Tax Update: The 1993 West Virginia Legislature

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# TAX UPDATE:
The 1993 West Virginia Legislature

Harry Preston Henshaw, III*

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I. INTRODUCTION

In 1993, the West Virginia Legislature was faced with a need for additional revenue. A number of amendments to various taxes were made that were designed to balance this need for revenue with the desire to attract and retain business in West Virginia. The changes increased revenue primarily by repealing or limiting certain exemptions and credits rather than increasing tax rates. A brief summary of the taxes involved and an explanation of the most significant tax changes follows.

II. ANALYSIS

A. Sales and Service Tax and the Use Tax

1. Summary

The West Virginia consumer sales tax was first adopted in 1933. The use tax was adopted in 1951 and generally subjects a West Virginia consumer to tax on a purchase from an out-of-state vendor where the purchaser would have paid the sales and service tax had the purchase been made in West Virginia. These taxes were originally “consumer oriented” and provided for broad exemptions for businesses and intermediate purchasers. In 1987, the Legislature enacted the West Virginia Tax Reform Act of 1987. This Act substantially changed the

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sales and service tax and the use tax by broadening the base of both taxes. Then, in 1988, the Legislature increased the tax rate from five percent to six percent.

The sales and service tax is imposed upon the ultimate consumer, and creates a presumption that all transactions involving tangible personal property and services are subject to the tax unless specifically exempted by statute. There are three methods of exemptions from the tax: 1) per se exemptions; 2) exemptions for which an exemption certificate is required; and 3) exemptions that require the taxpayer to pay the tax and then apply for a refund claiming the transaction was exempt.

Per se exemptions are exemptions from the sales and service tax that do not require the purchaser to present an exemption certificate or direct pay permit in order to avoid the collection of the tax by the seller. In contrast, other sales of tangible personal property and ser-


8. The following types of transactions are per se exempted:

1) Sales of gas, steam or water delivered to consumers through mains or pipes;
vices are exempt from collection of the sales and service tax only if an exemption certificate is presented to and accepted by the vendor at the time of sale. These are generally called exemption by certificate.\(^9\)

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2) Sales of electricity;
3) Sales of public services regulated by the West Virginia Public Service Commission;
4) Sales of textbooks;
5) Isolated transactions;
6) Delivered newspapers;
7) Prescription drugs;
8) Day care services;
9) Lottery tickets;
10) Leases of licensed motor vehicles;
11) Food sold by schools, colleges and certain non profit organizations;
12) Items purchased with food stamps;
13) Tickets for school activities;
14) Advertisements;
15) Personal activities;
16) Professional services;
17) Contracting for a capital improvement to a structure;
18) Services for an employer;
19) Transactions prohibited from taxation by law;
20) Charges for room and board by fraternities and sororities to their members;
21) Charges for transportation of passengers in interstate commerce;
22) Casual and occasional sales by certain exempt organizations;
23) Tuition charged by summer camps;
24) Sales of licensed vehicles;
25) Nonprofit organizations' membership fees utilized for traffic and pedestrian safety education programs;
26) Charges for opening and closing burial lots;
27) Sales of farm products and livestock;
28) Charges for membership in health and fitness clubs;
29) Limited charges for babysitting services; and
30) Sales of services by certain exempt organizations.


9. The exemption of the following transactions may be asserted with an exemption certificate:

1) Sales to the state and federal governments;
2) Sales to churches and charitable organizations;
3) Sales of property or services which are resold;
4) Purchases of materials for a government contract;
5) Sales to schools;
6) Sales of mobile homes;
7) Sales of propane for poultry house heating;
8) Sales to be used in agricultural production;
The third type of exemption is asserted by the purchaser applying for a refund or a credit against other taxes for the sales and service tax collected by a vendor. The following types of transactions are the exemption by refund:

1) Sales to certain charitable organizations;
2) Sales to be directly used or consumed in manufacturing, contracting, transportation, transmission, communication, gas storage or production of resources;
3) Sales to fraternities and social organizations;
4) Sales of fire fighting equipment to volunteer fire departments;
5) Casual sales by certain charities;
6) Sales to a business subject to the business and occupation tax on utilities, the business and occupation tax on the production of electricity, the severance tax or the telecommunications tax;
7) Sales of building materials to charities;
8) Sales to charities which make no charges for their services if the items sold are directly used in the charitable activity;
9) Sales of aircraft repair services and tools for use in providing such services; and
10) Sales to persons entitled to a credit for a management information service facility.10

Purchasers may present a direct pay permit in lieu of paying the sales and service tax or the use tax to a vendor. Purchasers can then assert any refundable exemption on their next direct pay permit return.11 As a practical matter, this is the normal procedure which is followed to claim the foregoing exemptions.

9) Sales of building material for use in a "qualified business" or "enterprise zone";
10) Sales to certain exempt organizations;
11) Sales of electronic data processing services;
12) Services performed with a controlled group;
13) Purchases of food by schools, colleges and certain nonprofit organizations; and
14) Sales of video machines and motion pictures.


11. This use of direct pay permits is authorized by W. VA. CODE § 11-15-9d (1991), and it is acknowledged in 110 W. Va. C.S.R. § 15-4.3.3 (1992).
The exemptions from the use tax are the same as those from the sales and service tax with several additional categories applicable only to the use tax.\textsuperscript{12}

2. Changes

The exemption by refund was repealed for (1) all sales to a business subject to the business and occupation tax on utilities, (2) the business and occupation tax on the production of electricity, (3) the business and occupation tax on gas storage, (4) the severance tax, and (5) the telecommunications tax.\textsuperscript{13} This exemption applied even if the purchase was only indirectly used in the business. Some overlap existed between this repealed exemption and the exemption by refund for sales to be \textit{directly used} in manufacturing, contracting, transportation, transmission, communication or production of resources.\textsuperscript{14}

Although telecommunication businesses and producers of natural resources could assert this direct use exemption, they generally did not have to be concerned with the direct use of their purchases because they could come under the repealed blanket or non-direct use exemption for all severance taxpayers or telecommunications taxpayers. If a business was involved in the production of natural resources or in telecommunications but was not subject to either the severance tax or the telecommunication tax, the direct use exemption was important. This primarily arose when a contractor was used to produce natural resources.\textsuperscript{15} Such contractors were not exempt on their purchases by


\textsuperscript{13} \textsc{W. Va. Code} § 11-15-9(v) (Supp. 1992) (setting forth the former non-direct use exemption).

\textsuperscript{14} The direct use exemption is found in \textsc{W. Va. Code} § 11-15-9(g) (Supp. 1992).

\textsuperscript{15} For example a contract miner generally does not have an economic interest in the coal he mines and consequently does not pay the severance tax, but he would be considered in the business of producing a natural resource. This scenario is presented in 110 W. Va. C.S.R. §§ 15-9.4.1.1.d & 15-123.4.3.5 (1992). \textit{See also} 110 W. Va. C.S.R. § 13A-4.5 (1992) (discussing the interest required to subject a contract miner to the severance tax); 110 W. Va. C.S.R. §§ 15-123.4.3 (1992) (discussing the activities constituting the production
virtue of paying the severance tax. Accordingly, they had to establish that their purchases were directly used in the business of producing natural resources in order to be exempt.

The utilities, electrical producers, and gas storage businesses that were exempted from the sales and service tax by virtue of paying the business and occupation tax, were not exempted on purchases to be directly used in their business. With the repeal of the unlimited exemption for utilities and producers of electricity, these businesses were added to the direct use exemption.

Businesses involved in producing natural resources, telecommunications, storing natural gas, production of electricity, and providing

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16. Prior to the 1993 changes, the latter exemption applied only when the goods or services sold are directly used or consumed in the “manufacturing, transportation, transmission, communication or . . . the production of natural resources.” W. Va. Code § 11-15-9(g) (Supp. 1992). The definition of these covered activities did not include utilities, electrical producers, or gas storage activities. See W. Va. Code §§ 11-15-2(n), (p), (q), (t), (s) and (i) (1991); 110 W. Va. C.S.R. § 15-2.27 (1992). Gas storage was not an activity that gave rise to the direct use exemption; however, gas storage in the course of gas transmission was regarded as a component of transmission which was an activity giving rise to the direct use exemption. See W. Va. Code § 11-15-2(n)(2)(C) (1991); 110 W. Va. C.S.R. § 15-2.27.1.3 (1992).

17. The revised provision setting out the scope of the direct use exemption reads in relevant part:

Provided, that on and after the first day of July, one thousand nine hundred eighty-seven, the exemption provided in this subsection shall apply only to services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication or the production of natural resources in the businesses or organizations named above and shall not apply to purchases of gasoline or special fuel: provided, however, that on and after the first day of May, one thousand nine hundred ninety-three, the exemption provided in this subsection shall apply only to services, machinery, supplies and materials directly used or consumed in the activities of manufacturing, transportation, transmission, communication, production of natural resources, gas storage, generation or production of selling electric power, provision of a public utility service or the operation of a utility business, in the businesses or organizations named above, and shall not apply to purchases of gasoline or special fuel.

utilities will now have to establish that their purchases are to be directly used in their business in order to be exempt. A general definition of direct use as the concept applies to all businesses appears in the statute and an expanded explanation is set forth in the regulations in a section entitled “General Guidelines for Determining Tax Ability of Purchases for Use in Industries Subject to Direct Use Concept.”

The statute and regulations state that property or services constituting direct use will only include the following:

1) Tangible personal property physically incorporated into a finished product (for example raw materials used by a manufacturer to make a product);

2) Property or services causing a direct physical chemical or other change upon property (for example machinery to assemble parts which have been manufactured);

3) Transporting or storing property undergoing use or consumption in the business (for example fork lifts used to move items being manufactured would be directly used but not fork lifts used to load the manufactured items for shipping);

4) Measuring or verifying a change in property used in the business (for example testing equipment used by manufacturers for quality control);

5) Control or direction of the physical movement or operation of property directly used in the business (for example conveyor belts used to move goods in the process of being manufactured);

6) Directly recording the flow of property in the business (for example meters used to record the amount of gas used by a manufacturer’s machines);

7) Producing energy for property directly used in the business (for example an electrical generator, a boiler used to produce energy for use by a manufacturer’s equipment);

8) Facilitating the transmission of gas, water, steam or electricity from the point of their diversion if such is directly used in the business (for example pipes used to carry water to equipment used in manufacturing);

9) Controlling or otherwise regulating atmospheric conditions required for the business (for example air conditioning necessary to control tempera-

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19) Maintenance or repair of property directly used in the business (for example repair services performed on equipment used in manufacturing);

11) The storage, removal or transportation of economic waste directly resulting from the activities of the business (for example trash bins used to store waste resulting from the manufacturing process);

12) Pollution control or environmental quality or protection activity directly relating to the activities of the business (for example shrubbery used to clean air emissions from a manufacturing facility or a slurry pond used to collect run-off from a mine);

13) Personnel, plant product or community safety or security activity directly relating to the activities of the business (for example safety shoes used by personnel for protection in hazardous manufacturing);

14) Tangible personal property or services used as an integral and essential part of the business. 19

Although direct use seems initially to be limited to those uses specifically enumerated by the language of the statute and regulations, the last example is a catch-all provision which restates the general principle that direct use is a use which is an "integral and essential part" of a business. 20

The statute and regulations also enumerate certain specific uses of property or services which do not constitute a direct use for businesses in general. These uses which do not constitute a direct use are:

1) Heating or illumination of office buildings (for example the purchase of lighting fixtures for an office building);

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20. The concept of an "integral and essential part" lies at the heart of the statutory definition of direct use. It appears both in the definition of direct use established before the 1993 changes and retained under those changes, see W. VA. CODE § 11-15-9(n)(1) (Supp. 1991), and in the definition of direct use for gas storage and utilities, which is added in 1993 as part of the extension of the direct use exemption to those businesses, see Revenue Enhancement Amendments, supra note 17 (to be codified as W. VA. CODE § 11-15-9(w)(1)).
2) Janitorial or general cleaning activities (for example the cleaning supplies or janitorial services purchased for the general maintenance of a facility);

3) Personal comfort of employees (for example couches purchased for employees in an employees' lounge);

4) Production planning, scheduling of work or inventory control (for example a computer purchased for use in maintaining records on inventory levels or for layout in designing of products);

5) Marketing, general management, supervision, finance, training, accounting in administration (for example property purchased for use in research for a new and improved product);

6) An activity or function incidental or convenient to transportation, communication, transmission, manufacturing production, production of natural resources rather than in an integral or essential part of such activity. (This is a restatement of the general rule).  

The statute was amended to list new uses of property and services that constitute a direct use or consumption in gas storage, generation of electric power, and providing a utility service. It may be impor-
tant that this list in the statute does not have a catchall provision stating that any other tangible personal property or services used as an integral and essential part of the business will constitute a direct use. Therefore, this list may be exclusive.

The regulations also set forth direct use guidelines for specific industries. This portion of the regulations details what will be considered to be directly used in the production of natural resources which will now be of importance to all producers of natural resources. The regulation discusses coal processing, limestone processing and refining, or processing of natural gas or oil and indicates that these processes are not considered to be part of the production of natural resources and were not covered by the repealed exemption. However, the definition of "production of natural resources" in the statute was expanded to include "processing" as well as "shipment." The regulations do

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23. The items which the regulations state are not considered to be used directly in the production of natural resources are:
1) Blueprinting equipment;
2) Engineering and surveying equipment;
3) Equipment, maps and other property used in exploration;
4) Office and clerical supplies and equipment;
5) Janitorial supplies;
6) Light bulbs and fixtures used in offices, repair shops, bath houses or other similar facilities;
7) Supplies used in bath houses;
8) Textbooks, manuals and reference materials;
9) Research and development equipment used in developing new products or improving present products;
10) Personnel records and time logs;
11) Machinery, tools, parts and materials used to repair equipment other than equipment directly used in the production of natural resources;
12) Machinery, tools, parts and materials used to maintain office facilities, repair shops, bath houses or eating facilities;
13) Temporary employment services when a person is not an employee of the taxpayer and is rendering services not directly used in the activity of the production of natural resources, such as clerical services; and
14) Consultant services, unless services rendered are professional or directly used in the activity of the production of natural resources.

25. See Revenue Enhancement Amendments, supra note 17 (to be codified at W. Va. CODE § 11-15-2(t)). Even without this change, processing natural resources is considered to be manufacturing and purchases for manufacturing are exempt if used in the manufacturing
not detail specific items or services that are considered to be directly in the communication business. This was probably because most businesses involved in the activity of communication would pay the telecommunications tax and thereby come within the blanket exemption on all of their purchases. The uses listed for producers of natural resources suggests what constitutes direct use in communication businesses.

Certain items may be used in both a taxable and exempt manner. In such cases, the sales tax must be apportioned in some reasonable manner.\textsuperscript{26} An example of this would be heavy construction equipment used for both surface mining and construction.

B. Business Investment and Jobs Expansion Credit and the Minimum Severance Tax

1. Summary

The business investment and jobs expansion credit is the most liberal of the tax credits designed to stimulate business in the state. This credit is subdivided into three separate credits that share some of the same general provisions. These credits are the "supercredit,"\textsuperscript{27} the "small business credit,"\textsuperscript{28} and the "headquarter’s relocation credit."\textsuperscript{29}

In order to be eligible for the supercredit, a business must create a minimum of fifty new jobs.\textsuperscript{30} The amount of available credit is com-

\begin{itemize}
\item process. See 110 W. Va. C.S.R. § 15-123.4.2 (1992).
\item 26. Regulations addressing the apportionment of the exemption in this fashion are as follows: for items in part used in transportation, 110 W. Va. C.S.R. § 15-123.4.1.3 (1992); for items in part used in manufacturing, 110 W. Va. C.S.R. § 15-123.4.2.3 (1992); for items used in part in the production of natural resources, 110 W. Va. C.S.R. § 15-123.4.3.8 (1992); for items used in part in transmission, 110 W. Va. C.S.R. § 15-123.4.4.3 (1992).
\item 27. The general provisions describing the basic business investment and jobs expansion credit appear in W. VA. CODE § 11-13C-1 to -14 (1991). This credit is generally referred to as the "supercredit" because of the size it may attain.
\item 29. The major provisions concerning the headquarter’s relocation credit appear in W. VA. CODE § 11-13C-4a (1991).
\item 30. No new jobs percentage is provided if the number of new jobs is less than fifty.
\end{itemize}
puted by multiplying the “qualified investment” times a “new jobs percentage.” The headquarters relocation credit is available for any business that has its headquarters outside of West Virginia and relocates its headquarters within the state. The headquarters relocation must create at least fifteen new jobs at the new headquarters. The credit is computed by adding the qualified investment and one hundred percent of the “relocation expenses” and multiplying this total by ten percent, or by the taxpayers “new job percentage,” if larger. The small business credit is available to any “small business” creating at least ten new jobs in the state. The available small business credit is computed each year for ten consecutive years by dividing the qualified investment by ten and then multiplying this amount by the new jobs percentage for that year.

The super credit, the headquarters relocation credit, and the small business credit are all applied against taxes in the same manner. Over the credit’s ten year spread, it may offset up to eighty percent of the business and occupation tax, carrier taxes, severance taxes, telecommunications taxes, etc.

W. VA. Code § 11-12C-7(b) (1991).

31. The procedure for computing the amount of the supercredit is set out in W. VA. Code § 11-13C-4(b) (1991). “New job percentages” are established in W. VA. Code § 11-13C-7(b) (1991), and range from fifty percent to ninety percent depending on the number of new jobs created. W. VA. Code § 11-13C-6 sets forth the procedure for calculating the “qualified investment” and generally provides that the investment is adjusted by multiplying the investment by 33⅓% to 100% depending on its useful life.

32. This definition of headquarters’ relocation appears in W. VA. Code § 11-13C-4a(a) (1991).

33. This requirement appears in W. VA. Code § 11-13C-4a(a) (1991), which reads in relevant part: “A corporation that . . . employs, on a full-time basis, at its new corporate headquarters location, at least fifteen people, who are domiciled in this state . . . .”

34. Rules for computing the headquarters relocation credit appear in W. VA. Code § 11-13C-4a(b) (1991). Because no new job percentage is defined for situations in which less than fifty new jobs are created; the ten percent figure provided by statute is used. See supra note 31.


36. Rules for computing the small business credit appear in W. VA. Code § 11-13C-7a(b)(2) (1991). The “new jobs percentage” used to calculate the small business credit is determined according to W. VA. Code § 11-13C-7a(d) (1991). This “new jobs percentage” is different from the “new jobs percentage” defined in W. VA. Code § 11-13C-7(b) used to compute the supercredit.
communication taxes, business franchise taxes, corporate net income taxes, personal income taxes, and sales and use taxes. The credit is specifically limited to the taxes attributable to the new investment. A second credit computation is provided, which is called a "rebate." The rebate is equal to eighty percent of the ad valorem property taxes and unemployment taxes and twenty percent of the workers' compensation premiums. Taxpayers take the lesser of this rebate or their unused annual credit against the remaining twenty percent of the foregoing taxes. Thus, the credit, along with the rebate calculation, can offset one hundred percent of the foregoing taxes.

The effectiveness of the business investment and jobs expansion credit has been criticized particularly as it was used by the coal industry. Consequently, the credit was limited so that it could not be taken against the severance tax for investments made after March 10, 1990. Also, a minimum severance tax of fifty cents per ton (2,000 pounds) was enacted effective for coal sold or delivered for sale or use after October 1, 1990. The minimum severance tax was creditable against the severance tax that remains to be paid after the busi-

37. The application of the credits against these taxes is set out in W. VA. CODE §§ 11-13C-5(c) through (j) (1991). Limitations on the application of the credit against severance taxes appear in W. VA. CODE § 11-13C-14(c) (1991). Unless expressly allowed by statute, the credit may not be applied against severance taxes. W. VA. CODE § 11-13C-14(c)(1) (1991). The credit may not be taken against the severance tax if the credit results from qualified investments placed into service after Mar. 10, 1990, unless the investment was acquired pursuant to an agreement made before that date and the property is placed into service before Jan. 1, 1992. W. VA. CODE §§ 11-13C-14(c)(2)(A)(B) (1991). There is a further exception for a project involving more than $10 million in qualified investment made before Mar. 1, 1990. W. VA. CODE § 11-13C-14(c)(2)(C) (1991). In this instance, property purchased after Mar. 1, 1990 is a part of the project if it is grandfathered and the credit derived therefrom may be taken against the severance tax.

38. The limitation of the supercredit to taxes attributable to qualifying investment or expansion appears in W. VA. CODE § 11-13C-5(b) (1991).


41. Concern over the effectiveness of the supercredit, and specifically of the use of the credit by the coal industry despite decreasing employment in the industry, appears in the legislative findings for the 1990 amendments that limited the application of the supercredit to severance taxes. See W. VA. CODE § 11-13C-14(a) (1991).

ness investment and jobs expansion credits have been applied by the taxpayer.\textsuperscript{43} Because the regular state severance tax is $4.65 per ton, no minimum severance tax will be paid unless the regular severance is reduced by the credit below the minimum severance tax liability. Therefore, the only effect of the minimum severance tax was to ensure that coal producers would pay at least fifty cents per ton in severance tax even if they had a large credit.\textsuperscript{44}

2. Changes

Although the minimum severance tax required coal businesses with an existing supercredit to pay a severance tax of at least fifty cents per ton and new supercredit holders could not take the credit against the severance tax, there was still criticism of the effectiveness of the supercredit as it was used by the coal industry.\textsuperscript{45} The criticism was in large part based on the fact that the coal industry’s use of the credit was substantial, but the number of jobs in the state in the coal industry was continuing to decline. This concern was increased by State’s need for additional revenue.\textsuperscript{46} Consequently, there was considerable pressure to further limit the coal industry’s use of the business investment and jobs expansion credit.

The 1993 Legislature imposed two additional limitations on businesses which have qualified for the business investment and jobs expansion credits. First, the credit cannot be taken against the sales and service tax or the use tax for purchases made after July 1, 1993.\textsuperscript{47}

\textsuperscript{43} The crediting of the minimum severance tax is set out in W. VA. CODE § 11-12B-3(b) (1991). The minimum severance tax may be credited against the state severance tax of $4.65 imposed by W. VA. CODE § 11-13A-3, but not against the separate “additional severance tax” of $0.35 which is designated to go to the counties by W. VA. CODE § 11-13A-6 (1991).

\textsuperscript{44} Eighty percent of the $5 per ton severance tax could be eliminated by application of the supercredit, and half of the remaining ($1 per ton) severance tax could be eliminated by crediting the fifty cents per ton minimum severance tax.

\textsuperscript{45} Because the credit is taken over ten years, there was a cumulative effect by businesses qualifying for the credit in successive years.

\textsuperscript{46} Paul Owens, \textit{Tax Credits May End Firms’ Plans}, CHARLESTON DAILY MAIL, Mar. 31, 1993, at D1.

\textsuperscript{47} Revenue Enhancement Amendments, \textit{supra} note 17 (to be codified as W. VA.
Second, only eighty percent of the annual credit, as calculated under prior law, may be used to offset the available taxes.\textsuperscript{48} The remaining twenty percent of the credit which could have been used under prior law is carried forward and can be used in the tenth, eleventh and twelfth year after the qualified investment was put into service.\textsuperscript{49} Because the credit can be first taken for taxes attributable to the year in which the qualified investment was placed into service, this can have the effect of spreading the credit over three additional years.\textsuperscript{50} If the credit is taken in the year after the investment is placed into service, the credit would only be spread over two additional years, and there would be an overlap of the carryover of deferred credit and the taking of the annual credit.

The credit can only be taken against eighty percent of the taxes listed, so eighty percent of the credit can be taken against eighty percent of these taxes.\textsuperscript{51} The remaining twenty percent of the tax listed may be offset by the lesser of the rebate credit or any unused annual credit.\textsuperscript{52} Because the annual credit has been reduced by twenty percent, this will have the effect of reducing the credit that could have been taken against the remaining tax liabilities if the remaining annual credit is less than the rebate credit as is generally the case.

To further limit the business investment and jobs expansion credit, the minimum severance tax was increased to seventy-five cents per ton for coal produced on or after May 31, 1993.\textsuperscript{53} This ensured that coal producers with a large supercredit would have to pay a severance tax of at least seventy-five cents per ton. However, to mitigate the effect

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\textsuperscript{48} Revenue Enhancement Amendments, \textit{supra} note 17 (to be codified as \textit{W. Va. CODE § 11-13C-5(k)}). This change is effective for taxable years ending after May 31, 1993.

\textsuperscript{49} Revenue Enhancement Amendments, \textit{supra} note 17 (to be codified as \textit{W. Va. CODE § 11-13C-5(o)(2)}).

\textsuperscript{50} At the taxpayer's irrevocable election, the supercredit may first be taken either in the year that the investment is placed in service or in the following year. \textit{W. Va. CODE § 11-13C-4(c) (1991)}.

\textsuperscript{51} See \textit{supra} notes 37 and 49.

\textsuperscript{52} See \textit{supra} note 39.

\textsuperscript{53} Revenue Enhancement Amendments, \textit{supra} note 17 (to be codified at \textit{W. Va. CODE § 11-12B-3(a)}).
of this, one-third of a taxpayer's "net minimum severance tax" will constitute what the State calls a "free-up credit" which the taxpayer can use. This free-up credit is applied after the annual credit.\textsuperscript{54} It is only one-third of the "net minimum severance tax" ($0.25 per ton) which gives rise to this free-up credit. The net minimum severance tax is the minimum severance tax minus the regular severance tax.\textsuperscript{55} Thus, one-third of the minimum severance tax constitutes a credit only if it increases the severance tax payable. For example, if a business has a $20,000 minimum severance tax liability and a $5,000 severance tax liability after use of its supercredit, its net minimum severance tax is $15,000 and the business will pay $15,000 in minimum severance tax. Its credit will be increased by one-third of this or $5,000.

The statute indicates that this free-up credit can offset up to one hundred percent of the remaining business franchise taxes, corporate net income taxes, personal income taxes, business and occupation tax, carrier taxes, and telecommunication taxes, so this free-up credit may offset taxes owed because of the deferral of twenty percent of the regular credit.\textsuperscript{56} This addition credit presumably is used after the rebate credit calculation.\textsuperscript{57} This could be important because any excess

\textsuperscript{54} Revenue Enhancement Amendments, supra note 17 (to be codified at W. Va. Code § 11-13C-5(p)(1)).

\textsuperscript{55} Revenue Enhancement Amendments, supra note 17 (to be codified at W. Va. Code § 11-13C-5(p)(2)).

\textsuperscript{56} Revenue Enhancement Amendments, supra note 17 (to be codified at W. Va. Code § 11-13C-5(g), (h), (i)). Under this provision, the allowable portion of the minimum severance tax may offset "up to one hundred percent of the remaining taxes enumerated in subsections [of W. Va. Code § 11-13C-5(g), (h), (i)] in that order" for the current tax year. These subsections only provide that the credit may be taken against the business franchise tax, corporation net income tax, and personal income taxes, respectively. It should be noted that this free-up credit cannot be taken against business and occupation taxes, carrier income taxes or telecommunication taxes as the annual credit can be. Revenue Enhancement Amendments, supra note 17 (to be codified at W. Va. Code §§ 11-13C-5(g), 5(h), 5(i)).

\textsuperscript{57} The credit for minimum severance tax is to be allowed "[a]fter application of up to eighty percent of annual credit . . . for the current tax year under subsection (o) of this section." Revenue Enhancement Amendments, supra note 17 (to be codified as W. Va. Code § 11-13C-5(p)(1)). Subsection (o)(1) describes the application of "eighty percent of the amount of annual credit calculated under subsections (a) through (l) of this section . . . for the current tax year." Id. (to be codified at W. Va. Code § 11-13C-5(o)(1)). The provisions dealing with the corporation and application of the "rebate" appear in subsection (z). Id. (to be codified at W. Va. Code § 11-13C-5(z)). Thus, the rebate is part of the "annual
rebate credit can be carried forward for twelve years after the qualified investment was first placed into service whereas there is no carry forward for the additional credit derived from the minimum severance tax paid.\textsuperscript{58}

This complex statutory scheme is a result of the Legislature's compromise with coal businesses who had qualified for the credit and who could take the credit against the severance tax because they were grandfathered. The effect of this is that the State is assured of collecting an additional twenty-five cents per ton in severance tax that cannot be offset by the credit from these coal businesses. On the other hand, the coal businesses who have qualified for the credit can take this additional twenty-five cents per ton as a credit against the listed taxes (which do not include the severance tax). Because twenty percent of the annual credit has been deferred until the tenth, eleventh and twelfth year after their investment, this free-up credit may mitigate the effect of that deferral. Uncertainty exists as to whether the free-up credit derived from any minimum severance tax paid can be taken in the tenth, eleventh, and twelfth years. However, the position of the regulations will almost certainly be that the credit cannot be taken in those years.\textsuperscript{59}

The Legislature also enacted a one year suspension of new credit entitlement for investments placed in service after the date of passage of the bill (April 10, 1993) if application for the credit has not been made before that date.\textsuperscript{60} The suspension does not apply to manufac-

\textsuperscript{58.} Revenue Enhancement Amendments, supra note 17 (to be codified at W. VA. CODE § 11-13C-5(p)(1)) (stating that any credit derived from the minimum tax which is not used annually is forfeited). W. VA. CODE § 11-13C-5(k)(2) provides for the carry forward of the rebate credit.

\textsuperscript{59.} The provision allowing the credit for minimum severance tax allows this credit "after application of up to eighty percent of annual credit against taxes . . . for the current year" Revenue Enhancement Amendments, supra note 17 (to be codified at W. VA. CODE § 11-13C-5(p)(1)). Only the remaining twenty percent of the annual credit is deferred for use in the eleventh, twelfth and thirteenth year. See id. (to be codified at W. VA. CODE § 11-13C-5(o)(2)). The eighty percent referred to above still must be taken during the first ten years in which the credit is allowed. W. VA. CODE § 11-13C-4(e) (1991). Because the (undeferred) eighty percent of the annual credit is not available beyond ten years, the credit for minimum severance tax presumably is not available after this ten year period.

\textsuperscript{60.} Revenue Enhancement Amendments, supra note 17 (to be codified at W. VA.
turing businesses, information processing businesses, warehousing businesses, goods distribution businesses, and recreation and tourism businesses. The Secretary of the Department of Tax and Revenue is to submit a report to the Governor, the President of the Senate, and the Speaker of the House of Delegates, regarding a replacement for the business investment and jobs expansion credit. The statute specifically requests that the proposal address the problem of determining the maximum amount of total credits which will be available so that the fiscal impact of the credit on state revenue can be forecast.

C. West Virginia Capital Company

1. Summary

The West Virginia Capital Company Act allows a taxpayer who invests in a “qualified West Virginia capital company” a credit against state taxes equal to fifty percent of his investment in such company. A qualified West Virginia capital company is a corporation or partnership which has a minimum capitalization of $1 million and a maximum capitalization of $4 million, and which was formed to make “qualified investments” in West Virginia businesses. After qualification, a capital company must make a qualified investment of at least thirty-five percent of its capital base within one year, fifty-five percent of its capital base within two years, and seventy-five percent of its capital base within three years. Each qualified investment of the capital company must be continued for at least five years. There was statewide limitation of $10 million on the total tax credits that may be given to investors in all capital companies in any one year.

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61. Id. (to be codified at W. VA. CODE § 11-13C-15(b)).
62. Id. (to be codified at W. VA. CODE § 11-13C-15(f)).
64. The requirements for a qualified West Virginia Capital Company appear in W. VA. CODE § 5E-1-7 (1993).
65. These additional requirements are set out in W. VA. CODE § 5E-1-12(a) (1993).
66. The “five year” requirement is established in W. VA. CODE § 5E-1-12(b) (1993).
67. This statewide limitation is imposed by W. VA. CODE § 5E-1-8(b) (1993).
After this limit was reached, no more capital companies are qualified for that year.

2. Changes

In keeping with the general approach of the 1993 Legislature, the statewide limitation of $10 million was reduced by fifty percent to $5 million for the total tax credits for qualified capital companies that might be authorized in any one year. Additionally, only applications from capital companies which agree to become a "small business investment company" organized under the Federal Small Business Investment Act of 1958 will be considered until December 28, 1993. Consequently, only $10 million may be invested in West Virginia capital companies in one year. This change is effective July 1, 1993.

D. Industrial Expansion and Revitalization Credit, Research and Development Project Credit, Housing Development Project Credit and Management Information Services Facility Credit

1. Summary

Article 13D, Chapter 11 of the West Virginia Code sets forth several credits for business development in West Virginia. The industrial expansion and revitalization credit that is set forth in Article 13D was the first credit enacted to stimulate business in West Virginia. Credits for research and development, housing development, and management information services facility were added to the provisions for the industrial expansion and revitalization credit. An additional, sim-

68. Revenue Enhancement Amendments, supra note 17 (to be codified at W. VA. CODE § 5E-1-8(b)).
69. Id.
70. The industrial expansion and revitalization credit is established by W. VA. CODE § 11-13D-3(a) (1991). Under W. VA. CODE § 11-13D-4 (1991), only eligible investments in property purchased for industrial use expansion and revitalization gives rise to this credit. Property of this type is defined in W. VA. CODE §§ 11-13D-2(b)(13)-(15) (1991) (with references to other definitions within the same section).
71. The credits are based upon eligible investments in research and development, W. VA. CODE § 11-13D-5(c) (1991) or in a qualified housing development project, W. VA.
ilar credit was added in a separate article for investment in a coal loading facility.\textsuperscript{72} A management information services facility credit was also enacted which is not of general interest since it provides an incentive for a very limited number of taxpayers.\textsuperscript{73} All of the other foregoing credits provide that ten percent of the cost of the "eligible investment," adjusted for its useful life, may be used as a credit.\textsuperscript{74} This ten percent credit is spread over the ten consecutive years after the property was first placed into service.\textsuperscript{75} These credits could all be taken against the business and occupation tax, the sales and service tax, the use tax, the severance tax, and the business franchise tax.\textsuperscript{76}

2. Changes

The provisions of the industrial expansion and revitalization credit, the research and development project credit, the housing development project credit, the management information services facility credit, and coal loading facility credit were amended so that none of these credits may be applied to reduce the sales and service tax or the use tax payable.\textsuperscript{77} This limitation applies even though taxpayers have already

\textsuperscript{72} The provisions for a credit for a coal loading facility appear in Chapter 11, Article 13E of the West Virginia Code.

\textsuperscript{73} The credit for management information services facilities is established in W. VA. CODE § 11-13D-3c(a) (1991).

\textsuperscript{74} The provisions setting the credits at this level are as follows: For the industrial expansion or revitalization credit, W. VA. CODE § 11-13D-3(e) (1991) (applying to all qualified investments made after Feb. 28, 1985); for research and development projects, W. VA. CODE § 11-13D-3(f) (1991) (applying to all qualified investments made after June 30, 1985); for the housing project credit, W. VA. CODE § 11-13G-3(g) (1991) (applying to all qualified investments made after June 30, 1986); for the coal facility credit, W. VA. CODE § 11-13E-3(c) (1991) (applying to all eligible investments made after Feb. 28, 1985).

\textsuperscript{75} The provisions allowing for this allocation of the credits over time are as follows: W. VA. CODE § 11-13D-3(e)(1) (1991) (for the industrial expansion or revitalization credit); W. VA. CODE § 11-13D-3(f)(1) (1991) (for the research and development project credit); W. VA. CODE § 11-13D-3(g)(1) (1991) (for the housing project credit); and W. VA. CODE § 11-13E-3(c)(1) (1991) (for the coal facility credit).

\textsuperscript{76} All of the credits may be applied to reduce these taxes by up to fifty percent. W. VA. CODE § 11-13D-3a (1991).

\textsuperscript{77} Revenue Enhancement Amendments, supra note 17 (to be codified as W. VA. CODE §§ 11-13D-3e & 11-13E-3b).
made their eligible investment and obtained the credit that they are spreading over ten years. This is effective for the application of credits after June 30, 1993.78 Qualified housing development projects in existence on or before July 1, 1992 are not subject to this limitation, and can continue to take their credit against the sales and service tax and the use tax.79

E. Corporate Net Income Tax

1. Summary

Any corporation that does business in West Virginia is subject to the corporate net income tax unless exempted by a statute.80 Taxable income for the corporate net income tax is derived from federal taxable income, but net operating losses are specifically computed for West Virginia corporate net income purposes.81 Net operating losses were carried back for three years and carried forward for fifteen years just as under the federal corporate tax rules.82

2. Changes

Because of the carry back of West Virginia net operating losses, which resulted in corporate net income tax refunds, the State’s revenue projections were uncertain. As a result, the law was changed and net operating losses in excess of $300,000 may no longer be carried back three years; losses in excess of $300,000 may be carried forward.83

78. Id. Neither limitation provision is qualified with respect to the credit remaining under the old provisions.

79. Id. (to be codified at W. VA. CODE § 11-13D-3e).

80. This tax is imposed by W. VA. CODE § 11-24-4(3) (1991) (for taxable periods beginning after July 1, 1987).


82. Net operating losses are established by reference to the Internal Revenue Code in W. VA. CODE §§ 11-24-6(d) (1991).

83. Revenue Enhancement Amendments, supra note 17 (to be codified at W. VA. CODE § 11-24-6(d)).
This change is effective for taxable years beginning after December 31, 1992.\(^8\)

A minor change was made with respect to the due date of exempt corporations with unrelated business taxable income filing West Virginia corporate net income tax returns. These returns are now due the 15th day of the fifth month after the close of the corporation's taxable year. This brings the West Virginia due date in line with the due date of the corresponding federal tax forms.\(^8\)

F. Criminal Investigation Section to be Financed by Charitable Gaming Fees

Charitable bingo license fees and charitable raffle license fees were raised and a new fee was imposed on the sale of charitable raffle boards and games.\(^8\) Also, a fee of six cents per dollar is now imposed on the sale of raffle boards and games and an excise tax of six percent of the winnings from charitable raffle boards and games is imposed.\(^8\) All of these fees and taxes go to fund a new criminal investigatory section of the State Tax Division of the Department of Revenue.\(^8\) The criminal investigation section is charged with assuring compliance with laws, rules and regulations pertaining to all state taxes, fees, and credits.\(^9\)

\(^8\) Id.

\(^8\) Id. (to be codified at W. VA. CODE § 11-24-13).

\(^8\) Id. (to be codified at W. VA. CODE § 47-20-6) (raising existing fee on charitable bingo); id. (to be codified at W. VA. CODE § 47-21-7) (raising existing fee on charitable raffles); id. (to be codified at W. VA. CODE § 47-23-3) (imposing new fee on charitable raffle boards and games).

\(^8\) Id. (to be codified at W. VA. CODE § 47-20-6, 47-21-7, 47-23-3).

\(^9\) These fees and taxes are individually dedicated to this use. See Revenue Enhancement Amendments, supra note 17 (to be codified at W. VA. CODE §§ 47-20-6, 47-21-7, 47-23-3).

\(^8\) The matters falling within the purview of the criminal investigation section include the following: the interstate compromise, inheritance debt taxes, interstate arbitration of inheritance debt taxes, business registration taxes, annual taxes on incomes of certain carriers, minimum severance taxes on coal, business and occupation taxes, severance taxes, telecommunication taxes, business investment and jobs expansion credit, business and occupation tax
G. Gasoline and Special Fuels Excise Tax

A gasoline and special fuel excise tax is imposed on distributors, producers, retail dealers or importers, and others.90 There are a number of exemptions from the tax on the sale of gasoline and special fuels including the exemption of previously taxed fuels.91 The rate of the fuel excise tax was fifteen and one-half cents per gallon of fuel withdrawn from storage within the state for use or sold for use.92 This tax was raised by five cents per gallon to twenty and one-half cents per gallon.93 All the fuel excise taxes collected are to be used for the purpose of construction and repair of the State’s highways and bridges.94 It was the Legislature’s hope that with the additional revenue produced by this tax increase, the State could obtain matching federal funds for substantial highway improvement.

93. Revenue Enhancement Amendments, supra note 17 (to be codified at W. VA. CODE § 11-14-13).
94. More specifically, the gasoline and special fuels excise tax is earmarked for “construction and maintenance of highways, matching of federal monies available for highway purposes and payment of the interest and sinking fund obligations on state bonds issued for highway purposes.” W. VA. CODE § 11-14-15 (1991).
III. CONCLUSION

The tax changes to raise additional revenues enacted by the 1993 Legislature will primarily affect businesses. The principal exception to this will be the increase in the gasoline and special fuels excise tax. The elimination of the non-direct use exemption for purchases by utilities, electric power producers, and producers of natural resources will have a significant, although not major, effect on these businesses. If any of these businesses have an existing credit carried forward for business investments, such as a supercredit, their liability for sales tax on non-direct use purchases cannot now be offset by their credit. This will make the tax changes particularly costly for those businesses who have existing credit carried forward.

The limitations placed on the business investment and jobs expansion credit are applied to businesses which have already obtained the credit by making an investment. These changes were controversial and were vigorously opposed by the affected businesses. The businesses who had already qualified for a credit argued that they had made their investment and created more jobs in the state in reliance on obtaining a credit against their state tax liability. When the application of the credit was limited by altering the period over which credit could be taken and the taxes against which the credit could be taken, such businesses contended that a right had been taken away from them by the State. When the supercredit previously was changed so that it could no longer be applied against severance taxes, the amendment was effective prospectively affecting only investments made after the change. However, the Legislature did enact a new minimum coal severance tax against which the supercredit could not be applied. This had the effect of partially disallowing existing credits to be taken against severance taxes although done in an indirect manner.

The 1993 legislative changes did not seek to avoid the appearance of changing the rules for credits that had already been obtained. Businesses who have existing tax credits can no longer apply them against their sales and service tax or use tax liability, and only eighty percent of business investment and job expansion credit may be used, although the remaining twenty percent may be carried forward an additional
three years. The question will naturally be asked whether existing credit holders can have the rules changed regarding the use of their credit when such changes diminish the value of the credit they have already obtained. A detailed discussion of this question is beyond the scope of this Article, but there are a number of cases involving federal taxes where taxpayers have argued that they made investments in reliance upon the certain tax laws. When changes in the tax laws diminished the value of their investment, these taxpayers asserted that they had been deprived of property without due process of law. The courts have not been receptive to this argument and have generally found that such changes can be made. Consequently, the courts would probably uphold any changes in the means and methods of applying state credits. However, if the Legislature attempted to make changes which were so substantial as to constitute the retroactive repeal of a credit which had been previously enacted with the sole purpose of inducing business investment in the State, the result might be different.