January 1987

Analysis of Tax Incentives for Business Development in West Virginia

Harry Preston Henshaw III

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Taxation-State and Local Commons, and the Tax Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol89/iss2/3

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
ANALYSIS OF TAX INCENTIVES FOR BUSINESS DEVELOPMENT IN WEST VIRGINIA

HARRY PRESTON HENSHAW III*

I. INTRODUCTION

In recent years West Virginia has suffered a severe economic recession as evidenced by its unemployment statistics.1 This economic downturn is the result of a decline in West Virginia’s traditional industries such as coal, steel and chemicals and the state’s failure to attract new businesses. Consequently, the present administration has made both the attraction of new business and the revitalization of current industries a priority, as evidenced by the recent enactment of tax incentives to stimulate business growth in the state. The seriousness of West Virginia’s economic problems and the legislative resolve to rectify them are evident in the West Virginia Capital Company Act’s declaration of policy.2

(a) The legislature finds and declares that:
(1) Economic insecurity due to unemployment is a serious detriment to the health, safety, and general welfare of the citizens of this state;
(2) Involuntary unemployment, with its resulting burden of indigence, falls with crushing force upon unemployed workers and ultimately on the state itself in the form of public assistance and unemployment; and
(3) Unemployment causes a migration of West Virginia workers and families seeking jobs and establishing homes elsewhere which deprives this state of its most valuable resource, its people, and reduces the tax base of this state and of its local governments, impairing their ability to provide services.
(b) The Legislature further finds that:
(1) The best method of combating unemployment and protecting West Virginia against the loss of its people is by promoting, stimulating, developing, rehabilitating and revitalizing the business prosperity and economic welfare of this state and its citizens; . . .

* A.B., 1966, Washington and Lee University and West Virginia University; J.D., 1969, West Virginia University; L.L.M. in Taxation, 1970, Washington University. Mr. Henshaw is a member of the Natural Resources Committee of the Tax Section of the American Bar Association, has written for the Journal of Taxation, and has been a frequent lecturer on taxation at various seminars. Mr. Henshaw has his own law firm in Charleston, West Virginia. The author would like to acknowledge the assistance of Dale Steager, General Counsel, West Virginia State Tax Department, and Katherine Forbes, Executive Director, West Virginia Industrial and Trade Jobs Development Corporation, who conferred with him regarding this article.

1 U.S. Bureau of Labor statistics showed West Virginia as leading all other states in the percentage of its labor force which was unemployed in 1984 and 1985.

One of the most effective methods for stimulating business growth and development is the enactment of tax incentives for new or expanding businesses. These tax incentives often take the form of tax credits against state taxes which are a factor of the new investment within the state. Within the last several years, West Virginia has enacted a number of these credits designed to promote business development. Both these credits and other tax incentives are the subject of this article. They include: the industrial expansion and revitalization credit, the research and development projects credit, the residential housing development project credit, the coal loading facility credit, the business investment and jobs expansion credit (called the "super credit"), the corporate headquarters relocation credit, the coal coking facilities credit, the West Virginia capital company credit, the enterprise zone credit and certain utility credits. In addition to the foregoing analysis, hypothetical examples of each credit are presented in the article's appendix.

II. INDUSTRIAL EXPANSION AND REVITALIZATION CREDIT

The first of these credits is the business and occupation tax credit for industrial expansion, formerly set forth in article 13C of the West Virginia Code. The purpose of this earlier 1983 credit was to provide an incentive to industrial taxpayers to locate new businesses or expand existing businesses within the state. However, since this credit was for expansion, the State Tax Department contended that, to qualify for this credit, a business must make an investment which increased employment within the state. With respect to modernizing an existing facility, the legislature enacted the industrial revitalization credit set forth in article 13D. Due to their similarity, these two credits were consolidated in article 13D in 1985. As part of the 1985 changes, the industrial expansion and revitalization

---

4 Id.
5 Id.
6 W. VA. CODE §§ 11-13E-1 to 7 (Supp. 1986).
7 W. VA. CODE §§ 11-13C-1 to 13 (Supp. 1986).
8 Id.
10 W. VA. CODE §§ 5E-1-1 to 17 (Supp. 1986).
13 In Andy Bros. Tire Co. v. West Virginia State Tax Comm'r, 160 W. Va. 144, 233 S.E.2d 134 (1977), the Tax Commissioner argued that the cost of rebuilding a destroyed industrial facility and the subsequent reemployment of its labor force did not qualify for the industrial expansion credit. The court held for the taxpayer.
credit was expanded to provide a new credit for research and development projects. Article 13D was again amended in 1986 to provide a credit for residential housing constructed for sale or lease. Presently article 13D generally sets forth three distinct credits: the industrial expansion and revitalization credit, the research and development projects credit, and the housing development projects credit, the first of which is discussed in this section.

Any business engaged in manufacturing, producing electric power or providing a manufacturing service in West Virginia that invests in a state “industrial facility” is eligible for the industrial expansion and revitalization credit. Mining businesses, however, are not eligible. The amount of the credit is 10% of the “qualified or eligible investment.” The terms qualified investment and eligible investment are used interchangeably for this and the other credits. The credit is taken equally over ten years beginning with the year the property is first placed in business, and amounts to 1% of the qualified investment for ten consecutive years. The “eligible investment” is the cost of the property acquired or constructed for

---


W. Va. Code § 11-13D-2(b)(5) (Supp. 1986) broadly defines an industrial facility which may be the subject of an investment eligible for the credit as almost any real or tangible personal property located within the state used in an “industrial business.” W. Va. Code § 11-13D-2(b)(4) (Supp. 1986) defines industrial business in the same manner that an industrial taxpayer is defined. Neither a mine nor a coal loading facility are considered an industrial facility.

expansion or revitalization adjusted for the useful life of the property.\textsuperscript{20} If the useful life of the property is less than four years, none of the cost can be taken into consideration; if the useful life of the property is between four and six years, one-third of the cost is an eligible investment; between six and eight years, two-thirds of the cost is an eligible investment; and more than eight years, all of the cost of the property is an eligible investment.\textsuperscript{21}

The cost of property used in the expansion or revitalization of a business for a non-qualifying purpose is allocated as well in order to determine the qualified investment. There is, however, no procedure set forth for determining how such allocation is to be made.\textsuperscript{22} The cost of property acquired for industrial expansion or revitalization does not include trade-in allowances or insurance proceeds which are used to acquire replacement property.\textsuperscript{23} Property previously used in the state and acquired as a result of the acquisition of the assets or stocks of the seller does not qualify for the credit.\textsuperscript{24} Property which is leased as part of an industrial expansion or revitalization is deemed to be an eligible investment if the lease is for a term of ten years or longer, not including renewal periods. The cost of the leased property is the rentals to be paid over the primary term of the lease not to exceed twenty years.\textsuperscript{25} Although real property would probably be leased for ten or more years, most equipment has a useful life of less than ten years and therefore would probably be leased for some lesser period. As a result, most equipment leases probably do not qualify as an eligible investment.

If property for which the credit was allowed is disposed of or ceases to be used in a business, the unused credits are forfeited for future years.\textsuperscript{26} Also, the credits taken in prior years are redetermined with the useful life of the property considered to be the period for which it was actually used. The percentage of the cost of the property that is an eligible investment is also adjusted.\textsuperscript{27} For example, 100\% of the cost of land acquired for an industrial site would be an eligible investment since the land would have a useful life of more than eight years. If the business conducted at the site was permanently shut down after five years, the useful life of the property would be five years and the credit would be redetermined for the prior years with only one-third of the cost of the land

\textsuperscript{20} W. Va. Code § 11-13D-2(b)(13)(A) (Supp. 1986) includes as property purchased for industrial expansion or revitalization tangible personal property acquired to modernize buildings and equipment if the materials must be capitalized for federal income tax purposes.


\textsuperscript{24} W. Va. Code § 11-13D-2(b)(13)(F) (Supp. 1986). However, property which was not previously used in the state and which was acquired in the acquisition of a business may be eligible for the credit under the language of the statute provided the other conditions are met.


\textsuperscript{26} W. Va. Code § 11-13D-6 (Supp. 1986).

\textsuperscript{27} Id.
constituting an eligible investment. The sale of an industrial facility to one who continues operating the facility would not be a disposition requiring a redetermination of the credit.\textsuperscript{28}

A troublesome provision requires credit redetermination when cessation of the operation of an expanded or revitalized industrial facility occurs. A cessation due to flood, fire, or other casualty will not cause a redetermination of the credit, but other cessations such as those resulting from labor disputes or lack of market are not similarly exempted. It is unclear how permanent a shutdown must be before a redetermination of the credit is required, but presumably a temporary cessation of business which is not a permanent abandonment of the use of the facility would not cause a redetermination of the credit. The limitations on the use of the credit by a business have changed. However, for property purchased after February 28, 1985, the credit is limited to 50\% of the gross business and occupation tax payable under all classifications.\textsuperscript{29} When the new business franchise tax and severance tax replaces the business and occupation tax on July 1, 1987, the credit may be applied against, but is limited to 50\% of those taxes.\textsuperscript{30} If the credit cannot be used in any one year because of those limitations, it is foreited.\textsuperscript{31} If the super credit is taken for property, the industrial expansion and revitalization credit cannot be taken, even though the property might otherwise qualify.\textsuperscript{32}

### III. Research and Development Projects Credit

Article 13D was expanded in 1985 to provide a credit for research and development projects conducted within the state.\textsuperscript{33} The credit is available to a business which purchases property or services for the purpose of conducting an "eligible research and development project."\textsuperscript{34} An eligible research and development project is defined as one conducted within West Virginia by an "industrial business" or a producer of natural resources. The purpose of the project must relate to expanding

\textsuperscript{28} W. Va. Code § 11-13D-7 (Supp. 1986). In the event of a transfer to a successor business of property for which only part of the available credit has been taken, the successor may take the remaining available credit.

\textit{Id.}

\textsuperscript{29} W. Va. Code § 11-13D-3(e)(2) (Supp. 1986). The 50\% limitation is computed before allowance for the annual exemption provided by W. Va. Code § 11-13-3 (1983). W. Va. Code § 11-13D-3(h) (Supp. 1986) provides that the industrial expansion and revitalization credit, the research and development projects credit, the housing development projects credit, and the coal loading facilities credit cannot in total exceed 50\% of the business taxes payable. However, the 50\% limit is computed without regard to the super credit.


markets for or increasing sales of the state’s natural resources or industrial products.35

The research and development credit is 10% of the “eligible investment” spread equally over ten consecutive years.36 An eligible investment in a qualified research project is calculated in essentially the same manner as the industrial expansion or revitalization credit. The cost of all real and personal property purchased for the project is adjusted for its useful life and the resulting adjusted cost is the eligible investment.37 However, 100% of the “qualified research expenses” is also considered to be an eligible investment without regard to any adjustment for useful life.38 Qualified research expenses, unlike other eligible investments, are not capital expenses, but are “in-house” and “contract” research expenses incurred by an industrial business or a producer of natural resources.39

In-house research expenses are broadly defined to include supplies used in the conduct of the research, rents paid for personal property used in the research, and wages paid for “qualified services,” which are services performed in the state and are a part of the research or indirect supervision or support of the research.40 Contract research expenses are the amounts paid to another for “qualified research.” However, only 65% of these contract research expenses may be counted as an eligible investment available for the credit.41 Research performed by a state college or university pursuant to a written agreement is specifically included as contract research.42 Qualified research does not include research conducted outside the state, research in the social sciences, humanities research funded by a grant or contract by the government,43 or any business or exploration and development expenses incurred to ascertain the quantity or quality of a natural resource deposit.44

The limitations on the taxes which may be offset by the research and development projects credit are more restrictive than the limitations on the industrial expansion and revitalization credit. The research and development credit may only

35 See supra note 18 for a discussion of the definition of an “industrial business.” It should be noted that the research and development credit is also available to a producer of natural resources while the industrial expansion and revitalization credit generally is not.
37 The research and development projects credit has provisions as to the calculations of the cost of property acquired with trade-ins, insurance proceeds, by lease or for multiple use, which are substantially the same provisions as those relating to the industrial expansion and revitalization credit. See W. Va. Code § 11-13D-5(c) (Supp. 1986).
offset up to 50% of the business and occupation tax assessed under the production of natural resources classification, under the manufacturing classification, under the service classification for manufacturing services, and under the production of electric power classification.\textsuperscript{45} The research and development projects credit cannot be taken with respect to property for which the industrial expansion and revitalization credit or the super credit has been taken.\textsuperscript{46} The remaining provisions of the research and development projects credit are shared in common with the industrial expansion and revitalization credit.\textsuperscript{47}

IV. "Housing and Development Projects Credit"

The housing development projects credit was added to article 13D in 1986\textsuperscript{48} "and is available to any taxpayer who constructs property as part of a qualified housing development."\textsuperscript{49} Such a project is defined as any residential housing development located in West Virginia and containing five or more housing units.\textsuperscript{50} "The 'residential housing units' may be contained in one building or may be in separate buildings provided they are adjacent to one another." The units must be constructed for sale or lease to individuals as primary and permanent residences.\textsuperscript{51} Therefore, vacation units, motels, hotels, and other similar facilities do not qualify for the credit.

The housing credit is equal to 10% of the "eligible investment" in the project and the credit is taken equally over ten years beginning with the year in which five or more units are available for occupancy in the housing project.\textsuperscript{52} An eligible investment is determined in much the same manner as the industrial expansion and revitalization credit. Specifically, the cost of all real and personal property purchased is adjusted for its useful life using the same scale.\textsuperscript{53} This adjusted cost

\footnotesize
\begin{itemize}
\item \textsuperscript{45} W. VA. CODE § 11-13D-3(f)(2) (Supp. 1986). The 50% limitation is computed before allowance for the annual exemption provided by W. VA. CODE § 11-13-3 (1983). W. VA. CODE § 11-13D-3(i) (Supp. 1986) provides that after June 30, 1987, the credit is taken against the severance tax, the business and occupation tax on electricity production, and the business franchise tax. At that time, the credit is not limited to offsetting taxes under specific classifications of the business and occupation tax since that tax will then be repealed except for the tax on the generation of electric power. \textit{See supra} note 29 relating to the applicable limitation if more than one credit is taken.
\item \textsuperscript{46} W. VA. CODE § 11-13D-3(f)(5) (Supp. 1986).
\item \textsuperscript{47} W. VA. CODE §§ 11-13D-6 to -9 (Supp. 1986). The provisions of the industrial expansion and revitalization credit pertaining to the forfeiture of any unused credit and the redetermination of the credit upon cessation of use or disposition of an eligible investment are the same, but since qualified research expenses are not an investment in property which has a useful life, it does not appear that a redetermination of the credit would have to be made for these expenses if there is a disposition or cessation of the qualified research.
\item \textsuperscript{48} 1986 W. Va. Acts 1078.
\item \textsuperscript{49} W. VA. CODE § 11-13D-2(b)(2) (Supp. 1986).
\item \textsuperscript{50} W. VA. CODE § 11-13D-5a(d) (Supp. 1986).
\item \textsuperscript{51} W. VA. CODE § 11-13D-5a(e) (Supp. 1986).
\item \textsuperscript{52} W. VA. CODE § 11-13D-3(g)(1), (2) (Supp. 1986).
\item \textsuperscript{53} W. VA. CODE § 11-13D-5a(a), (b) (Supp. 1986).
\end{itemize}
is the eligible investment. Any real property and improvements thereto and any tangible personal property incorporated into the realty, whether or not such personal property becomes a fixture, may be the subject of an eligible investment in a qualified housing development project. Under this limitation, it appears that the cost of acquiring furnishings for a residential unit would not be eligible for the credit, but that the cost of acquiring personal property such as permanent heating or cooling units and permanent cabinets would be eligible.

The taxpayer's credit is limited to 50% of the business and occupation tax paid under the sales classification and the contracting classification. The credit cannot be taken for property if the industrial expansion and revitalization credit or the super credit has been taken for the same property.

The other provisions of the qualified housing project credit are the same as, or substantially similar to, the provisions of the industrial expansion and revitalization credit and the research development projects credit. With regard to the forfeiture of any unused credit and redetermination of the credit upon cessation of use or disposition of the eligible investment, the provisions are the same.

V. COAL LOADING FACILITIES CREDIT

The tax credit for coal loading facilities was enacted in 1983. Any business subject to tax in West Virginia is eligible for this credit, provided it purchases real or personal property for the purpose of building, expanding, or revitalizing a coal loading facility. Property purchased for a coal loading facility includes real and personal property used solely for the purpose of transferring coal from a coal preparation facility or from a coal storage facility to rail or barge transportation. A coal tipple used to load railroad cars or river barges will also qualify for this credit, but any other type of coal tipple, such as a truck tipple, is not eligible.

55 W. Va. Code § 11-13D-3(g)(2) (Supp. 1986). The 50% limitation is computed before allowance for the annual exemption provided by W. Va. Code § 11-13-3. See supra note 29 as to the overall limitation if more than one credit is taken. See supra note 45 as to the effect of the repeal of the business and occupation tax.
56 W. Va. Code § 11-13D-3(g)(5) (Supp. 1986). Although this section does not specifically prohibit taking the housing development projects credit for property for which the research and development projects were taken, it is unlikely that property could qualify under both credits.
59 W. Va. Code § 11-13E-2(b)(2) (Supp. 1986) states that any taxpayer subject to the business and occupation tax, the severance tax, or the business franchise tax is eligible to take the credit.
The amount of the coal loading facilities credit is 10% of the "eligible investment" spread over ten consecutive years. An eligible investment in a coal loading facility is calculated in basically the same manner as for the industrial expansion and revitalization credit previously discussed. The cost of all real and personal property purchased for the facility is adjusted for its useful life according to the same percentage adjustment, and the adjusted cost is the eligible investment. An investment in a coal loading facility does not include the cost of a coal preparation plant, or blending or sizing equipment. It does, however, include such items as conveyors, coal storage facilities, weighing equipment and railroad track, provided such items are directly associated with and used solely for the loading of coal. Therefore, land purchased to be used for the storage of coal in conjunction with the coal tipple should qualify for this credit as should the cost of laying track to the tipple or the cost of constructing a dock for barges to be loaded from a coal tipple.

The limitations on the taxes which may be offset by the coal loading facility credit are the same as those under the industrial expansion and revitalization credit. Thus, unlike the research and development projects credit and the housing projects credit, this credit may be taken against taxes generated under all classifications of the business and occupation tax. The remaining provisions of the coal loading facility credit, including the provisions pertaining to the forfeiture of any unused credits and the redetermination of the credit upon cessation of use or disposition of an eligible investment, are similar to those of the industrial expansion and revitalization credit.

VI. BUSINESS INVESTMENT AND JOBS EXPANSION CREDIT (SUPER CREDIT)

The business investment and jobs expansion tax credit enacted in 1985 is the most liberal of the tax credits designed to stimulate business in the state. The Governor's Office believes this credit may well be the most liberal tax credit allowed by any state. Any business subject to taxation in West Virginia is eligible for the credit if the business acquires property as part of a new or expanded business. The feature of this super credit, which distinguishes it from the other state tax credits, is that the additional business investment for which the credit is given must generate a minimum of fifty new jobs. The amount of the credit

---

varies with the number of new jobs created according to a "new jobs percentage." A new employee, for purposes of determining the new jobs percentage, is a resident of the state who assumes a position which did not previously exist. The number of new jobs created by an investment is determined by the net increase in the business's employment in the state. Therefore, if a business reduces the number of its employees at one facility and increases the number of its employees at another facility, the new jobs percentage would be determined using the net overall increase in the number of new jobs taking into consideration the employment at both facilities.

Since the jobs created by a new or expanded facility will not always come into being in the year in which the investment is made, an estimation of the expected number of new jobs is made in the first taxable year for which the credit is allowed. After three years, the actual number of new jobs is certified to the State Tax Department by the business. If that number varies from the estimated number of jobs, the new jobs percentage is adjusted accordingly and the credit allowed is adjusted for prior and future years. Presumably, this same three year period will be used to test whether the new jobs created are a net overall increase in the jobs provided within the state by the business. If the total number of jobs in the state does not increase by at least the number of new jobs claimed for purposes of the credit, the credit is decreased. Once certified, if the number of jobs declines in any year resulting in a decreased new jobs percentage, the credit is redetermined and decreased for the current and subsequent years. However, if the number of jobs subsequently increases to the former threshold, the credit will be reinstated to its former level.

---

6 W. VA. Code § 11-13C-7(b) (Supp. 1986) provides: Applicable percentage. For the purpose of subsection (a), the applicable new jobs percentage shall be determined under the following table:

<table>
<thead>
<tr>
<th>If number of new jobs is:</th>
<th>The applicable percentage is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,000</td>
<td>90%</td>
</tr>
<tr>
<td>760</td>
<td>80%</td>
</tr>
<tr>
<td>520</td>
<td>70%</td>
</tr>
<tr>
<td>280</td>
<td>60%</td>
</tr>
<tr>
<td>50</td>
<td>50%</td>
</tr>
</tbody>
</table>

6a W. VA. Code § 11-13C-3(b)(13)(B) (Supp. 1986). Part-time employment may qualify as a new job if the individual is employed at least 20 hours per week for at least six months during the year at the prevailing minimum wage or greater.

6b W. VA. Code § 11-13C-7(d) (Supp. 1986).


6d W. VA. Code § 11-13C-8(c) (Supp. 1986). The statute does not seem to require a redetermination of the credit if there is a net decrease in new jobs in the state after three years since the redetermination is made only if the new jobs "directly attributable to the qualified investment" are decreased.
The position of the State Tax Department has been that a business may aggregate its investment and the jobs created at different locations in any year. To provide even more flexibility in determining the number of jobs created and the cost of the investment made, the super credit was amended in 1986 to allow the Tax Commissioner to certify a project so that jobs or investments which would not otherwise qualify may be counted for purposes of computing the credit. There are three situations which this procedure is designed to encompass:

(1) If a business plans a project within the state that creates at least fifty jobs and the capital investment for the project is spread over several years, the Tax Commissioner may certify that the additional investment made within the next two tax years will qualify for purposes of determining the super credit. However, in order for the additional investment to qualify, the taxpayer must show that the initial investment would not have been made without the subsequent investment.

(2) If a business plans a new or expanded facility that will create new jobs at the facility as a result of the additional investment but all of the new employees will not be employees of the business making the investment, the Tax Commissioner may certify that the total number of new jobs created will include the jobs created for the other business.

(3) If a business plans a new or expanded facility which will create new jobs but these new jobs are not at the facility and the new employees will not be employees of the business making the investment, the Tax Commissioner may certify that the new jobs created include the employees of the other business if the employees work within a seventy-five mile radius of the new or expanded facility. However, in this latter situation, the new jobs percentage is limited to 50% regardless of the number of jobs created. Therefore, the certification in this instance is only useful in reaching the initial new job threshold for purposes of determining the new jobs percentage.

Once the new job percentage has been determined, the amount of the super credit is calculated by multiplying the new jobs percentage times the "qualified investment." The qualified investment is determined in the same way that an "eligible investment" is calculated. The qualified investment is adjusted for the useful life of the property with the same sliding scale used to determine an eligible investment. However, unlike the other credits which are equal to 10% of the eligible

---

76 See supra notes 12 to 32 and accompanying text for a discussion of the industrial expansion and revitalization credit.
investment, the super credit is equal to the new job percentage (which varies from 50% to 90%) times the qualified investment. This amount is the credit which is spread equally over ten years. The super credit can be from five to nine times the amount of the other credits for the same amount expended; hence the name super credit.

The definition of property which may qualify for the super credit is more expansive than the definition of property used for the business expansion and revitalization credit. For instance, while mines are specifically included as a qualified investment for purposes of the super credit, they are not included within the definition of eligible property for the business expansion and revitalization credit. Although the super credit is not available for replacement property which is purchased, it is available for property transferred into West Virginia from another state even though such property is not purchased. However, property purchased from a related party or acquired as part of a tax free reorganization cannot qualify for the credit.

The super credit differs in another important respect from the other credits in that it may be taken for the acquisition of minerals in place, provided there will be at least ten years of production from the minerals. The acquisition of minerals includes a lease of minerals. In these cases, the cost will ordinarily be equal to the royalties paid to the lessor for the first ten years of the lease. The royalties paid each year are multiplied by the new jobs percentage to obtain the

---

78 W. VA. CODE § 11-13C-4(b), (c) (Supp. 1986). W. VA. CODE § 11-13C-4(c) (Supp. 1986) provides that the credit will be taken beginning in the year the investment is placed into service or at the election of the taxpayer in the following year.


81 W. VA. CODE § 11-13C-6-(c)(6) (Supp. 1986) provides that for property brought into the state, the cost is the basis of the property adjusted for straight line depreciation. If rental property is transferred into the state, the cost is the rentals over the remaining term of the lease or the remaining useful life of the property, whichever is less. In contrast, the industrial expansion and revitalization credit does not specifically exclude property purchased as a replacement.

82 W. VA. CODE § 11-13C-3(b)(20), (22) (Supp. 1986). The previously discussed credits do not directly prohibit taking a credit for property acquired from a related party.


84 Since the useful life of a mineral property must be at least ten years, 100% of the cost, i.e., the rentals, would be considered a qualified investment.

W. VA. CODE § 11-13C-3(b)(15)(B) (Supp. 1986) provides that the acquisition of leased property is deemed to be made at the time the lease is executed, so in order for a mineral lease to be eligible for the credit, it would have to be executed after the effective date of the super credit which is March 1, 1985. Although royalties paid under a lease in existence before March 1, 1985, cannot qualify for the credit, if a lease was purchased for a specific dollar premium over the rentals assumed, the premium should qualify provided the other requirements of the section are met. The author understands that the State Tax Department’s position is that override royalties and base royalties in a sublease or assignment will be considered in determining the cost of acquiring a mineral if the land is not being currently mined and the other conditions are met.
amount of the credit for the cost of obtaining the minerals. The credit determined each year is then taken equally over the ten years following the year in which the royalty was paid. Since the royalties each year for ten years will be counted as the cost of the acquisition of the minerals and the credit generated each year will be spread over ten years, the credit for the cost of the acquisition of minerals by lease will be taken over twenty years. As with the other credits, real property which is leased may be included as a qualified investment if the term of the lease without renewals is for more than ten years, but unlike the other credits, tangible personal property must only be leased for four rather than ten years.82 The cost of leased property is considered to be the total rentals to be paid under the lease not to exceed twenty years, but all of the credit for property other than minerals would normally be taken in the year the rented property is placed in service since the rental for the term of the lease would be ascertainable.

It may be possible to have an investment qualify under both the industrial expansion and revitalization credit or the coal loading facility credit and the super credit if fifty or more jobs are created as part of the investment. The super credit specifically provides, however, that it cannot be taken if one of the other credits has been taken for the same property; therefore, it is not possible to have a double credit for the same investment.83 Where there is a choice, it is preferable to take the super credit because a higher percentage of the investment can be taken as a credit.

The super credit may be taken against almost all the taxes a new or expanded business would have to pay. Depending on the tax, the credit may offset up to or operate as a rebate of 80% of the tax. The credit may only be applied as a rebate of 20% of workers' compensation premiums, however.85 Although the super credit may be taken against a larger number of state taxes than the other credits and may offset a larger amount of these taxes, unlike the other credits, it is specifically limited to the tax attributable to the new investment. If the amount

---

82 W. VA. CODE § 11-13C-6(b)(3)(B) (Supp. 1986). The other credits previously discussed require that tangible personal property be leased for at least ten years to be eligible for the credit.
84 W. VA. CODE § 11-13C-5(a) - (i) (Supp. 1986) provides that the credit may offset up to 80% of the business and occupation tax, carrier taxes, severance taxes, telecommunications taxes, business franchise taxes, corporate net income taxes, and personal income taxes. W. VA. CODE section 11-13C-5(j) provides for a second credit computation as part of the super credit which is called a "rebate" credit. The rebate is equal to 80% of ad valorem property taxes and unemployment taxes and 20% of workers' compensation premiums and a taxpayer may take the lesser of this rebate or his unused annual credit from investment against the remaining 20% of the business and occupation tax, carrier taxes, severance taxes, telecommunications taxes, business franchise taxes, corporate net income taxes, and personal income taxes. Any unused rebate (or any unused annual credit from investment if that is less) may be carried forward from year to year until used or through the twelfth year following the year in which the credit was taken. W. VA. CODE section 11-13C-5(k) states that, except as provided above, any annual credit from investment not used in any year is forfeited.
of taxes attributable to the new investment cannot be readily determined, the super credit prescribes a formula for making the allocation. According to the formula, the total tax liability of the business is multiplied by the compensation paid to the new employees. The sum is then divided by the compensation paid to all employees of the business within West Virginia.88

The other provisions of the super credit are substantially the same as the provisions of the other credits discussed. Specifically, the provisions of the super credit with regard to trade-ins, insurance proceeds used to acquire a qualified investment, property used only partly as a qualified investment, and the redetermination of the credit upon cessation of use or disposition of the eligible investment are the same as under the other credits.

VII. HEADQUARTERS RELOCATION CREDIT

The 1986 legislature expanded the provisions of the super credit89 to give a credit to any corporation which relocates its headquarters within the state and, as part of such relocation, creates fifteen new jobs at its new headquarters.90 The definition of new jobs is the same as for the super credit, and if the relocation of the corporate headquarters creates fifty or more new jobs, the new jobs percentage will be the same as set forth under the super credit.91 An important difference with a headquarters relocation is that the credit may be taken provided only fifteen new jobs are created. If between fifteen and fifty new jobs are created, the new jobs percentage under the headquarters relocation credit is 10% spread over ten years.92 Although this is not any greater than the industrial expansion and revitalization credit, the headquarters relocation credit takes into consideration all reasonable and necessary expenses “paid by the corporation, to unrelated third parties” to relocate within the state.93 All of the relocation expenses are considered to be a qualified investment without any adjustment for useful life.94 Except for those differences noted, the headquarters relocation credit is the same as the super credit.

VIII. COAL COKING FACILITIES CREDIT

The Economic Development Act of 1985 was amended in 1986 to provide an incentive specifically designed to encourage the development of new facilities for

88 W. Va. Code § 11-13C-5(c)(2), (d)(2), (e)(2), (f)(2), (g)(2), (h)(2), (i)(3), (j)(1)(B) and (j)(1)(C) (Supp. 1986) sets forth formulae which are substantially the same for determining the amount of each separate tax which is attributable to a new investment.
converting West Virginia coal into coke.\textsuperscript{95} The director of Community and Industrial Development is authorized to provide reduced rate loans to private companies building coal processing facilities which make coke for steel production. Funds for such loans are to be borrowed from the workers’ compensation fund or any other fund administered by the State of West Virginia. The rate of interest is the current prime lending rate charged by banks with respect to investment in similar projects minus 2\%. The reduced rate loans will fund no more than 80\% of the total cost of any coking facility. All coal converted to coke during the term of the loan and for five years thereafter must be coal mined exclusively in the state.\textsuperscript{96} 

Additionally, four separate sections were added to the Code which provide that any company granted a reduced rate loan for a coal coking facility will be allowed a credit, for a period of five years from the date of the loan, against its liability for the business and occupation tax, the severance tax, the business franchise tax, and the corporate net income tax.\textsuperscript{97} Although it is clear in each of the four sections that the credit is to be taken over five years, the amount of the credit is not specifically defined.\textsuperscript{98} The intent may be to allow 100\% credit for the cost of building a coal coking facility at a rate of 20\% per year.

The sections providing for the credit are also silent as to what is included as the cost of building a coal coking facility. Since a reduced rate loan may only be made for the cost of construction of a coking facility and cannot be used for the acquisition of the site for the facility, it is not clear whether a credit will be available for the cost of acquiring the coke oven site. The credit seems to be available to a taxpayer in the year the reduced rate loan is made, rather than the year in which the facility is placed in service. Clarification of this credit will have to wait for regulations or remedial legislation.

**IX. Reduced Taxes within Enterprise Zones**

The Economic Development Act of 1985 was also amended in 1986 to reduce taxes of businesses locating or expanding within depressed areas of West Virginia,

\textsuperscript{95} 1986 W. Va. Acts 433 amended W. Va. Code ch. 5B by adding § 7 to art. 2 entitled, "Authority of director to provide low-interest loans to private companies entering into the process of converting West Virginia coal to coke; funding."

\textsuperscript{96} W. Va. Code § 5B-2-7 (Supp. 1986).

\textsuperscript{97} W. Va. Code § 11-13-30 (Supp. 1986) provides for a credit against the business and occupation tax; W. Va. Code § 11-13A-23 (Supp. 1986) provides for a credit against the severance tax; W. Va. Code § 11-23-24 (Supp. 1986) provides for a credit against the business franchise tax; and W. Va. Code § 11-24-22 (Supp. 1986) provides for a credit against the corporate net income tax. None of the foregoing sections are mutually exclusive, so it is at least arguable that the credit may be taken in full against each of the taxes.

\textsuperscript{98} W. Va. Code § 5B-2-7 (Supp. 1986).
officially designated as "enterprise zones." The Act creates an Enterprise Zone Authority which consists of seven members who may designate two enterprise zones in 1987, two in 1988, two in 1989, and one in 1990.

An enterprise zone must have a contiguous boundary and must meet several other criteria in order to assure that it is an area of "pervasive poverty, unemployment and economic distress." An enterprise zone must also have an average rate of unemployment for the preceding eighteen months one and one-half times the national average. At least 70% of the residents of the zone must have incomes below 80% of the median income of the counties in which they reside or the population of all census tracts in the zone must have decreased by more than 10% within the last two national censuses. If an enterprise zone meets only the last criteria, it must establish either chronic abandonment or demolition of commercial or residential structures or that it has substantial tax delinquencies relating to ad valorem real property taxes. If an area designated as an enterprise zone fails to meet the criteria in any year, the statute allows the enterprise zone authority to remove the area's designation as an enterprise zone, but no designation as an enterprise zone shall be removed within ten years of the date of its original designation.

Incentive for business development within an enterprise zone is provided through reduced taxes. Building materials used in constructing, remodeling, and rehabilitating existing buildings in an enterprise zone, as well as new and used equipment purchased by a business for use in an enterprise zone, are exempt from sales and use tax. Motor vehicles purchased from a seller located in an enterprise zone by a "qualified business" located in an enterprise zone will receive a 50% reduction of the motor vehicles privilege tax. Qualified businesses will also be allowed a credit equal to their unemployment compensation taxes against their corporate net income taxes or personal income taxes. State taxes will be reduced


103 W. Va. Code § 5B-2B-9(c) (Supp. 1986). However, the removal of the enterprise zone designation would appear to be discretionary by the authority since the word "may" is used in the statute.


105 W. Va. Code § 5B-2B-5(3) (Supp. 1986). See W. Va. Code § 5B-2B-2(c) (Supp. 1986) which defines a qualified business as a business which has 50% of its employees performing substantially all their services within the enterprise zone, and 25% of its employees are either residents of the enterprise zone or persons who have been unemployed for the 12 preceding months, or persons who received welfare benefits for the 12 preceding months.

106 W. Va. Code § 5B-2B-5(4) (Supp. 1986). Since the business and occupation tax has been repealed effective in 1987, no credit is provided against that tax because the first enterprise zone will not be designated until 1987.
50% on interest payments on loans made to a qualified business within an enterprise zone or mortgage loans on any property within an enterprise zone if the loan is made after the enterprise zone was designated. Since the statute is worded in terms of any mortgage loan, this exemption should apply to home mortgage loans as well as commercial real estate loans.\textsuperscript{107} Lastly, businesses within an enterprise zone may carry forward their net operating losses, including casualty losses, in calculating the state taxes as long as the enterprise zone exists.\textsuperscript{108} It should be noted that these reduced taxes differ from the other business tax incentives in that they apply to existing businesses even though they do not expand or revitalize their facilities. This provides an incentive for existing businesses to remain within an enterprise zone as well as an incentive for businesses to expand within a zone.

X. Credits Available to Utilities

Effective July 1, 1986, there are several special purpose credits giving utilities in West Virginia incentives to provide service at reduced rates to certain specific consumers. Since these are not of general interest, they will only be discussed briefly.

A credit is provided against the business and occupation tax for increased generation of electricity by coal.\textsuperscript{109} This credit is only for the increase in generation of electricity above the kilowatts of electric power generated during the "base year" by a particular electric company.\textsuperscript{110} The effect of the credit is to exempt the increase in production of electricity from the business and occupation tax.\textsuperscript{111} However, the credit is only available to the extent that the increased generation of electricity is attributable to coal from a mine which employs West Virginia miners.\textsuperscript{112} Therefore, if a West Virginia power company purchases 75\% of its coal from mines employing West Virginia miners, only 75\% of the business and occupation tax on generating or producing electric power attributable to the increased generation would be tax free.

A credit is given for reducing telephone utility rates for certain low income residential consumers against the carrier income tax, corporate net income tax and telecommunication tax.\textsuperscript{113} The credit is equal to the utility's additional cost of providing service at reduced rates. A telephone company can only receive a credit for providing reduced rate service to "certain low-income households."\textsuperscript{114}

\textsuperscript{107} W. VA. Code § 5B-2B-5(1) (Supp. 1986).
\textsuperscript{109} W. VA. Code §§ 11-13H-1 to -4 (Supp. 1986).
\textsuperscript{110} W. VA. Code § 11-13H-2(1) (Supp. 1986).
\textsuperscript{111} W. VA. Code § 11-13H-3(b)(1) (Supp. 1986).
\textsuperscript{112} W. VA. Code § 11-13H-3(b)(2) (Supp. 1986).
\textsuperscript{113} W. VA. Code §§ 11-13G-1 to -5 (Supp. 1986).
\textsuperscript{114} W. VA. Code §§ 24-2C-1 to -5 (Supp. 1986).
There is also a tax credit for the sale of electric power to persons producing chlorine. This credit exempts a power company from the payment of business and occupation tax on sales of electric power to a business which uses the power in an electrostatic process to produce chlorine.

Finally, a credit is given for providing electric or natural gas utility service at reduced rates to "low income residential customers." The credit is approximately equal to the utility's cost of providing the service at reduced rates to "low income residential customers" as certified by the Public Service Commission.

XI. WEST VIRGINIA CAPITAL COMPANY CREDIT

The West Virginia Capital Company Act took effect in 1986 and differs from the other tax incentives for business development in that it is designed to raise venture capital from individual and corporate investors. The Act allows a taxpayer who invests in a "qualified West Virginia capital company" a tax credit equal to 50% of his investment which may be taken against an individual's personal state income taxes or against a business's business and occupation tax. Under the Act, a qualified West Virginia capital company is an entity that has been certified by the Board of the West Virginia Industrial and Trade Jobs Development Corporation. When a capital company is qualified, a tax credit is available to its investors without regard to when the funds of the company are actually invested.

In order to obtain initial qualification as a capital company, the company must have a minimum capitalization of $1,000,000. At least 75% of this capital must be raised in cash. The remaining 25% of the capital may be in the form of notes, but these must be interest bearing demand notes backed by an irrevocable letter of credit or by a bond from a reputable source. The credit allowed an

119 W. VA. CODE § 5E-1-8(c) (Supp. 1986); W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, § 4.7.3.1, (July 1, 1986). W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, § 4.7.3.2. (July 1, 1986) provides that after June 30, 1986, the credit can be taken against the corporate net income tax.
120 W. VA. CODE § 5E-1-4(a), (c) (Supp. 1986). W. VA. CODE § 5E-1-4(c) (Supp. 1986) provides that a qualified capital company can be a West Virginia business development corporation, a profit or nonprofit corporation, or any other entity organized under West Virginia law. W. VA. EMBRO. LEGIS. R. 5E-1, ser. 1, § 2.2.6 (July 1, 1986) indicates that the instruments creating the organization should state that the purpose of the entity is "to encourage and assist in the creation, development or expansion of West Virginia businesses."
121 W. VA. CODE § 5E-1-8(d) (Supp. 1986).
122 W. VA. CODE § 5E-1-7 (Supp. 1986).
123 W. VA. EMBRO. LEGIS. R. 5E-1, ser. 1, § 2.2.5 (July 1, 1986).
Investor is equal to fifty percent of the investment. Furthermore, the total amount of tax credits authorized for a single company may not exceed $2,000,000 which limits total qualified capitalization to $4,000,000.\textsuperscript{124} Also, there is an overall statewide limitation of $10,000,000 on the total tax credits available to investors in all capital companies in any one year thereby limiting total qualified capitalization under the Act to $20,000,000 in any one year.\textsuperscript{125}

The emergency legislative rules promulgated under the West Virginia Capital Company Act provide a detailed procedure for qualification of a capital company.\textsuperscript{126} These rules require that a capital company must escrow the capital it has raised until it is qualified.\textsuperscript{127} Once a company has been qualified, if it wishes to raise additional capital for which its investors will receive tax credits, the increased capital base must also be approved.\textsuperscript{128} After its initial qualification, a capital company must increase its capital base by the lesser of $1,000,000 or the amount necessary to bring it up to the $4,000,000 capital limit.\textsuperscript{129} A capital company may not subsequently increase its capital base in excess of $4,000,000 and give its investors a total credit in excess of $2,000,000.

After qualification, a capital company must make a "qualified investment" of at least 20% of its capital base within one year, at least 40% of its capital base within two years, and at least 60% of its capital base within three years.\textsuperscript{130} There is no requirement that the remaining 40% of a capital company's assets be invested.\textsuperscript{131} A qualified investment is broadly defined as an investment in a "West Virginia business" engaged in "[m]anufacturing; agricultural production or processing; forestry production or processing; mineral production or processing, except for conventional oil and gas exploration; transportation; research and development of products or processes associated with any of the activities previously enumerated above; tourism; and wholesale or retail distribution activities within the state."\textsuperscript{132} A West Virginia business is a business primarily located in West Virginia which has "more than 50% of its assets, operations and employees

\textsuperscript{124} W. VA. Code § 5E-1-8(a) (Supp. 1986); W. VA. Emerg. Legis. R. 5E-1, ser. 1, § 2.2.4 (July 1, 1986).
\textsuperscript{125} W. VA. Code § 5E-1-8(b) (Supp. 1986).
\textsuperscript{126} W. VA. Emerg. Legis. R. 5E-1, ser. 1, §§ 2.3, 2.14 (July 1, 1986).
\textsuperscript{127} W. VA. Code § 5E-1-10 (Supp. 1986); W. VA. Emerg. Legis. R. 5E-1, ser. 1, § 2.2.7 (July 1, 1986). W. VA. Emerg. Legis. R. 5E-1, ser. 1, § 2.2.3 (July 1, 1986) also requires that a capital company must maintain its uninvested capital in an account with a financial institution or money management corporation in West Virginia.
\textsuperscript{128} W. VA. Emerg. Legis. R. 5E-1, ser. 1, § 3 (July 1, 1986). W. VA. Emerg. Legis. R. 5E-1, ser. 1, § 2.2.7 (July 1, 1986) requires that any additional capital raised must also be escrowed pending the certification of the new capital level of the company.
\textsuperscript{129} W. VA. Emerg. Legis. R. 5E-1, ser. 1, §§ 3.1.1, 4.3 (July 1, 1986).
\textsuperscript{130} W. VA. Code § 5E-1-12(a) (Supp. 1986); W. VA. Emerg. Legis. R. 5E-1, ser. 1, § 5.3 (July 1, 1986).
\textsuperscript{131} See supra note 127 as to where noninvested funds must be deposited.
\textsuperscript{132} W. VA. Code § 5E-1-4(d) (Supp. 1986).
located in the state." A capital company cannot invest in a West Virginia busi-
ness which is a bank, savings and loan association, credit company or other
financial institution, another capital company, any charitable or religious insti-
tution, or any other business which is determined to be against the public interest
or the purposes of the Act. Also, a capital company cannot invest in a business
which is related to a capital company or in any business owned or operated by
employees, officers, investors, members of the board of directors of the capital
company, or the family of such person, unless the West Virginia Industrial and
Trade Jobs Development Corporation approves such investment. Any type of
debt or equity investment can be a qualified investment.

A West Virginia capital company is required to diversify its investment to a
minimal degree since not more than 30% of its total capital may be invested in
any one business. Since the capital company must invest only 60% of its capital,
this means that only two separate investments have to be made. If a qualified
investment is sold or liquidated within five years, the capital company must rein-
vest the initial cost basis in a qualified manner within twenty-four months unless
the Industrial and Trade Jobs Development Corporation approves a longer pe-
riod. Since a qualified investment must only be maintained for a period of five
years, a capital company would only have to be 60% invested in its third, fourth
and fifth year.

If a capital company does not make or maintain qualified investments as
required, the investing taxpayers are not subject to a recapture provision but the
capital company must pay a penalty equal to all the credit allowed to its investors
plus interest at a rate of 1.5% per month compounded monthly. It should be
noted that the penalty paid is not just the recapture of credits attributable to the
company’s investments which are not qualified, it is the recapture of all the credits
taken, even though the majority of the investments may have been proper. To assist in the enforcement of the provision, every capital company must be audited

133 W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, § 1.7, 1.22 (July 1, 1986).
134 W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, § 5.5 (July 1, 1986).
135 W. VA. CODE § 5E-1-13(b) (Supp. 1986); W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, § 5.6 (July
1, 1986). The definition of a related business used in Section 267 of the Internal Revenue Code of
1954 [26 U.S.C. § 267], as amended, is incorporated by the statute. However, the statute is much
broader than Section 267 in what it considers to be a related party.
136 W. VA. CODE § 5E-1-4(d) (Supp. 1986); W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, § 1.7, 1.17
(July 1, 1986). The debt or equity investment may be in the form of common stock, preferred stock,
convertible preferred stock, debentures, convertible debentures, bonds, short-term notes or long-term
notes regardless of the interest rate.
137 W. VA. CODE § 5E-1-13(a) (Supp. 1986); W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, § 5.4 (July
1, 1986).
138 W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, § 5.8.1 (July 1, 1986).
139 W. VA. CODE § 5E-1-9 (Supp. 1986); W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, § 6.6 (July 1,
1986).
each year, and the audit must address the company’s compliance with the Capital
Company Act.\textsuperscript{140}

The credits generated by a capital company are allocated to its investors in
proportion to their investments. If an investor is a partnership or an S corporation,
the partnership or S corporation may allocate its credit among its partners as it
wishes.\textsuperscript{141} If the amount of the tax credit exceeds an investor’s tax liability for
the taxable year, the excess credit may be used for preceding or subsequent tax
years as provided by the Internal Revenue Code.\textsuperscript{142} The emergency legislative rules
set forth the procedures for the allocation of a credit between married couples
filing joint returns or separate returns, and divorced couples. The West Virginia
Capital Company Act takes effect July 1, 1986, so credits may be available during
1986.\textsuperscript{143}

XII. Conclusion

The industrial expansion and revitalization credit, the research and develop-
ment projects credit, the residential housing projects credit, the coal loading
facility credit, and the coal coking facilities credit are incentives for business
development which have counterparts in many other states and in the federal
tax law. By contrast, the super credit and the capital company credit are innovative
approaches which provide unique incentives for business development. In partic-
ular, the super credit may provide the most liberal tax benefits for new business
available in any state. This is evident given that in most situations the super credit
will allow a new or expanded business to operate without significant state tax
liability for its first ten to twelve years. The state has provided venture capital
for business development in West Virginia as well as tax incentives for such
development. Low interest loans are available from funds managed by the state for
business ventures within the state. To complement this state program, West Vir-
ginia capital companies were authorized to generate funds from the private sector
for venture capital to be invested in West Virginia businesses. The West Virginia
Capital Company Act is a very unusual and aggressive incentive for private funds
to be made available for West Virginia business ventures, since after a private
investor contributes his money to a capital company, he immediately receives a
credit equal to his investment in the company.

The dual approach of the state in dramatically reducing taxes attributable to
many new or expanded businesses along with assistance in making available ven-

\textsuperscript{140} W. VA. CODE § 5E-1-16(a) (Supp. 1986). The audit must be certified and sent to the Industrial
and Trade Jobs Development Corporation.

\textsuperscript{141} W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, §§ 2.10, 4.7.6 (July 1, 1986).

\textsuperscript{142} W. VA. CODE § 5E-1-8(d) (Supp. 1986); W. VA. EMERG. LEGIS. R. 5E-1, ser. 1, § 4.8 (July
1, 1986).

\textsuperscript{143} See supra note 118.
ture capital upon reasonable terms should with time stimulate business in the state as the significance of these benefits become known. It is the hope of the author that this article will assist prospective businesses in understanding and evaluating the various tax incentives which are now provided for business development in West Virginia.
APPENDIX

Example 1
Industrial Expansion and Revitalization Credit
and
Coal Loading Credit

A coal company invests $3,000,000 in a new coal preparation plant and tipple for its existing mine. Only nine new jobs are created by the investment so it does not qualify for the super credit. Although the taxpayer is in the business of mining coal and the industrial development and revitalization credit is not available to a coal producer, it is available to the operator of a coal preparation plant who washes some outside coal since coal preparation of outside coal is a manufacturing process. The investment in the coal loading facility is not eligible for the industrial expansion and revitalization credit, but is eligible for the coal loading facility credit which is calculated in the same manner as the industrial expansion and revitalization credit.

Of the $3,000,000 investment: $1,000,000 is attributable to land and improvements which have a useful life of more than eight years therefore 100% of the cost of the land and improvements is an eligible investment; $1,000,000 of the investment is in property with a useful life of between six and eight years therefore of the cost of this property or $666,666 is an eligible investment; and $1,000,000 of the investment is in property with a useful life of between four and six years so 1/3 of the cost of this property or $333,333 is an eligible investment. The total eligible investment is $2,000,000.

The credit is 10% of the total eligible investment. The total available credit is therefore $200,000. This credit is spread over ten years so that there is a $20,000 credit for each of the ten successive years commencing with the year in which the property is placed into service. The credit can be taken against the business and occupation tax payable without limitation as to classification. After June 30, 1987, the credit can be taken against the severance tax and the business franchise tax and can reduce those liabilities by up to 50%.

Example 2
Research and Development Projects Credit

A West Virginia glass company wishes to increase its sales by developing new glass products using new production techniques. Not having the in-house facilities to undertake such a research project, the company enters into a written contract with West Virginia University to conduct the research working with one of the company's officers. The corporate officer spends 20% of his time for one year working with the University on this research project. The officer's total compensation is $60,000 per year. The company pays West Virginia University $150,000 for the research.
Since the corporate officer spent 20% of his time on the project, $12,000 of his annual compensation is allocated to the project and 100% of this is qualified research expense. Only 65% of contract research expenses are allowed as qualified research expenses. Therefore, of the $150,000 paid to West Virginia University, $97,500 is a qualified research expense. This gives a total qualified research expense of $109,500. Ten percent of the qualified research of $10,950 is the amount of the credit. This credit is then spread equally over ten successive years so the company has a credit of $1,095 per year. The credit can be taken against the business and occupation tax payable under the manufacturing classification and the service classification for manufacturing services. After June 30, 1987, the credit can be taken against the business franchise tax and may reduce that tax by up to 50%.

Example 3
Housing Development Projects Credit

An individual investor purchases land and constructs two buildings, each containing four apartments which he intends to rent and two other buildings containing two townhouses which he intends to sell as condominiums. The land cost $150,000, the apartments $18,000 a unit and the townhouses $30,000 a unit. The construction of both rental property and property held for sale are eligible for the credit if five or more adjacent units are constructed. Since the investment in land and buildings would have a useful life of more than eight years, 100% of the $414,000 would be considered a qualified investment. Ten percent of the qualified investment or $41,400 would be the amount of the credit which would be available to the developer in the year in which the housing units are first available for rent or sale. The credit is spread over ten years. Therefore, the amount of the credit would be $4,140 each year. The credit can be taken against the business and occupation tax payable by the developer under the sales classification and the contracting classification. After June 30, 1987, the credit can be taken against the business franchise tax and may reduce that tax up to 50%.

Example 4
Super Credit

A listed coal company forms a West Virginia subsidiary corporation which leases certain coal properties for twenty years at 6% royalty. The property contains 40,000,000 recoverable tons of coal. The mining complex is in an area which has been designated as an enterprise zone. The company invests $1,000,000 in capital improvements for its mine site, $3,000,000 in new mining equipment, and $4,000,000 in a coal processing and loading facility.

The new mine will create forty new jobs and, as part of its development, the company will contract for a surface mine on its leasehold which will employ another twenty people. The company obtains certification from the Tax De-
department that there will be a total of sixty new jobs created for its project.

The company will produce 500,000 tons a year from its deep mine and its contract surface mine. The company has a contract to sell its coal at $34.00 per ton to a steel company.

The coal processing plant is financed in part by a $1,000,000 loan for seven years at 9% from a certified West Virginia capital company which is a partnership of ten individuals. The loan is secured by a deed of trust on the coal processing plant and is guaranteed by the parent company.

Since the coal company’s project has been certified as creating more than fifty new jobs, the company is eligible for the super credit. The amount of the super credit is computed by the first determining the qualified investment.

Assuming that, of the $8,000,000 invested, $5,000,000 is the property with a useful life of more than eight years and $3,000,000 is property with a useful life of four years, the qualified investment is: $5,000,000 x 100% or $5,000,000, and $3,000,000 x 33 1/3% or $1,000,000 for a total qualified investment, excluding the coal, of $6,000,000.

Royalties are also considered a qualified investment made for the acquisition of the coal in the year the royalties are paid (if they cannot be calculated over the term of the lease or twenty years, whichever is less) so: 6% royalty rate x 500,000 tons produced each year x $34.00 per ton sales price gives a $1,020,000 royalty which will be paid each year. The coal reserves will sustain a mining operation at the levels projected for more than ten years, so 100% of the royalties paid each year for ten years is a qualified investment since the useful life of the property is more than eight years. Therefore, assuming that a royalty of $1,020,000 is paid each year, the qualified investment for the coal is 100% of the royalties paid or $1,020,000 each year for ten years.

The qualified investment is adjusted by the new jobs percentage which is 50% if between 50 and 280 new jobs are created. The available credit with respect to the investment, excluding the coal is $6,000,000 x 50% (new jobs percentage) or $3,000,000. The credit available for the investment in the coal will be $1,020,000 x 50% (new jobs percentage) or $510,000 each year for ten years. However, the credit for a qualified investment is spread equally over ten years, so the credit available each year thereafter for ten years for the mine and processing plant (excluding the coal) is $300,000. Since each year’s royalty payment is spread over ten years and ten years royalties are counted, the credit attributable to the acquisition of the coal will be $51,000 in the first year and will increase each year in increments of $51,000 until the tenth year when it is $510,000; the credit will then decline in increments of $51,000 each year until the twentieth year.

The amount of the super credit which the coal company may offset against its state taxes attributable to the mining complex would be: $351,000 in the first year; $555,000 in the fifth year; $810,000 in the tenth year; and $8,100,000 in total over twenty years.
Example 5
Super Credit

A manufacturing subsidiary with existing facilities in West Virginia invests $40,000,000 in a new facility. The company also moves its corporate headquarters to the new facility in West Virginia incurring moving expenses of $1,500,000. The company creates 300 new jobs which gives a new job percentage of 60%. Of the $40,000,000 invested in the new facility (after adjusting for useful life), $25,000,000 is determined to be an eligible investment. One hundred percent of the reasonable moving expenses is added to the qualified investment to obtain an adjusted qualified investment of $26,500,000. The adjusted qualified investment is multiplied by the new jobs percentage of 60% to give the maximum total credit of $15,900,000. The credit is then spread equally over ten successive years to give a maximum annual credit of $1,590,000.

The following table sets forth the application of the annual credit and the rebate credit.

<table>
<thead>
<tr>
<th>1987</th>
<th>Pre-Credit Liability</th>
<th>Apportioned Tax Base</th>
<th>Credit</th>
<th>Rebate Credit</th>
<th>Net Liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Franchise</td>
<td>150,000</td>
<td>82,500²</td>
<td>66,000</td>
<td>16,500</td>
<td>67,500</td>
</tr>
<tr>
<td>CNIT¹</td>
<td>250,000</td>
<td>137,500²</td>
<td>110,000</td>
<td>27,500</td>
<td>112,500</td>
</tr>
<tr>
<td>Unemploy-</td>
<td>400,000</td>
<td>220,000²</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ment Comp. Workers’</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Comp.</td>
<td>1,200,000</td>
<td>660,000²</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property Tax</td>
<td>900,000</td>
<td>594,000³</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Credit Carry Forward Calculations

<table>
<thead>
<tr>
<th>Maximum Allowable Rebate Credit</th>
<th>Rebate Credit Used</th>
<th>Unused Rebate Credit</th>
<th>Unused Annual Credit</th>
<th>Credit Carried Forward</th>
</tr>
</thead>
<tbody>
<tr>
<td>783,200</td>
<td>44,000</td>
<td>739,200</td>
<td>1,414,000</td>
<td>739,200</td>
</tr>
</tbody>
</table>

¹ Assuming all West Virginia income is business income.
² The annual credit may then be taken against the corporate taxes attributable to the new investment. To determine the corporate taxes attributable to the new investment, the taxes are apportioned according to the wages paid to the new employees versus the total wages paid in West Virginia. This percentage is assumed to be 55%.
³ Property taxes are directly allocated for new property acquired. The property taxes on the new property are assumed to be $594,000.
4 The credit can only offset 80% of the taxes attributable to the new investment.
5 The rebate credit can offset the remaining 20% of the taxes attributable to the new investment.
6 The maximum allowable rebate credit is determined by adding together 80% of unemployment compensation taxes, 20% of workers' compensation fees, and 80% of property taxes; the maximum rebate credit is $783,200.
7 The annual credit was $1,590,000.
8 The unused rebate credit may be carried forward for up to three years beyond the expiration of the annual credit. However, if the unused annual credit is less than the unused rebate credit, then only the amount of the unused annual credit allowed may be carried forward. Any annual credit left over in excess of the maximum allowable rebate credit is automatically forfeited.

Example 6
West Virginia Capital Company Credit

A West Virginia capital company is formed as a West Virginia partnership by six individuals and two corporations. The individual partners in the capital company each contribute $75,000 to the company, and the two corporations each contribute $275,000 for a total capitalization of $1,000,000. All partners make their contributions in cash and all uninvested funds are escrowed and invested in a West Virginia tax exempt fund which is exempt from both the federal income and state income taxes.

In the first year, the capital company invests $200,000 in a West Virginia trucking firm. The investment is in the form of a five-year loan with interest at 9.5%. The loan is used to buy trucks and is secured by a lien on the trucks. In the second year, $200,000 is invested in a motel. The investment is in the form of convertible debentures which are unsecured and bear an interest rate of 8.75%. The debentures are due in five years, however, the capital company can elect to convert the debentures to a 60% equity position in the motel at any time before maturity. In the third year, the capital company loans $200,000 to a West Virginia coal company which is the subsidiary of a large listed oil company. The investment is in the form of a loan for a coal loading facility. The loan is secured by a deed of trust on the facility and the parent corporation guarantees the loan. The interest rate is 8.75%, and the loan is due in five years. The loans are all repaid on time, and the capital company is liquidated in the eighth year.

Each individual partner's investment of $75,000 will give him a credit of $37,500 which may be taken against his West Virginia income taxes in the year the capital company was certified. Assuming the individual partners cannot use the credit in full the first year, it could be carried back to three preceding years and they may obtain a refund from the state. Any credit still remaining may be carried forward for fifteen years and applied against future state income tax liability. The corporate capital company partners which invested $275,000 would have a credit of $137,500 available in the year in which the capital company was
certified. Assuming that their tax liability in West Virginia was only $75,000 in that year, the companies could carry the $62,500 unused credit back three years and apply for a refund of $62,500.

Example 7
Reduced Taxes Within Enterprise Zones

An appliance store is started within an enterprise zone. The business employs five people all of whom reside within the zone and perform substantially all their services within the zone. Consequently, the appliance company is a qualified business which may receive the reduced taxes available to such businesses which operate within an area designated as an enterprise zone. The company purchases two small delivery trucks for $20,000 from a dealer located within the enterprise zone. The company intends to borrow $50,000 at 10% from a bank located outside the enterprise zone.

Goods sold by a business within an enterprise zone to residents of an enterprise zone are exempted from the consumer sales tax. The appliance store hopes to attract customers who are now going outside of the zone to buy their appliances since these purchasers can save the 5% consumer sales tax by buying them from their store. The delivery trucks which the business purchases from the dealer in the enterprise zone are exempted from 50% of the motor vehicles privilege tax which is 5%. The appliance store therefore saves $500 by purchasing its trucks from the dealer within the zone. A qualified business in an enterprise zone is allowed a credit equal to its unemployment taxes against its corporate net income taxes. In the case of the appliance store which has five employees, this should amount to a credit of about $1000 per year. Since state taxes are reduced by 50% on interest received from a loan made to a qualified business in an enterprise zone, this should make it easier for the appliance store to obtain financing from a bank.