

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #2

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FILED
1987 JUL 10, 1987
OFFICE OF THE
SECRETARY

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: TAX DEPARTMENT TITLE NUMBER: 110
RULE TYPE: LEGISLATIVE; 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: _____
TITLE OF RULE BEING AMENDED: _____
IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 23
TITLE OF RULE BEING PROPOSED: BUSINESS FRANCHISE TAX

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON 5:00 p.m. AT AUGUST 10, 1987

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

STATE TAX COMMISSIONER
STATE TAX DEPARTMENT
WW-300
STATE CAPITAL
CHARLESTON, WV 25305

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


MICHAEL E. CARYL
STATE TAX COMMISSIONER

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

BRIEF SUMMARY OF PROPOSED RULE

BUSINESS FRANCHISE TAX

The Business Franchise Tax became effective July 1, 1987. This proposed rule provides necessary guidelines to taxpayers subject to the tax. This rule will help to assure taxpayer compliance and prevent taxpayer confusion.

EMERGENCY
WEST VIRGINIA LEGISLATIVE REGULATIONS
STATE TAX DEPARTMENT
TITLE 110
SERIES 23
(1987)

Filed: July 10, 1987

BUSINESS FRANCHISE TAX

EMERGENCY
WEST VIRGINIA LEGISLATIVE REGULATIONS
STATE TAX DEPARTMENT
TITLE 110
SERIES 23
1987

BUSINESS FRANCHISE TAX

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EMERGENCY
WEST VIRGINIA LEGISLATIVE REGULATIONS
STATE TAX DEPARTMENT
TITLE 110
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§ 110-23-1 General.

1.1 Type of Regulation. - These regulations are emergency legislative regulations as defined in W. Va. Code §§ 29A-1-2(d) and 29A-3-15.

1.2 Scope. - These regulations explain and clarify the West Virginia business franchise tax set forth at W. Va. Code § 11-23-1 et seq.

1.3 Authority. - These emergency legislative regulations are issued under the authority of W. Va. Code §§ 11-10-5, 29A-3-15.

1.4 Filing Date. - These emergency legislative regulations were promulgated and filed in the State register on _____, 1987. A public comment period will be held until _____, 1987.

1.5 Effective Date. - These emergency legislative regulations become effective on _____, 1987.

1.6 Citation. - These emergency legislative regulations may be cited as 110 C.S.R. 23, § _____ (1987).

§ 110-23-2 General Overview.

2.1 The business franchise tax is imposed on partnerships, as defined in Section 3.19 of these regulations, and corporations, as defined in Section 3.8 of these regulations, beginning July 1, 1987. The tax is imposed upon the privilege of doing business in the State of West Virginia or owning or leasing property having its business situs in the State. The tax is not an ad valorem property tax.

2.2 The measure of tax is the "capital" of the partnership or corporation, as defined in Section 3.4 of these regulations. If the taxpayer is taxable in more than one state, its capital must be apportioned using a four factor formula (property payroll and sales) in which the sales factor is double weighted and the denominator is four. The tax rate is .55 percent of the adjusted and apportioned capital of the taxpayer. The minimum tax is \$50.00.

2.3 The tax is an annual tax, 90 percent of which must be remitted in installment payments during the taxable year by taxpayers having an estimated

tax liability of more than \$12,000.00. The taxable year is the same as the taxpayer's taxable year for federal income tax purposes. The annual return of corporations is due on March 15th of the next taxable year, and the annual return of partnerships is due on April 15th of the next taxable year in the case of calendar year taxpayers. Declarations of estimated tax are due from calendar year taxpayers on April 15th of the current taxable year at which time one-fourth of the estimated tax must be remitted. Remaining installment payments are due June 15th, September 15th and December 15th for such calendar year taxpayers.

2.4 Credit is allowed against the tax for the payment of West Virginia severance taxes and West Virginia bank shares taxes. Credit is also allowed for West Virginia business franchise taxes paid by subsidiaries, and, beginning on July 1, 1988, credit will be allowed for business and occupation tax paid.

2.5 Certain partnerships and corporations are exempt from the tax. This includes entities exempt from federal income taxes; insurance companies which pay the State premiums tax; farming partnerships and corporations and joint ventures which are not required to file federal partnership income tax returns under Section 761 of the Internal Revenue Code.

2.6 The business franchise tax is administered under the West Virginia Tax Procedure and Administration Act, W. Va. Code § 11-10-1 et seq. Criminal penalties applicable with regard to administration of the business franchise tax are found in the West Virginia Tax Crimes and Penalties Act, W. Va. Code § 11-9-1 et seq.

§ 110-23-3 Definitions.

3.1 General. - When used in these regulations, terms defined in this section shall have the meanings ascribed to them herein unless a different meaning is clearly required by either the context in which the term is used, or by specific definition.

3.2 Business Franchise Tax Act. - The term "Business Franchise Tax Act" means the tax imposed by Article 23, Chapter 11 of the West Virginia Code of 1931, as amended.

3.3 Business Income. - The term "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

3.4 Capital. - The term "capital" of a taxpayer means:

3.4.1 In the case of corporations, except electing small business

corporations, the average of the beginning and ending year balances of the sum of the following entries from Schedule L of the "Federal Form 1120," as filed by the taxpayer with the Internal Revenue Service for the taxable year:

3.4.1.1 The amount of all common and preferred stock of the taxpayer;

3.4.1.2 The amount of paid-in or capital surplus;

3.4.1.3 The amount of retained earnings, appropriated and unappropriated;

3.4.1.4 Less the cost of treasury stock.

3.4.2 S Corporations. - In the case of an electing small business corporation, the average of the beginning and ending year balances of the sum of the following entries from Schedule L of the Federal Form 1120S, as filed by the taxpayer with the Internal Revenue Service for the taxable year:

3.4.2.1 The amount of all stock of the taxpayer;

3.4.2.2 The amount of paid-in or capital surplus;

3.4.2.3 The amount of retained earnings, appropriated and unappropriated;

3.4.2.4 The amount of shareholders' undistributed taxable income;

3.4.2.5 The amount of the accumulated adjustments accounts;

3.4.2.6 The amount of the other adjustments account;

3.4.2.7 Less the cost of treasury stock.

3.4.3 Partnerships. - In the case of a partnership, the average of the beginning and ending year balances of the amount of partners' capital accounts from Schedule L of Federal Form 1065, as filed by the taxpayer with the Internal Revenue Service for the taxable year.

3.4.4 Additional Items in Capital. - The term "capital" for purposes of the business franchise tax includes such additional items from the accounts of the taxpayer as the Tax Commissioner may by regulation prescribe, which fairly represent the net equity of the taxpayer as defined in accordance with generally accepted accounting principles.

3.4.5 Allowance for Certain Government Obligations and Obligations

Secured by Residential Property. - As to both corporations and partnerships, capital must be multiplied by a fraction equal to one minus a fraction:

3.4.5.1 The numerator of which is the sum of the average of the monthly beginning and ending account balances during the taxable year (account balances to be determined at cost in the same manner as obligations, investments and loans are reported on Schedule L of the "Federal Form 1120" or Federal Form 1065) of the following:

3.4.5.1.a Obligations and securities of the United States, or of any agency, authority, commission or instrumentality of the United States and any other corporation or entity created under the authority of the United States Congress for the purpose of implementing or furthering an objective of national policy;

3.4.5.1.a.1 The term "obligation," for purposes of this Subsection 3.4.5.1.a, means a direct obligation of the United States government issued under law for valuable consideration, including bonds, notes, certificates of indebtedness, Treasury bills, and interim certificates issued for an obligation. It does not include, for example, an overpayment of federal income tax.

3.4.5.1.a.2 The term "obligations and securities of the United States or any agency, authority, commission or instrumentality of the United States and any other corporation or entity created under the authority of the United States Congress for the purpose of implementing or furthering an objective of national policy" means direct equity securities of any such agency, authority, commission, instrumentality, corporation or entity; or direct obligations of the United States government or any such agency, authority, commission, instrumentality, corporation or entity whereby the federal government is the obligor and is exercising the constitutional borrowing power of the federal government pursuant to a specific congressional authorization. Obligations or securities for which the federal government or any such agency, authority, commission, instrumentality, corporation or entity acts as a mere guarantor, rather than the direct obligor, shall not constitute obligations or securities of the United States or any such agency, authority, commission, instrumentality, corporation or entity for purposes of the West Virginia business franchise tax and these regulations.

3.4.5.1.b Obligations of the State of West Virginia or any political subdivision of the State of West Virginia;

3.4.5.1.c Investments or loans primarily secured by mortgages, or deeds of trust, on residential property located in the State of West Virginia and occupied by nontransients;

3.4.5.1.c.1 The term "residential property" means an

abode and dwelling for human habitation intended to be inhabited for a permanent or indeterminate and lengthy period of time. The term does not include hotels, motels and similar short-term lodging accommodations, but does include apartments, condominiums, single family dwellings and housing developments.

3.4.5.1.c.2 The term "nontransient" means natural persons, rather than corporations, who own their residence or who have a lease for their residence which has a primary term of not less than ninety days or such persons who hold a weekly or monthly periodic tenancy or a tenancy at will in their residence but who have resided at the residence for a period of more than eighty-nine days.

3.4.5.1.d And loans primarily secured by a lien or security agreement on residential property in the form of a mobile home, modular home or double-wide, located in the State of West Virginia and occupied by nontransients.

3.4.5.2 The denominator of which is the average of the monthly beginning and ending account balances of the total assets of the taxpayer which are shown on Schedule L of the "Federal Form 1120," as filed by the taxpayer with the Internal Revenue Service or, in the case of partnerships, Schedule L of Federal Form 1065, as filed by the taxpayer with the Internal Revenue Service, or in the case of taxpayers not required to file such schedules or forms with the Internal Revenue Service, the pro forma version thereof.

3.4.5.3 For purposes of this regulation, the average of the monthly beginning and ending account balances shall be determined for any given account by adding the account balance on the first day of the month to the account balance on the last day of the month and dividing the resulting sum by two. The averages resulting from this procedure shall, for each of the 12 months of the taxable year, or, in the case of short taxable years for the number of months in the taxable year, be added together, and the sum shall then be divided by 12 in the case of taxable years having 12 months, or shall be divided by the number of months in the taxable year for short taxable years. The resulting figure shall be the average of the monthly beginning and ending balance for any account described under this Section of the these regulations.

3.4.5.3.a When a taxpayer maintains records insufficient to clearly establish the monthly beginning and ending account balances, the average of the monthly beginning and ending account balances shall be deemed to be zero unless the taxpayer can otherwise affirmatively establish to the satisfaction of the Tax Commissioner the amount of the average monthly beginning and ending account balances.

3.5 Commercial Domicile. - The term "commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or

managed.

3.5.1 The term "directed or managed" for purposes of these regulations shall mean the guidance and control exerted by the executive officers or managerial authorities of a corporation over the business affairs of the corporation. In the case of parent and subsidiary corporations or other related or affiliated corporations, any direction, management, guidance or control exerted by the executive officers or managerial authorities of parent corporations over or upon subsidiary corporations or the management thereof, or by the executive officers or managerial authorities of related or affiliated corporations over or upon other related or affiliated corporations or the management thereof, shall not constitute the direction or management of the corporation for purposes of the West Virginia business franchise tax or these regulations.

3.6 Commissioner or Tax Commissioner. - The terms "Commissioner" or "Tax Commissioner" are used interchangeably in these regulations, and mean the Tax Commissioner of the State of West Virginia, or his delegate.

3.7 Compensation. - The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

3.8 Corporation. - The term "corporation" includes any corporation, S corporation, joint-stock company and any association or other organization which is taxable as a corporation under federal income tax laws or the income tax laws of West Virginia, or which is treated as an S corporation under federal income tax law.

3.9 Delegate. - The term "delegate" in the phrase "or his delegate," when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Department duly authorized by the Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in West Virginia Code § 11-23-1 et seq. or these regulations.

3.10 Doing Business. - The term "doing business" means any activity of a corporation or partnership which enjoys the benefits and protection of the government and laws of the State of West Virginia, except the activities of agriculture and farming.

3.10.1 For purposes of these regulations, the terms agriculture and farming shall mean the production of food, fiber, and woodland products (but not timbering activity) by means of cultivation, tillage of the soil and by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, horticultural, or any other plant or animal production activity and all farm practices related, usual or incidental thereto, including the storage, packing,

shipping and marketing of agricultural or farm products, but not including any manufacturing, milling or processing of such products by persons other than the producer thereof.

3.10.2 The activities of agriculture and farming shall mean such activities, as defined herein, occurring on not less than five acres of land and the improvements thereon, used in the aforementioned activities, and shall mean only such agriculture and farming activities resulting in the production of at least one thousand dollars of agriculture or farming products per annum through the conduct of the business of farming as the principal activity of the corporation or partnership in the manner described in Section ten, Article one-a, Chapter eleven of the West Virginia Code and the regulations related thereto.

3.11 Domestic Corporation. - The term "domestic corporation" means a corporation organized under the laws of the State of West Virginia, and certain corporations organized under the laws of the State of Virginia before the twentieth day of June, 1863. Every other corporation is a foreign corporation.

3.12 Federal Form 1120. - The term "Federal Form 1120" means the annual federal income tax return of any corporation made pursuant to the United States Internal Revenue Code of 1986, as amended, or in successor provisions of the laws of the United States, and filed with the Federal Internal Revenue Service. In the case of a corporation that elects to file a federal income tax return as part of an affiliated group, but files as a separate corporation under the Business Franchise Tax Act, then as to such corporation, the term "Federal Form 1120" means the pro forma Federal Form 1120. In the case of S corporations, the term "Federal Form 1120" means Federal Form 1120S.

3.12.1 For purposes of the West Virginia business franchise tax and these regulations, the term "Federal Form 1120" shall mean a pro forma Federal Form 1120 for those corporations not required by federal law to file a Federal Form 1120.

3.12.2 The term "Schedule L of Federal Form 1120" shall mean the balance sheet required to be filed with the federal income tax return, whether designated Schedule L or otherwise. For those corporations not required by federal law to file a "Federal Form 1120" or a balance sheet, whether designated Schedule L or otherwise, with their federal income tax return, the term "Schedule L of Federal Form 1120" shall mean the pro forma Schedule L of Federal Form 1120.

3.13 Federal Form 1065. - The term "Federal Form 1065" means the annual federal income tax return or filing of a partnership made pursuant to the United States Internal Revenue Code of 1986, as amended, or in successor provisions of the laws of the United States, and filed with the Internal Revenue Service.

3.13.1 For purposes of the West Virginia business franchise tax and these regulations, the term "Federal Form 1065" shall mean a pro forma Federal Form 1065 for those partnerships not required by federal law to file a Federal Form 1065.

3.13.2 The term "Schedule L of Federal Form 1065" shall mean the balance sheet required to be filed with the federal partnership tax return or filing, whether designated Schedule L or otherwise. For those partnerships not required by federal law to file a Federal Form 1065 or a balance sheet, whether designated Schedule L or otherwise, with their federal partnership return, the term "Schedule L of Federal Form 1065" shall mean the pro forma Schedule L of Federal Form 1065.

3.14 Fiduciary. - The term "fiduciary" means, and includes, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person.

3.15 Financial Organization. - The term "financial organization" includes any bank, banking association, trust company, industrial loan company, small loan company or licensee, building and loan association, savings and loan association, finance company, investment company, investment broker or dealer, and any other similar business organization, at least ninety percent of the assets of which consist of intangible personal property, and at least ninety percent of the gross receipts of which consist of dividends, interest and other charges derived from the use of money or credit.

3.16 Fiscal Year. - The term "fiscal year" means an accounting period of twelve months ending on any day other than the last day of December, and on the basis of which the taxpayer is required to report for federal income tax purposes.

3.17 Includes and Including. - The term "includes" and the term "including" when used in a definition contained in this article shall not be deemed to exclude other things otherwise within the meaning of the term being defined.

3.18 Parent and Subsidiary Corporations. - The corporation which owns on average during the taxable year more than fifty percent of the stock of all classes of another corporation is defined to be the "parent corporation" and the corporation which is so owned by the parent corporation is defined to be a "subsidiary corporation."

3.19 Partnership and Partner. - The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation or venture is carried on, and which is not a trust or estate, a corporation or a sole proprietorship. The term "partner" includes a member in such a syndicate, group, pool, joint venture or organization.

3.19.1 A mere tenancy in common or joint tenancy as lessors of rental property without more, shall not be deemed to be a partnership for purposes of the Business Franchise Tax Act and for purposes of these regulations. However, such persons, entities or enterprises shall be treated as partnerships for purposes of these regulations if they file as a partnership for federal income tax purposes.

3.19.2 The term "corporate partner" or the term "parent-partner" means a corporation owning an interest in a partnership as a general or limited partner.

3.20 Person. - The term "person" includes any corporation or partnership.

3.21 Pro Forma Return. - The term "pro forma return," when used in these regulations, means the return which a corporate taxpayer would have filed with the Internal Revenue Service had it not elected to file as part of a consolidated group for federal income tax purposes.

3.21.1 Pro Forma Statements, Forms, Schedules or Documents. - The term "pro forma" when applied to statements, forms, schedules or documents means that statement, form, schedule or document drawn up or drafted to conform to the applicable rules, regulations, informational requirements and format for the statement, form, schedule or document upon which the pro forma statement, form, schedule or document is to be based as if the taxpayer were required to file such statement, form, schedule or document for federal income tax purposes and in accordance with federal income tax law.

3.22 Sales. - The term "sales" means all gross receipts of the taxpayer which are "business income," as defined in these regulations.

3.23 State. - The term "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

3.24 Stock. - The term "stock" includes shares in a corporation, association or joint stock company. The term does not include nonvoting stock which is limited and preferred as to dividends, or treasury stock. The term "stock owned by a corporation" shall include stock owned directly by such corporation and stock which is subject to an option to acquire stock.

3.25 Taxable Year. - The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxpayer's tax liability is computed under the Business Franchise Tax Act. The term "taxable year" means, in the case of a return made for a fractional part of a year (short taxable year) under the provisions of the Business Franchise Tax Act, or under these regulations, the period for which such return is made.

3.25.1 The term "taxable year for federal income tax purposes" or the term "filing year for federal income tax purposes" means the fiscal or calendar year for which the taxpayer is required to report for federal income tax purposes in accordance with federal income tax law for purposes of the annual federal income tax return or for purposes of federal informational returns.

3.26 Taxable in Another State. - The term "taxable in another state" for purposes of apportionment under Section 110-23-5 of these regulations means those circumstances where a taxpayer:

3.26.1 Is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax; or

3.26.2 Would be subject to a net income tax if such other state imposed such a tax.

3.27 Taxpayer. - The term "taxpayer" means any person as defined in these regulations subject to the tax imposed by Section 11-23-1 et seq. of the West Virginia Code.

3.28 This State. - The term "this State" means the State of West Virginia.

3.29 Treasury Stock. - The term "treasury stock" means shares of a corporation which have been issued and have been subsequently acquired by and belong to such corporation, and have not been cancelled or restored to the status of authorized but unissued shares. Treasury stock is deemed to be issued shares, but not outstanding shares.

3.30 W. Va. Code. - The term "W. Va. Code" means the Code of West Virginia of 1931, as amended.

3.31 Meaning of Terms. - Any term used in these regulations shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required by the context or by definition in these regulations. Any reference in these regulations to the laws of the United States, or to the Internal Revenue Code or to the federal income tax law shall mean the provisions of the laws of the United States relating to the determination of income for federal income tax purposes as in effect on the first day of January, 1985.

§ 110-23-4 Tax Base Determined.

4.1 The tax base of a taxpayer, for purposes of the business franchise tax, is the taxpayer's "capital," as defined in these regulations and as

adjusted in accordance with Section 11-23-3 of the West Virginia Code and Section 3.4 of these regulations.

4.2 If the taxpayer is also taxable in another state as defined in Section 110-23-3 of these regulations, then the tax base of the taxpayer shall be its "capital," as defined in Section 11-23-3 of the West Virginia Code and Section 3.4 of these regulations, multiplied by the said taxpayer's apportionment fraction determined under Section 11-23-5 of the West Virginia Code and Section 110-23-5 of these regulations.

§ 110-23-5 Apportionment of Tax Base.

5.1 A taxpayer subject to the business franchise tax which is also taxable in another state shall apportion its tax base to the State of West Virginia by multiplying its tax base by a fraction, the numerator of which is the sum of its property factor, plus the payroll factor, plus two times the sales factor, all of which shall be determined in accordance with this Section, and the denominator of which is four. However, when the denominator of one or more of the factors is zero, the denominator of the apportionment formula fraction shall be decreased by the number of factors having a denominator of zero. In the case of a sales factor which has a denominator of zero the apportionment fraction denominator shall be decreased by two.

5.2 Property Factor. - The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used by it in this State during the taxable year, and the denominator of which is the average value of all real and tangible personal property owned or rented by the taxpayer and used by it during the taxable year, which is reported on Schedule L of "Federal Form 1120," or Schedule L of Federal Form 1065 for partnerships, plus the average value of all real and tangible personal property leased and used by the taxpayer during the taxable year.

5.3 Value of Property. - Property owned by the taxpayer shall be valued at its original cost, adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc.: Provided, That where records of original cost are unavailable or cannot be obtained without unreasonable expense, property shall be valued at original cost as determined under Section 5.3.3 of these regulations. Property rented by the taxpayer from others shall be valued at eight times the net annual rental rate. Net annual rental rate is the annual rental paid, directly or indirectly, by the taxpayer, or for its benefit, in money or other consideration for the use of the property and includes:

5.3.1 Any amount payable for the use of real or tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise;

5.3.2 Any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs or any other items which are required to be paid by the terms of the lease or other arrangement, not including amounts paid as service charges, such as utilities, janitor services, etc. If a payment includes rent and other charges unsegregated, the amount of rent shall be determined by consideration of the relative values of the rent and the other items. The term "rent" does not include incidental day-to-day expenses such as hotel or motel accommodations, daily rental of automobiles, etc.

5.3.2.1 Example 1: A taxpayer, pursuant to the terms of a lease, pays the lessor \$12,000 a year rent plus taxes in the amount of \$2,000 and interest on a mortgage in the amount of \$1,000. The amount of rent is \$15,000.

Example 2: A taxpayer stores part of its inventory in a public warehouse. The total charge for the year was \$1,000, of which \$700 was expressly for the use of storage space and \$300 of which was expressly for inventory, insurance, handling and shipping charges, and C.O.D. collections. The annual rent is \$700.

Shipping and handling charges and C.O.D. charges would be for transactions entirely unrelated to the lease of storage space, and would not constitute consideration for use of the leased storage space. The cost of insurance on the lessee's property is not a responsibility of the lessor of the building, and does not relate to the leased storage space. Had the insurance fee been for insurance on the warehouse building paid pursuant to the lease, rather than for the lessee's inventory, it would have then related to the leased property and would have been a payment of an obligation of the lessor pursuant to a lease. It would then constitute consideration paid for use of the storage space, and would qualify as rent under this Section.

5.3.3 Where records of the original cost of property are not available, property shall be valued at original cost. The determination of original cost shall be made by determining the fair market value of the property on the date of acquisition.

5.4 Leasehold Improvements. - Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the lessee regardless of whether the lessee is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Leasehold improvements shall be included in the property factor at their original cost.

5.5 Average Value of Property. - The average value of property shall be determined by averaging the values at the beginning and ending of the taxable year: Provided, That the Tax Commissioner may require the averaging of monthly values during the taxable year if substantial fluctuations in the values of the

property exist during the taxable year or where property is acquired after the beginning of the taxable year, or is disposed of, or for which the rental contract ceases, before the end of the taxable year.

5.6 Payroll Factor. - The payroll factor is a fraction, the numerator of which is the total compensation paid in the State of West Virginia during the taxable year by the taxpayer, and the denominator of which is the total compensation paid by the taxpayer during the taxable year as shown on the taxpayer's federal income tax form as filed with the Internal Revenue Service, as reflected in the schedule of wages and salaries and that portion of cost of goods sold which reflects compensation, or as shown on a pro forma return.

5.7 Compensation. - The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or to any other person not properly classifiable as an employee shall be excluded. Only the amounts paid directly to employees shall be included in the payroll factor. Amounts which are considered paid directly to employees include the value of board, rent, housing, lodging, and other benefits or services furnished to employees by the taxpayer in return for personal services, provided such amounts constitute income to the recipient for federal income tax purposes.

5.8 Employee. - The term "employee" means:

5.8.1 Any officer of a corporation; or

5.8.2 Any individual who, under the usual common law rules applicable in determining the employer/employee relationship, has the status of an employee.

5.9 Compensation Paid in This State. - Compensation is paid in this State if:

5.9.1 The employee's service is performed entirely within the State;

5.9.2 The employee's service is performed both within and outside of the State, but the service performed outside of the State is incidental to the individual's service within the State. The word "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction; or

5.9.3 Some of the service is performed in the State of West Virginia and:

5.9.3.1 The employee's base of operations or, if there is no base of operations, the place from which the service is directed or controlled

is in the State of West Virginia, or

5.9.3.2 The base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the employee's residence is in the State of West Virginia. The term "base of operations" means the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his trade or profession at some other point or points. The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

5.10 Sales Factor. - The sales factor is a fraction, the numerator of which is the gross receipts of the taxpayer derived from transactions and activity in the regular course of its trade or business in the State of West Virginia during the taxable year, less returns and allowances. The denominator of the fraction is the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, and reflected in its gross income reported and as appearing on the taxpayer's "Federal Form 1120" or Federal Form 1065, and consisting of those certain pertinent portions of the gross income elements set forth.

5.10.1 For purposes of these regulations, the term "gross receipts," shall mean gross income, not gross profit, and no reduction for cost of goods sold or other expenses or decreases in the amount of gross receipts shall be permitted in the determination of the sales factor.

5.11 Allocation of Sales of Tangible Personal Property. - Sales of tangible personal property are in the State of West Virginia if:

5.11.1 The property is delivered or shipped to a purchaser, other than the United States government, within the State of West Virginia regardless of the f.o.b. point or other conditions of the sale; or

5.11.2 The property is shipped from an office, store, warehouse, factory or other place of storage in the State of West Virginia and:

5.11.2.1 The purchaser is the United States government or;

5.11.2.2 The taxpayer is not taxable in the state of the purchaser.

5.12 Allocation of Other Sales. - Sales, other than sales of tangible personal property, are in the State of West Virginia if:

5.12.1 The income producing activity is performed in the State of West Virginia; or

5.12.2 The income producing activity is performed both in and outside the State of West Virginia and a greater portion of the income producing activity is performed in the State of West Virginia than in any other state, based on costs of performance.

5.13 Other Methods of Allocation.

5.13.1 General. - If the statutory formula for apportionment of the tax base, as outlined above, does not fairly represent the extent of the taxpayer's business activities in the State of West Virginia, the taxpayer may petition for, or the Tax Commissioner may require, in respect to all or any part of the taxpayer's business activities, if reasonable:

5.13.1.1 Separate accounting;

5.13.1.2 The exclusion of one of the factors;

5.13.1.3 The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in the State of West Virginia; or

5.13.1.4 The employment of any other method to effectuate an equitable allocation or apportionment of the taxpayer's tax base.

5.13.2 A taxpayer desiring to use another method of allocation or apportionment to determine taxable "capital" must file its petition no later than the due date of the annual return (determined without regard to any extension of time for filing) in which such other method will be used.

5.13.3 Burden of Proof. - In any administrative or judicial proceeding, in which employment of one of the methods of allocation or apportionment provided for in Section 5.13.1 is sought, on the ground that the statutory apportionment formula described in Section 5.1 of these regulations does not fairly represent the extent of the taxpayer's business activities in the State of West Virginia, the burden of proof shall:

5.13.3.1 If the Tax Commissioner seeks employment of one of such methods, be on the Tax Commissioner, or

5.13.3.2 If the taxpayer seeks employment of one of such other methods, be on the taxpayer.

§ 110-23-6 Imposition of Tax.

6.1 General. - An annual business franchise tax is imposed under Section 11-23-6 of the West Virginia Code on the privilege of doing business in the State of West Virginia and in respect of the benefits and protections conferred. Such tax is collected from every domestic corporation, every corporation having its commercial domicile in the State of West Virginia, every foreign or domestic corporation leasing property located in the State of West Virginia or doing business in the State of West Virginia and from every partnership owning or leasing property located in the State of West Virginia or doing business in the State of West Virginia. It is effective beginning July 1, 1987 for taxable years ending after that date.

6.2 Amount of Tax and Rate: Effective Date. - On and after the first day of July, 1987, the amount of tax imposed under Section 11-23-6 and generally under Section 11-23-1 et seq. of the West Virginia Code shall be the greater of fifty dollars or .55% of the value of the tax base, as determined under Section 11-23-1 et seq. of the West Virginia Code and these regulations: Provided, That when the taxpayer's first taxable year under the said Section 11-23-1 et seq. of the West Virginia Code is a short taxable year, the taxpayer's liability shall be prorated based upon the ratio which is the number of months which the said short taxable year bears to twelve.

6.2.1 Example: If a taxpayer has a fiscal year ending on September 30, the 1987 short taxable year for that taxpayer will be three months long and will constitute the period of July 1, 1987, to September 30, 1987. The taxpayer would be liable for a tax equal to the greater of \$50 X 3/12ths, or the annual tax liability times 3/12ths.

§ 110-23-7 Persons and Organizations Exempt From Tax. - The following organizations and persons shall be exempt from the business franchise tax to the extent provided in Section 11-23-7 of the West Virginia Code and in this Section of these regulations:

7.1 Natural persons doing business in the State of West Virginia that are not doing business in the form of a partnership (as defined in Section 110-23-3 of these regulations) or in the form of a corporation (as defined in Section 110-23-3 of these regulations). Such persons include persons doing business as sole proprietors, sole practitioners and other self-employed persons.

7.2 Corporations and organizations which by reason of their purposes or activities are exempt from federal income tax: Provided, That this exemption shall not apply to that portion of their capital (as defined in Section 110-23-3 and of these regulations) which is used, directly or indirectly in the generation of unrelated business income (as defined in the Internal Revenue Code) of any such corporation or organization if the unrelated business income is subject to federal income tax.

7.2.1 For purposes of this regulation, the determination of the

portion of capital which is used directly or indirectly in the generation of unrelated business income shall be made by multiplying capital, as defined in Section 110-23-3 of these regulations, of the corporation or organization by a fraction, the numerator of which is the total gross unrelated business income of the corporation or organization, and the denominator of which is all gross income of the corporation or organization.

7.2.2 Capital used directly or indirectly in the generation of unrelated business income shall be adjusted in accordance with Section 3.4 of these regulations. The tax base thereby determined shall be subject to apportionment in accordance with Section 110-23-5 of these regulations.

7.3 Insurance companies which pay the State of West Virginia a tax upon premiums.

7.4 Production credit associations organized under the provisions of the federal "Farm Credit Act of 1933": Provided, That this exemption shall not apply to corporations or associations organized under the provisions of Section 19-4-1 of the West Virginia Code.

7.5 Any trust established pursuant to Section 186, Chapter 7, Title 29 of the Code of the Laws of the United States (enacted as Section 302(c) of the Labor Management Relations Act of 1947), as amended prior to the first day of January, 1985.

7.6 Any credit union organized under the provisions of Chapter 31 or any other Chapter of the West Virginia Code provided that this exemption shall not apply to corporations or cooperative associations organized under the provisions of Section 19-4-1 et seq. of the West Virginia Code.

7.7 Any corporation organized under the West Virginia Code which is a political subdivision of the State of West Virginia, or is an instrumentality of a political subdivision of the State of West Virginia, and was created pursuant to the West Virginia code.

7.8 Farm corporations and partnerships.

7.9 A racing association exempt from payment of the franchise tax in accordance with Section 19-23-12 of the West Virginia Code.

§ 110-23-8 Accounting Periods and Methods of Accounting.

8.1 General Rule. - For purposes of the business franchise tax, a taxpayer's taxable year shall be the same as the taxpayer's taxable year or reporting year for federal income tax purposes.

8.2 Change of Taxable Year. - If a taxpayer's taxable year or reporting

year is changed for federal income tax purposes, the taxpayer's taxable year for purposes of the business franchise tax shall be likewise changed. The taxpayer shall provide a copy of the authorization for such change from the Internal Revenue Service with its business franchise tax return filed for the taxable year under Section 11-23-1 et seq. of the West Virginia Code.

8.3 Methods of Accounting.

8.3.1 Same as Federal. - A taxpayer's method of accounting under the Business Franchise Tax Act shall be the same as the taxpayer's method of accounting for federal income tax purposes. In the absence of any method of accounting for federal income tax purposes, the accrual method of accounting shall be used unless the Tax Commissioner consents, in writing, to the use of another method.

8.3.2 Change of Accounting Methods. - If a taxpayer's method of accounting is changed for federal income tax purposes, its method of accounting for purposes of the business franchise tax shall likewise be changed. The taxpayer shall provide a copy of the authorization for such change from the Internal Revenue Service with its return filed for the taxable year under the Business Franchise Tax Act.

§ 110-23-9 Annual Returns.

9.1 In General. - Every person subject to the Business Franchise Tax Act shall make and file an annual return for the taxable year with the Tax Commissioner on or before:

9.1.1 The fifteenth day of the third month of the next succeeding taxable year if the person is a corporation; or

9.1.2 The fifteenth day of the fourth month of the next succeeding taxable year if the person is a partnership.

9.1.3 The annual return shall include such information as the Tax Commissioner may require for determining the amount of business franchise taxes due for the taxable year.

9.2 Consolidated Returns. - Any corporation that files as a part of an affiliated group for purposes of the West Virginia Corporation Net Income Tax Act, shall file a consolidated return under the Business Franchise Tax Act.

9.3 The Tax Commissioner may, at his discretion, require an affiliated group of corporations to file a consolidated business franchise tax return in order to accurately determine the amount of business franchise tax due for the taxable year.

§ 110-23-10 Extension of Time for Filing Returns. - The Tax Commissioner may grant a reasonable extension of time for filing any returns or other documents required under the Business Franchise Tax Act upon such terms as the Tax Commissioner prescribes in these regulations. An extension of time for filing "Federal Form 1120," Federal Form 990T or Federal Form 1065 shall automatically extend the time for filing any return or other document required by the Business Franchise Tax Act for the same period as the extension for filing such federal form. An extension of time for filing a return shall not extend the time for payment of the tax.

10.1 Documents and Payment to be Submitted for Granting of an Extension of Time for Filing Returns. - Taxpayers seeking an extension of time for filing a return under this Section shall pay the total amount of tax estimated to be due at the time of filing the request for such extension, unless an extension of time for paying tax has been requested and not denied, or has been granted, and shall at the time of filing the request for such extension file a copy of the taxpayer's request for an extension of time for filing "Federal Form 1120," Federal Form 990T or Federal Form 1065. Failure to file the aforesaid documents in a proper and timely manner or, if an extension of time for paying tax has not been requested or has been denied, failure to pay the total estimated tax due at the time of the submission of a request for an extension of time for filing a return under this Section shall result in the denial of an extension of time to file the West Virginia Business Franchise Tax return.

§ 110-23-11 Time and Place for Paying Tax Shown on Returns.

11.1 In General. - The person required to make the annual return required by the Business Franchise Tax Act, shall, without assessment or notice and demand from the Tax Commissioner, pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

11.2 Date Fixed for Payment of Tax. - The date fixed for payment of the business franchise tax shall be deemed to be a reference to the last day fixed for such payment (determined without regard to any extension of time for paying the tax).

§ 110-23-12 Extensions of Time for Paying Tax.

12.1 Amount Determined on Return. - The Tax Commissioner may extend the time for payment of the amount of the tax shown, or required to be shown, on any return required by the Business Franchise Tax Act (or any periodic installment payments), for a reasonable period not to exceed six months from the date fixed for payment thereof.

12.2 Amount Determined as Deficiency. - In accordance with Section 11-23-12 of the West Virginia Code and under these regulations, the Tax Commissioner may

extend the time for the payment of the amount determined as a deficiency of the tax imposed by Section 11-23-1 of the West Virginia Code for a period not to exceed eighteen months from the date fixed for payment of the deficiency. In exceptional cases, a further period of time not to exceed 12 months may be granted. An extension of time under Section 11-23-12(b) of the West Virginia Code and this Section of these regulations may be granted only where it is shown to the satisfaction of the Tax Commissioner that payment of a deficiency upon the date fixed for the payment thereof will result in undue hardship to the taxpayer.

12.3 No Extension for Certain Deficiencies. - No extension shall be granted under Section 11-23-12 of the West Virginia Code or this Section of these regulations for any deficiency of tax, interest, penalties or other charges if such deficiency is due to negligence, intentional disregard of rules and regulations, or to fraud with intent to evade tax.

12.4 Documents to be Submitted for Granting an Extension of Time for Paying the Tax and Procedure for Applying for an Extension of Time for Paying Tax. - Taxpayers seeking an extension of time for paying tax under these regulations shall file a written request with the Tax Commissioner for such an extension on or before the time fixed by statute for payment of the tax. Such request shall set forth the relevant facts and the reason for the taxpayer's inability to make payment of the tax due on its tax return.

12.4.1 The taxpayer shall file its tax return or, in the case of a request for extension of time for paying tax made in conjunction with a request for extension of time for filing a return under Section 11-23-10 of these regulations, a copy of such request for extension of the time to file the return, with the request for an extension of time for paying the tax.

12.5 An extension of time for paying the tax shall not constitute an extension of time for filing any tax return.

12.6 No extension of time shall be granted unless the Tax Commissioner finds that exceptional circumstances exist and that to require payment within the time prescribed by the statute would work an undue hardship on the taxpayer.

12.7 If the time for payment of tax is extended, interest at the rate established under Section 11-10-17a of the West Virginia Code and accruing from the original due date of the return, until the tax and all interest, penalties and additions relating to such tax are paid shall be added to such tax.

12.8 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 the amount for which the extension of time for payment is granted.

§ 110-23-13 Declaration and Payment of Estimated Tax.

13.1 Requirement of Declaration. - Every taxpayer subject to the business franchise tax under Section 11-23-1 et seq. of the West Virginia Code shall file a declaration of estimated tax for the taxable year if the taxpayer's liability for tax under Section 11-23-1 et seq. of the West Virginia Code can reasonably be expected to exceed twelve thousand dollars for the taxable year. A taxpayer not required by Section 11-23-13 of the West Virginia Code or this Section of these regulations to file a declaration and pay estimated tax may elect to so file and pay.

13.2 Definition of Estimated Tax. - The term "estimated tax" means the amount which a taxpayer estimates to be its liability under Section 11-23-1 et seq. of the West Virginia Code for the taxable year.

13.3 Contents of Declaration. - The declaration shall contain such information as the Tax Commissioner may prescribe by the instructions for the declaration of estimated tax form or by the form itself.

13.4 Time for Filing Declaration. - A declaration of estimated tax shall be filed on or before the fifteenth day of the fourth month of the taxable year, for any taxable year beginning after the thirtieth day of June, 1987.

13.4.1 Time for Filing Declaration for the Period of July 1, 1987 to the End of the Taxpayer's Taxable Year. - A declaration of estimated tax shall be filed on or before the fifteenth day of the third month of any fiscal or calendar year tax quarter ending after July 1, 1987 for the tax liability accrued on and after July 1, 1987, through the end of any taxable year ending before June 30, 1988, if the taxpayer's liability for tax under Section 11-23-1 et seq. of the West Virginia Code, can reasonably be expected to exceed six thousand dollars for the period of July 1, 1987 to the end of the taxpayer's taxable year or through December 31, 1987, whichever comes first, based on a monthly pro ration of the estimated annual tax liability.

13.4.2 Payment of Estimated Tax for the Period of July 1, 1987, to the End of the Taxpayer's Taxable Year. - The estimated tax due for the period of July 1, 1987, to the end of the taxable year ending before June 30, 1988, shall be paid in equal installments, the number of which is determined by the number of tax quarters, or partial tax quarters, remaining in the taxable year which end on or after July 1, 1987, but prior to June 30, 1988. The first installment payment shall be made at the time of filing the declaration. Remaining installments, if any, shall be paid on or before the fifteenth day of the third month of each remaining tax quarter of the short taxable year.

13.5 Amendment of Declaration. - A taxpayer may amend his declaration at any time during the taxable year in accordance with these regulations. If any

amendment of a declaration is filed by a taxpayer, 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. If any amendment is made after the fifteenth day of the ninth month of the taxable year, any increase in the estimated tax by reason thereof shall be paid at the time of making such amendment.

13.6 Payment of Estimated Tax. - The estimated tax shall be paid in four equal installments. At the time the declaration of estimated payment is filed, the taxpayer shall pay one-fourth of the estimated tax liability for the taxable year. The second, third and fourth installments shall be paid on the following fifteenth day of the sixth, ninth and twelfth months of the taxable year, respectively.

13.7 Application to a Short Taxable Year. - The provisions of this Section of these regulations shall apply to a taxable year of less than 12 months.

13.8 Installments Paid in Advance. - Any taxpayer may elect to pay any installment of its estimated tax prior to the date prescribed for such payment.

13.9 Criminal and Administrative Sanctions. - The provisions of the West Virginia Code regarding failure to properly file declarations of estimated tax or estimated tax returns or other documents or 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, Section 11-10-5L and Section 11-10-18a of the West Virginia Code, as well as any other applicable provisions of Chapter 11, Article 10 of the West Virginia Code, shall apply to the filing of declarations of estimated tax, estimated tax returns and payments of estimated tax under Section 110-23-13 of these regulations.

§ 110-23-14 Requirements Concerning Returns, Notices, Records and Statements.

14.1 General. - The Tax Commissioner may require any person to make such returns, render such statements, or keep such records, as the Tax Commissioner may deem sufficient to show whether or not such person is liable for tax under the Business Franchise Tax Act.

14.2 As a part of a full and complete tax return, the taxpayer shall provide:

14.2.1 A copy of pages one through four of its signed federal corporation income tax return or its signed federal partnership income tax return, as filed with the Internal Revenue Service for the taxable year; and

14.2.2 If a consolidated federal income tax return was filed for the taxable year:

14.2.2.1 Supporting schedules showing the consolidation of its income statement and balance sheet, including schedules supporting any eliminations and adjustments made to the income statement and balance sheet;

14.2.2.2 A copy of Federal Form 851 as filed with the Internal Revenue Service and supporting schedules displaying subsidiary corporations in which the taxpayer has stock ownership; and

14.2.2.3 A signed statement explaining the relationship and differences, if any, between the income statement and the balance sheet reported for federal consolidated filing purposes and the income statement and the balance sheet reported to the State of West Virginia under the tax imposed by Section 11-23-1 et seq. of the West Virginia Code.

14.3 Notice of Qualification as a Receiver, Trustee, Assignee or Other Fiduciary. - Every receiver, trustee in bankruptcy, assignee for benefit of creditors, or other like fiduciary shall give notice of his qualification as such to the Tax Commissioner.

§ 110-23-15 Signing of Returns and Other Documents.

15.1 General. - Any return, statement or other document required to be made or filed under the provisions of the Business Franchise Tax Act or these regulations shall be signed in accordance with the instructions prescribed by the Tax Commissioner and in accordance with these regulations.

15.2 Signing of Corporation Returns. - The return of a corporation shall be signed by the president, vice president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to so act. In the case of a return made for a corporation by a fiduciary, such fiduciary shall sign the return. The fact that an individual's name is signed on the return shall be prima facie evidence that such individual is authorized to sign the return on behalf of the corporation.

15.3 Signature Presumed Authentic. - The fact that an individual's name is signed to a return, statement or other document shall be prima facie evidence for all purposes that the return, statement or other document was actually signed by that individual.

15.4 Verification of Returns. - Except as otherwise provided by the Tax Commissioner, any return, declaration or other document required to be made under Section 11-23-1 et seq. of the West Virginia Code shall contain or be verified by a written declaration that it is made under the penalties of perjury.

§ 110-23-16 Place for Filing Returns or Other Documents. - Tax returns,

statements or other documents, or copies thereof, required by Section 11-23-1 et seq. of the West Virginia Code or by these regulations shall be filed with the Tax Commissioner by delivering such returns, statements or other documents, or copies thereof, in person or by mail, to the Tax Commissioner's office in Charleston, West Virginia: Provided, That the Tax Commissioner may, by regulation, prescribe the place for filing tax returns, statements or other documents or copies thereof.

§ 110-23-17 Credits Against Tax.

17.1 For the period prior to July 1, 1988, and after June 30, 1987, a credit shall be allowed against the tax imposed by Section 11-23-1 et seq. of the West Virginia Code equal to the amount of franchise tax liability due under the said Section 11-23-1 et seq. of the West Virginia Code, (determined before application of credits) multiplied by a fraction, the numerator of which is the gross income of the business subject to tax under Article thirteen-a of Chapter eleven of the West Virginia Code and the denominator of which is the total amount of gross income derived by the taxpayer from all activity in West Virginia.

17.2 On and after the first day of July, 1988, a credit shall be allowed against the business franchise tax imposed by Section 11-23-1 et seq. of the West Virginia Code equal to the amount of franchise tax liability due under the said Section 11-23-1 et seq. of the West Virginia Code, (determined before application of credits) multiplied by a fraction, the numerator of which is the gross income of the business subject to tax under Articles thirteen and thirteen-a of Chapter eleven of the West Virginia Code and the denominator of which is the total amount of gross income derived by the taxpayer from all activity in West Virginia.

17.3 Rules

17.3.1 Gross Income Derived by the Taxpayer From All Activity in West Virginia. - For purposes of this Section, the term "gross income derived by the taxpayer from activity in West Virginia" shall mean:

17.3.1.1 Business Activities Entirely Within West Virginia. - If the business activities of a taxpayer take place entirely within the State of West Virginia, and if such taxpayer is not taxable in another state, the entire gross income of such taxpayer shall constitute gross income derived by the taxpayer from activity in West Virginia.

17.3.1.1.a Definition of the Term "Taxable in Another State". - A taxpayer is taxable in another state if:

17.3.1.1.a.1 In any state other than the State of West Virginia the taxpayer is subject to a net income tax, a franchise tax

measured by net income, a franchise tax for the privilege of doing business, or a corporation stock tax, or

17.3.1.1.a.2 Any state other than the State of West Virginia has jurisdiction to subject the taxpayer to a net income tax, regardless of whether, in fact, that other state does or does not subject the taxpayer to such tax.

17.3.1.2 Business Activities Partially Within and Partially Without West Virginia; Allocation of Non-Business Income. --If the business activities of a taxpayer take place partially within and partially without the State of West Virginia, and such taxpayer is not taxable in another state, rents and royalties from real or tangible personal property, gross income subject to capital gains treatment, interest, dividends or patent or copyright royalties, to the extent that they constitute non-business income of the taxpayer, shall be allocated as provided in Subsections 17.3.1.2.a through 17.3.1.2.d.3 of these regulations and shall constitute gross income derived by the taxpayer from activity in West Virginia.

17.3.1.2.a Rents and Royalties

17.3.1.2.a.1 Rents and royalties from real property located in the State of West Virginia are allocable to the State of West Virginia and constitute gross income derived by the taxpayer from activity in West Virginia.

17.3.1.2.a.2 Rents and royalties from tangible personal property are allocable to the State of West Virginia and constitute gross income derived by the taxpayer from activity in West Virginia:

17.3.1.2.a.2.a If, and to the extent, that the property is utilized in the State of West Virginia, or

17.3.1.2.a.2.b In their entirety, if the taxpayer's commercial domicile is in the State of West Virginia and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

17.3.1.2.a.3 The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the State during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property is

located at the time the rental or royalty payer obtained possession.

17.3.1.2.b Capital Gains.

17.3.1.2.b.1 Gross income subject to capital gains treatment and capital losses from sales of real property located in the State of West Virginia are allocable to the State of West Virginia and constitute gross income derived by the taxpayer from activity in West Virginia.

17.3.1.2.b.2 Gross income subject to capital gains treatment and capital losses from sales of tangible personal property are allocable to the State of West Virginia and constitute gross income derived by the taxpayer from activity in West Virginia if:

17.3.1.2.b.2.a The property had a situs in the State of West Virginia at the time of the sale, or

17.3.1.2.b.2.b The taxpayer's commercial domicile is in the State of West Virginia and the taxpayer is not taxable in the state in which the property had a situs.

17.3.1.2.b.3 Gross income subject to capital gains treatment and capital losses from sales of intangible personal property are allocable to the State of West Virginia and constitute gross income derived by the taxpayer from activity in West Virginia if the taxpayer's commercial domicile is in the State of West Virginia.

17.3.1.2.b.4 Gains pursuant to Section 631(a) and (b) of the Internal Revenue Code of 1986, as amended, shall be considered business income for purposes of this regulation.

17.3.1.2.c Interest and dividends are allocable to the State of West Virginia and constitute gross income derived by the taxpayer from activity in West Virginia if the taxpayer's commercial domicile is in the State of West Virginia.

17.3.1.2.d Patent and Copyright Royalties.

17.3.1.2.d.1 Patent and copyright royalties are allocable to the State of West Virginia and constitute gross income derived by the taxpayer from activity in West Virginia:

17.3.1.2.d.1.a If, and to the extent, that the patent or copyright is utilized by the payor in the State of West Virginia; or

17.3.1.2.d.1.b If, and to the extent, that the patent or copyright is utilized by the payor in a state in which the taxpayer is

not taxable and the taxpayer's commercial domicile is in the State of West Virginia.

17.3.1.2.d.2 A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing or other processing in the State or to the extent that a patented product is produced in the State. If the basis of receipts from patent royalties does not permit allocation to states of if the allocation procedures do not reflect states of utilization, the patent is deemed to be utilized in the state in which the taxpayer's commercial domicile is located.

17.3.1.2.d.3 A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

17.3.1.3 Business Activities Partially Within and Partially Without the State of West Virginia; Apportionment of Business Income. - All gross income, after deducting those items specifically allocated under Subsection 17.3.1.2 of these regulations, shall be apportioned to the State of West Virginia by multiplying such gross income by a fraction, the numerator of which is the property factor plus the payroll factor plus two times the sales factor, as defined in Section 110-23-5 of these regulations, and the denominator of which is four; Provided, That the denominator shall be decreased by one for each factor having a denominator of zero and by two if the denominator of the sales factor is zero. Such apportioned income shall constitute gross income derived by the taxpayer from activity in West Virginia.

17.4 Parent Corporations. - A parent corporation taxpayer which files a separate return under the Business Franchise Tax Act shall be allowed a credit against such taxpayer's liability for the tax under the said Business Franchise Tax Act for the amount of net taxes that would have been paid without regard to the adjustment required by Section 11-23-3(b)(2)(D) of the West Virginia Code for the taxable year by a subsidiary corporation or partnership: Provided, That the amount of credit allowed shall not exceed the amount of tax that would have been paid, without regard to such adjustment, under the Business Franchise Tax Act by the subsidiary or partnership, multiplied by the percentage of the parent's ownership of the subsidiary corporation or partnership. In the case of corporations, this percentage shall be equal to the percentage of stock of all classes owned by the parent. In no case shall any credit allowable by Section 11-23-17 of the West Virginia Code, which is not used on an annual return, be carried forward or back, but instead such credit shall be forfeited.

17.5 Bank Shares Tax Credit. - A credit is allowed against the business franchise tax liability for property taxes paid to a county, district or town in

West Virginia on shares of stock in a banking institution, national banking association, or industrial loan company imposed under Section 11-3-14 of the West Virginia Code. Property taxes imposed under Section 11-3-14(a) of the West Virginia Code and paid to a county, district or town in West Virginia on the capital of a building and loan association or federal savings and loan associations also qualify for the credit.

17.5.1 The amount of the credit is the lesser of the net amount of ad valorem property taxes payable for the time period for which the business franchise tax return is filed, or the business franchise tax liability remaining after application of the subsidiary credit set forth under Section 17.4 of these regulations and the severance tax credit set forth under Section 17.1 of these regulations, or for periods subsequent to July 1, 1988, the subsidiary credit set forth under Section 17.4 of these regulations and the combined severance tax and business and occupation tax credit set forth under Section 17.2 of these regulations.

17.5.1.1 The "net amount" of property taxes is the property tax liability minus any discount earned. The net amount of property taxes shall not include any interest or penalties imposed.

17.5.2 To determine the dollar amount of property taxes available for credit consideration, a dollar amount attributable to each month must be established. The sum of the dollar amounts attributable to the months after June 30, 1987, which occur within the filing period, is the amount of ad valorem property taxes available for the credit.

17.5.2.1 Example: A taxpayer, filing a West Virginia business franchise tax return for the taxable year ending December 31, 1987, will have available for credit consideration only 50% of the 1987 property taxes. This amount represents the dollar amount of the property taxes attributable to the months of July through December, 1987.

17.5.3 A fiscal year taxpayer will use only the dollar amounts attributable to the months within the filing period that begin on or after July 1, 1987.

17.5.3.1 Example: A taxpayer whose fiscal year ends September 30, 1987, will have available for credit consideration the dollar amounts attributable to the months of July, August and September, 1987.

17.6 Order in Which Credits Are Taken. - The credits set forth in Section 110-23-17 shall be taken in the following order:

17.6.1 First, the credit set forth in Section 17.4 of these regulations, if any.

17.6.2 Second, the credit set forth in Section 17.1 or 17.2 of these regulations, if any.

17.6.3 Third, the credit set forth in Section 17.5 of these regulations, if any.

Section 17a Tax Credit for Business Investment and Jobs Expansion; Industrial Expansion and Revitalization; Eligible Research and Development Projects; Coal Loading Facilities and Consumers Sales and Service Tax and Use Tax Paid.

17a.1 There shall be allowed as credit against the tax imposed by the Business Franchise Tax Act for the taxable year the amount determined under Sections 11-13C-1 et seq., 11-13D-1 et seq. and 11-13E-1 et seq. of the West Virginia Code relating respectively to:

17a.1.1 The tax credit for business investment and jobs expansion;

17a.1.2 The tax credit for industrial expansion and revitalization and eligible research and development projects; and

17a.1.3 The tax credit for coal loading facilities.

17a.2 Reserved for future use.

17a.3 The provisions of Section 17a of these regulations shall take effect on the first day of July, 1987.

17a.4 Credit for Consumers Sales and Service Tax and Use Tax Paid. - The tax imposed by section 11-23-1 of the West Virginia Code shall be subject to the credits allowed for tax exempt purchases or uses which are set forth at Section 11-15-9b and Section 11-15A-3b of the West Virginia Code, in accordance with the said Section 11-15-9b or Section 11-15A-3b.

§ 110-23-18 Tax Under Section 11-23-1 et seq. of the West Virginia Code is in Addition to All Other Taxes. - The returns, requirements and taxes set forth and imposed under Section 11-23-1 et seq. of the West Virginia Code, the Business Franchise Tax Act, shall be in addition to all other reports, requirements, taxes and duties set forth and imposed by the State of West Virginia.

§ 110-23-19 Records.

19.1 Every taxpayer liable for reporting or paying taxes under the Business Franchise Tax Act shall keep such records, receipts, invoices and other pertinent papers and documents in such form as the Tax Commissioner may require by instruction.

19.2 Every taxpayer shall keep such records for not less than three years

after the annual return is filed under Section 11-23-1 et seq. of the West Virginia Code, unless the Tax Commissioner in writing authorizes their earlier destruction. An extension of time for making an assessment or filing a claim for refund shall automatically extend the time period for keeping the records for all years subject to assessment or refund covered in the agreement for extension of time for making an assessment.

§ 110-23-20 Criminal Penalties. - Each and every provision of the West Virginia Tax Crimes and Penalties Act set forth in Section 11-9-1 et seq. of the West Virginia Code shall apply to the business franchise tax imposed under Section 11-23-1 et seq. of the West Virginia Code with like effect as if the said act were applicable only to the tax imposed by the said Section 11-23-1 et seq. of the West Virginia Code and were set forth in extenso in the said Section 11-23-1 et seq. of the West Virginia Code.

§ 110-23-21 General Procedure and Administration. - Each and every provision of the West Virginia Tax Procedure and Administration Act set forth in Section 11-10-1 et seq. of the West Virginia Code, shall apply to the business franchise tax imposed by Section 11-23-1 et seq. of the West Virginia Code with like effect as if the said act were applicable only to the tax imposed by the said Section 11-23-1 et seq. of the West Virginia Code and were set forth in extenso in the said Section 11-23-1 et seq. of the West Virginia Code.

§ 110-23-22 Severability. - If any provision of Section 11-23-1 et seq. of the West Virginia Code or the application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of the said Section 11-23-1 et seq. of the West Virginia Code, but shall be confined in its operation to the provision thereof directly involved in the controversy in which such judgments shall have been rendered, and the applicability of such provision to other persons or circumstances shall not be affected thereby.

§ 110-23-23 Short Taxable Year Provisions.

23.1 Reserved for future use.

23.2 If the taxpayer's taxable year under Section 11-23-1 et seq. of the West Virginia Code is not the calendar year, then such taxpayer's first taxable year under the said Section 11-23-1 et seq. of the West Virginia Code shall be a short taxable year and shall cover the period beginning the first day of July, 1987 and ending with the last day of the taxpayer's then current fiscal year for federal income tax purposes.

§ 110-23-24 Reserved for future use.

EMERGENCY
WEST VIRGINIA LEGISLATIVE REGULATIONS
STATE TAX DEPARTMENT
TITLE 110
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1987

BUSINESS FRANCHISE TAX

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State Tax Department
of West Virginia

Charleston 25305

ARCH A. MOORE, JR.
GOVERNOR

MICHAEL E. CARYL
COMMISSIONER

July 10, 1987

Honorable Ken Hechler
Secretary of State
State of West Virginia
Charleston, WV 25305

Dear Mr. Hechler:

Under the authority of W. Va. Code §§ 29A-3-15 and 11-10-5, the Tax Department is hereby filing in the State Register the attached emergency regulations for the Business Franchise Tax.

Also attached are Notice Of A Comment Period On A Proposed Rule and Notice Of An Emergency Rule. The public comment period will end at 5:00 p.m., August 10, 1987.

Very truly yours,


Michael E. Caryl
State Tax Commissioner

mm/ss
Attachments