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

AGENCY: Tax　　TITLE-SERIES: 110-21G

RULE TYPE: Legislative　　Amendment to Existing Rule: No　　Repeal of existing rule: No

RULE NAME: 110-21G Income Tax Paid at the Entity Level by Electing Pass-Through Entities

PRIMARY CONTACT

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CITE STATUTORY AUTHORITY: W. Va. Code §11-21-3a(p)

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

This rule is explicitly required by W. Va. Code §11-21-3a(p), which provides: The Tax Commissioner shall propose rules for legislative approval in accordance with the provisions of §29A-3-1 et seq. of this code to administer the tax levied pursuant to the provisions of this section. These rules must include a description of how the adjustments to income and the credit authorized by this section apply to direct or indirect owners of an electing pass-through entity based upon various ownership structures.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/8/2023

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/10/2023

COMMENTS RECEIVED: Yes

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: Yes

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

Published on WV Tax website

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

This is a new rule that is mandated by legislation passed in the 2023 regular session. In SB 151, the Legislature stated in new W. Va. Code 11-21-3a(p) that "The Tax Commissioner shall propose rules for legislative approval in accordance with the provisions of §29A-3-1 et seq. of this code to administer the tax levied pursuant to the provisions of this section. These rules must include a description of how the adjustments to income and the credit authorized by this section apply to direct or indirect owners of an electing pass-through entity based upon various ownership structures."

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

This rule provides requirements, procedures and limitations for filing and payment of income tax by electing pass-through entities and assertion of credits and deductions in accordance with W. Va. Code §11-21-3a.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

There will be a short-term increase in General Revenue Fund collections due to the retroactive nature of the bill and related first-year payment and filing requirements. Over the longer-term, the impact of the legislation on General Revenue collections should be revenue neutral.
Additional administrative costs incurred by the State Tax Department would be $15,000 in FY2023.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

none

C. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

There will be a short-term increase in General Revenue Fund collections due to the retroactive nature of the bill and related first-year payment and filing requirements. Over the longer-term, the impact of the legislation on General Revenue collections should be revenue neutral.

Additional administrative costs incurred by the State Tax Department would be $15,000 in FY2023.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2023 Increase/Decrease (use "-")	2024 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	15,000.00	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	15,000.00	0	0
2. Estimated Total Revenues	0	0	0

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

This legislative rule provides guidance for Pass-through Entities that elect to be taxed at the entity level and their respective owners. Effective for taxable years beginning on and after January 1, 2022, a qualifying Pass-through Entity may elect to be subject to the personal income tax at the entity level for a taxable year. The election must be made on or before the due date for filing the applicable return, including any extensions that have granted. The election only applies to the taxable year for which the election is made and, once made, is irrevocable for that year.
Owners of an electing Pass-through Entity are eligible for a tax credit equal to the owner's proportionate share of the tax remitted by the Pass-through Entity. The credit is claimed for the taxpayer's taxable year that includes the last day of the electing Pass-through Entity's taxable year for which the tax was paid. Excess credit may be carried forward by the taxpayer for up to five taxable years.
There will be a short-term increase in General Revenue Fund collections due to the retroactive nature

of the bill and related first-year payment and filing requirements. Over the longer-term, the impact of the legislation on General Revenue collections should be revenue neutral.
Additional administrative costs incurred by the State Tax Department would be $15,000 in FY2023.

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

Yes

Anoop Bhasin -- 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 DIVISION

SERIES 21G
INCOME TAX PAID AT THE ENTITY LEVEL BY ELECTING PASS-THOURGH ENTITIES

§110-21G-1. General.

1.1. Scope. -- This rule provides requirements, procedures and limitations for filing and payment of income tax by electing pass-through entities and assertion of credits and deductions in accordance with W. Va. Code §11-21-3a.

1.2. Authority. -- W. Va. Code §11-21-3a(p).

1.3. Filing date. -- .

1.4. Effective date. -- .

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect after August 1, 2029.

§110-21G-2. Definitions.

2.1. General Rule. -- Unless a specific definition is provided elsewhere in this rule, 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 §§11-10-1 *et seq.*, 11-21-1 *et seq.*, and 11-24-1 *et seq.*

2.2. Terms defined.

2.2.1. The definitions set forth in W.Va. Code §11-21-3a are incorporated here by reference.

2.2.2. "Owners of qualifying pass-through entity" or "owners" means the partners of a partnership or other pass-through entity, or shareholders of an S-corporation.

2.2.3. "Partners" means a person that holds an interest directly or indirectly in a partnership or other pass-through entity. For the purposes of this rule, "person" includes, but is not limited to, any individual, firm, partnership, limited partnership, co-partnership, limited liability company, other pass-through entity, joint venture, association, corporation, municipal corporation, organization, receiver, estate, trust, guardian, executor, administrator, and any other group or combination acting as a unit.

2.2.4. "Reconciliation tax credit" means a credit that owners of an electing pass-through entity may take against their West Virginia personal income tax liability for income taxes paid by the electing pass-through entity.

§110-21G-3. Introduction.

W. Va. Code §11-21-3a authorizes an electing pass-through entity ("electing PTE") to make an annual election to pay an elective income tax at the entity level, at a rate equal to the top marginal personal income tax rate on individuals. A nonrefundable income tax credit, subject to a 5-year carryforward, is authorized for owners of the electing PTE for West Virginia income tax paid by the electing PTE. The electing PTE tax is payable in addition to any other taxes imposed on the entity, including sales and use taxes, withholding taxes with respect to employees, property tax, and other local or municipal taxes.

110-21G-4. Owner's Reconciliation Tax Credit for Tax Paid at the Entity Level.

4.1. Owner's reconciliation tax credit -- Subject to the requirements and limitations of W. Va. Code §11-21-3a the owner of an electing PTE may apply a reconciliation tax credit against the owner's personal income tax liability under W. Va. Code §11-21-1 *et seq.*, in the amount of the owner's proportionate share of the tax paid under W. Va. Code §11-21-1 *et seq.*, by the electing PTE for the taxable year.

4.1.1. An owner of an electing PTE may claim a reconciliation tax credit against the owner's West Virginia individual income tax or fiduciary income tax.

4.1.2. A trust (other than a trust that is disregarded for income tax purposes) that is an owner of an electing Subchapter S corporation may claim the reconciliation tax credit that it receives on its fiduciary income tax return or distribute any portion of the reconciliation tax credit to its beneficiaries as may be appropriate: Provided, That no credit may be claimed by both a trust and a beneficiary of the trust.

4.2. Timing -- The reconciliation tax credit for tax paid by the electing PTE may only be claimed in the taxable year for which the tax was paid by the electing PTE. If the reconciliation tax credit exceeds the owner's tax liability for the taxable year, the excess credit may be carried forward by the owner for not more than five consecutive tax years.

4.2.1. Eligible taxpayers must wait until the electing PTE makes the election and pays the tax at the entity level before claiming the reconciliation tax credit.

4.2.2. If the electing PTE does not make the election and pay the tax until after the due date for the owner's return, the owner may (1) make any necessary extension payments and file the return during the extension period, or (2) file the original return without claiming the credit and then file an amended tax return once the election has been made and the tax paid by the electing PTE.

4.3. Resident owners' tax credit for tax paid to another state -- Subject to the requirements and limitations of W. Va. Code §11-21-20, individual resident owners of the electing PTE may claim a credit for income taxes paid by the electing PTE to other states for the same taxable year under laws substantially similar to the West Virginia pass-through entity income tax, or directly paid by a West Virginia resident pass-through entity owner, on pass through income taxed by another state, that is also subject to West Virginia personal income tax, which would be taxed by both the other state and the State of West Virginia but for the W. Va. Code §11-21-20 tax credit. Any such credit may also be included as a credit against the PTE tax liability as determined by such individual resident owner's includable income in any PTE tax liability pursuant to Section 7.2.1 to the extent paid on behalf of such owner through non-resident withholding, a composite return, or a similar PTE tax in such other state.

110-21G-5. Making the Election.

5.1. A pass-through entity has the option to make the election to pay West Virginia income tax directly under W. Va. Code §11-21-3a for the taxable year. The election can be made as follows:

5.1.1. For Taxable Years 2023 and after, by timely filing a form, as directed by the Tax Commissioner, for electing to pay the tax at an entity level.

5.1.2. An electing PTE must also file a form for quarterly estimated payments of tax for the taxable year and submit timely quarterly estimated payments of tax due with that form.

5.1.3. If, as a result of a federal partnership audit, a partnership elects to be taxed at the entity level for federal tax purposes, that federal election will also act as an election to be taxed at the entity level for West Virginia state income tax purposes.

5.2. Electing PTEs may obtain an extension of time to file; but may only do so pursuant to timely payment of tax for the taxable year.

5.3. Electing PTEs must file an annual tax return, as directed by the Tax Commissioner, on or before the due date, or extended due date, for the taxable year.

5.4. Once the form for electing to pay the tax at an entity level is filed, the election is binding for that taxable year.

5.5. Each electing PTE may decide how to obtain consent from its owners. The election is binding on all the owners for the taxable year once the election is made by the pass-through entity and filed with the Tax Division. Once the electing PTE has filed its election with the Tax Division, an owner may not "opt out" of the pass-through entity's election for that particular taxable year. An owner, officer, or employee of the pass-through entity who is authorized to act on behalf of the pass-through entity in tax matters must sign the tax return. By signing the return, the signer declares that they are the authorized representative of the pass-through entity. Because the tax return must be filed electronically, the return must be signed using the electronic signature procedures established by the Tax Division.

110-21G-6. Pass-Through Entity Qualification to Make the Election.

Generally, a pass-through entity qualifies to make the election only if it is taxable under W. Va. Code §11-21-1 *et seq.*, and not taxable under W. Va. Code §11-24-1 *et seq.* Any pass-through entity that is treated as a disregarded entity for federal income tax purposes may not elect to be taxed under W. Va. Code §11-21-3a.

110-21G-7. Taxable Income.

7.1. West Virginia Taxable Income -- An electing PTE's West Virginia taxable income is the total of: (1) all resident owner's share of the electing PTE's income or loss; (2) all nonresident owner's share of pass-through entity income or loss, other than apportionable income, multiplied by the pass-through entity's apportionment percentage; and (3) each nonresident owner's share of income allocable to West Virginia.

7.1.1. The electing PTE must determine the status of each owner as a resident or nonresident of West Virginia.

7.1.2. Individual owners of a pass-through entity are West Virginia residents if they meet the definition of "resident individual" specified in W. Va. Code §11-21-7.

7.1.3. Estates or trusts that are owners of a pass-through entity are West Virginia residents if they meet the definition of "resident estate or trust" specified in W. Va. Code §11-21-7.

7.1.4. Individual owners of a pass-through entity are nonresidents of West Virginia if they meet the definition of "nonresident individual" specified in W. Va. Code §11-21-7.

7.1.5. Estates or trusts that are owners of a pass-through entity are nonresidents of West Virginia if they meet the definition of "nonresident estate or trust" specified in W. Va. Code §11-21-7.

7.1.6. For the purposes of the electing PTE tax computation, owners may not be classified as part-year residents. Part-year residents will be calculated as nonresidents on the electing PTE return.

7.2. Computation For Resident Owners. --

7.2.1. An electing PTE's calculation of its pass-through entity taxable income must include all items of income, gain, loss, and deduction, to the extent they would flow through and be included in the income of resident owners that are taxable under W. Va. Code §11-21-1 *et seq.*

7.2.2. Pass-through entity taxable income includes each resident owner's share of the electing PTE's income or loss, subject to increasing and decreasing modifications directly applicable to the electing PTE's income or loss that is attributable to West Virginia. Modifications subject to the provisions of W. Va. Code §11-21-17 and W. Va. Code §11-21-17a shall be made in accordance with the requirements of those sections as applicable.

7.2.3. The West Virginia personal exemption specified in W. Va. Code §11-21-16 may not be applied by the electing PTE in determining electing PTE taxable income.

7.2.4. West Virginia residents are taxable on all of their pass-through entity income regardless of the pass-through entity's allocation and apportionment. However, subject to the requirements and limitations of W. Va. Code §11-21-20, owners of the electing PTE may claim a credit for income taxes paid to another state. Any such credit may also be used as a credit against the PTE's tax liability as determined by such individual resident owner's includable income in any PTE tax liability pursuant to Section 7.2.1 to the extent paid on behalf of such owner through nonresident withholding, a composite return, or a similar PTE in such other state.

7.2.5. In determining West Virginia taxable income, an electing PTE must add to its West Virginia taxable income any state and local taxes to the extent that the electing PTE deducted such taxes in determining the electing PTE's federal taxable income.

7.3. Computation For Nonresident Owners.

7.3.1. A pass-through entity's taxable income includes each nonresident owner's share of the electing PTE's income or loss, subject to increasing and decreasing modifications directly applicable to the pass-through entity's income or loss attributable to West Virginia. Modifications subject to the provisions of W. Va. Code §11-21-17 and W. Va. Code §11-21-17a shall be made in accordance with the requirements of those sections as applicable.

7.3.2. The West Virginia personal exemption specified in W. Va. Code §11-21-16 may not be applied by the electing PTE in determining the electing PTE's taxable income.

7.3.3. In determining the share of pass-through entity income or loss that is attributable to West Virginia, the electing PTE adds each nonresident owner's share of pass-through entity income or loss other than dividend income ("apportionable income"), after any increasing or decreasing modifications, multiplied by the pass-through entity's apportionment percentage; and each nonresident owner's share of dividend income ("allocable income") if the pass-through entity is commercially domiciled in West Virginia.

7.3.4. An electing PTE's calculation of its pass-through entity taxable income must include all items of income, gain, loss, and deduction, to the extent they would flow through and be included in the income of owners that are taxable under W. Va. Code §11-21-1 *et seq.*

7.3.5. The electing PTE can exclude income from the calculation of pass-through entity taxable income to the extent that the electing PTE can establish that the amount is properly allocable to an owner who is not subject to tax on such amount under W. Va. Code §11-21-1 *et seq.* Two examples are: (1) income that is not U.S. sourced and is allocable to nonresident alien partners and, therefore, not included in federal adjusted gross income under the Internal Revenue Code; and (2) retirement income of former partners that is exempt from nonresident state taxation under 4 U.S.C § 114.

7.3.6. In determining West Virginia taxable income, an electing PTE must add to its West Virginia taxable income any state and local taxes to the extent that the electing PTE deducted such taxes in determining the electing PTE's federal taxable income.

110-21G-8. Computing Electing Pass-Through Entity Tax.

8.1. An electing PTE calculates its West Virginia income tax by multiplying its West Virginia taxable income by a tax rate equal to the top marginal personal income tax rate on individuals.

8.2. Economic development tax credits and other credits allowed by law to be passed through to the owners of a pass-through entity may be applied against the electing PTE tax. These credits include, but are not limited to:

Economic Opportunity Tax Credit (WV Code §11-13Q-1 *et seq.*);

High Technology Manufacturers Credit (WV Code §11-13Q-10a);

Jobs Creation Tax Credit (WV Code §11-13Q-22);

Small Business Property Tax Adjustment Tax Credit (a refundable credit) (WV Code §11-13MM-5);

Downstream Natural Gas Manufacturing Investment Tax Credit (W. Va. Code §11-13GG-1 *et seq.*);

Natural Gas Liquids Property Tax Adjustment Credit (W. Va. Code §11-13HH-1 *et seq.*);

Post-Coal Mine Site Business Credit (W. Va. Code §11-28-1 *et seq.*);

Environmental Agricultural Equipment Credit (W. Va. Code §11-13K-1 *et seq.*);

Military Incentive Credit (Formerly Veterans Employment Credit) (W. Va. Code §11-21-42);

High-Wage Growth Business Tax Credit (W. Va. Code §11-13II-1 *et seq.*);

Neighborhood Investment Program Credit (W. Va. Code §11-13J-1 *et seq.*);

Historic Rehabilitated Buildings Investment Credit (W. Va. Code §11-21-8a);

Credit For Qualified Rehabilitated Residential Building Investment (W. Va. Code §11-21-8a);

Apprenticeship Training Tax Credit (W. Va. Code §11-13W-1 *et seq.*);

West Virginia Farm To-Food Bank Tax Credit (W. Va. Code §11-13DD-1 *et seq.*);

Tax Credit For Donation Or Sale Of Vehicle (W. Va. Code §11-13FF-1 *et seq.*);

Professional Services Destination Facility Tax Credit (part of the Tourism Development Tax Credit) (W. Va. Code §5B-2e-1 *et seq.*);

Small Arms and Ammunition Manufacturing Facility Tax Credit For Federal Excise Tax Paid (W. Va. Code §11-13KK-1 *et seq.*);

High-Wage Growth Business Tax Credit (a refundable credit) (W. Va. Code §11-13II-1 *et seq.*); and

The West Virginia Film Industry Investment Act Credit (W. Va. Code §11-13X-1 *et seq.*);

8.3. Treatment of the federal 26 U.S.C. § 199A deduction -- The federal income tax deduction allowable under 26 U.S.C. § 199A is not an allowable adjustment in determining the tax liability of an electing PTE. The federal 26 U.S.C. § 199A deduction is a "below the line" federal income tax deduction. It does not reduce a Taxpayer's federal adjusted gross income. The deduction is taken after federal adjusted gross income is determined.

8.4. Treatment of depletion allowance -- The electing PTE may take a *proforma* depletion allowance in the amount allowable under 26 U.S.C. § 611 *et seq.*, to be deducted by the electing PTE in determining West Virginia taxable income of the electing PTE at the entity level.

110-21G-9. Filing the Annual Electing Pass-Through Entity Tax Return.

9.1. Electing PTEs are required to file their returns and the accompanying schedules, and make any tax payments electronically.

9.2. Electing PTE tax returns are due by the 15th day of the third month following the close of the taxable year.

9.3. For calendar year filers, the PTE tax return is due by March 15. West Virginia allows an automatic 6-month filing extension for electing PTE. An application for extension is required and must be filed on or before the original due date of the income tax return. An extension of time to file does not extend the due date for payment of taxes. An electing PTE must pay all electing PTE tax due by the original due date for filing the return.

9.4. If the annual return is filed within the automatic extension period, but less than 100 percent of the tax liability was paid on or before the original due date, a penalty will apply. That penalty may include revocation of the election of the pass-through entity to be taxed at the entity level, with tax liabilities, penalties and interest being assessed against the owners of the pass-through entity.

9.5. When an electing PTE files an annual West Virginia income tax return reflecting an overpayment, the Tax Division will refund the overpayment of electing PTE tax to the electing PTE. Only the electing PTE is entitled to request a refund of an overpayment of electing PTE tax. Owners of the electing PTE shall not be eligible for a refund of overpaid electing PTE tax.

9.6. An electing PTE must notify its owners that the election has been made and provide its owners with information regarding the income and related deductions and the amount of the reconciliation tax credit passed through to the owner so that owners can complete their West Virginia tax returns.

9.7. The total amount of reconciliation tax credits reported by an electing entity shall not exceed the total electing PTE tax paid by the electing PTE.

110-21G-10. Estimated Tax Payments.

10.1. For the 2022 tax year, an electing PTE is not required to make estimated payments of tax and will not be subject to penalties or interest for not making estimated payments for that year.

10.2. For taxable years beginning on and after January 1, 2023, an electing PTE is required to make estimated payments if its tax for the taxable year can reasonably be expected to exceed $2,400.

10.3. Estimated payments for electing PTE will be based upon the requirements set forth in W. Va. Code §11-21-1 *et seq.* and rules promulgated pursuant thereto. Calendar year filers are required to make four quarterly installments to the Tax Division: 25 percent of the amount due by April 15, 25 percent of the amount due by June 15, 25 percent of the amount due by September 15, and 25 percent of the amount due by December 15.

10.4. Non-calendar year filers are required to make four quarterly installments to the Tax Division: 25 percent of the amount due by the 15th day of the 4th month following the beginning of its fiscal year. Subsequent installments are payable by the 15th day of the 6th month, the 15th day of the 9th month, and the 15th day of the 12th month following the beginning of its fiscal year. In case of any underpayment of estimated tax payments by an electing PTE, additions to tax, penalties and interest may be imposed in accordance with the West Virginia Tax Procedure and Administration Act.

110-21G-11. Nonresident Withholding Payments and Composite Payments.

Electing PTEs should not make nonresident withholding payments or payments associated with composite returns ("composite payments"). If nonresident withholding payments were made before the electing PTE made the election to be an electing PTE taxed at the entity level, the electing PTE should request the withholding payments be treated as an estimated payment, in the form and manner as directed by the Tax Commissioner, or request a refund of any such payments made.

110-21G-12. Filing Requirements for Nonresident Owners of an Electing Pass-Through Entity.

An electing PTE may not file a composite return on behalf of its nonresident owners. If a nonresident owner's only West Virginia source income is through an electing PTE that fully pays the tax, that nonresident owner is not required to file a West Virginia nonresident return, but may do so at the election of the nonresident owner.