



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

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Office of West Virginia  
Secretary Of State

## **NOTICE OF RULE MODIFICATION OF A PROPOSED RULE**

AGENCY: Tax

RULE TYPE: Legislative

TITLE-SERIES: 110-13KK

RULE NAME: WEST VIRGINIA TAX CREDIT FOR  
FEDERAL EXCISE TAX IMPOSED  
UPON SMALL ARMS AND  
AMMUNITION MANUFACTURERS

CITE AUTHORITY: W. Va. Code §11-10-5 and W. Va. Code  
§11-13KK-13

The above proposed Legislative rules, following review by the Legislative Rule Making Review Committee, is hereby modified as a result of review and comment by the Legislative Rule Making Review Committee. The attached modifications are filed with the Secretary of State.

**BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.**

**Yes**

**Allen R Prunty -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.**

TITLE 110  
LEGISLATIVE RULE  
STATE TAX DEPARTMENT

SERIES 13KK  
WEST VIRGINIA TAX CREDIT FOR FEDERAL EXCISE TAX IMPOSED  
UPON SMALL ARMS AND AMMUNITION MANUFACTURERS

**§110-13KK-1. General.**

1.1. Scope. -- This legislative rule establishes the procedures for applying for and claiming the West Virginia Tax Credit for Federal Excise Tax Imposed Upon Small Arms and Ammunition Manufacturers, and sets forth the methodology the State Tax Commissioner will use to administer the West Virginia Tax Credit for Federal Excise Tax Imposed Upon Small Arms and Ammunition Manufacturers.

1.2. Authority. -- W. Va. Code §11-10-5 and W. Va. Code §11-13KK-13.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect on August 1, 2027.

**§110-13KK-2. Definitions.**

2.1. General Rule. -- Unless a specific definition is provided in section 2.2 of this section heading, or the context in which the term is used clearly requires a different meaning, the terms used in this rule have the definitions provided under W. Va. Code §11-13KK-1, et seq., §11-10-1, et seq., §11-21-1, et seq., and §11-24-1, et seq.

2.2. Terms defined.

2.2.1. “Affiliated group” means any affiliated group within the meaning of section 1504(a) of the Internal Revenue Code, or any similar group defined under a similar provision of state, local, or foreign law, except that section 1504 of the Internal Revenue Code shall be applied by substituting “more than 50 percent” for “at least 80 percent” each place it appears in that section.

2.2.2. “Business” means small arms or ammunition manufacturing business activity, which is or may be classified under the North American Industry Classification System with a six-digit code for a product produced at a facility under code numbers 332992 or 332994 as they are defined on January 1, 2021, which is engaged in by any person in this State that is taxable under W. Va. Code §11-21-1, et seq., or §11-24-1, et seq.

2.2.3. “Business expansion” means capital investment in a new or expanded small arms or ammunition manufacturing facility in this State, which is or may be classified under the North American Industry Classification System with a six-digit code for a product produced at a facility under code numbers 332992 or 332994 as they are defined on January 1, 2021.

2.2.4. “Commissioner” or “Tax Commissioner” are used interchangeably in this rule and mean the Tax Commissioner of the State of West Virginia, or his or her designee.

2.2.5. “Controlled group of corporations” means a controlled group of corporations as defined in section 1563(a) of the Internal Revenue Code.

2.2.6. “Corporation” means any corporation, joint-stock company, association, or other entity treated as a corporation for federal income tax purposes, and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certificate of interest or ownership or similar written instrument.

2.2.7. “Designee” in the phrase “his or her designee,” when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Department duly authorized by the Commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this rule.

2.2.8. “Eligible taxpayer” means any person who makes a qualified investment in a new or expanded small arms and ammunition manufacturing facility located in this State and who is subject to any of the taxes imposed by W. Va. Code §11-21-1, *et seq.* or §11-24-1, *et seq.*

2.2.9. “Expanded facility” means any small arms and ammunition manufacturing facility, other than a new or replacement business facility, resulting from the acquisition, construction, reconstruction, installation, or erection of improvements or additions to existing property if the improvements or additions are purchased on or after July 1, 2021, but only to the extent of the taxpayer’s qualified investment in the improvements or additions.

2.2.10. “Federal excise tax” means all excise taxes paid to the government of the United States under section 4181 of Title 26 of the Internal Revenue Code imposed upon manufacturers, producers, or importers for the sale of pistols, revolvers, firearms (other than pistols and revolvers), shells and cartridges.

2.2.11. “Includes” and “including,” when used in a definition contained in this rule, shall not be considered to exclude other things otherwise within the meaning of the term defined.

2.2.12. “Leased property” does not include property that the taxpayer is required to show on its books and records as an asset under generally accepted principles of financial accounting. If the taxpayer is prohibited from expensing the lease payments for federal income tax purposes, the property shall be treated as purchased property under this section.

2.2.13. “New small arms and ammunition manufacturing facility” means a business facility which satisfies all the following requirements:

2.2.13.a. The facility is employed by the taxpayer in the conduct of a small arms and ammunition manufacturing activity, the net income of which is or would be taxable under W. Va. Code §§11-21-1, *et seq.*, or 11-24-1, *et seq.* The facility is not considered a new small arms and ammunition manufacturing facility in the hands of the taxpayer if the taxpayer’s only activity with respect to the facility is to lease it to another person or persons; and

2.2.13.b. The facility is purchased by, or leased to, the taxpayer on or after July 1, 2021; and

2.2.13.c. The facility was not purchased or leased by the taxpayer from a related person. The Commissioner may waive this requirement if the facility was acquired from a related party for its fair market value and the acquisition was not tax motivated; and

2.2.13.d. The facility was not in service or use during the 90 days immediately prior to transfer

of the title to the facility or prior to the commencement of the term of the lease of the facility.

2.2.14. "New property" means:

2.2.14.a. Property, the construction, reconstruction, or erection of which is completed on or after July 1, 2021, and placed in service or use after that date; and

2.2.14.b. Property leased or acquired by the taxpayer that is placed in service or use in this State on or after July 1, 2021, if the original use of the property commences with the taxpayer and commences after that date.

2.2.15. "Original use" means the first use to which the property is put, whether or not the use corresponds to the use of the property by the taxpayer.

2.2.16. "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, which is treated as a partnership for federal income tax purposes, and that is not a trust or estate, a corporation, or a sole proprietorship.

2.2.17. "Partner" includes a member of a partnership as defined in this rule.

2.2.18. "Person" includes any natural person, corporation, or partnership.

2.2.19. "Property purchased or leased for business expansion" shall be treated as follows for purposes of this credit.

2.2.19.a. Included property. - Except as provided in subdivision b of this subsection, the term "property purchased or leased for business expansion" means real property and improvements thereto, and tangible personal property, but only if the real or personal property was constructed, purchased, or leased and placed in service or use by the taxpayer for use as a component part of a new or expanded small arms and ammunition manufacturing facility as defined in this section heading, which is located within the State of West Virginia. This term includes only:

2.2.19.a.1. Real property and improvements thereto having a useful life of four or more years, placed in service or use on or after July 1, 2021, by the taxpayer.

2.2.19.a.2. Real property and improvements thereto acquired by written lease having a primary term of 10 or more years and placed in service or use by the taxpayer on or after July 1, 2021.

2.2.19.a.3. Tangible personal property placed in service or use by the taxpayer on or after July 1, 2021, with respect to which depreciation, or amortization in lieu of depreciation, is allowable in determining the personal or corporation net income tax liability of the business taxpayer under W. Va. Code §11-21-1, *et seq.*, or §11-24-1, *et seq.*, and which has a useful life, at the time the property is placed in service or use in this State, of four or more years.

2.2.19.a.4. Tangible personal property acquired by written lease having a primary term of four years or longer, that commenced and was executed by the parties thereto on or after July 1, 2021, if used as a component part of a new or expanded small arms and ammunition manufacturing business facility, shall be included within this definition.

2.2.19.a.5. Tangible personal property owned or leased and used by the taxpayer at a

business location outside this State that is moved into the State of West Virginia on or after July 1, 2021, for use as a component part of a new or expanded small arms and ammunition manufacturing facility located in this State.

2.2.19.a.5.A. If the property is owned, it must be depreciable or amortizable personal property for income tax purposes and have a useful life of four or more years remaining at the time it is placed in service or use in this State.

2.2.19.a.5.B. If the property is leased, the primary term of the lease remaining at the time the leased property is placed in service or use in this State, must be four or more years.

2.2.19.b. Excluded property. -- The term “property purchased or leased for business expansion” does not include:

2.2.19.b.1. Repair costs, including the cost of materials used in the repair, unless for federal income tax purposes the cost of the repair must be capitalized and not expensed.

2.2.19.b.2. Airplanes and helicopters.

2.2.19.b.3. Property that is primarily used outside this State, with use being determined based upon the amount of time the property is actually used both within and outside this State.

2.2.19.b.4. Property which is acquired incident to the purchase of the stock or assets of the seller, unless for good cause shown, the Tax Commissioner consents to waiving this requirement.

2.2.19.b.5. Purchased or leased property, the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time the property is placed in service or use.

2.2.19.b.5.A. If the contract of purchase specifies a minimum purchase price or minimum annual rent, the amount thereof shall be used to determine the qualified investment in the property under W. Va. Code §11-13KK-6 and this rule, if the property otherwise qualifies as property purchased or leased for expansion of a small arms and ammunition manufacturing facility.

2.2.19.b.5.B. If the contract of lease specifies a minimum purchase price or minimum annual rent, the amount thereof shall be used to determine the qualified investment in the property under W. Va. Code §11-13KK-6 and this rule, if the property otherwise qualifies as property purchased or leased for expansion of a small arms and ammunition manufacturing facility.

2.2.20. “Purchase” means any acquisition of property, but only if:

2.2.20.a. The property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under section 267 or 707 (b) of the United States Internal Revenue Code.

2.2.20.b. The property is not acquired by one component member of an affiliated or controlled group from another component member of the same affiliated or controlled group, as applicable. The Tax Commissioner may waive this requirement if the property was acquired from a related party for its then fair market value; and

2.2.20.c. The basis of the property for federal income tax purposes, in the hands of the person acquiring it, is not determined;

2.2.20.c.1. In whole or in part, by reference to the federal adjusted basis of the property in the hands of the person from whom it was acquired; or

2.2.20.c.2. Under Section 1014(e) of the United States Internal Revenue Code.

2.2.21. “Qualified activity” means any small arms and ammunition manufacturing business activity subject to any of the taxes imposed by W. Va. Code §11-21-1, *et seq.*, or §11-24-1, *et seq.*, which is or may be classified under the North American Industry Classification System with a six-digit North American Industry Classification System code for a product produced at a facility with code numbers 332992 or 332994 as they are defined on January 1, 2021.

2.2.22. “Related person” means:

2.2.22.a. A corporation, partnership, association, or trust controlled by the taxpayer;

2.2.22.b. An individual, corporation, partnership, association, or trust that is in control of the taxpayer;

2.2.22.c. A corporation, partnership, association, or trust controlled by an individual, corporation, partnership, association, or trust that is in control of the taxpayer; or

2.2.22.d. A member of the same affiliated or controlled group as the taxpayer.

2.2.22.e. The term “control” means the following.

2.2.22.e.1. For purposes of this subsection, “control,” with respect to a corporation, means ownership, directly or indirectly, of stock possessing 50 percent or more of the total combined voting power of all classes of the stock of the corporation entitled to vote.

2.2.22.e.2. “Control,” with respect to a trust, means ownership, directly or indirectly, of 50 percent or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association, or of a beneficial interest in a trust is determined in accordance with the rules for constructive ownership of stock provided in section 267(c) of the United States Internal Revenue Code, other than paragraph (3) of that section.

2.2.23. “Replacement small arms and ammunition manufacturing facility” means any property (other than an expanded small arms and ammunition manufacturing facility) that replaces or supersedes any other property located within this State that:

2.2.23.a. The taxpayer or a related person used in or in connection with any small arms and ammunition manufacturing facility for more than two years during the period of five consecutive years ending on the date the replacement or superseding property is placed in service by the taxpayer; or

2.2.23.b. Is not used by the taxpayer or a related person in or in connection with any small arms and ammunition manufacturing facility for a continuous period of one year or more commencing with the date the replacement or superseding property is placed in service by the taxpayer.

2.2.24. “Small arms and ammunition manufacturing” refers to a facility that is or may be classified under the North American Industry Classification System with a six-digit North American Industry Classification System code for a product produced at a facility with code numbers 332992 or 332994 as they

are defined on January 1, 2021.

2.2.25. “Small arms and ammunition manufacturing business” means a business primarily engaged in this State in small arms or ammunition manufacturing that is or may be classified under the North American Industry Classification System with a six-digit North American Industry Classification System code for a product produced at a facility with code numbers 332992 or 332994 as they are defined on January 1, 2021.

2.2.26. “Small arms and ammunition manufacturing facility” means any factory, mill, plant, warehouse, building, or complex of buildings located within this State, including the land on which it is located, and all machinery, equipment, and other real and personal property located at or within the facility, used in connection with the operation of the facility, and all site preparation and start-up costs of the taxpayer for the small arms and ammunition manufacturing facility, which is or may be classified under the North American Industry Classification System with a six-digit North American Industry Classification System code for a product produced at a facility with code numbers 332992 or 332994 as they are defined on January 1, 2021, and that it capitalizes for federal income tax purposes in a business that is taxable in this State.

2.2.27. “Taxpayer” means any person subject to any of the taxes imposed by W. Va. Code §11-21-1, et seq., or §11-24-1, et seq.

2.2.28. “The code” means the Code of West Virginia, 1931, as amended.

2.2.29. “This State” means the State of West Virginia.

2.2.30. “United States Internal Revenue Code” or “I.R.C.” means the Internal Revenue Code 182 as defined in W. Va. Code §11-21-1, et seq. or §11-24-1, et seq.

2.2.31. “Used property” means property acquired after June 30, 2021, that is not “new property.”

### **§110-13KK-3. The amount of credit.**

3.1. Credit allowed. -- Eligible taxpayers are allowed a credit against the portion of taxes imposed by this State that are attributable to and the consequence of the taxpayer’s qualified investment in a new or expanded small arms and ammunition manufacturing facility in this State.

3.1.1. The qualified investment must be equal to or greater than \$2 million.

3.1.2. The amount of this credit is determined and applied as provided in W. Va. Code §11-13KK-1, et seq., and this rule.

3.1.3. The amount of this credit claimed for any taxable year cannot exceed the amount of federal excise tax paid or payable to the government of the United States under section 4181 of Title 26 of the Internal Revenue Code, after application of any federal credits that may have been claimed.

3.2. Amount of credit. -- The amount of credit allowable is 100 percent of the amount of federal excise tax paid in a tax year under section 4181, Title 26 of the Internal Revenue Code, which is attributable to and the consequence of the taxpayer’s qualified investment.

3.2.1. Threshold for the credit. -- No credit shall be allowed under W. Va. Code §§11-13KK-1, et seq., or this rule unless the taxpayer has invested at least two million dollars in property purchased or leased for business expansion during the tax year for which the credit is claimed.

3.2.2. It is the intent of W. Va. Code §11-13KK-1, *et seq.*, that a qualified taxpayer makes and continuously maintains a minimum capital investment in a qualified munitions manufacturing facility of no less than two million dollars. The sole purpose of the capital investment portion of W. Va. Code §11-13KK-1, *et seq.*, is to determine whether the two-million-dollar threshold requirement is met in every operational year based on a rolling ten-year time span for creation and extinguishment for measurement of capital investment.

3.2.2.a. If the two-million-dollar capital investment threshold is met or exceeded in any given tax year, then the taxpayer is authorized to apply the annual dollar for dollar W. Va. Code §11-13KK-1, *et seq.* tax credit against corporation net income tax or personal income tax, as applicable, in the amount of federal excise tax paid pursuant to 26 U.S.C. 4181.

3.2.2.b. If the two-million-dollar threshold has not been met, then the taxpayer may not apply the annual tax credit in the amount of the federal excise tax paid each year.

3.2.2.c. Under §11-13KK-5, the statute contemplates placement of potential qualified investment in service or use in each taxable year. Therefore, the two-million-dollar threshold is an ongoing determination, with each year contributing a new layer of capital investment over a ten-year time span.

Yr. 1 investment is counted from year 1 to year 10.

Yr. 2 investment is counted from year 2 to year 11.

Yr. 3 investment is counted from year 3 to year 12,

etc.

A Taxpayer cannot gain entitlement to the credit until at least two million dollars of accumulated qualified investment is in place.

3.2.2.c.1. EXAMPLE: If the taxpayer meets the \$2,000,000 threshold in year 1, then the taxpayer can apply the credit beginning in year 1. If the qualified investment is made in phases such that the \$2,000,000 threshold qualified investment is not in place until a later year, the Taxpayer may begin taking the tax credit in the year when the \$2,000,000 threshold is met, based on the qualified investment made in the current year, combined with investments placed in service or use in the prior 10 years (under the 10 year rolling measurement system), provided that all other requirements of W. Va. Code §11-13KK-1, *et seq.*, are met, including the filing for of an application for credit.

3.2.2.c.2. The tax credit set forth in W. Va. Code §11-13KK-1, *et seq.*, uses a 10-year rolling measurement of qualified investment to determine that at least two million dollars of capital is continuously in place in the facility.

3.2.2.d. If the two-million-dollar threshold is reached or exceeded, then the taxpayer is authorized to take the annual W. Va. Code §11-13KK-1, *et seq.*, tax credit, the amount of which is an annual dollar for dollar offset of West Virginia income taxes, in the amount of federal excise tax paid in each taxable year on manufacture of certain firearms and ammunition, pursuant to 26 U.S.C. §4181.

3.2.3. Nothing in this subsection shall prevent the taxpayer from making a subsequent two-million-dollar investment and claiming an additional credit during a subsequent tax year.

3.3. Application of credit over 10 years. -- The amount of credit allowable shall be taken over a ten-year period, beginning with the taxable year in which the taxpayer places the qualified investment in service or use in this State that is used to reach the two-million-dollar threshold.



3.3.1. The taxpayer may elect to delay the beginning of the 10-year period until the next succeeding taxable year.

3.3.1.a. This election shall be made in the annual income tax return filed for the taxable year in which qualified investment is first placed into service or use by the taxpayer.

3.3.1.b. Once made, the election cannot be revoked.

3.3.2. The annual credit allowance is taken in the manner prescribed in W. Va. Code §11-13KK-4 and this rule.

3.4. Placed in service or use. -- For purposes of the credit allowed by W. Va. Code §11-13KK-1, *et seq.*, and this section heading, property is considered placed in service or use in the earlier of the following taxable years:

3.4.1. The taxable year in which, under the taxpayer's depreciation practice, the period for depreciation with respect to the property begins; or

3.4.2. The taxable year in which the property is placed in a condition or state of readiness and availability for a specifically assigned function.

#### **§110-13KK-4. Application of the credit.**

4.1. In general. -- The amount determined under W. Va. Code §11-13KK-3 and this rule is allowed as a credit against 100 percent of that portion of the taxpayer's state tax liability that is attributable to and the direct result of the taxpayer's qualified investment and applied as provided in subsections 1 and 2, both inclusive of this section, and in that order.

4.1.1. Corporation net income taxes. --

4.1.1.a. That portion of the allowable credit attributable to qualified investment in a small arms and ammunition manufacturing facility may be applied to reduce the taxes imposed by W. Va. Code §11-24-1, *et seq.*, for the taxable year as determined before application of allowable credits against tax.

4.1.1.b. If the taxes due under W. Va. Code §11-24-1, *et seq.*, as determined before application of allowable credits against tax, are not solely attributable to and the direct result of the taxpayer's qualified investment in a small arms and ammunition manufacturing business, the amount of the taxes that is attributable is determined by multiplying the amount of taxes due under W. Va. Code §11-24-1, *et seq.*, for the taxable year, as determined before application of allowable credits against tax, by a fraction, the numerator of which is all wages, salaries, and other compensation paid during the taxable year to all employees of the taxpayer employed in this State whose positions are directly attributable to the qualified investment, and the denominator of which is the wages, salaries, and other compensation paid during the taxable year to all employees of the taxpayer employed in this State.

4.1.2 Personal income taxes. --

4.1.2.a. If the person making the qualified investment in a small arms and ammunition manufacturing facility is an electing small business corporation, as defined in section 1361 of the United States Internal Revenue Code, a partnership, a limited liability company that is treated as a partnership for federal income tax purposes, or a sole proprietorship, then any unused credit is allowed as a credit against the taxes imposed by W. Va. Code §11-21-1, *et seq.*, on the income from the small arms and ammunition

manufacturing facility, or on income of a sole proprietor attributable to the small arms and ammunition manufacturing facility.

4.1.2.b. Electing small business corporations, limited liability companies treated as partnerships for federal income tax purposes, partnerships, and other unincorporated organizations shall allocate the credit against the income tax imposed by W. Va. Code §11-21-1, *et seq.*, among its members in the same manner as profits and losses are allocated for the taxable year.

4.1.2.c. If the amount of taxes attributable to business activity due under W. Va. Code §11-21-1, *et seq.*, as determined before application of allowable credits against tax, is not solely attributable to and the direct result of the qualified investment of the electing small business corporation, limited liability company treated as a partnership for federal income tax purposes, other unincorporated organization, or sole proprietorship, the amount of the taxes that are so attributable are determined by multiplying the amount of taxes due under W. Va. Code §11-21-1, *et seq.*, as determined before application of allowable credits against tax that are attributable to business activities by a fraction, the numerator of which is all wages, salaries, and other compensation paid during the taxable year to all employees of the electing small business corporation, limited liability company, partnership, other unincorporated organization, or sole proprietorship employed in this State, whose positions are directly attributable to the qualified investment, and the denominator of which is the wages, salaries, and other compensation paid during the taxable year to all employees of the taxpayer.

4.1.2.d. No credit is allowed under this section against any employer withholding taxes imposed by W. Va. Code §11-21-1, *et seq.*

4.2. If the wages, salaries, and other compensation fraction formula provisions of subsections 1 and 2 of this section, inclusive, do not fairly represent the taxes solely attributable to and the direct result of qualified investment of the taxpayer, then the Tax Commissioner may require, in respect to all or any part of the taxpayer's businesses or activities, if reasonable:

4.2.1. Separate accounting or identification;

4.2.2. Adjustment to the wages, salaries, and other compensation fraction formula to reflect all components of the tax liability;

4.2.3. The inclusion of one or more additional factors that will fairly represent the taxes solely attributable to and the direct result of the qualified investment of the taxpayer and all other project participants in the businesses or other activities subject to tax; or

4.2.4. The employment of any other method to effectuate an equitable attribution of the taxes.

4.3. Unused credit. -- If any credit remains after application of section 1 of this section heading, the amount thereof is carried forward to each ensuing tax year until used or until the expiration of the tenth taxable year subsequent to the end of the initial 10-year credit application period.

4.3.1. If any unused credit remains after the 20th year, the amount thereof is forfeited.

4.3.2. No carryback to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance.

#### **§110-13KK-5. Qualified investment.**

5.1. General. -- The qualified investment in property purchased or leased for a new, or expansion of an

existing, small arms and ammunition manufacturing facility is the applicable percentage of the cost of each property purchased or leased for the purpose of the new, or expansion of an existing, small arms and ammunition manufacturing facility that is placed in service or use in this State by the taxpayer during the taxable year.

5.1.1. Applicable percentage. -- For the purposes of section 1 of this subject heading, the applicable percentage of any property is determined pursuant to the following table:

5.1.1.a. Table.

| <u>If useful life is:</u> | <u>The applicable percentage is:</u> |
|---------------------------|--------------------------------------|
|---------------------------|--------------------------------------|

|                                                    |                |
|----------------------------------------------------|----------------|
| <u>Less than four years</u>                        | <u>0%</u>      |
| <u>Four years or more but less than six years</u>  | <u>33 1/3%</u> |
| <u>Six years or more but less than eight years</u> | <u>66 2/3%</u> |
| <u>Eight years or more</u>                         | <u>100%</u>    |

5.1.1.b. The useful life of any property, for purposes of this section heading, is determined as of the date the property is first placed in service or use in this State by the taxpayer, determined in accordance with the provisions of W. Va. Code §11-13KK-4 and this rule.

5.2. Cost. -- For purposes of section 1 of this section heading, the cost of each property purchased for a new, or expansion of an existing, small arms and ammunition manufacturing facility is determined under the following rules:

5.2.1. Trade-ins. -- Cost does not include the value of property given in trade or exchange for the property purchased for a new, or expansion of an existing, small arms and ammunition manufacturing facility.

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

5.2.3. Rental property. --

5.2.3.a. The cost of real property acquired by written lease for a primary term of 10 years or longer is 100 percent of the rent reserved for the primary term of the lease, not to exceed 20 years.

5.2.3.b. The cost of tangible personal property acquired by written lease for a primary term of:

5.2.3.b.1. Four years, or longer, is one third of the rent reserved for the primary term of the lease;

5.2.3.b.2. Six years, or longer, is two thirds of the rent reserved for the primary term of the lease; or

5.2.3.b.3. Eight years, or longer, is 100 percent of the rent reserved for the primary term of the lease, not to exceed 20 years.

5.2.3.c. In no event may rent reserved include rent for any year subsequent to expiration of the book life of the equipment, determined using the straight-line method of depreciation.

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

5.2.5. Transferred property. -- The cost of property used by the taxpayer out-of-state and then brought into this State, is determined based on the remaining useful life of the property at the time it is placed in service or use in this State,

5.2.5.a. The cost is the original cost of the property to the taxpayer less straight-line depreciation allowable for the tax years or portions thereof the taxpayer used the property outside this State.

5.2.5.b. In the case of leased tangible personal property, cost is based on the period remaining in the primary term of the lease after the property is brought into this State for use in a new or expanded business facility of the taxpayer, and is the rent reserved for the remaining period of the primary term of the lease, not to exceed 20 years, or the remaining useful life of the property, as determined as aforesaid, whichever is less.

#### **§110-13KK-6. Forfeiture of unused tax credits; redetermination of credit allowed.**

6.1. Disposition of property or cessation of use. -- If, during any taxable year, property with respect to which a tax credit has been allowed under W. Va. Code §11-13KK-1, *et seq.*, and this rule is disposed of or ceases to be used in a small arms and ammunition manufacturing facility of the taxpayer in this State, then the unused portion of the credit allowed for the property is forfeited for the taxable year and all ensuing years, except when the property is damaged or destroyed by fire, flood, storm, or other casualty, or is stolen.

6.2. Cessation of operation of small arms and ammunition manufacturing facility. -- If, during any taxable year, the taxpayer ceases operation of a small arms and ammunition manufacturing facility in this State for which credit was allowed under W. Va. Code §11-13KK-1, *et seq.*, then the unused portion of the allowed credit is forfeited for the taxable year and for all ensuing years, except when the cessation is due to fire, flood, storm, or other casualty.

#### **§110-13KK-7. Transfer of qualified investment to successors.**

7.1. Mere change in form of business. -- Property will not be treated as disposed of under W. Va. Code §11-13KK-8 or this rule, by reason of a mere change in the form of conducting the business, as long as the property is retained in the successor's small arms and ammunition manufacturing facility in this State, and the transferor business retains a controlling interest in the successor business. The successor business may claim the amount of credit still available with respect to the business facility or facilities transferred.

7.2. Transfer or sale to successor. -- Property is not treated as disposed of under W. Va. Code §11-13KK-8 or this rule by reason of any transfer or sale to a successor business that continues to operate the small arms and ammunition manufacturing facility in this State. Upon transfer or sale, the successor shall acquire the amount of credit that remains available under this article for each subsequent taxable year.

#### **§110-13KK-8. Identification of investment credit property.**

8.1. Every taxpayer who claims credit under W. Va. Code §11-13KK-1, *et seq.*, and this rule shall maintain sufficient records to establish the following facts for each item of qualified property:

8.1.1. The identity of the qualified property;

8.1.2. The actual or reasonably determined cost of the qualified property;

8.1.3. The straight-line depreciation life of the qualified property;

8.1.4. The month and taxable year in which the qualified property was placed in service;

8.1.5. The amount of credit taken with respect to the qualified property;

8.1.6. The date the qualified property was disposed of or otherwise ceased to be used as qualified property in the small arms and ammunition manufacturing facility of the taxpayer; and

8.1.7. The amounts and dates of federal excise tax paid.

**§110-13KK-9. Failure to keep records of investment credit property.**

9.1. A taxpayer who does not keep the records required for identification of investment credit property is subject to the following rules:

9.1.1. A taxpayer is treated as having disposed of during the taxable year any investment credit property that the taxpayer cannot establish was still on hand, in this State, at the end of that year.

9.1.2. If a taxpayer cannot establish when investment credit property reported for purposes of claiming this credit during the taxable year was placed in service, the taxpayer is treated as having placed it in service in the most recent prior year in which similar property was placed in service, unless the taxpayer can establish that the property placed in service in the most recent year is still on hand. In that event, the taxpayer will be treated as having placed the returned property in service in the next most recent year.

**§110-13KK-10. Interpretation and construction.**

10.1. No inference, implication, or presumption of legislative construction or intent may be drawn or made by reason of the location or grouping of any particular section, provision, or portion of this rule; and no legal effect may be given to any descriptive matter or heading relating to any section, subsection, paragraph, part, or item of this rule.

10.2. The provisions of this rule shall be reasonably construed in order to effectuate the legislative intent recited in W. Va. Code §11-13KK-1.

**§110-13KK-11. Burden of proof; application required; failure to make timely application.**

11.1. Burden of proof. -- The burden of proof is on the taxpayer to establish by clear and convincing evidence that the taxpayer is entitled to the benefits allowed by W. Va. Code §11-13KK-1, *et seq.*, and this rule.

11.2. Application for credit required. --

11.2.1. Application required. -- No credit is allowed or may be applied under W. Va. Code §11-13KK-1, *et seq.*, or this rule for any qualified investment property placed in service or use until the person asserting a claim for the allowance of credit under W. Va. Code §11-13KK-1, *et seq.*, and this rule makes written application to the Commissioner for allowance of credit as provided in this section heading.

11.2.1.a. An application for credit shall be filed, in the form prescribed by the Tax Commissioner, no later than the last day for filing the tax returns, determined by including any authorized extension of time for filing the return, required under W. Va. Code §11-21-1, *et seq.*, or §11-24-1, *et seq.*, for

the taxable year in which the property to which the credit relates is placed in service or use. The form to apply for the credit is available online at <https://tax.wv.gov>.

11.2.1.b. All information required by the form shall be provided, or the application will be rejected.

11.2.2. Failure to make timely application. -- Failure to timely apply for the credit results in forfeiture of 50 percent of the annual credit allowance otherwise allowable under W. Va. Code §11-13KK-1, et seq., and this rule. This penalty applies annually until the application is filed.

#### **§110-13KK-12. Tax credit review and accountability.**

12.1. Beginning on February 1, 2026, and every fifth year thereafter, the Tax Commissioner shall submit to the Governor, the President of the Senate, and the Speaker of the House of Delegates a tax credit review and accountability report evaluating the cost effectiveness of this credit during the most recent five-year period for which information is available. The criteria to be evaluated shall include, but not be limited to, for each year of the five-year period:

12.1.1. The numbers of taxpayers claiming the credit;

12.1.2. The moneys invested, and net number of new jobs created, by all taxpayers claiming the credit;

12.1.3. The cost of the credit;

12.1.4. The cost of the credit per new job created; and

12.1.5. A comparison of employment trends for the industry and for taxpayers within the industry that claim the credit.

12.2. Taxpayers claiming the credit shall provide any information the Tax Commissioner may require to prepare the report required by this section; the information provided is subject to the confidentiality and disclosure provisions of W. Va. Code §11-10-5d.

12.3. On or before February 1, 2026, the Department of Commerce, in consultation with the Tax Commissioner, the Department of Transportation, and the Department of Environmental Protection, shall submit to the Governor, the President of the Senate, and the Speaker of the House of Delegates a report of the impact of all the tax credits and other economic incentives provided in W. Va. Code §11-13KK-1, et seq., upon;

12.3.1. Economic development in this State, including, but not limited to, the moneys invested and jobs created in this State;

12.3.2. The State's infrastructure, including, but not limited to, the need for construction or maintenance of the roads and highways of the State;

12.3.3. The natural resources of the State; and

12.3.4. Public and private property interests in the State.

#### **§110-13KK-13. General procedure and administration.**

13.1. Each provision of the “West Virginia Tax Procedure and Administration Act” set forth in W. Va. Code §11-10-1, *et seq.*, applies to the tax credit allowed under W. Va. Code §11-13KK-1, *et seq.*, except as otherwise expressly provided in W. Va. Code §11-13KK-1, *et seq.*, and this rule with like effect as if that act were applicable only to the tax credit allowed by W. Va. Code §11-13KK-1, *et seq.*, and this rule and were set forth *in extenso* in W. Va. Code §11-13KK-1, *et seq.*, and this rule.

13.2. The provisions of W. Va. Code §11-10-5EE shall not be interpreted in such a way as to prevent any otherwise eligible taxpayer from claiming both the credit set forth by W. Va. Code §11-13KK-1, *et seq.*, and this rule, and any credit available against the federal excise tax paid to the government of the United States under section 4181 of Title 26 of the Internal Revenue Code.

13.3. Although the two-million-dollar qualified investment threshold measurement of this credit is similar to the measure of qualified investment used for the manufacturing investment and other tax credits, calculation and amount of the W. Va. Code §11-13KK-1, *et seq.*, tax credit is not based on the amount of qualified investment. The W. Va. Code §11-13KK-1, *et seq.*, tax credit is based on the dollar amount of annual federal excise tax paid. Therefore, the prohibition of W. Va. Code §11-10-5ee (SB 532 (2021 Regular Legislative Session)) does preclude simultaneous application of the W. Va. Code §11-13S-1, *et seq.*, manufacturing investment tax credit or W. Va. Code §11-13Q-1, *et seq.*, economic opportunity tax credit, and the W. Va. Code §11-13KK-1, *et seq.*, tax credit.

#### **§110-13KK-14. Crimes and penalties.**

Each provision of the “West Virginia Tax Crimes and Penalties Act” set forth in W. Va. Code §11-9-1, *et seq.*, applies to the tax credit allowed by §11-13KK-1, *et seq.*, and this rule with like effect as if that act were applicable only to the tax credit set forth in W. Va. Code §11-13KK-1, *et seq.*, and this rule and were set forth *in extenso* in W. Va. Code §11-13KK-1, *et seq.*, and this rule.

#### **§110-13KK-15. Severability.**

15.1. If any provision of W. Va. Code §11-13KK-1, *et seq.* or this rule, or the application thereof, is for any reason adjudged by any court of competent jurisdiction to be invalid, the judgment may not affect, impair, or invalidate the remainder of W. Va. Code §11-13KK-1, *et seq.* or this rule, but shall be confined in its operation to the provision thereof directly involved in the controversy in which the judgment shall have been rendered, and the applicability of the provision to other persons or circumstances may not be affected thereby.

15.2. If any provision of W. Va. Code §11-13KK-1, *et seq.* or this rule, or the application thereof, is made invalid or inapplicable by reason of the repeal or any other invalidation of any statute, section, or portion therein addressed or referred to, such invalidation or inapplicability may not affect, impair, or invalidate the remainder of W. Va. Code §11-13KK-1, *et seq.* or this rule, but shall be confined in its operation to the provision thereof directly involved with, pertaining to, addressing, or referring to the statute, section, or portion, and the application of the provision with regard to other statutes, sections, or portions or in other instances not affected by any such repealed or invalid statute, section, or portion may not be abrogated or diminished in any way.

#### **§110-13KK-16. Effective date.**

The credit allowed by W. Va. Code §11-13KK-1, *et seq.*, and this rule is allowable for qualified investment property placed in service or use on or after July 1, 2021.