authorization of either the husband or the wife cannot be obtained because of illness or absence, and no power of attorney or written authorization is available for the same reason, a return or declaration signed by one spouse and offered to the Tax Commissioner for filing as a joint return or declaration may be accepted as such if all the evidence indicates that the taxpayers intended to file it as a joint return or declaration.

53.1.2.2 In the case of death of one or both spouses during the year for which a joint return is made under the circumstances referred to in Subsection 51.3.2 of these regulations, the signatures and evidence of authorization required under the United States Internal Revenue Code and applicable regulations for such purpose shall apply for West Virginia income tax purposes.

53.2 Partnerships.—Any return, statement or other document required to be made or filed by a partnership shall be signed by one (1) or more partners. The fact that a partner's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that such partner is authorized to sign on behalf of the partnership and that the signature is his.

53.3 Certifications.—The making or filing of any return, declaration, statement or other document or copy thereof required to be made or filed pursuant to these regulations, including a copy of a federal return, shall constitute a certification by the person making or filing such return, declaration, statement or other document or copy thereof that the statements contained therein are true and that any copy filed is a true copy.

53.4 Signature Of Preparer.—If a return is prepared for a taxpayer by another person or firm (other than the taxpayer's agent as detailed in Subsection 53.1.1 above) for compensation, such person or firm must sign such return. This signature is in addition to the required signature of the taxpayer or his agent. If the return is prepared by a firm, such return shall be signed by the person duly authorized to act on behalf of the firm, the name of which shall be stated in conjunction with such signature. This regulation does not apply to a return prepared for an employer by an employee who is regularly and continuously employed by such employer, such as, for example, a clerk, secretary or bookkeeper, nor does this regulation apply to a person who renders mere mechanical assistance in the preparation of a return, such as a stenographer or typist.

§ 110-21-54. Change Of Resident Status During Year.

54.1 General.—A taxpayer who changes his residence either from West Virginia to another place or from another place to West Virginia during his taxable year is required to file two (2) income tax returns with the State of West Virginia: one (1) return covering the period of residence, and one (1) return covering the period of nonresidence.

54.1.1 If a change of residence occurred during the taxable year and the taxpayer had no income derived from or connected with West Virginia sources during the period of nonresidence, a statement verifying that the taxpayer had no West Virginia income during such period may be attached to the required return in lieu of filing the nonresident return. Such statement will serve as the return for the nonresident period only if the taxpayer had no West Virginia income during the period of nonresidence.

54.1.1.1 Example.-If an individual resided in the State of Ohio for the first (1st) six (6) months of the taxable year and in West Virginia for the last six (6) months of the taxable year and had no West Virginia source income while an Ohio resident but did have income while a West Virginia resident, a statement verifying that such individual had no West Virginia income while a nonresident, attached to the required return, will satisfy filing requirements for the nonresident portion of the year.

54.1.2 The provisions of Subsection 54.1.1 above are equally applicable where the taxpayer had West Virginia income while a nonresident but had no income while a resident.

54.1.3 Husband And Wife With Different Resident Status.-If a husband or wife changes his or her resident status during the taxable year, while the other spouse maintains his or her status as a resident or nonresident, as the case may be, during the entire taxable year, the spouse who changes his or her residence during the taxable year must, unless excused under Subsection 54.1.1 of this regulation, file two (2) returns for that year: one (1) return for the portion of the year during which such spouse was a resident and one (1) return for the portion of the year during which such spouse was a nonresident. The spouse who did not change his or her residence during the taxable year must file a separate West Virginia return, if such spouse has income subject to taxation under the West Virginia Personal Income Tax Act, without regard to the change made by the other spouse.

54.1.3.1 Example.-X, a West Virginia resident, marries Y, an Ohio resident, on November 1, 1989, and on the same date Y moves into West Virginia to live with X. Y earned income in West Virginia after she became a resident; therefore, Y is required to file two (2) returns with the State of West Virginia for the taxable year 1989, and X must file a separate resident return for the taxable year 1989. Each must claim his own exemption. Neither spouse may file a joint return.

54.2 West Virginia Taxable Income As Resident And Nonresident.-The West Virginia taxable income for the portion of the year during which an individual was a resident shall be determined except for the special accruals under Subsection 54.3 of this regulation, as if his taxable year for federal income tax purposes was limited to the period of his resident status. The West Virginia taxable income for the remaining portion of the taxable year during which he was a nonresident shall be determined, except for the special accruals under Subsection 54.3 of this regulation, as if his taxable year for federal income tax purposes was limited to the period of his nonresident status.

54.2.1 For purposes of the preceding Subsection annual limitations with respect to specific items of income, gain, loss and deduction allowable for federal income tax purposes are to be applied separately to the applicable federal items attributable to the separate periods covered by the West Virginia resident and nonresident returns required under this regulation.

#### 54.3 Special Accruals.

54.3.1 If an individual changes his status from resident to nonresident, he must, regardless of the method of accounting he normally employs, accrue and include on his West Virginia return for the portion of the year prior to such change, any items of income, gain, loss or deduction accruing prior to the change if not otherwise properly includible or allowable for West Virginia income tax purposes for such portion of the taxable year or for a prior taxable year. Thus, in computing his West Virginia taxable income for that period, he must include all the items he would be required to include if he were filing a federal return for the same period on the accrual basis, together with any other accruals, such as deferred gain on installment obligations, which are not otherwise includible or deductible for federal or West Virginia income tax purposes either for such period or for a prior taxable period.

54.3.1.1 Where a taxpayer sells his business in West Virginia at a gain, under a contract whereby the purchase price is to be paid in installments, and later changes his status from resident to nonresident, he must accrue the entire amount of the gain remaining unpaid from such installment obligations, regardless of the method of accounting he normally uses in reporting his transactions. Likewise, where a beneficiary of an estate or trust changes his status during the taxable year from resident to nonresident, he must accrue on his West Virginia return for the resident period any estate or trust income credited, distributable, payable or required to be distributed to him as of the date of his change of residence.

54.3.1.1.a Gain which is not recognized for federal income tax purposes need not be accrued for West Virginia income tax purposes solely because of the change of residence. For example, a gain realized on the sale of the taxpayer's principal residence, if it is not recognized for federal tax purposes by virtue of the provisions of the Internal Revenue Code relating to acquisition of a new residence, then it need not be accrued in the taxpayer's West Virginia return for the period prior to his change of residence.

54.3.1.2 The amount of the accrued items shall be determined, with the applicable modifications described in West

Virginia Code § 11-21-12 and Section 12 of these regulations, as if such accrued items were includible or allowable for federal income tax purposes.

54.3.1.2.a Example.—On September 10, 1989, A, a cash basis calendar year taxpayer residing in West Virginia, terminates his employment in West Virginia and moves to Florida. His salary up to the termination amounted to eight thousand dollars (\$8,000). On September 1, 1989, his employer notifies him that under his employment contract he will receive on October 1, 1989, a bonus of one thousand dollars (\$1,000), subject to no contingencies.

On August 15, 1989, the X Corporation declares a dividend of six hundred dollars (\$600), payable to A on September 20, 1989, as a stockholder of record on August 15, 1989.

On June 1, 1989, A closed title with C on a tract of vacant land in Pennsylvania, taking from C a purchase money mortgage calling for annual payments on July 1 of each year. By reason of A's federal election of the installment method of accounting with respect to this transaction, A will realize a gain of five hundred dollars (\$500) each year for five years or twenty-five hundred dollars (\$2,500).

On November 1, 1989, the XYZ Realty Company sells A's West Virginia residence, and A realizes a taxable gain of three thousand dollars (\$3,000).

For 1989, A must file two (2) West Virginia income tax returns: one (1) as a resident, and one (1) as a nonresident. On his 1989 income tax return for the portion of the year during which A was a resident, he includes in West Virginia adjusted gross income the following items:

Salary until termination. . . . .	\$8,000
Bonus-nonforfeitable. . . . .	\$1,000
Dividends accrued . . . . .	\$ 600
Gain on sale of Pennsylvania property-accrued . . . . .	\$2,500

On his 1989 nonresident income tax return, A includes in West Virginia adjusted gross income the following item which is derived from West Virginia sources.

Gain on sale of West Virginia residence. . . . .	\$3,000
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The gain from the sale of the West Virginia residence was not accruable for the portion of the year A was a resident, for the sale was made and the gain realized after A became a nonresident. Because A reports the bonus payment on his

West Virginia return for the resident portion of 1989, he need not take it into account on his nonresident return as an item of income derived from West Virginia sources even though he actually receives this item of income when he is a nonresident. See Subsection 54.3.3 of this regulation.

54.3.2 If an individual changes his status from nonresident to resident, he shall make the same accruals as those set forth in Subsection 54.3.3 of this regulation, except that no accrual is required for items of income, gain, loss or deduction derived from or connected with West Virginia sources. The amounts of such accrued items shall be determined with the applicable modifications described in Section 12 of these regulations as if such accrued items were includible or allowable for federal income tax purposes.

54.3.3 No item of income, gain, loss or deduction accrued under Subsection 54.3 of this regulation for the portion of a taxable year prior to a change of resident status is taken into account in determining West Virginia adjusted gross income of any subsequent taxable period.

54.3.3.1 Example.-A, a cash-basis calendar year taxpayer residing in Kentucky, performs services in Kentucky in March, 1989, for which he is paid ten thousand dollars (\$10,000) in September, 1989, from the employer's West Virginia office. On August 10, 1989, A moves to West Virginia where on September 1, 1989, he receives the ten thousand dollar (10,000) salary. For 1989, A is required to file two (2) West Virginia returns, one (1) as a nonresident and one (1) as a resident. No part of the ten thousand (10,000) dollar salary is taken into account as this item was sourced in another state which preceded the date of the change of residence.

54.3.4 The return for the period prior to a change from resident to nonresident status may be filed without the special accruals referred to herein if the taxpayer files with the Tax Commissioner a bond or other security acceptable to the Tax Commissioner, in an amount not less than the amount of additional income tax which would be payable had such bond or security not been filed. The additional tax, which is considered in determining the amount of the bond or other security which the taxpayer will be required to furnish, is computed at the rates which he would have been obligated to pay if no bond or other security had been filed, taking into account all accrued items of income, gain, loss and deduction, and resolving against him all matters in dispute affecting the amount of tax.

54.4 Minimum Tax.-Where two (2) returns for one (1) taxable year are required because of a change of resident status, the total of the income taxes due thereon shall not be less than

would be due if the West Virginia taxable incomes reportable on the two (2) returns were includible in one (1) return.

54.5 Prorations. -Where two (2) returns are required to be filed because of a change in resident status, the West Virginia personal exemptions allowable under Sections 16 and 36 of these regulations must be prorated between the period before the change of residence and the period after the change of residence to reflect the portions of the entire taxable year during which the individual was a resident and a nonresident.

54.5.1 The proration of personal exemptions is based upon the fractional periods of time both as a resident and as a nonresident. In determining fractional periods, a fraction of a month amounting to half a month or more constitutes a full month, and a fraction of a month amounting to less than half a month is disregarded.

54.5.2 Personal Exemption Proration For Resident Return. -The proration of personal exemptions on the return for the period of residency equals the amount allowed per exemption times the number of personal exemptions to which the taxpayer is entitled multiplied by a fraction the numerator of which is the number of months during which the taxpayer was a resident and the denominator of which is twelve (12). Thus, the resident proration formula is as follows:

Amount Per Exemption X Number Of Exemptions X (Number of Months in State/12) = Prorated Exemption Amount To Be Claimed On Resident Return.

54.5.3 Personal Exemption Proration For Nonresident Return. -The proration of personal exemptions on the return for the period of nonresidency equals the product of the amount allowed as a personal exemption for a West Virginia resident multiplied by the ratio the nonresident individual's West Virginia source income during the period of nonresidency bears to that nonresident individual's federal adjusted gross income for the taxable year times the number of personal exemptions to which the taxpayer is entitled to claim multiplied by a fraction the numerator of which is the number of months during which the taxpayer was a nonresident and the denominator of which is twelve (12). Thus, the nonresident proration formula is as follows:

Amount Per Exemption X  $\frac{\text{W.Va. Source Income For Nonresident Period}}{\text{Federal Adjusted Gross Income}}$  X Number of Personal Exemptions X  $\frac{\text{Number of Months Outside W.Va.}}{12}$  =

Prorated Exemption Amount To Be Claimed on Nonresident Return.

54.5.4 Examples.

Example 1.-A taxpayer moves into West Virginia on May 1, 1989. He was a nonresident for four (4) months and a resident for eight (8) months during tax year 1989. This taxpayer has four (4) personal exemptions and because he is required to file two (2) income tax returns with West Virginia there must be a proration of his personal exemptions to reflect the portions of the tax year where he was a resident and a nonresident. In order to determine the amount of his personal exemption to be claimed on the resident income tax return, the taxpayer must multiply two thousand dollars (\$2,000) (the amount for each personal exemption) times four (4) (the number of his personal exemptions) times 8/12 (the fractional period of residence). Therefore, the amount of personal exemption on the resident return will be \$5,333 ( $\$2,000 \times 4 \times (8/12) = \$5,333$ ).

To find the amount to be claimed as the personal exemption on the nonresident return, this taxpayer will multiply two thousand dollars (\$2,000) (the amount per exemption) by 25,000/100,000 (the ratio that his West Virginia source income for the period of nonresidence bears to his federal adjusted gross income for the taxable year) times four (4) (the number of his personal exemptions) multiplied by 4/12 (the fractional period of nonresidence). Therefore, the amount of personal exemption on the nonresident return will be \$667 ( $\$2,000 \times 25,000/100,000 \times 4 \times (4/12) = \$667$ ).

Example 2.-The taxpayer, a dependent child, leaves West Virginia with his family on August 5, 1989. This taxpayer is entitled to one (1) West Virginia personal exemption even though he is not permitted an exemption for federal income tax purposes because he is claimed by his parents on their federal return. Since he is required to file two (2) State returns to reflect the portions of the taxable year as a resident and nonresident, he must prorate his personal exemption. For purposes of determining the fractional period of time, a fraction of a month amounting to half a month or more constitutes a full month, and a fraction of a month amounting to less than a month is disregarded. Thus, the taxpayer's fractional period of residence is 7/12, and his fractional period of nonresidence is 5/12. To find the amount of his personal exemption to be claimed on the resident return, the taxpayer multiplies five hundred dollars (\$500) (the amount of the dependency exemption) by 7/12 (the fractional period of residence). Therefore, the amount allowable will be \$292. ( $\$500 \times (7/12) = \$292$ ). The amount of personal exemption on his nonresident return presuming West Virginia source income for the nonresident period of three thousand dollars (\$3,000) and federal

adjusted gross income of nine thousand dollars (\$9,000) will be \$69. ( $\$500 \times 3,000/9,000 \times (5/12) = \$69$ ).

§ 110-21-55. Declarations Of Estimated Tax.

55.1 Requirement Of Declaration.-Every resident and nonresident individual whose West Virginia adjusted gross income (other than from wages on which the proper amount of tax is withheld under Section 71 of these regulations) can reasonably be expected to exceed four hundred dollars (\$400) shall make and file a West Virginia declaration of estimated tax for the taxable year unless the estimated tax otherwise due in installment payments is remitted through additional withholding by the employer from the employee's wages during the taxable year or withholding satisfies at least ninety percent (90%) of the annual personal income tax liability.

55.1.1. If in addition to income from wages subject to West Virginia withholding an individual also has other income, the sum of that individual's allowable personal exemptions are to be counted only once for purposes of determining the amount of withholding taxes and estimating the tax due on the additional income. In other words, the amount of West Virginia personal income taxes owed for the taxable year (determined before application of credit for employer withholding) must be prepaid either by employer withholding, installment payments or a combination of both. Taxpayers are encouraged to increase the amount withheld from wages under West Virginia Code § 11-21-71 and Section 71 of these regulations whenever practicable in order to insure that the proper amount of taxes are prepaid for the taxable year.

55.1.1.1. Whether or not a taxpayer is required to file a federal declaration of estimated tax for the taxable year or remit installment payments of estimated federal income tax is not relevant to determining whether or not the taxpayer is required to file a West Virginia declaration of estimated tax for the taxable year.

55.1.2. Examples.-Application of Subsection 55.1 of this regulation is illustrated by the following examples. The applicability of safety zones is not considered in any of the examples set forth below. See Subsection 56a of these regulations for a discussion of safety zones.

Example 1.-X, a taxpayer making his return on the calendar year basis, is married and has two (2) dependent children. X is sole proprietor of a retail business which is his only source of income. X can reasonably expect to realize twenty-five thousand dollars (\$25,000) from the business during 1989, based on prior year's earnings. Therefore, X is required

to make a declaration of estimated tax, because his income can reasonably be expected to exceed the sum of his personal exemptions plus four hundred dollars ( $[2,000 \times 4] + 400 = \$8,400$ ) for 1989.

Example 2.-Y is a cash basis taxpayer with three (3) personal exemptions including himself. Y is employed and expects to receive twenty-three thousand dollars (\$23,000) subject to withholding during calendar year 1989. Also, Y expects to receive twelve thousand dollars (\$12,000) of income during the taxable year from the practice of a profession on his own account. Y is required to file a West Virginia declaration of estimated tax, for Y's income (\$12,000) not subject to withholding exceeds four hundred dollars (\$400). The sum of his personal exemptions ( $2,000 \times 3 = \$6,000$ ) was considered in determining the amount withheld from his wages for the 1989 taxable year. Alternatively, Y could increase the amount being withheld for West Virginia personal income taxes by his employer. If the amount of estimated tax due on Y's other income is remitted through additional withholding, Y will not be required to file a declaration of estimated tax and make quarterly installment payments.

Example 3.-P is a taxpayer making his return on a calendar year basis. P is engaged in the practice of law as a sole practitioner. He has West Virginia adjusted gross income of three thousand dollars (\$3,000) from his profession each month in the first (1st) quarter of 1989. He can reasonably expect that his profession will continue to average three thousand dollars (\$3,000) for each month throughout the year, and that he will not have income from any other source during 1989. Since P's gross income is not subject to withholding, he is required to file a declaration of estimated tax for that year, on or before April 15, 1989. Since P's West Virginia adjusted gross income from sources other than wages subject to withholding exceeds his two thousand (2,000) dollar personal exemption plus four hundred dollars (\$400), P is required to file a declaration of estimated tax for the 1989 tax year on or before April 15, 1989, and make quarterly installment payments.

Example 4.-S, a married taxpayer, has been regularly employed for many years. As of January 1, 1989, his salary was twenty-six thousand dollars (\$26,000) per year. S also owns stocks and other investments which he inherited when his father died in 1987, and which pay S approximately five thousand dollars (\$5,000) a year. Because his West Virginia adjusted gross income not subject to withholding taxes exceeds four hundred dollars (\$400), and the sum of his personal exemptions ( $2,000 \times 2 = \$4,000$ ) was considered in determining employer withholding taxes, S is required to file a declaration of estimated tax for calendar year 1989 by April 15, 1989, unless the amount of tax remitted

with his 1989 annual return will be ten percent (10%) or less of his liability for the taxable year. Alternatively, S can avoid filing a declaration of estimated tax by increasing the amount being withheld for West Virginia personal income taxes by his employer in order to pay the amount of estimated tax that otherwise would be due in installment payments.

Example 5.-H is a married individual with three (3) dependent children. H is employed at an annual salary of eighteen thousand dollars (\$18,000). His spouse, W, is employed at an annual salary of sixteen thousand dollars (\$16,000). Both salaries are subject to this State's withholding taxes. They have additional income of fifteen thousand dollars (\$15,000) from investments. H and W will file a joint personal income tax return for calendar year 1989. Because the amount of West Virginia adjusted gross income from sources not subject to withholding taxes is in excess of four hundred dollars (\$400), a declaration of estimated tax is required for the 1989 calendar year. In lieu of filing the declaration of estimated tax, H and W can elect to increase the amount of West Virginia personal income taxes withheld from their wages by their employees so that the required amount of tax is prepaid.

Example 6.-Presuming the same facts as in Example 5 above except that on July 20, 1989, W is the grand prize winner in a contest sponsored by a national magazine. The prize is an initial payment of five thousand dollars (\$5,000) plus a payment of one thousand dollars (\$1,000) per month for the rest of W's life. An amended declaration of estimated tax must be filed by W or a joint amended declaration by H and W on or before September 15, 1989.

55.1.3 Exemption Of Spouse.-For the purpose of determining whether a declaration of estimated tax is required under Subsection 55.1 of this regulation, a married taxpayer filing a separate declaration may not take into account the exemption of his spouse, if his spouse has, or is reasonably expected to have, West Virginia adjusted gross income, or is reasonably expected to be the dependent of another taxpayer for the taxable year.

55.1.4 Income Of Child.-In estimating the amount of West Virginia adjusted gross income for the taxable year, a parent should not include the income of his or her minor child. Such income is not includible in the gross income of the parent.

55.1.5 Partnerships And S Corporations.-Neither a partnership nor an S Corporation is subject to tax under the West Virginia Personal Income Tax Act. Partners and S Corporation shareholders in their individual capacities must file

declarations of estimated income tax for their estimated income from the partnership or S Corporation.

55.1.6 Estates And Trusts.-An estate or trust is generally taxed as an individual but is not required to file a declaration of estimated tax, or remit estimated tax in installment payments during the taxable year. Beneficiaries of estates and trusts must file declarations of estimated tax in their individual capacities and must take into consideration their estimated distributive shares of income from estates and trusts.

55.1.7 Death Of Taxpayer.-No declaration of estimated income tax is required to be filed for a decedent subsequent to the date of his or her death. A short year tax return may however need to be filed and additions to tax may be due for any failure of the decedent to: (1) timely file a declaration of estimated tax required under West Virginia Code § 11-21-55 and Section 55 of these regulations; (2) timely pay any installment of estimated tax required under West Virginia Code § 11-21-56 and Section 56 of these regulations; or (3) properly estimate his or her income tax. See Subsection 55.3.4.2 of this regulation regarding the making of an amended declaration by a surviving spouse where a joint declaration had been made prior to the death of the decedent.

55.1.8 Fiscal Year Taxpayers.-The provisions of this regulation are equally applicable to fiscal year taxpayers. See Subsection 55.10 of this regulation.

55.1.9 Declaration For Taxable Year Of 52-53 Weeks.-No declaration may be made for a period of more than twelve (12) months. For purposes of this Subsection, a taxable year of fifty-two (52) or fifty-three (53) weeks, in the case of a taxpayer who computes his or her taxable income for federal income tax purposes in accordance with the election permitted by 26 U.S.C. § 441(f) shall be deemed a period of twelve (12) months. A separate declaration for a fractional part of a year is required where the taxpayer has a short taxable year for federal income tax purposes.

55.1.10 When Preceding Year Was A Loss Year.-If an individual has zero (0) or negative West Virginia taxable income for the preceding year, a declaration of estimated tax is not required to be filed for the current taxable year until such time as the individual can reasonably estimate that his or her West Virginia adjusted gross income for the current tax year will exceed the amount of his or her allowable exemption(s) plus four hundred dollars (\$400) unless the zero (0) or negative West Virginia taxable income in the preceding taxable year was due to:

(1) the carry forward of a loss from a preceding taxable year unless the loss will also be carried forward to the current taxable year with like effect; or

(2) unusual events or occurrences not reasonably expected to affect the current taxable year with like effect.

55.1.10.1 Notwithstanding the provisions of Subsection 55.1.10 above, a declaration of estimated tax is not required for the current year if the amount remitted or that should be remitted with the annual return for that year is ten percent (10%) or less of the tax liability for the taxable year (determined before application of any credits) for employer withholding taxes and installment payments of estimated tax.

#### 55.1.11 Contents Of Declaration.

55.1.11.1 The declaration of estimated tax by an individual shall be made on Form 140-ES.

55.1.11.1.a For the purpose of making the declaration, the amount of West Virginia adjusted gross income which the taxpayer can reasonably be expected to receive or accrue, depending upon the method of accounting upon which his or her taxable income is computed, and the sum of the estimated allowable deductions and credits to be taken into account in computing the amount of estimated income tax shall be determined upon the basis of the facts and circumstances existing at the time prescribed for the filing of the declaration along with those reasonably to be anticipated for the taxable year.

55.1.11.1.b Where the taxpayer is employed at the date prescribed for filing his or her declaration at a given wage or salary, it should, in the absence of circumstances indicating the contrary, be presumed by him or her for purposes of the declaration that such employment will continue to the end of the taxable year at the wage or salary received by him or her as of such date.

55.1.11.1.c In the case of income other than wages and salary, it is the responsibility of the taxpayer to estimate correctly or comply with provisions of these regulations allowing for the timely filing of an annual return to be accepted as a declaration of estimated tax where such other income is expected to be paid with regularity.

55.1.11.1.d In the case of a taxpayer engaged in a trade, business or profession, he or she shall make an estimate of gross income, deductions and credits in the light of the best available information affecting the trade, business or profession.

55.1.11.1.e In determining whether or when the filing of a declaration of estimated tax is required by law and these regulations, and in determining the amount of estimated tax, the burden is on the taxpayer to show he or she complied with the law and these regulations. If, upon filing of the annual return, more than ten percent (10%) of the taxpayer's liability is remitted or should have been remitted with the return it will be presumed that there was noncompliance. Similarly, a taxpayer's total West Virginia personal income tax liability for the taxable year, as shown on his or her annual return for that year, will be divided by five (5) to determine whether tax was timely remitted in "equal" installment payments in compliance with the law and these regulations.

55.1.11.2 Use Of Prescribed Form.-Copies of Form 140-ES will, so far as possible, be furnished to the taxpayer by the Tax Commissioner. A taxpayer will not be excused from making a declaration, however, by the fact that no form has been furnished to him or her. Taxpayers not supplied with the proper form should make application therefor to the Tax Department in ample time to have their declarations prepared, verified, and filed with the Tax Commissioner on or before the date prescribed for filing the declaration. If the prescribed form is not available, a statement disclosing the amount estimated as the tax, the estimated credits, and the estimated tax after deducting such credits should be filed as a tentative declaration within the prescribed time, accompanied by the payment of the required installment. Such tentative declaration should be supplemented, without unnecessary delay, by a declaration made on the proper form.

55.2 Definition Of Estimated Tax.-The term "estimated tax" means the amount which an individual estimates to be his income tax under the provisions of the West Virginia Personal Income Tax Act and these regulations for the taxable year, less the amount such individual estimates to be the sum of any credits allowable against the tax.

### 55.3 Joint Declaration Of Husband And Wife.

55.3.1 In General.-A husband and wife may make a joint declaration of estimated income tax as if they are one (1) taxpayer, even though they are not living together, except as provided below. A joint declaration may be made even though one (1) spouse is expected to have no income during the taxable year. If a husband and wife make a joint declaration, their liability with respect to the estimated tax shall be joint and several.

55.3.2 Exceptions.-A joint declaration of estimated income tax may not be made if the husband and wife are separated under a decree of divorce or of separate maintenance, or if they

have different taxable years. Also, a joint declaration of estimated tax may not be filed if the husband and wife do not have the same resident status unless both elect to determine their joint West Virginia taxable income as if both were residents.

55.3.3 Application To Separate Returns.-The fact that a joint declaration of estimated income tax is made by a husband and wife will not preclude them from electing to determine their West Virginia income taxes on separate annual returns. In the case where a joint declaration is made but a joint annual return is not made for the same taxable year, the installment payments of estimated tax for such year may be treated as payments on account of the tax liability of either the husband and wife for the taxable year or may be divided between them in such manner as they may agree. One spouse may claim the full amount of estimated tax paid during the year. Where husband and wife file separate returns, the spouse claiming the estimated tax paid, or each spouse if each claims a portion of the estimated tax paid, must make a notation on his or her West Virginia Personal Income Tax Return to the effect that the estimated tax paid was by a joint declaration.

55.3.3.1 In the event that a husband and wife file separate returns and fail to agree to a division of any estimated tax payments, such payments shall be allowed between them in accordance with the following rule. The portion of estimated tax payments to be allocated to a spouse shall be that portion of the aggregate of all such payments as the amount of tax imposed under the West Virginia Personal Income Tax Act shown on the separate return of the taxpayer bears to the sum of the taxes imposed under the West Virginia Personal Income Tax Act shown on the separate returns of both the taxpayer and his or her spouse.

55.3.3.2 Example.-Assume that for calendar year 1989 H and his spouse, W, make a joint return of estimated tax and pursuant thereto, pay a total of nine hundred dollars (\$900) of estimated tax. H and W subsequently file separate returns for 1989 showing tax imposed under the West Virginia Personal Income Tax Act in the amount of five hundred forty-eight dollars (\$548) and four hundred fifty dollars (\$450) respectively. H and W fail to agree to a division of the estimated tax paid. The amount of the aggregate estimated tax payments allocated to H is computed as follows:

- |  |       |
|--|-------|
| (1) Amount of tax imposed as shown on H's return. . . . .    | \$548 |
| (2) Total taxes imposed as shown on W's return. . . . .      | \$450 |
| (3) Total taxes imposed as shown on both H's and W's returns | \$998 |

(4) Proportion of taxes on H's return to the total amount of taxes shown on both returns.  
(\$548 ÷ 998) . . . . .54.90%

(5) Amount of estimated tax payments allocated to H . . . \$494.10

Accordingly, H's return would show remaining tax liability in the amount of \$53.90 (\$548 taxes shown less than \$494.10 estimated tax allocated.)

55.3.4 Death Of Spouse.

55.3.4.1 A joint declaration may not be made after the death of either a husband or wife. However, if it is reasonable for a surviving spouse to assume that there will be filed a joint return for himself and the deceased spouse for his taxable year and the last taxable year which includes the period comprising such last taxable year of his spouse, he may estimate the amount of tax imposed on his and his spouse's taxable income on an aggregate basis and compute his estimated tax in the same manner as though a joint declaration had been filed.

55.3.4.2 If a joint declaration is made by a husband and wife and thereafter one spouse dies, no further payments of estimated tax on account of the joint declaration are required from the estate of the decedent. The surviving spouse, however, shall be liable for the payment of any subsequent installments of the joint estimated tax unless an amended declaration setting forth the separate estimated tax for the taxable year is made by the surviving spouse. Such separate estimated tax shall be paid at the times and in the amounts determined under the rules prescribed in Section 56 of these regulations.

55.3.4.2.a For the purposes of making the amended declaration by the surviving spouse, and for the allocation of payments made pursuant to a joint declaration between the surviving spouse and the legal representative of the decedent in the event a joint return is not filed, the payments made pursuant to the joint declaration may be divided between the decedent and the surviving spouse in such proportion as the surviving spouse and the legal representative of the decedent may agree.

55.3.4.2.a.1 In the event the surviving spouse and the legal representative of the decedent fail to agree to a division, such payments shall be allocated in accordance with the following rule. The portion of such payments to be allocated to the surviving spouse shall be that portion of the aggregate amount of such payments as the amount of tax imposed under the West Virginia Personal Income Tax Act shown on

the separate return of the surviving spouse bears to the sum of the taxes imposed by said Act shown on the separate returns of the surviving spouse and of the decedent; and the balance of such payments shall be allocated to the decedent. This rule may be illustrated by analogizing the surviving spouse described in this rule to H in the example contained in Subsection 55.3.1.1 of this regulation and the decedent in this rule to W in that example.

55.3.5 Signing Of Joint Declaration.-A joint declaration of a husband and wife (if not made by an agent of one (1) or both spouses) shall be signed by both spouses. The provisions of Subsection 55.11 of this regulation, relating to returns made by agents shall apply where one (1) spouse signs a declaration as agent for the other or where a third (3rd) party signs a declaration as agent for both spouses.

55.4 Time For Filing Declaration.

55.4.1 In General.-A declaration of estimated income tax of an individual, other than a farmer, shall be filed on or before April fifteenth (15th) of the taxable year, except that if the requirements of Subsection 55.1 of these regulations are met:

(1) After April first (1st) and before June second (2nd) of the taxable year, the declaration shall be filed on or before June fifteenth (15th) or

(2) After June first (1st) and before September second (2nd) of the taxable year, the declaration shall be filed on or before September fifteenth (15th), or

(3) After September first (1st) of the taxable year, the declaration shall be filed on or before January fifteenth (15th) of the succeeding year.

55.4.2 Exceptions.-A declaration of estimated tax need not be filed for the taxable year if:

(1) At least ninety percent (90%) of the annual tax liability is satisfied by withholding; or

(2) The amount of taxes due for the taxable year that will be remitted (or should be remitted) with the annual return is ten percent (10%) or less.

55.4.3 Optional Rule For Farmers.-See Subsection 55.5 of this regulation.

55.4.4 Fiscal Year Taxpayers.-An individual's tax year for purposes of this tax shall be the same as his or her taxable year for federal income tax purposes. Fiscal year

taxpayers, except farmers, shall file declarations of estimated tax in accordance with Subsection 55.9 of this regulation.

#### 55.5 Declarations Of Estimated Tax By Farmers.

55.5.1 In General.-In the case of an individual on a calendar year basis, if that individual expects to derive at least two-thirds (2/3) of his or her estimated West Virginia adjusted gross income from farming, he or she may file a declaration of estimated income tax at any time on or before January fifteenth (15th) of the succeeding year in lieu of the time for filing set forth in Subsection 55.4 of these regulations.

55.5.1.1 "Farming" Defined.-Income is attributable to farming if it is obtained from cultivation of the soil, the raising or harvesting of any agricultural or horticultural commodities, the raising, etc., of livestock, bees, poultry, furbearing animals, or wildlife. In other words, the requisite percentage of West Virginia adjusted gross income must be derived from the operation of a stock, dairy, poultry, fruit or truck farm. If an individual receives for the use of his or her land income in the form of a share of the crops produced thereon, such income is from farming.

55.5.2 Fiscal Year.-In the case of an individual on a fiscal year basis, if that individual expects to derive at least two-thirds (2/3) of his or her estimated West Virginia adjusted gross income from farming, he or she may file a declaration of estimated income tax at any time on or before the fifteenth (15th) day of the first (1st) month of the succeeding year.

55.5.3 Joint Return.-If a joint declaration of estimated tax will be filed by a husband and wife, at least two-thirds (2/3) of their combined estimated West Virginia adjusted gross income must be from farming before that declaration may be filed under Subsections 55.5.1 and 55.5.2. Otherwise, the rules of Subsection 55.4 of this regulation shall control.

#### 55.6 Automatic Extension Of Time For Filing Declarations Of Estimated Tax.

55.6.1 In General.-If an individual determines that the amount of tax to be remitted with his or her annual return for the taxable year will be ten percent (10%) or less of the amount of tax shown (or that should have been shown) to be due on the annual return for the taxable year, determined before application of credits for employer withholding taxes and installment payments of estimated tax, whichever is greater, he

or she is only required to file an annual return for the taxable year and pay the amount of tax shown thereon to be due, on or before April fifteenth (15th) of the succeeding tax year. For this purpose, all eligible taxpayers are granted an automatic extension of time from the date when the declaration of estimated tax and installment payments would otherwise be lawfully due until April fifteenth (15th) of the next tax year.

55.6.1.1. A husband and wife who file a joint declaration of estimated tax or a joint annual return are treated as one (1) individual for purposes of Subsection 55.6.1.

55.6.1.2. An individual with estimated tax in excess of forty dollars (\$40) would in the absence of Subsection 55.6.1 be required to file his or her declaration of estimated tax as provided in Subsection 55.4 of this regulation.

55.6.1.3. An individual with estimated tax of forty dollars (\$40) or less would in the absence of Subsection 55.6.1 be required to file his or her declaration of estimated tax on or before January fifteenth (15th) of the succeeding tax year.

#### 55.6.2 Additions To Tax.

55.6.2.1. If the amount remitted with the annual return is ten percent (10%) or less of the tax liability for the taxable year, or if one of the safety zones applies (See Subsection 56a), no additions to tax under West Virginia Code § 11-10-18a will begin to accrue on the amount due until April sixteenth (16th) of the succeeding tax year (sixteenth (16th) day of the fourth (4th) month of the succeeding tax year if filing on a fiscal year basis).

55.6.2.2. If the amount remitted with the annual return exceeds ten percent (10%) of the tax liability and if none of the safety zones discussed under Section 56a of these regulations is applicable, additions to tax shall be imposed and shall be calculated from the date when the declaration of estimated tax and the first installment payment should have been remitted. Additions to tax shall similarly be applied to any subsequent installment payments that should have been remitted, calculated from the date such installments should have been paid. See Sections 56 and 56a of these regulations for matters pertaining to additions to tax and application of safety zones.

#### 55.7 Amendment Of Declaration.

55.7.1. In General.-In making a declaration of estimated income tax, the taxpayer is required to take into account the then existing facts and circumstances as well as

those reasonably to be anticipated relating to prospective West Virginia adjusted gross income, allowable deductions for personal exemptions and estimated credits for the taxable year. Amended or revised declarations may be made in any case in which the taxpayer estimates that his or her West Virginia adjusted gross income, deductions for personal exemptions or credits will differ from the West Virginia adjusted gross income, deductions for personal exemptions, or credits reflected in the previous declaration. Only one amended declaration, however, may be filed during the interval between installment dates and no further amendment may be made until a succeeding installment date. An amended declaration may be filed jointly by husband and wife even though separate declarations have previously been filed.

55.7.2 Payments.-Subsequent installment payments shall be proportionally increased or decreased based on the amended declaration. No refund will be issued due to the filing of an amended declaration. Consideration will be given to a refund only in connection with a completed annual return filed by a taxpayer for the taxable year covered by his or her declaration, and/or amended declaration.

55.7.3 Time For Filing Amended Declaration.-An amended declaration of estimated income tax may be filed on or after an installment date prescribed for the taxable year. However, no amended declaration may be filed until after the original declaration has been filed and only one (1) amended declaration may be filed during any interval between installment due dates.

55.7.4 Forms.-An amended declaration shall be made on Form 140-ES clearly marked "AMENDED". If the proper form is not available, the procedure outlined in Subsection 55.1 of this regulation must be followed.

55.8 Return As Declaration Or Amendment.

55.8.1 In General.-If the annual return of the taxpayer is filed as hereinafter provided, the annual return may be treated as the declaration or amended declaration of estimated tax.

55.8.2 Time For Filing Return.

55.8.2.1 Return As Declaration; February Fifteenth (15th).-If the taxpayer files his or her return for the calendar year on or before February fifteenth (15th) of the succeeding calendar year (or if the taxpayer is on a fiscal year basis, the fifteenth (15th) day of the second (2nd) month of the next succeeding fiscal year) and pays therewith the full amount of the tax shown to be due on the return, then such return shall

be considered as the taxpayer's declaration if the declaration is not required to be filed during the taxable year, but is otherwise required to be filed on or before January fifteenth (15th) of the succeeding year (or in the case of a fiscal year, the fifteenth (15th) day of the first (1st) month of the succeeding fiscal year).

55.8.2.2 Return As Amendment Of Declaration: January Fifteenth (15th). - If the taxpayer files his or her return for the calendar year on or before January fifteenth (15th) of the succeeding calendar year (or if on a fiscal year basis, the fifteenth (15th) day of the first (1st) month of the succeeding fiscal year), and pays therewith the full amount of the tax shown to be due on the return, then if a declaration was filed during the taxable year, such return shall be considered as the amendment of the declaration if the tax shown on the return is greater than the estimated income tax shown in the declaration.

55.8.2.3 Examples.

Example 1. - An individual taxpayer on the calendar year basis who, subsequent to September 1, 1989, first meets the requirements of Subsection 55.1 of this regulation for filing a declaration for 1989, may satisfy such requirements by filing his or her return for 1989 on or before February 15, 1990, and paying in full at the time of such filing the tax shown thereon to be payable.

Example 2. - Similarly, if a taxpayer files on or before September 15, 1989, a timely declaration for such year and on or before January 15, 1990, files a 1989 return on which the tax shown is more than the estimated income tax shown on such declaration, and pays at the time of such filing the tax shown by the return to be payable, such return shall be treated as the amended declaration permitted to be filed on or before January 15, 1990.

Example 3. - A taxpayer discovers on January 10, 1990, that he underpaid his estimated tax for the calendar year 1989. He may in lieu of filing the amended declaration on January 15, 1990, file his annual return on January fifteenth (15th), and pay in full the amount computed thereon as payable. By so doing he will avoid the additions to tax with respect to the installment payment that was due January 15, 1990. The periods of underpayment of the installments due April 15, 1989, June 15, 1989, and September 15, 1989, will also terminate on January 15, 1990.

55.8.3 Additions To Tax.

55.8.3.1 Compliance with the provisions of Subsection 55.8 will enable a taxpayer to avoid paying additions to tax with respect to an underpayment of the installment not required to be paid until January fifteenth (15th) of the succeeding calendar year.

55.8.3.2 With respect to an underpayment of any earlier installment, compliance with Subsection 55.8 will not relieve the taxpayer from additions to tax imposed under Article 10, Chapter 11, of the West Virginia Code. However, the period of the underpayment with respect to an earlier installment will terminate on January fifteenth (15th) of the succeeding calendar year.

55.9 Fiscal Year Taxpayers.-In the case of individuals on a fiscal year basis, other than those referred to in Subsections 55.5 and 55.6 of this regulation, the declaration must be filed on or before the fifteenth (15th) day of the fourth (4th) month of the taxable year. The provisions of this Section and of Section 56 of these regulations shall apply to a taxable year other than a calendar year by the substitution of the corresponding fiscal year months for the calendar year months referred to in this Section 55. See Section 6 relating to accounting periods and tax years.

55.10 Short Taxable Periods.

55.10.1 In General.-If a taxpayer is required to make a declaration of estimated income tax pursuant to Subsection 55.1 of this regulation, and a short taxable year is involved, a separate declaration for such fractional part of the year is required, except as hereinafter provided.

55.10.2 Income And Income Tax Placed On Annual Basis.-In order to determine whether a declaration of estimated tax needs to be filed for a short taxable year, West Virginia adjusted gross income and the taxes imposed under the West Virginia Personal Income Tax Act shall be placed on an annual basis in the manner prescribed in 26 U.S.C. § 443(b)(1).

55.10.2.1 Example.-A taxpayer changes from a calendar year to a fiscal year basis beginning July first (1st). The taxpayer will have a short taxable year beginning January first (1st), and ending June thirtieth (30th). The anticipated West Virginia adjusted gross income (excluding wages on which tax is withheld) for such short taxable year is three thousand dollars (\$3,000). His West Virginia adjusted gross income for the purpose of determining whether a declaration is required is six thousand dollars (\$6,000), which is the amount obtained by placing the anticipated income of three thousand dollars (\$3,000) upon an annual basis (\$3,000 multiplied by 12 and divided by 6).

55.10.3. Four (4) Months Or Less.-No declaration is required if the short taxable year is a period of less than four (4) months or one (1) of the safety zones set forth under Section 56a of these regulations is applicable.

55.10.4. Time For Filing.

55.10.4.1 In General.-In the case of a short taxable year, the declaration shall be filed by individuals (other than those referred to in Subsection 55.5 and 55.6 of this regulation) on or before the fifteenth (15th) day of the fourth (4th) month of such taxable year. If the requirements prescribed in Subsection 55.1 of this regulation are originally met after the first (1st) day of the fourth (4th) month but before the second (2nd) day of the sixth (6th) month, the declaration must be filed on or before the fifteenth (15th) day of the sixth (6th) month. If the requirements of Subsection 55.1 are originally met after the first (1st) day of the sixth (6th) month but before the second (2nd) day of the ninth (9th) month, the declaration must be filed on or before the fifteenth (15th) day of the ninth (9th) month.

55.10.4.2 Short Year Of More Than Six But Less Than Nine (9) Months.-If, however, the period for which the declaration is filed is at least six (6) months but less than nine (9) months and the requirements of Subsection 55.1 of this regulation are not met until after the first (1st) day of the fourth (4th) month, the declaration may be filed on or before the fifteenth (15th) day of the succeeding taxable year.

55.10.4.3 Short Year Of More Than Nine (9) Months.-If, however, the period for which the declaration is filed is for nine (9) months or more and such requirements are not met until after the first (1st) day of the sixth (6th) month, the declaration may be filed on or before the fifteenth (15th) day of the succeeding taxable year.

55.11. Declaration Made By Agent For Individual Under Disability.

55.11.1 In General.-The declaration of estimated tax for an individual who is unable to make a declaration by reason of minority, disease, injury, or other disability may be made and filed by his or her guardian, committee, fiduciary or other person charged with care of the individual or his property (other than a receiver in possession of only a part of the individual's property), or by his or her duly authorized agent in accordance with Subsection 55.11.2 below.

55.11.2 Procedure.

55.11.2.1 General.-Whenever a declaration is made by a duly authorized agent, it must be accompanied by a power of attorney (or copy thereof) authorizing the agent to represent his or her principal in making, executing, or filing the declaration. A copy of the Federal Form used for the same purpose, when properly completed, is sufficient, and in the case of a court appointed agent, a copy of the court order of appointment is sufficient.

55.11.2.2 Disabled Spouse.-Where one spouse is physically unable by reason of disease or injury to sign a joint declaration, the other spouse may, with the oral consent of the one who is incapacitated, sign the incapacitated spouse's name in the proper place in the declaration followed by the words "By.....Husband (or Wife)," and by the signature of the signing spouse in his or her own right, provided that a dated statement signed by the spouse who is signing the declaration is attached to and made a part of the declaration providing the following information: the name of the declaration being filed, the taxable year to which the declaration applies, the reason for the inability of the incapacitated spouse to sign the declaration and a statement verifying that the spouse who is incapacitated consented to the signing of the declaration.

55.11.2.3 Liability Of Taxpayer And Agent.-The taxpayer and his or her agent, if any, are responsible for the declaration as filed and incur liability for any penalties for false, or fraudulent declarations.

55.11.2.3.a "Agent" Defined.-For purposes of this regulation, the term "agent" includes guardian, committee, fiduciary or other person charged with the care of the individual under a disability, and a duly authorized agent of the taxpayer.

§ 110-21-56. Payments Of Estimated Tax.

56.1 General.-The amount of estimated income tax due as shown on a declaration of estimated income tax may be paid in installments or, at the election of the taxpayer, may be paid in full at the time of filing the declaration. If the estimated income tax is paid in installments, the first (1st) payment must accompany the declaration.

56.1.1 Installment Dates.-In the case of a declaration of estimated income tax for a calendar year, the initial payment date and the subsequent payment dates are set forth in the following table:

<u>Date Of Filing Declaration</u>	<u>Dates Of Installment Payments</u>
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- (1) On or before April 15th. . . . . In four (4) equal installments - one (1) at time of filing declaration (on or before April 15), one (1) on or before June 15, one (1) on or before September 15, and one (1) on or before January 15 of the succeeding taxable year.
- (2) After April 15 and before June 16, if not required to be filed on or before April 15. . . . . In three (3) equal installments - one (1) at time of filing declaration (on or before June 15), one (1) on or before September 15, and one (1) on or before January 15 of the succeeding taxable year.
- (3) After June 15 and before September 16, if not required to be filed on or before June 15 or . . . . . In two (2) equal installments one (1) at time of filing declaration (on or before September 15), and the other succeeding on or before January 15 of the succeeding taxable year.
- (4) After September 15, if not required to be filed on or before September 15. . . . . In full at time of filing declaration.

56.1.1.1 Filing After The Prescribed Time. - If a declaration is filed after the time prescribed in Section 55 of these regulations, or after the expiration of any extension of time, items (2), (3) and (4) of the table set forth under Subsection 56.1.1 shall not apply, and there shall be paid at the time of filing the declaration of estimated tax all installments of the estimated tax which would have been payable on or before such date of filing if the declaration had been filed on or before its due date, determined without regard to any extension of time. The remaining installments shall be paid at the time and in the amounts in which they would have been payable if the declaration had been filed when originally due.

56.1.1.1.a Example. - A taxpayer who was required to file a declaration of estimated income tax on or

before April 15, 1989, files his declaration for 1989 on September 15, 1989. Under this example, at the time of filing his declaration, this taxpayer was delinquent in the payment of two (2) installments of his estimated income tax for the taxable year of 1989 and therefore three-fourths (3/4) of the estimated tax shown on his declaration must be paid.

56.2 Estimated Income Tax Payments By Farmers.-Special provisions are made with respect to the filing of the declaration and the payments of the tax by an individual whose estimated West Virginia adjusted gross income for the taxable year is at least two-thirds (2/3) from farming as defined under Subsection 55.5.1.2 of these regulations. The declaration of such an individual may be filed on or before January fifteenth (15th) of the succeeding taxable year, in lieu of the time prescribed for taxpayers generally. Where such an individual makes a declaration of estimated income tax after September fifteenth (15th) of the taxable year, the estimated income tax shall be paid in full at the time of the filing of the declaration as provided under West Virginia Code § 11-21-56(b).

56.3 Amendments Of Declaration.-If any amendment of a declaration is filed, the remaining installments, if any, shall be ratably increased or decreased (as the case may be) to reflect any increase or decrease in the estimated tax by reason of such amendment, and if any amendment is made after September fifteenth (15th) of the taxable year, any increase in the estimated tax by reason thereof shall be paid in full at the time of making such amendment.

56.4 Short Taxable Years.-In the case of a short taxable year of an individual for whom a declaration is required to be filed, the estimated income tax may be paid in equal installments, one (1) at the time of filing the declaration, one (1) on the fifteenth (15th) day of the sixth (6th) month of the taxable year and another on the fifteenth (15th) day of the ninth (9th) month of such year (unless the short taxable year closed prior to such sixth (6th) or ninth (9th) month, in which case the respective installment will be eliminated) and one (1) on the fifteenth (15th) day of the first (1st) month of the succeeding taxable year. For example, if the short taxable year is the period of ten (10) months from January 1, 1989 to October 31, 1989 and the declaration is required to be filed on or before April 15, 1989, the estimated income tax is payable in four (4) equal installments: one (1) on the date of filing the declaration, and one (1) each on June 15, September 15 and November 15, 1989. If, in such case, the declaration is required to be filed after April 15 but on or before June 15, the tax will be payable in three (3) equal installments, one (1) on the date of filing the declaration, and one (1) each on September 15 and November 15, 1989.

56.5 Fiscal Year.-In the case of individuals on a fiscal year basis, other than those referred to in Subsections 55.4 and 55.5 of these regulations, the declaration must be filed on or before the fifteenth (15th) day of the fourth (4th) month of the taxable year. The provisions of this Section and of Section 55 of these regulations shall apply to a taxable year other than a calendar year by the substitution of the corresponding fiscal year months for the calendar year months referred to in this Section.

56.6 Installments Paid In Advance.-An individual may elect to pay any installment of his estimated tax prior to the date prescribed for its payment.

56.7 Death Of Taxpayer.-In the case of a decedent, payments of estimated income tax are not required subsequent to the date of the decedent's death. However, see Subsection 55.3.4.2 of these regulations relating to the making of an amended declaration by a surviving spouse if a joint declaration had been made prior to the death of the decedent.

56.8 Application Of Installment Payments.-The payment of any installment of estimated income tax shall be considered payment on account of the income tax for the taxable year for which the declaration is made. The aggregate amount of the payments of estimated income tax should be entered upon the income tax return for such taxable year as payments to be applied against the tax shown on such return. See West Virginia Code § 11-10-5L pertaining to installment payments.

56.9 Overpayment Of Installments.-In the case of tax payable in installments, if the taxpayer has paid, as an installment of the tax, more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any for the taxable year. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax due for the taxable year, the overpayment shall be credited or refunded as provided under West Virginia Code § 11-10-14. See West Virginia Code § 11-10-5m.

56.10 Criminal And Administrative Sanctions For Failure To Pay Estimated Tax.-The provisions of the West Virginia Code relating to failure to pay estimated tax or any installment thereof in a proper and timely manner, including but not limited to, the applicable provisions of Chapter 11, Article 9 of the West Virginia Code, Sections 5L, 5m and 18a of Chapter 11, Article 10 of the West Virginia Code, shall apply to payments of estimated tax under West Virginia Code § 11-21-56 and Section 56 of these regulations.

§ 110-21-56a. Additions To Tax For Failure To Pay Estimated Tax.

56a.1 Applicability.-The additions to tax provisions of West Virginia Code § 11-10-18a are applicable to underpayments of estimated personal income tax. Such provisions will be applicable regardless of whether there is a failure to pay the entire amount of any installment of estimated tax on or before its due date or the amount of estimated tax (employer withholding tax plus installment payments) paid during the taxable year was less than ninety percent (90%) of the tax due for the taxable year. Exceptions to this rule, hereinafter referred to as "safety zones", are set forth in Subsection 56a.4 of this regulation.

56a.2 How Underpayment Of Estimated Tax Is Measured.

56a.2.1 In General.-To determine whether an individual's estimated tax payments for the taxable year equal at least ninety percent (90%) of his or her actual liability for the primary tax, and minimum tax imposed by West Virginia Code § 11-21-3, the following procedure shall be applied. The term "estimated tax payments" includes both the amount of installment payments remitted under West Virginia Code § 11-21-56, and the amount of taxes actually deducted and withheld at the source from wages under West Virginia Code § 11-21-71.

(1) Determine the sum of the individual's primary income tax shown on his or her return for the taxable year (as reduced by the amount of allowable credits) plus his or her minimum tax for the taxable year. If no annual return was filed, take one hundred percent (100%) of the total tax determined to be due for the taxable year.

(2) Take ninety percent (90%) of the above amount.

(3) Divide the amount of (2), above, by the number of installments required for the year. Generally, this will require dividing by four, but may be three, two or one. See Subsection 56.1 of these regulations.

(4) For each installment as computed in (3), above, find the excess, if any, over the amount actually paid or credited toward that installment payment. (Add in any overpayments available from a previous installment). If there is not excess, no further computation is necessary for that installment. For purposes of subparagraph (4), it is presumed that wages are received in equal payments throughout the year and that taxes are withheld under West Virginia Code § 11-21-71 in equal installments.

56a.2.2 Amount Of Underpayment.-Any excess computed in (4), above, for any installment is the amount of underpayment of that installment. If the actual payment made which is an underpaid installment does not meet at least one (1) of the available safety zone tests, additions to tax must be paid on the amount of that underpayment of estimated tax as provided under West Virginia Code § 11-10-18a. Additions to tax for failure to pay estimated tax are not waiveable by the Tax Commissioner.

56a.3 Period Of Underpayment.-The period of underpayment shall run from the date the installment was required to be paid to whichever of the following is earlier:

(1) The due date of the annual return following the close of the taxable year for which the installment was due;

(2) With respect to any portion of the underpayment, the date on which such portion is paid. For purposes of this regulation, a payment of estimated tax on any installment shall be considered a payment of any previous underpayment only to the extent such payment exceeds the amount of the installment which would be required to be paid if the estimated tax were an amount equal to ninety percent (90%) of the tax shown on the return for the taxable year for such installment date.

56a.4 "Safety Zones" Bar Imposition Of Additions To Tax For Underpayment Of Estimated Tax.

56a.4.1 In General.-Additions to tax will not be imposed for any underpayment of any installment of estimated tax if, on or before the date prescribed for payment of the installment (determined with regard to any authorized extension of time for payment), the total amount of all payments of estimated tax made equals or exceeds the least of the amounts due under "Safety Zones" 56a.4.1.3 through 56a.4.1.5 unless "Safety Zones" 56a.4.1.1 or 56a.4.1.2 is applicable:

56a.4.1.1 Safety Zone No. 1.-The amount of tax due with the annual return on the fifteenth (15th) day of the fourth (4th) month following the close of the taxable year is two hundred dollars (\$200) or less.

56a.4.1.2 Safety Zone No. 2.-The amount of tax due with the annual return on the fifteenth (15th) day of the fourth (4th) month following the close of the taxable year is ten percent (10%) or less of the tax liability for the taxable year.

56a.4.1.3 Safety Zone No. 3.-The amount of "tax shown" on the previous year's West Virginia personal income tax return was a taxable year of twelve (12) months reduced by the amount of West Virginia withholding taxes for the current year.

Safety Zone No. 3 avoids additions to tax if the total payments of estimated tax made by each installment date are at least equal to the amount which would have been required on that installment date if the estimated tax was the amount of "tax shown" on the previous year's West Virginia Personal Income Tax Return reduced by the amount of West Virginia withholding taxes for the current year. In applying Safety Zone No. 3, the following rules shall apply:

56a.4.1.3.a An individual that did not file a West Virginia personal income tax return for the preceding year cannot use Safety Zone No. 3.

56a.4.1.3.b A married couple that did not file a joint West Virginia personal income tax return for the preceding tax year cannot use Safety Zone No. 3.

56a.4.1.3.c The applicable tax credits are those allowed on the annual return for the preceding tax year.

56a.4.1.3.d If the annual return for the preceding year is not filed on or before the due date of the declaration of estimated tax for the taxable year, the declaration of estimated tax for the current tax year cannot be based on last year's tax.

56a.4.1.4 Safety Zone No. 4.-The amount of tax which would be due if computed based on the facts and law applicable to the West Virginia Personal Income Tax Return for the preceding year, but using current year rates, personal exemptions and credits. This safety zone avoids additions to tax if the total payments of estimated tax already made by the installment date are at least equal to an amount which would have been required on that installment date if the estimated tax was a tax based on the facts shown on the previous year's return and the previous year's law, but using current year rates, personal exemptions and credits. In applying Safety Zone No. 4, the following rules apply:

56a.4.1.4.a Nonrecurring items of income and deductions are not to be excluded.

56a.4.1.4.b An individual who did not file a West Virginia personal income tax return for the preceding tax year cannot use Safety Zone No. 4.

56a.4.1.4.c A married couple that did not file a joint West Virginia personal income tax return for the preceding tax year cannot use Safety Zone No. 4.

56a.4.1.5 Safety Zone No. 5.-The amount of West Virginia personal income tax which would have been required to be paid on or before the date prescribed for payment if the estimated tax was an amount equal to ninety percent (90%) of the tax for the current taxable year, and computed by placing on an annualized basis the taxable income: for the first (1st) three (3) months of the taxable year where the installment is required to be paid in the third (3rd) or fourth (4th) month; for the first (1st) three (3) months of the first (1st) five (5) months of the taxable year where the installment is required to be paid in the sixth (6th) month; for the first (1st) six (6) months or the first (1st) eight (8) months of the taxable year where the installment is required to be paid in the ninth (9th) month and for the first (1st) nine (9) months or for the first (1st) eleven (11) months of the taxable year where the installment is required to be paid in the twelfth (12th) month of the taxable year or the first (1st) month of the next succeeding taxable year.

56a.4.1.5.a For purposes of Subsection 56a.4.1.5, the taxable income shall be placed on an annualized basis by multiplying by twelve (12) the taxable income and dividing the resulting amount by the number of months in the taxable year by three (3), five (5), six (6), eight (8), nine (9) or eleven (11) as the case may be.

56a.4.2 Application Of Safety Zones To Short Tax Years.-Additions to tax for an underpayment of estimated tax are equally applicable to short tax years where a declaration of estimated tax is required to be filed. In computing the safety zones for short taxable years, the estimated tax (whether based on that shown on the previous year's return, based on the previous year's facts, or annualized current income) is reduced by multiplying the estimated tax for a full year by the percentage which the number of months in the short tax year bears to twelve (12). For this safety zone, the percentage figure will be applied to reduce the tax.

56a.4.2.1 If the preceding taxable year was a short year, estimated tax for the current year (for purposes of Safety Zone No. 4) will be computed on an annual basis (income multiplied by twelve (12) minus number of months in the short year). The tax will not be reduced because of the short year.

56a.4.2.2 If the tax rates for the year of underpayment have changed for the preceding year, the estimated tax must be computed using current rates.

56a.4.3 Safety Zone Requirements.-Safety zone requirements must be satisfied on each installment date to avoid the imposition of additions to tax on an underpayment of estimated tax as of the installment date. For purposes of this

regulation, it is presumed that a taxpayer's West Virginia taxable income is received in equal installments throughout the taxable year. The taxpayer bears the burden of proof to establish that the West Virginia taxable income was received during the taxable year in some other manner.

56a.4.4 Return For The Preceding Taxable Year.-The term "return for the preceding taxable year" means the West Virginia Personal Income Tax Return required to be filed under West Virginia Code § 11-21-51 for the taxable year immediately preceding the current taxable year. If an amended return was filed for the preceding taxable year before the due date of the declaration of estimated tax for the current taxable year (determined with regard to any extension of time for filing), then it constitutes the return for the preceding taxable year if it is a reasonable estimate of the amount of tax due for the current taxable year.

56a.4.5 "Facts Shown On The Preceding Year's Return."-The facts shown on the preceding year's return may include a net operating loss deduction properly claimed on the preceding year's return, information shown on a West Virginia joint personal income tax return for the preceding taxable year where the individual no longer qualifies to file a joint return, and tax credits claimed on the return for the previous year, even though allowable credits for the current taxable year are reasonably expected to be greater than or less than those allowed for the preceding year.

§ 110-21-57. Extensions Of Time.

57.1 General.-Pursuant to West Virginia Code § 11-21-57(a) the Tax Commissioner has discretionary authority to grant a reasonable extension of time for the payment of tax or estimated tax including any installments thereof, or for the filing of any return, declaration, statement or other document required to be filed under the provisions of the West Virginia Personal Income Tax Act, on such terms and conditions as he may require. Except for a taxpayer who is outside the United States, no such extension shall exceed six months.

57.1.1 Extensions Of Time For Filing Returns.

57.1.1.1 Automatic Extension Of Time.-Except as provided under Subsection 57.1.1.4 of this regulation, an extension of time for the filing of a taxpayer's federal income tax return shall automatically extend the time for the filing of the West Virginia Personal Income Tax Return for the same period as the extension for filing such federal return. A copy of the federal form requesting an extension of time must be attached to the West Virginia annual return when said return is filed. While

an extension of time for filing a federal income tax return automatically extends the time for filing the West Virginia income tax return, it does not extend the time for payment of the balance of the West Virginia tax due.

57.1.1.2 Extension By Application.-An extension of time to file the West Virginia Personal Income Tax Return may be granted by the Tax Commissioner upon written application by the taxpayer where no extension of time has been sought for federal income tax purposes. No such extension shall be granted unless the taxpayer applies in writing to the Tax Commissioner and sets forth a full recital of the causes for the delay. The application must be filed on or before the regular due date of the return. Failure to timely file a written application for an extension constitutes automatic denial of such extension. An extension of time for filing a return does not operate to extend the time for payment of the tax or any part thereof.

57.1.1.2.a An extension of time to file a return on an original application will be limited to a period of time not in excess of one hundred twenty (120) days. Longer periods of time will not be granted by the Tax Commissioner unless sufficient need for such extended period is clearly established by the taxpayer.

57.1.1.3 Where an additional extension of time is requested by a taxpayer, a copy of the last extension granted must be attached to the new request in every instance and such request must be made in writing and filed on or before the expiration of the preceding extension. This additional extension request must also contain a full recital of the causes necessitating further delay.

57.1.1.4 Limitation On Extensions To File Returns.-In no event shall any extension of time to file a West Virginia Personal Income Tax Return be granted in excess of six (6) months for taxpayers within the United States.

57.1.1.5 Payment Of Tax.-A taxpayer who is granted an extension of time for filing his or her annual income tax return (whether such extension is automatic under Subsection 57.1.1.1 or by application under Subsection 57.1.1.2 of this regulation) is not automatically granted a similar extension for the payment of tax otherwise due on or before the regular due date of the return. Where an extension of time to file the West Virginia return has been granted and no corresponding extension of time for payment of tax has been granted or has been denied, the taxpayer must pay the balance of any tax on or before the statutory due date of the return. Failure to so pay will act to

revoke any extension of time granted to file the West Virginia return.

57.1.1.5.a If a taxpayer desires an extension of time for paying his or her West Virginia income tax, an application for such extension must be timely filed with the Tax Commissioner as provided in Subsection 57.1.3 of this regulation.

57.1.2 Extensions For Filing Declaration Of Estimated Tax.

57.1.2.1 An application for an extension of time for filing a declaration, or amended declaration, of estimated tax must be in writing, addressed to the Tax Commissioner, contain a full recital of the cause for the delay and be filed on or before the due date of the declaration of estimated tax. Payment of estimated tax must accompany the request for extension of time to file the declaration unless an extension of time to pay has been granted prior to the due date of the estimated tax payment.

57.1.2.2 An extension of time granted to a taxpayer for filing a declaration of estimated tax does not automatically extend the time for paying the first (1st) installment of estimated tax for the same period, or any subsequent installments that become due during the extension period for filing the declaration.

57.1.3 Extension Of Time For Payment Of Tax.-The Tax Commissioner may grant a reasonable extension of time for the payment of tax shown, or required to be shown, on the annual return, or for the payment of any installment of estimated tax for a period, such extension of time not to exceed six (6) months for a taxpayer who is not outside the United States. The basis for determining whether to grant an extension of time for payment depends on the taxpayer's ability to establish that payment of tax at the required date would work an undue hardship on the taxpayer.

57.1.3.1 Application For Extension.-A taxpayer desiring an extension of time for payment of tax must submit a written request for such extension detailing the assets and liabilities of the taxpayer, and the request must be accompanied by evidence of the undue hardship that would result to the taxpayer if the extension were to be denied. Application for extension must be filed on or before the date prescribed for payment of the tax. Failure to timely file a written request for an extension of time for payment constitutes automatic denial of such request.

57.1.3.2 Undue Hardship Required For Extension.-An extension of time for payment of tax will be granted only upon a satisfactory showing that payment of tax at the time prescribed by statute will result in undue hardship. The extension will not be granted on a general statement of hardship.

57.1.3.2.a Undue Hardship Defined.-The term "undue hardship" means more than an inconvenience to the taxpayer. It must appear that substantial financial loss, such as selling assets at a sacrifice price, will result to the taxpayer from making payment on the due date of the amount with respect to which the extension is desired. If a market exists for assets owned by the taxpayer, the sale of such assets at the current market price is not ordinarily considered as resulting in undue hardship.

57.1.3.2.b Except in extremely unusual circumstances, an extension of time to pay will not be granted to a taxpayer who can borrow the amount needed to make timely payment from a bank or other financial organization or institution. It is to be presumed that a taxpayer has the ability to borrow until the taxpayer affirmatively proves otherwise.

57.1.4 Filing Returns And Declarations, And Paying Tax Where Extensions Have Been Granted.

57.1.4.1 Where an extension of time to file the annual return or a declaration of estimated tax has been granted the return or declaration must be filed on or before the date the extension period expires and the return or declaration must include a copy of the document granting the extension. In the case of an automatic extension discussed under Subsection 57.1.1.1 of this regulation, a copy of the federal application for automatic extension must be attached to the West Virginia income tax return filed on or before the expiration of the extension.

57.1.4.2 Where an extension of time has been granted for the payment of tax, the taxpayer shall remit, on or before the last day of the extension period, the entire tax due plus nonwaivable interest and or nonwaivable additions to tax as provided under West Virginia Code § 11-10-17, § 11-10-17a and 11-10-18a.

57.1.4.3 Under no circumstances shall an extension to file a return or declaration be construed to automatically extend the time for payment of tax otherwise due. Likewise, an extension of time to pay shall not constitute an extension of time to file.

57.2 Amount Determined As Deficiency.-The Tax Commissioner may extend the time for payment of an amount he determines to be a deficiency of the tax imposed under the provisions of the West Virginia Personal Income Tax Act for a period not to exceed eighteen (18) months from the date fixed for payment of the deficiency so determined. In exceptional cases, a further period of time not to exceed twelve (12) months may be granted. An extension under this Subsection may be granted only where it is established to the satisfaction of the Tax Commissioner that payment of the deficiency upon the date fixed for payment thereof will result in undue hardship to the taxpayer. (See Subsection 57.1.3.2.a for a definition of the term "undue hardship").

57.2.1 No Extension For Certain Deficiencies.-No extension shall be granted under Subsection 57.2 of this regulation for any deficiency of tax, additions to tax, penalties or other charges if such deficiency is due to negligence, intentional disregard of Tax Department rules and regulations, or to fraud with intent to evade tax.

57.2.2 Application For Extension Of Time For Payment Of Amount Determined As Deficiency.-Taxpayers seeking an extension of time for payment of an amount determined to be a deficiency shall file a written request with the Tax Commissioner for such an extension on or before the time fixed by the Tax Commissioner for payment of the deficiency. Such request shall set forth the relevant facts including a statement of the assets and liabilities of the taxpayer, the reason for the taxpayer's inability to pay the amount determined as a deficiency and a statement of the undue hardship that would result to the taxpayer if the extension were to be denied.

57.2.3 An extension of time for the payment of an amount determined to be a deficiency shall not constitute an extension of time for filing any other return or document due during the extended period for payment.

57.2.4 No extension of time shall be granted for the payment of an amount determined to be a deficiency unless the Tax Commissioner finds that exceptional circumstances exist and that to require payment of the deficiency at the date prescribed by the Tax Commissioner would work an undue hardship on the taxpayer.

57.2.5 If the time for payment of an amount determined to be a deficiency is extended, nonwaivable additions to tax at the rate established under West Virginia Code § 11-10-18a and accruing from the statutory due date of the tax until the tax and all additions relating to the deficiency are paid, shall be added to such tax.

57.3 Claims In Bankruptcy Or Receivership Proceedings.-An extension of time for payment of any portion of a claim for tax allowed in bankruptcy, receivership or similar proceedings, which is unpaid, may be granted by the Tax Commissioner, subject to the same provisions and limitations as in the case of a deficiency in such tax as detailed under Subsection 57.2 of this regulation.

57.4 Furnishing Of Security.-As a prerequisite to granting an extension of time for payment of any tax or deficiency, the Tax Commissioner may require the taxpayer to furnish a bond or other security. Such bond or other security shall be in an amount not exceeding twice the amount of any tax or deficiency for which the extension of time for payment is granted.

§ 110-21-58. Requirements Concerning Returns, Notices, Records And Statements.

58.1 General.-Every person subject to tax under the West Virginia Personal Income Tax Act, or subject to collection of such tax, and any person required to file a return of information with respect to income, shall keep such permanent books of account or records as are sufficient to establish the amount of gross income, deductions, credits or other matters required to be shown by such person in any return of such tax or information. The Tax Commissioner is authorized to prescribe the content and form of returns and statements, and may require the inclusion in a return, document, or statement of any information he deems necessary for the proper enforcement of the West Virginia Personal Income Tax Act. For purposes of this regulation, the term "person" shall include, but is not limited to, any individual, firm, partnership, limited partnership, copartnership, joint adventure, association, corporation, S corporation, municipal corporation, organization, receiver, estate, trust, guardian, executor, administrator, and also any officer, employee or member of any of the foregoing who, as such officer, employee or member, is under a duty to perform or is responsible for the performance of an act prescribed by the provisions of the West Virginia Personal Income Tax Act or these regulations.

58.1.1 If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, then the computation of taxable income shall be made under such a method as, in the opinion of the Tax Commissioner, does clearly reflect income.

58.1.2 Bookkeeping entries, in and of themselves, are not conclusive of the amount of income. The actual facts, rather than the book entries, control. In addition, entries on another individual's books are not conclusive against a taxpayer.

58.1.3 Retention Of Records.-The books or records required by this Section 58 shall be kept at all times available for inspection by authorized representatives of the Tax Commissioner.

58.1.4 Farmers And Wage Earners.-Individuals deriving gross income from the business of farming as defined under Subsection 55.5.1.1 of these regulations, and individuals whose gross income includes salaries, wages or similar compensation for personal services rendered, are required with respect to such income to keep such records (including duplicate copies of the wage and tax deduction statements furnished by their employers) as will enable the Tax Commissioner to determine the correct amount of income subject to tax.

58.1.5 Form Of Records.-The records required in this regulation shall be kept accurately, but no particular form is required for keeping the records. Such methods of accounting shall be used which will enable the Tax Commissioner to ascertain whether liability for tax has been incurred, and, if so, the correctness of the amounts required to be reported in any return of tax or information.

58.1.6 Employer's Records.

58.1.6.1 Every employer or withholding agent, as defined for federal withholding tax purposes, required under the West Virginia Personal Income Tax Act to deduct and withhold State income taxes upon the wages of employees, and every person, firm, organization or corporation required to file information returns as described in this regulation, shall keep all records pertinent to these taxes and information reports available for examination and inspection by the Tax Commissioner, or his authorized representatives. Such records shall be retained and preserved for a period of five (5) years following the close of the calendar year to which they relate.

58.1.6.2 No particular form is prescribed for such records, but the records shall include the amounts and dates of all wage payments subject to West Virginia personal income taxes, the names, addresses and occupations of employees receiving such payments, the periods of their employment, the periods for which they are paid by the employer while absent due to sickness or personal injuries and the amount and weekly rate of such payments, their social security account numbers, their income tax withholding exemption certificates, the employer's identification number, records of monthly or quarterly and annual withholding returns and reports filed, and the dates and amounts of withholding tax payments made.

58.1.6.3 For nonresidents, performing services partly within and partly without the State, a record of the allocation used for withholding purposes must be kept.

58.1.7 Notice By Tax Commissioner Requiring Returns, Statements, Or The Keeping Of Records.-The Tax Commissioner may require any person, by notice served upon him, to make such returns, render such statements, furnish such copies of federal income tax returns and of federal audit determinations, or keep such specific records as the Tax Commissioner may deem necessary to verify whether or not such person is complying or has complied with any applicable provision of the West Virginia Personal Income Tax Act.

58.1.8 Copies Of Returns, Schedules And Statements.-Every person who is required in these regulations or by instructions applicable to any form prescribed thereunder to keep a copy of any return, schedule, statement or other document, shall keep such copy as a part of his records.

58.1.9 Place For Keeping Records.-All records prescribed by these regulations shall be kept, by the person required to keep them at one (1) or more convenient safe locations accessible to the authorized representatives of the Tax Commissioner, and shall at all times be available for inspection by such representatives.

58.2 Partnerships.-Every partnership having a resident partner or having any income derived from West Virginia sources shall file a partnership return for the taxable year. The partnership shall file a return regardless of the amount of its income and regardless of the taxable years of the partners. Such partnership return shall set forth all items of income, gain, loss and deduction. The return shall also set forth the names, addresses, social security numbers, and amount of distributive shares of income and deduction of all partners, and such other information or schedules which the Tax Commissioner may prescribe on income tax forms and instructions.

58.2.1 Under certain prescribed circumstances, the Internal Revenue Service does not require the execution and filing of a federal partnership return of information. Where a federal partnership return is not required for a taxable year, a West Virginia partnership return is not required for such taxable year.

58.3 Information At Source.-See Section 72 of these regulations.

58.4 Notice Of Qualification As Receiver, Trustee, Assignee Or Other Fiduciary.-Every receiver, trustee in bankruptcy,

assignee for the benefit of creditors, or like fiduciary shall give written notice of his qualification as such to the Tax Commissioner.

58.5 Employers With Nonresident Employees Working Both Within And Without The State.-If an employer has nonresident individuals as employees and such individuals work both within and without West Virginia, the employer is required to keep records which clearly reflect the amount of income earned within West Virginia and the number of days worked therein.

§ 110-21-59. Report Of Change In Federal Taxable Income.

59.1 General.-If the amount of a taxpayer's federal taxable income reported on his federal income tax return for any taxable year is changed or corrected by the United States Internal Revenue Service or other competent authority or as the result of a renegotiation of a contract or subcontract with the United States, the taxpayer shall report such change or correction in federal taxable income within ninety (90) days after the final determination of such change, correction, or renegotiation, or as otherwise required by the Tax Commissioner, and shall concede the accuracy of such determination or state wherein it is erroneous. When making such report, the taxpayer shall disclose to the Tax Commissioner the full particulars of such federal tax change or correction.

59.2 Any taxpayer who files an amended federal income tax return must also file within ninety (90) days thereafter an amended West Virginia income tax return, and shall in addition provide the Tax Commissioner with such further information as he may require.

§ 110-21-60. Change Of Election.

60.1 General.-Unless otherwise provided herein, any change of election made by a taxpayer for federal income tax purposes pursuant to the provisions of the Internal Revenue Code and its applicable regulations, which increases or decreases the taxpayer's federal taxable income for a taxable year, must be made identically for West Virginia income tax purposes, except to the extent that such federal provisions are inconsistent with the West Virginia Personal Income Tax Act. A taxpayer making such a change of election for federal income tax purposes shall file an amended West Virginia return within ninety (90) days thereafter.

60.1.1 Any change of election shall be subject to the approval of the Tax Commissioner and, for this purpose, he may require such information, records or evidence that he deems necessary and may attach such conditions or limitations to his

approval of such a change of election as he may consider advisable.

## 60.2 Husband And Wife.

60.2.1 Change From Separate To Joint Return.-A husband and wife can file separate West Virginia returns, and then after the time for filing returns (April 15th, for calendar year taxpayers) has passed they may elect to file a joint West Virginia return. This election may be made within three (3) years after the date the original return was originally due, without regard to any extension of time. This election to change from separate to joint may, however, only be made if the taxpayer has made the same election federally. See Section 11 of these regulations.

60.2.1.2 If a husband and wife determine their federal taxable income on a joint federal return, they may elect to determine their West Virginia taxable income on a joint West Virginia return. If the taxpayers elect to change from a joint return to separate returns federally, within the prescribed time period, the taxpayers must also make the same election for West Virginia purposes. (See Section 11 of these regulations). An election to file a joint West Virginia return is binding and may not be changed after the due date of the original West Virginia return. A different election may be made each year.

60.2.2 Husband And Wife With Different Resident Status.-Sections 11 and 31 of these regulations provide that, where either husband and wife is a resident and the other is a nonresident, they shall file separate returns unless they were otherwise entitled to file a joint federal return and both elect to file a joint West Virginia return for the taxable year as if both were residents. A husband and wife may elect to file a joint West Virginia return only if one spouse was a resident for the entire taxable year and the other spouse was a nonresident for the entire taxable year. If they exercise such election they will be permitted to change their original election to file separate State returns and to make, instead, a joint return as if both were residents in accordance with Subsection 60.1 above, provided that the tax due on such joint return is paid in full at the time it is filed.

60.2.3 Approval For Change Of Election.-Elections to make the changes as hereinbefore described and to file amended returns shall be subject to the Tax Commissioner's approval and discretion. No amended return filed with the Tax Commissioner shall be valid unless the amount of tax due on such amended return is or has been paid in full at the time of the filing of the amended return.

60.3 Additions To Tax And Interest.-The filing or acceptance of an amended return pursuant to this regulation shall not prevent the assessment of additions to tax or interest to which the taxpayer may be subject prior to the filing of such amended return, except that the amount thereof shall be computed upon the amount of tax due after giving effect to any change of election made in such amended return.

§§ 110-21-61 to 110-21-70. Reserved For Future Use.

PART V. WITHHOLDING OF TAX.

§ 110-21-71. Requirement Of Withholding Tax From Wages.

71.1 General.-Every employer maintaining an office or transacting business within West Virginia and making payment of any wages taxable under the West Virginia Personal Income Tax Act to a resident or nonresident individual shall deduct and withhold from such wages for each payroll period such amount of tax as will result in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due as the result of the inclusion in the employee's West Virginia adjusted gross income of his wages received during such calendar year. For this purpose, the provisions of the United States Internal Revenue Code and its applicable regulations, with respect to deducting and withholding of federal income tax by employers from wages, including the meaning of the various federal terms (such as "employer", "employee", "wages", "payroll period", "withholding exemptions") shall apply for West Virginia personal income tax purposes except as otherwise specifically provided herein or where such federal rules and definitions are clearly inconsistent with and inapplicable to the provisions of West Virginia Code § 11-21-71.

71.1.1 Employer.-The term employer means any person for whom an individual performs or performed any service, of whatever nature, as the employee of such person. An employer may be an individual, a corporation including an S corporation, a partnership, a trust, an estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group or entity. A trust or estate, rather than the fiduciary acting on behalf of the trust or estate, is generally the employer.

71.1.1.1 The term employer embraces not only individuals and organizations engaged in trade or business, but organizations exempt from federal and State income tax; such as, charitable organizations and educational institutions.

71.1.1.2 The term employer shall also mean any person or organization qualifying as an employer for federal

income tax purposes and maintaining an office or transacting business within West Virginia, whether or not a paying agency is maintained within this State.

71.1.2 Wages. - Any remuneration which constitutes payments which are considered wages for federal income tax withholding purposes also constitutes wages for purposes of West Virginia income tax withholding. Wages in respect to withholding for West Virginia personal income tax purposes shall not, however, include either payments made by the United States to members of the Armed Forces of the United States, including Reserve and National Guard components for service therein or payments made to seamen who are members of the crew on a vessel engaged in foreign, coastwise, intercoastal, interstate or noncontiguous trade.

71.1.3 Employers Relieved From Withholding. - A determination by the Internal Revenue Service which relieves an employer from the requirement of withholding with respect to wages paid to an employee shall likewise apply for West Virginia personal income tax withholding purposes; Provided, That the employer granted such relief by the Internal Revenue Service must notify and provide the Tax Commissioner with all particulars pertaining to the granting of such relief by the Internal Revenue Service including but not limited to a copy of the Internal Revenue Service determination.

71.1.3.1 Where an employer is required to reinstate withholding of federal income tax with respect to an employee, such reinstatement is equally applicable for West Virginia personal income tax withholding purposes.

71.2 Withholding Exemptions. - An employee shall be entitled to the same number of West Virginia withholding exemptions as the number of withholding exemptions to which he is entitled for federal income tax withholding purposes. An employer may rely upon the number of federal withholding exemptions claimed by the employee except where the employee claims a higher number of West Virginia withholding exemptions.

71.2.1 In determining the proper tax to be deducted and withheld from an employee's wages, the employer shall allow the number of exemptions claimed by the employee on his withholding exemption certificate. Because the number of exemptions for federal and West Virginia income withholding purposes is generally the same, the employer may accept the Federal Form W-4 filed by the employee, unless such employee elects to file a West Virginia withholding exemption certificate. Once filed with the employer, a withholding exemption certificate will remain in effect until an amended certificate is furnished or until a new certificate is required to be filed.

71.2.1.1 An employee has the right to request that an employer withhold an additional amount of income taxes from wages to the extent that any amount of wages remains after all other federal, state or local withholding taxes have been withheld. When such a request is made, the employer must comply with the employee's request. Any employee who desires additional withholding should make his request to his employer by completing and presenting the appropriate West Virginia withholding exemption certificate to his employer.

71.2.2 The "withholding exemptions", in general, should correspond with the exemptions to be allowed the employee in computing his income tax on his annual West Virginia Personal Income Tax Return. An employer is not required to ascertain whether an employee has claimed the correct number of exemptions. If, however, the employer believes that the employee has claimed an excessive number of exemptions, said employer should so notify the West Virginia State Tax Department.

71.2.2.1 The amount of each West Virginia exemption shall be two thousand dollars (\$2,000) except as otherwise provided under West Virginia Code §§ 11-21-16 and 11-21-36.

### 71.3 Exception To Employer Withholding For Certain Nonresidents.

71.3.1 As a general rule, every employer maintaining an office or transacting business in West Virginia and making payment of wages subject to personal income taxation by West Virginia is required to deduct and withhold from such wages. The Tax Commissioner, however, pursuant to West Virginia Code § 11-21-71(c) has discretionary authority to promulgate regulations dictating conditions under which employers of certain nonresidents may be relieved of the requirement of withholding set forth under West Virginia Code § 11-21-71(a). Where West Virginia and another taxing jurisdiction in accordance with the provisions of West Virginia Code § 11-21-40 have entered into a written reciprocal credit agreement which results in allowing the residents of another taxing jurisdiction (nonresidents for West Virginia income tax purposes) a credit against West Virginia personal income tax sufficient to offset all taxes required to be withheld, the employer of such employee is hereby relieved from the withholding requirements set forth under the West Virginia Personal Income Tax Act.

71.3.1.1 Employers of resident individuals of Virginia who are nonresident employees of West Virginia persons or organizations need not withhold from wages and salaries of said individuals even though such nonresident employees may otherwise be required to file annual income tax returns for the

taxable year with this State due to a written reciprocal credit agreement between West Virginia and Virginia.

71.3.1.1.a As a condition precedent to not withholding, the employer must obtain from the nonresident employee a properly executed West Virginia exemption certificate.

71.3.1.1.b Employers paying wages to nonresident employees should contact the Tax Department for information pertaining to which taxing jurisdictions have entered into written reciprocal credit agreements with West Virginia.

#### 71.4 Wages Paid To A Nonresident.

71.4.1 In General.-An employer shall deduct and withhold on all wages paid to a nonresident employee for services performed in West Virginia except as provided under Subsection 71.3 of this regulation. Where such services are performed entirely within West Virginia, the employer shall withhold the tax from all wages paid to such employee.

71.4.1.1 The compensation or remuneration paid to a nonresident employee for services rendered entirely without the State is not considered West Virginia wages and therefore is not subject to West Virginia withholding, whether payment is made from within or without the State.

#### 71.4.2 Wages Of A Nonresident For Services Performed Partly Within And Partly Without West Virginia.

71.4.2.1 If a nonresident employee performs services for his employer partly within and partly without West Virginia, the employer may require him to execute an employee's certificate of nonresidence for the purposes indicated in this regulation.

71.4.2.2 The employer may withhold on the basis of the apportionment shown by the nonresident employee on the above certificate but must nevertheless make necessary adjustments during the year so that the proper amount of tax is withheld from the employee's wages. For the purpose of making these adjustments, the proportion of remuneration which is paid for services rendered within West Virginia shall be determined as follows:

71.4.2.2.a If the services are rendered by a traveling salesman, agent or other employee whose compensation on the basis of commissions depends directly on the volume of business transacted by him, the amount attributable to services in West Virginia is that proportion of the compensation received which the volume of business transacted by the employee

within the State of West Virginia bears to the volume of business transacted by him both within and without the State of West Virginia.

71.4.2.2.b With respect to all other employees, the amount of wages attributable to services within West Virginia is that proportion of the total compensation which the total number of working days employed within West Virginia bears to the total number of working days employed within and without West Virginia, exclusive of nonworking days, such as Saturdays, Sundays, holidays, and days of absence because of illness, personal injury, vacation or leave with or without pay.

71.4.2.3 The portion of wages allocable to West Virginia may be determined by the employer on the basis of the preceding year's experience, except that the employer shall make any necessary adjustments during the year to insure that the required tax is withheld for the current year. If the employee reasonably expects that the preceding year's experience will not be applicable to the current year, he may furnish to his employer a statement estimating the proportion of his wages allocable to West Virginia, or the employer himself may make such estimate and may then withhold on the basis thereof; in either case, however, the employer is required to make the necessary adjustments during the year so that the proper amount is withheld from the employee's salary for the current year.

71.4.2.4 Where a nonresident employee will work only a short period of time within West Virginia and it is reasonably expected that the total wages of such nonresident employee for services rendered within West Virginia will not exceed his personal exemption amount, the employer need not withhold or deduct any amount from his wages until the aggregate amount paid to him exceeds his personal exemption amount.

71.4.2.5 An employer is required to withhold on all wages paid to a nonresident who works partly within and partly without West Virginia unless there is filed with him the statement referred to in Subsection 71.4.2.3 or unless the employer maintains adequate current records to determine accurately the amount of wages paid for services performed in West Virginia. In this instance, merely accepting such statement does not relieve the employer from the duty of withholding the proper amount of tax from wages paid to an employee. The statement shall be retained by the employer and made available for inspection by representatives of the Tax Commissioner when so required.

71.5 Wages Paid To A Resident. -Wages paid to a resident of West Virginia are fully subject to withholding even though some or all of the services may have been rendered without West

Virginia, because a resident's wages are taxable under the West Virginia Personal Income Tax Act regardless of where earned.

71.6 Determining Tax To Be Withheld.-The West Virginia income tax to be withheld by an employer must be determined in accordance with one of the following income tax withholding methods: the Wage Bracket Method or the Percentage Method. For unusual circumstances, an employer may apply to the Tax Commissioner for permission to use another method. Information pertaining to employer withholding, including explanations on the use of either the Wage Bracket or Percentage Method of withholding, is available in booklet form from the Tax Department.

§ 110-21-72. Information Statement For Employee.

72.1 General.-Every employer required to deduct and withhold tax under the West Virginia Personal Income Tax Act from the wages of an employee, or who would have been required to deduct and withhold tax if the employee had claimed no more than one withholding exemption, shall furnish to each such employee on or before February fifteenth (15th) of the year succeeding the taxable year a West Virginia withholding tax statement. If an individual's employment is terminated before the close of the taxable year, the employer is required to furnish the employee a West Virginia withholding statement on the date of the last payment of wages to such employee.

72.2 Information Required On Withholding Statement.-The West Virginia withholding tax statement must contain the following information:

- (1) The employer's name, address, and identification number.
- (2) The employee's name, complete address and social security account number.
- (3) The employee's total West Virginia wages before payroll deductions, i.e., all wages paid residents, or all wages earned in West Virginia by nonresidents.
- (4) The total amount of West Virginia income tax withheld, if any, from the employee's wages.
- (5) The employee's total wages for federal tax purposes, if different from wages for West Virginia tax purposes.
- (6) The total amount of federal income tax withheld, if any, from the employee's wages.

§ 110-21-73. Credit For Tax Withheld.

73.1 General.-The West Virginia income tax deducted and withheld from an individual's wages in any calendar year shall be allowed as a credit against the West Virginia income tax imposed on such individual. If the tax has actually been withheld by the employer, such credit shall be allowed to the person from whose wages the tax was withheld, even though such tax has not been paid over to the Tax Commissioner. However, the taxpayer will not be granted credit for West Virginia income taxes withheld from wages unless the taxpayer attaches a withholding tax statement to his annual return to substantiate such claimed credit.

73.1.1 Where an employer fails to provide an employee with a withholding tax statement and the employee is unable to obtain such statement from the employer, the employee should request from the Tax Department an Affidavit Of West Virginia Income Taxes Withheld. A completed Affidavit Of West Virginia Income Taxes Withheld serves as a substitute withholding tax statement and is useable only where it is impossible to obtain a withholding tax statement from the employer.

73.2 Year Of Credit.-The tax withheld during any calendar year shall be allowed as a credit in accordance with Subsection 73.1 above against the tax imposed for the taxable year which begins in such calendar year. Since most employees file returns on the calendar year basis, they receive credit for the tax withheld during their entire reporting year. However, in the case of a taxpayer who files his return on a fiscal year basis and who is required to include in a return for such fiscal year the income from wages received during such fiscal year (cash basis taxpayer), credit must be claimed for the entire tax withheld in the calendar year during which such fiscal year began. This is true even though the withholding tax statement furnished by the employer shows wages paid and tax withheld for the calendar year.

73.2.1 Example.-A files on a fiscal year basis beginning June 1, 1988, and ending May 31, 1989. The full amount of tax withheld during the calendar year 1988 must be claimed as a credit on such fiscal year return and it may not be prorated to reflect the portion withheld from June 1 to December 31, 1988. The withholding tax statement for 1988 must be attached to the return filed for such fiscal year ending May 31, 1989.

§ 110-21-74. Employer's Return And Payment Of Withheld Taxes.

74.1 General.-Every employer required to deduct and withhold tax under the West Virginia Personal Income Tax Act shall file with the Accounting Division of the Tax Department an Employer's

Return of West Virginia Income Tax Withheld and remit with said return the full amount of taxes withheld at such time and in such manner as provided in this regulation.

74.1.1 Monthly Returns.-Every employer who withholds more than one hundred dollars (\$100) per month must file a monthly return and remit therewith the tax withheld for such month. The due date for the filing of a monthly return shall be on or before the twentieth (20th) day of the succeeding month except for the month of December where the due date of the return shall be on or before the thirty-first (31st) day of January.

74.1.1.1 Where an employer is required to file on a monthly basis, such employer shall continue to file on a monthly basis until the end of the calendar year regardless of the amount of tax withheld. The monthly status of an employer can only be changed by permission of the Tax Commissioner when it can be established that the amount of tax will not exceed one hundred dollars (\$100) per month. Such change will only be permitted to be made at the beginning of a calendar year.

74.1.1.2 Monthly returns are required to be filed even though, in any given month, no wages are paid or tax withheld. On such returns, the employer shall state the reason why no West Virginia income tax was withheld on the monthly return.

74.1.1.3 Once a monthly return is required to be filed, an employer must continue to file monthly returns unless the Tax Commissioner has ordered otherwise or until the employer has permanently ceased to pay wages under his current identification number.

74.1.2 Quarterly Returns.-Every employer who withholds less than one hundred dollars (\$100) per month must file quarterly returns and remit therewith the tax withheld during each calendar quarter. Quarterly returns are due on or before the last day of the month following the close of each calendar quarter as herein provided:

Period	Due Date
January 1 to March 31. . . . .	April 30
April 1 to June 30. . . . .	July 31
July 1 to September 30. . . . .	October 31
October 1 to December 31. . . . .	January 31

74.1.2.1 Quarterly returns are required to be filed even though, in any calendar quarter, no wages are paid or tax withheld. On such returns, the employer shall state the reason why no West Virginia income tax was withheld on the quarterly return.

74.1.2.2 Once a quarterly return is required to be filed, an employer must continue to file quarterly returns unless the Tax Commissioner has ordered otherwise or until the employer has permanently ceased to pay wages under his current identification number.

74.1.3 Annual Returns.—Where the aggregate amount of West Virginia income tax withheld by the employer is less than twenty-five dollars (\$25) in a calendar quarter and the total amount can reasonably be expected to be less than one hundred dollars (\$100) for the entire calendar year, the employer may be granted permission to file his withholding returns annually instead of quarterly. An employer, however, may not withhold on an annual basis unless he has obtained written permission to do so from the Tax Commissioner.

74.1.3.1 The due date for filing an annual return and for remitting tax therewith is January thirty-first (31st) of the succeeding year.

74.1.4 Notwithstanding the provisions of Subsections 74.1.1, 74.1.2, 74.1.3, the Tax Commissioner may, if he believes such action necessary for the protection of the revenues, require any employer to make such return and pay to him or to a designated depository the tax deducted and withheld at any time, or from time to time as he deems advisable.

74.1.5 Credits Against Tax Withheld.—A payment of tax withheld pursuant to West Virginia Code § 11-21-74 and this regulation may be subject to the credit set forth in West Virginia Code § 11-15-9b and the credit set forth in West Virginia Code § 11-15A-3b as detailed under Section 43 of these regulations.

74.1.6 Correction Of Over And Underwithholding.—Any errors or mistakes in withholding shall be corrected in the same manner as provided for federal withholding tax purposes.

74.1.6.1 If a withholding error is discovered in a subsequent month of the same calendar year, wages and salary payments shall be adjusted in that month.

74.1.6.2 If a withholding error cannot be adjusted on a return for a subsequent return period of the same calendar year, the employer is required to consult the Accounting

Division for purposes of determining the proper method of correction.

74.1.6.3 If an error is made on the Employer's Return of West Virginia Income Tax Withheld, a credit or additional payment shall be made on the succeeding return.

#### 74.2 Annual Reconciliation Of Tax Withheld.

74.2.1 The Annual Reconciliation of West Virginia Income Tax Withheld (Form I.T 103) must be submitted by the employer on or before February twenty-eighth (28th) following the close of the calendar year, together with Tax Department copies of all withholding tax statements for the year. Such annual reconciliation must be accompanied by a list, preferably in the form of an adding machine tape or accounting machine listing of the amounts of income tax withheld. This reconciliation is to be submitted separately from the employer's monthly or quarterly return.

74.2.2 Where the number of withholding statements is substantial, they may be forwarded to the Tax Department's Accounting Division in packages of convenient size. When this procedure is followed, the packages should be identified with the name and identification number of the employer and consecutively numbered and the annual reconciliation placed in the package numbered one (1). The number of packages should be indicated on the annual reconciliation.

74.2.3 If an employer's total payroll consists of a number of separate establishments, the withholding statements may be assembled accordingly and a separate list submitted for each establishment. In such case, a summary list should be submitted, the total of which must agree with the corresponding entry made on the annual reconciliation.

74.3 Termination Of Business.—If an employer permanently discontinues or sells his business or permanently ceases to pay wages under his current identification number, withholding returns shall be filed simultaneously with or within thirty (30) days after the filing of the final monthly or quarterly return and shall be accompanied by the adding machine tape or accounting machine listing referred to above. Such last return must be marked "Final Return".

74.3.1 Liability Of Successor.—The successor in business of any employer required under West Virginia Code § 11-21-71 and Section 71 of these regulations to deduct and withhold personal income tax from wages who sells out his or its business or stock of goods, or ceases doing business, shall be personally liable for the payment of personal income tax withheld

or which should have been withheld plus additions to tax, penalties and interest relating thereto which remain unpaid after expiration of the thirty (30) day period allowed for payment by the predecessor except as provided in Subsection 74.3.1.1 of this regulation.

74.3.1.1 Where a business is purchased in an arms-length transaction, and where the purchaser withholds so much of the consideration for the purchase as will satisfy any withholding tax, additions to tax, penalties and interest which may be due until the seller produces a receipt from the Tax Commissioner evidencing the payment thereof, the purchaser shall not be personally liable for withholding taxes attributable to the former owner of the business unless the contract of sale provides for the purchaser to be liable for some or all of such taxes. The amount of tax, additions to tax, penalties and interest for which the successor is liable constitutes a lien on the property of the successor in accordance with West Virginia Code § 11-10-11(f)(2).

74.3.1.1.a Purchase price is not limited to cash transferred to the seller, but includes any consideration flowing directly or indirectly to a seller or predecessor.

74.3.1.1.b The requirement to withhold consideration does not necessarily mean to retain or hold physical assets, but means dealing with the purchase consideration in such a manner as to deny the seller or the predecessor the benefit of the purchase consideration and to make it available to the State for the satisfaction of the tax liability.

74.3.1.2 The term "successor" refers to any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any employer quitting, selling, or otherwise disposing of a business or stock of goods. The purchase or acquisition of a business may give rise to successor liability whether the consideration is money, property, assumption of liabilities or cancellation of indebtedness.

74.3.1.3 The liability of a successor arises from any sale, transfer, assignment or other acquisition of a business or stock of goods. A person who purchases or acquires a portion of a business or stock of goods may become liable as a successor where he purchases or acquires substantially all of the business assets or stock of goods.

74.3.1.4 The business assets include the assets of a business pertaining directly to the conduct of the business. Business assets include real property or any interest therein;

tangible personal property, including fixtures, equipment and vehicles; and intangible property, including accounts receivable, contracts, business name, business goodwill, customer lists, delivery routes, patents, trademarks or copyrights.

74.3.1.5 If any taxpayer operates more than one business at separate locations, each business location is a separate business and has a separate stock of goods for purposes of determining successor liability. A successor of the business or stock of goods of any business location is subject to liability as a successor with respect to the tax attributable to that location even if he does not purchase the business or stock of goods of all the locations.

74.3.1.6 A change in the form of a business will generally give rise to successor liability, such as the incorporation of a sole proprietorship or partnership, the voluntary or involuntary dissolution of a corporation, the merger or consolidation of two or more corporations, the formation of a partnership from one or more sole proprietorships or corporations; or change in the name of a corporation.

74.3.1.7 Successor liability does not arise in connection with sales or transfers pursuant to assignments for the benefit of creditors, deeds of trust, or security interests, statutory liens, judgment liens unless the previous owner receives purchase money from the transfer or sale. Any business operated under Title 11 of the United States Code, which is purchased or acquired by another person, shall not give rise to successor liability.

74.3.1.8 The liability of a successor extends to taxes incurred in the course of operation of the business by the predecessor, or any prior predecessor. The liability includes all taxes, interest, and additions to tax, whether assessed or unassessed against the predecessor, and without regard to whether a tax lien has been issued or perfected against the predecessor. If any predecessor is given a certificate relating to the tax liability of a prior predecessor, then the successor shall only be liable for the tax liability of his immediate predecessor.

74.4 Use Of Pre-Addressed Forms. - If pre-addressed forms are mailed to the employer by the Accounting Division for use in filing the employer's withholding returns, such pre-addressed forms shall be used by the employer in filing these reports. Where use of such forms is impractical, the employer must exercise extreme care to show the employer's name and identification number exactly as they appear on previously filed returns. Lack of any form or return required under this regulation shall not excuse an employer's failure to file any such form or return.

74.5 West Virginia Employer's Identification Number.

74.5.1 Each employer will be identified by a West Virginia employer's identification number. This identification number will be the same as the federal identification number in every case where the employer has been assigned such a number by the Internal Revenue Service.

74.5.2 In any instance where an employer has not been assigned an identification number for federal purposes and is not required to obtain such a federal number, the employer must notify the Accounting Division which will assign a West Virginia number for his use. If an employer has been assigned an identification number by the Accounting Division and later obtains a federal number, he must notify the Accounting Division of the federal number and he will be notified to discontinue using the West Virginia identification number.

74.5.3 Each employer shall have only one identification number. If an employer has been assigned more than one (1) federal number and has not been advised which to use, he should notify the Internal Revenue Service of the numbers he has, the name and address to which each number was assigned and the address of his principal place of business. The Internal Revenue Service will then advise him which number to use.

74.5.4 An employer who has acquired the business of another employer must not use any identification number assigned to the original employer, but must obtain a new identification number in accordance with this regulation.

74.6 Deposit In Trust For Tax Commissioner. -Whenever any employer fails to collect, truthfully account for, pay over the tax, or make returns of the tax as required under West Virginia Code § 11-21-74 and this regulation, the Tax Commissioner may serve a notice requiring such employer to collect the taxes which become collectible after service of such notice, to deposit such taxes within the time specified in such notice in a bank approved by the Tax Commissioner, in a separate account in trust for and payable to the Tax Commissioner, and to keep the amount of such tax in such account until payment over to the Tax Commissioner. Such notice shall remain in effect until a notice of cancellation is served by the Tax Commissioner. Any employer, who, after service of such notice by the Tax Commissioner, fails to comply with the instructions contained therein shall be liable for criminal and civil penalties.

74.6.1 In lieu of the requirement set forth in Subsection 74.6 to deposit the taxes in a separate bank account in trust for and payable to the Tax Commissioner, the notice may

require the employer to remit such taxes to a designated officer or employee of the Tax Commissioner.

§ 110-21-75. Employer's Liability For Withheld Taxes.

75.1 Every employer required to deduct and withhold West Virginia income tax from the wages of an employee is liable for the payment of such tax regardless of whether such tax is collected from the employee by the employer. To the extent not inconsistent with the provisions of the West Virginia Personal Income Tax Act, all of the provisions of West Virginia Code § 11-10-1 et seq. relating to assessment and collection of taxes, and to penalties, additions to tax and interest in respect thereto, shall apply to every employer required to withhold tax.

75.1.1 Where the employer deducts less than the correct amount of tax or fails to deduct any part of the tax, he is nevertheless liable for the correct amount of tax.

75.1.1.1 Exception.-If an employer fails to deduct and withhold tax as required and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer remains liable for any penalties, additions to tax and interest otherwise applicable for failure to deduct and withhold.

75.1.2 An employer is relieved of liability to any other person for the amount of income tax withheld and paid over to the Tax Commissioner, and no employee shall have any right of action against his employer in respect to any monies deducted and withheld from his wages and paid over to the Tax Commissioner in compliance or intended compliance with the West Virginia Personal Income Tax Act.

75.1.3 Any amount of tax withheld shall, with respect to the recipient of the wages, be deemed to have been paid by him and shall, in the hands of the employer or withholding agent, constitute a special fund in trust for the Tax Commissioner.

§ 110-21-76. Employer's Failure To Withhold.

76.1 General.-If an employer fails to deduct and withhold tax as required, and thereafter the income tax against which such tax may be credited is paid by the employee, the tax required to be deducted and withheld shall not be collected from the employer. Where this situation occurs, the employer shall not be relieved of liability for any penalties, additions to tax or interest otherwise applicable for failure to deduct and withhold.

76.1.1 Example--An employer fails to deduct and withhold West Virginia income tax from an employee's wages (on whose wages he is required to withhold). Thereafter, the employee files his West Virginia Personal Income Tax Return and pays the income tax shown on the return to be due. Since the tax was paid by the employee, the Tax Commissioner is precluded from collecting the tax from the employer who should have withheld from the employee. This payment of tax, however, does not relieve the employer from any penalties, additions to tax or interest in respect to his failure to withhold.

76.1.1.1 In the event that an employer provides an employee with a wage withholding tax statement but has not actually deducted and withheld personal income tax from the wages of the employee, the employer remains liable for the payment of withholding taxes if a credit against personal income tax is claimed by the employee on his income tax return based on the employer provided withholding tax statement.

§§ 110-21-77 to 110-21-79. Reserved For Future Use.

## PART VI. PROCEDURE AND ADMINISTRATION

### § 110-21-80. Criminal Penalties.

80.1 Each and every provision of the West Virginia Tax Crimes And Penalties Act set forth under West Virginia Code § 11-9-1 et seq. shall apply to the tax imposed pursuant to the West Virginia Personal Income Tax Act with like effect as if said Act were applicable only to the tax imposed by Article 21, Chapter 11 and were set forth in extenso in Article 21.

### § 110-21-81. General Procedure And Administration.

81.1 Each and every provision of the West Virginia Tax Procedure And Administration Act set forth under West Virginia Code § 11-10-1 et seq. shall apply to the tax imposed pursuant to the West Virginia Personal Income Tax Act with like effect as if said Act were applicable only to the tax imposed by Article 21, Chapter 11 and were set forth in extenso in Article 21.

### § 110-21-82. Severability.

82.1 If any provision of the West Virginia Personal Income Tax Act 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 Act, but shall be confined in its operation to the provision thereof directly involved in the controversy in which such judgement shall have been rendered, and the

STATE TAX DEPARTMENT  
TITLE 110  
SERIES 21

applicability of such provision to other persons or circumstances shall not be affected thereby.

PUBLIC COMMENTS ON THE EMERGENCY  
PERSONAL INCOME TAX REGULATIONS

FILED  
1989 JUN 26 AM 9:38  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Set forth below are public comments received by the State Tax Department pertaining to the Emergency Personal Income Tax Regulations. For purposes of responding to the issues presented, the comments have been condensed rather than repeated verbatim. Copies of each original correspondence containing comments are attached for your review.

COMMENT: Section 110-21-8 of the regulations pertaining to credits against personal income tax for business and occupation tax, carrier income tax and severance tax contradicts the provisions of West Virginia Code § 11-21-8 in that this regulation purports to prohibit a taxpayer from claiming the full credit provided by statute. This regulation arbitrarily and unlawfully disallows any credit against personal income tax on amounts a taxpayer receives from a partnership or S corporation in the form of a salary. Additionally, Section 110-21-8 creates an anomaly because sole proprietors are given a full credit while salaried partners and S corporation shareholder employees are not.

RESPONSE: West Virginia Code § 11-21-8(a) provides, in pertinent part, the following:

A credit shall be allowed against the tax imposed by section three of this article equal to the amount of the liability of the taxpayer for the taxable year for any tax imposed under article thirteen, chapter eleven of this Code: Provided, That the amount of such business and occupation tax credit shall not exceed the portion of the tax imposed by this article which is attributable to the West Virginia taxable income derived by the taxpayer for the taxable year from the business or occupation with respect to which said tax under article thirteen was imposed. In case the West Virginia taxable income of a taxpayer includes income from a partnership, estate, trust or a corporation electing to be taxed under subchapter S of the Internal Revenue Code of 1954, as amended, a part of any tax liability of the partnership, estate, trust or corporation under said article thirteen shall be allowed to the taxpayer, in computing the credit provided for by this section, in an amount proportionate to the

income of such partnership, estate, trust or corporation, which is included in the taxpayer's West Virginia taxable income.

The same statutory language set forth above is repeated in West Virginia Code § 11-21-8(b) which allows a credit against personal income tax for carrier income tax, and in West Virginia Code § 11-21-8(c) which allows a credit against personal income tax for severance tax.

The West Virginia Personal Income Tax Act, West Virginia Code § 11-21-1 et seq., was enacted in 1961. West Virginia Code § 11-21-8 which is titled "Credits against tax" has been amended by the West Virginia Legislature four times since 1961 primarily for the purpose of either adding or deleting specific credits. The statutory language providing for various credits remains virtually identical to the original Act.

Comments received with regard to Section 110-21-8 of the Emergency Personal Income Tax Regulations object to language contained in said Section which states that "Salaries that are not, in fact, part of the distributive share of the partnership income, (for example, salaries guaranteed to partners by the articles of partnership), and salaries paid to stockholders of S corporations, are not income of partnerships or S corporations for the purpose of computing the credit". The language in question represents Tax Department policy established in 1961 and included in personal income tax regulations promulgated by the Department in 1964. See W.Va. Leg. Reg. (Personal Income Tax) 11-10, Series XXI, § 8, pp. 31-43 (1964).

The long standing position of the Tax Department with regard to computing credits authorized under West Virginia Code § 11-21-8 is neither arbitrary nor unlawful as it reflects the fact that certain salaries paid to partners or to S corporation shareholders have been deducted as business expenses for federal income tax purposes in order to arrive at the net income of the partnership or S corporation. Any salary which constitutes an expense to the payor is not income to the payee for purposes of computing the credits in question as such salaries are not income of the business entity. The current regulations recognize that salaries which have not been expensed may be used for purposes of computing the credits.

It is evident from a reading of West Virginia Code § 11-21-8 that the Legislature did not intend to allow expensed salaries to constitute a basis for computation of the credits contained therein. Allowing expensed salaries in the basis for computing Section 8 credits would in essence create a double tax advantage because the same salaries would be deducted as an expense and also used for purposes of determining a credit. One of the

comments made pertaining to Section 110-21-8 is that said Section creates an anomaly because sole proprietors are given a full credit while salaried partners and S corporation shareholder employees are not. We, however, disagree with this comment as there is no anomaly between the treatment accorded to sole proprietors and that accorded salaried partners and S corporation shareholder employees. Under federal income tax law, sole proprietors who pay themselves salaries are prohibited from expensing such salaries in computing net income for purposes of taxation. The regulation in question prohibits as a basis for computing a credit, only those salaries which can be expensed. Thus, the treatment for sole proprietors is identical to all other taxpayers eligible to claim any credit under the provisions of West Virginia Code § 11-21-8.

dm

Attachments

RECEIVED

1988 DEC 16 AM 9:35

STATE TAX DEPARTMENT  
LEGAL DIVISION

J. DAVID CECIL  
J. NICHOLAS BARTH  
STEPHEN L. THOMPSON

CECIL, BARTH & THOMPSON  
ATTORNEYS AT LAW  
KANAWHA BOULEVARD, WEST AT BERKELEY  
CHARLESTON, WEST VIRGINIA

December 15, 1988

MAILING ADDRESS:  
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TELEPHONE:  
(304) 342-7111

Legal Division  
WV State Tax Department  
P. O. Box 1005  
Charleston, WV 25324-1005

Dear Sir:

The purpose of this letter is to comment upon the recently filed West Virginia Personal Income Tax Regulations.

West Virginia Code, §11-21-8 provides for a business and occupation tax credit and a severance tax credit against the personal income tax. For partnerships and S corporations the statute provides:

"In case the West Virginia taxable income of a taxpayer includes income from a partnership, estate, trust or a corporation electing to be taxed under subchapter S of the Internal Revenue Code of 1954, as amended, a part of any tax liability of the partnership, estate, trust or corporation under said article thirteen shall be allowed to the taxpayer, in computing the credit provided for by this section, in an amount proportionate to the income of such partnership, estate, trust or corporation, which is included on the taxpayer's West Virginia taxable income." West Virginia Code §11-21-8(a), (b) and (c).

The statute clearly allows this credit in proportion to the income of the partnership or S corporation which is included in the taxpayer's West Virginia taxable income. The statute makes no distinction as to what form the income from the S corporation or partnership income comes to the taxpayer. According to the law, the taxpayer is given a credit in proportion

Legal Division  
WV State Tax Department  
December 15, 1988  
Page Number Two

to the income of the partnership or S corporation which is included in the taxpayer's West Virginia taxable income, be it paid to the taxpayer in the form of dividend income, interest income, partnership distributive share, or salary.

However, the personal income tax regulations clearly contradicts the statute in sections 8.1.2.5.a, 8.1.2.6, 8.1.2.7, and 8.1.2.7a. These sections purport to prohibit a taxpayer from taking the full tax credit provided by statute. The sections arbitrarily and unlawfully disallow the credit on amounts a taxpayer receives from a partnership or S corporation in the form of a salary.

The regulations create an anomaly in that sole proprietors are given a full credit, yet partnerships and S corporations, which are pass through entities with the members thereof taxed as individuals, are treated differently. Take for example, a one man S corporation. The tax treatment for the owner of this corporation should be the same as a sole proprietor, for this is the effect of the S corporation election. Yet, under the regulations position, similarly situated taxpayers are treated differently.

Another policy reason stands against the arbitrary and unlawful position set forth in the regulations. As a matter of tax policy, taxpayers should generally not be allowed to designate the amounts of money upon which a credit is taken. An astute taxpayer would simply take all partnership and S corporation remuneration in the form of a dividend or distribution share. The position taken in the regulations is not only contrary to the statute, but creates traps for the unwary.

Please correct this inequitable and incorrect regulation.

Very truly yours,



J. Nicholas Barth

JNB:bjm

Victor Grigoraci  
Partner



900 United Center  
P.O. Box 2906  
Charleston, West Virginia 25330  
304/343-8971

December 29, 1988

Certified Return Receipt Requested

Legal Division  
West Virginia State Tax Department  
P.O. Box 1005  
Charleston, West Virginia 25324-1005

RECEIVED  
1989 JAN -4 AM 11:35  
STATE TAX DEPARTMENT  
LEGAL DIVISION

Gentlemen:

I appreciate the opportunity to comment upon the West Virginia Personal Income Tax Regulations which were filed on November 30, 1988. This comment is directed toward the West Virginia Business and Occupation Tax Credit, Carrier Income Tax Credit and Severance Tax Credit.

West Virginia Code Section 11-21-8 provides, in pertinent part, as follows:

In case the West Virginia taxable income of a taxpayer includes income from a partnership, estate, trust or a corporation electing to be taxed under subchapter S of the Internal Revenue Code of 1954, as amended, a part of any tax liability of the partnership, estate, trust or corporation under said article thirteen, shall be allowed to the taxpayer, in computing the credit provided for by this section, in an amount proportionate to the income of such partnership, estate, trust or corporation, which is included in the taxpayer's West Virginia taxable income.

This particular citation relates to the Business and Occupation Tax Credit. However, similar language is provided for with respect to the Carrier Income Tax Credit and the Severance Tax Credit.

As noted above, the statute clearly allows these credits in proportion to the income of the partnership or S corporation which is included in the taxpayer's West Virginia taxable income. There is no distinction made in the statute as to what form the income must be from the partnership or S corporation. Thus, the emergency regulations at 8.1 and the examples, thereunder that limit these credits based on income from pass through entities to other than salaries and so forth appear to be inconsistent with the statute.

I, therefore, respectfully request that you consider revising the regulations accordingly. In addition, if you find that the regulations are in error as to this particular matter, I also respectfully request that you promptly issue a notice to the public so that amended returns can be filed and correct returns will be filed for calendar year 1988.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Vito S. Givins". The signature is written in dark ink and is positioned below the typed text "Respectfully submitted,".

PAULEY, CURRY, STURGEON & VANDERFORD  
LAWYERS

ARDEN J. CURRY  
THOMAS H. VANDERFORD, IV  
JAMES M. STURGEON, JR.  
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(304) 342-6000

December 30, 1988

West Virginia State Tax Department  
Legal Division  
State Capitol, W.W. 410  
Charleston, WV 25305

Gentlemen:

I have had an opportunity to review the proposed West Virginia Personal Income Tax Regulations.

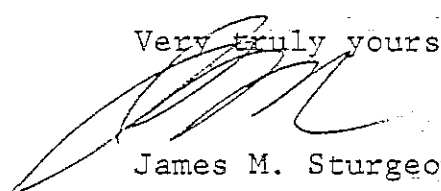
The proposed Regulations attempt to prohibit the shareholder in a Subchapter S corporation from using the B&O, Carrier and Severance Taxes as credits against his total income from the S corporation. Specifically, §8.1.2.7 and §8.2.2 and §8.3.1 attempt to prohibit the shareholder from offsetting these tax credits against the personal income tax arising from any salary taken from the S corporation.

We believe that this provision in the Regulations conflicts with the express language of W.Va. Code §11-21-8 which grants a credit against the personal income tax for the "income of such ... corporation."

The present Personal Income Tax Regulations §1.8.3 does contain the same provision. However, these Regulations have never been approved by the Legislature.

We respectfully request that the proposed Regulations be redrafted to recognize the entitlement of an S corporation shareholder to the total credit allowed by the statute. Any other interpretation would work a gross injustice by creating an unjustifiable disparity between businessmen and professionals who conduct their affairs under the auspices of an S corporation as opposed to a sole proprietorship or partnership.

Very truly yours,

  
James M. Sturgeon, Jr.

JMS/jr:plk