Tax Bills Passed During 2021 West Virginia Legislative Session

Apr 13, 2021

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The most discussed issue during West Virginia's 2021 legislative session was the proposed repeal of the personal income tax. Governor Jim Justice introduced a bill that would have reduced rates by 60% beginning with tax year 2022, but with various corresponding tax increases to offset revenue losses. The House of Delegates introduced its own bill, which would have fully phased out personal income tax over a number of years, with no revenue measures to account for the estimated $3 billion decrease in general revenue funds.

The Senate's Finance Committee offered a strike and insert version of the bill that was passed by the House of Delegates, which included concepts from the Governor's bill, including a push to replace the lost personal income tax revenue with increases to other tax types, primarily sales tax. The strike and insert amendment bill passed the Senate after additional amendments were made, but by the narrow margin of 18-16. The House refused to agree to the Senate's amendments by the less than narrow margin of 0-100.

While the efforts to phase out or repeal the personal income tax were unsuccessful, the following tax legislation was passed by the Legislature. Bills have not been signed by Governor Justice, unless otherwise stated, and it is possible that the Governor could opt to veto some of the following bills.

Sales & Use Tax

- **SB 34: Exemption for certain equipment leases**

  Provides for a sales and use tax exemption for leases of heavy equipment and machinery among commonly controlled companies. The commonly controlled companies must have at least 50% common ownership.

- **SB305: Exemption for certain aircraft maintenance**

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Provides a sales and use tax exemption for sales of aircraft repair, remodeling, and maintenance services, or to an engine or other part of the aircraft. Exemption also applies to tangible personal property that is permanently affixed or attached as a component part of an aircraft as part of a repair, remodeling, or maintenance service, and to sales of machinery, tools, or equipment directly used in repair, remodeling, or maintenance. Exemption may be claimed by providing a direct pay permit number to the vendor.

This bill was signed by the Governor on April 2.

- **SB661: Permitting retailers to assume sales or use tax assessed on tangible personal property**

  Permits retailers to assume or absorb sales or use tax assessed on tangible personal property.

Property Tax

- **HB2581: Providing for the valuation of natural resources property and an alternate method of appeal of proposed valuation of natural resources property, and providing a criminal penalty for unauthorized disclosure**

  This bill would result in a significant change to the valuation of producing oil and natural gas wells. It requires the Tax Commissioner to propose an emergency rule by July 1, 2021, with the requirement of determining fair market value based on applying a yield capitalization model to net proceeds for a particular well. Net proceeds shall be actual gross receipts on a sales volume basis determined from the actual price received by the taxpayer, less royalties and less actual annual operating costs as reported on the taxpayer's return. Actual annual operating costs include lease operating expenses, lifting costs, gathering, compression, processing, separation, fractionation, and transportation charges.

  The bill directly addresses the West Virginia Supreme Court's decision in *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 832 S.E.2d 135 (2019), wherein the Court noted that the legislative rule for the valuation of producing natural gas wells did not

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address gathering, compressing, processing, and transportation expenses, and that the Tax Department's determination that such expenses are not "directly related" to the "maintenance and production" of natural gas was not arbitrary, capricious, or manifestly contrary to the enabling taxation statute.

The bill includes a significant change to the property tax appeals process. Under the bill, taxpayers could elect to have appeals heard before a Board of Equalization and Review, which is composed of the County Commissioners of the county where the property is located, or with the Office of Tax Appeals, and independent tribunal that has heard virtually all tax disputes in West Virginia since 2002, save for property tax appeals. The option of having property tax appeals heard before an independent tribunal has been advocated for by commercial, industrial, and natural resource entities for years.

- **HB3010: Extending the special valuation for cellular towers owned by persons not subject to regulation by the Board of Public Works**

  Cellular towers that are appraised for property tax purposes by the Board of Public Works are currently valued at salvage value, or 5% of original cost. This bill extends the special valuation to cellular towers not appraised by the Board of Public Works.

- **HB3301: Property tax increment financing districts**

  This bill changes the definition of "payment in lieu of taxes" for purposes of the Tax Increment Financing Act, and clarifies the treatment of payment in lieu of taxes agreements for property located in a tax increment financing district.

  The bill also allows County Commissions or municipalities to extend the termination date of certain districts.

- **HJR3: Property Tax Modernization Amendment**

  This resolution will place a proposed amendment to the West Virginia Constitution on the ballot for the 2022 general

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election that would give the legislature the authority to exempt from property taxation tangible machinery and equipment personal property directly used in business activity, tangible inventory personal property directly used in business activity, and motor vehicles.

Income Taxation and Credits

- **HB2359: Updating meaning of "federal taxable income" under Corporate Net Income Tax Act**

  This bill fully conforms to any changes made to the Internal Revenue Code during 2020 for purposes of West Virginia's definition of "federal taxable income," which is the starting point for purposes of West Virginia corporate net income tax.

  Includes changes made to the Internal Revenue Code in 2020 by the Coronavirus Aid, Relief and Economic Security Act; Families First Coronavirus Response Act; Setting Every Community Up for Retirement Enhancement Act; and the Consolidated Appropriations Act.

  Has been signed by the Governor.

- **HB693: Updating certain definitions and terms used in the Personal Income Tax Act (supersedes HB2358)**

  This bill fully conforms to any changes made to the Internal Revenue Code during 2020, and from the period of January 1, 2021 through March 12, 2021, for purposes of West Virginia's definition of "federal taxable income," which is the starting point for purposes of West Virginia personal income tax.

  Includes changes made to the Internal Revenue Code in 2020 by the Coronavirus Aid, Relief and Economic Security Act; Families First Coronavirus Response Act; Setting Every Community Up for Retirement Enhancement Act; and the Consolidated Appropriations Act. Additionally, HB693 adopts changes resulting from the American Rescue Plan, including a waiver on the first $10,200 of unemployment benefits.

  The Legislature had originally passed HB2358 to cover 2020 changes. It was necessary to pass a subsequent bill to

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supersede HB2358 to account for the American Rescue Plan changes.

- **SB344: Credit for qualified rehabilitated buildings investment**

  The bill eliminates the sunset date for this credit, which was scheduled to be eliminated after December 31, 2022.

- **HB2001: Creating the West Virginia Jumpstart Savings Program**

  Creates a new program to allow residents to save and invest money to help cover the costs of pursuing a trade or occupation. A decreasing modification against personal income taxes equal to a contribution to a Jumpstart Savings Account, up to $25,000 per year, could be taken in a single taxable year, and the excess can be taken over the ensuing five tax years. Employers may claim a nonrefundable tax credit against personal or corporate income tax for a matching contribution to a Jumpstart Savings Account of up to $5,000 per employee.

- **HB2026: Modernization of the collection of income taxes by adopting uniform provisions relating to mobile workforce**

  This bill modernizes mobile workforce withholding requirements, and excludes the income from non-resident mobile employees from state source income for West Virginia personal income tax withholding purposes, if the compensation is paid for employment duties performed in West Virginia for 30 days or fewer during the calendar year; the individual performed employment duties in more than one state during the calendar year; the compensation is not related to employment duties performed by a professional athlete, professional entertainer, or public figure; and the nonresident's state of residence provides a similar exclusion or does not impose an individual income tax.

  The bill also eliminates West Virginia's "throw out" rule that has been used in the state's apportionment formula, changes

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West Virginia's apportionment sourcing from origin sourcing to market sourcing for services and intangible property, and adopts single sales factor sourcing instead of the property, payroll, and double weighted sales apportionment formula previously required in West Virginia.

All changes are effective beginning with tax year 2022. The bill was signed by the Governor on April 9.

- **HB2760: Economic development incentive tax credits**

  This bill amends the Economic Opportunity Tax Credit by adding a new tier for a 10% credit if between 10 and 19 new jobs are created over a three-year period, and eliminates the more restrictive credit for small businesses, effective beginning January 1, 2022. The Economic Opportunity Tax Credit provisions relating to high technology manufacturers is also amended to include the manufacturing of drones, autonomous motor vehicles, robots or robotic medical machines, machines and equipment related to artificial intelligence, biotechnology products, and medical devices.

Healthcare Provider Tax

- **SB397: Health care provider tax generally**

  Clarifies that a critical access hospital located in an urban area cannot be considered an "eligible acute care hospital" for purposes of the health care provider tax imposed under W. Va. Code § 11-27-39, modifies the effective date of the tax, and removes the expiration date of the tax. Hospitals designated as critical access hospitals, after meeting federal eligibility criteria, are already exempt from this tax under current law. W. Va. Code § 11-27-39 imposes an additional 0.13% tax on gross receipts received or receivable by an eligible acute care hospital that provides inpatient or outpatient hospital services in West Virginia.

- **SB437: Contingent increase of tax rate on certain eligible acute care hospitals**

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Clarifies that a critical access hospital located in an urban area cannot be considered an "eligible acute care hospital" for purposes of the health care provider tax W. Va. Code § 11-27-38, modifies the effective date of the tax, and removes the expiration date of the tax. Hospitals designated as critical access hospitals, after meeting federal eligibility criteria, are already exempt from this tax under current law. W. Va. Code § 11-27-38 imposes an additional tax of .75% on gross receipts received or receivable by an eligible acute care hospital that provides inpatient or outpatient hospital services in West Virginia through a directed payment program in accordance with 42 C.F.R. 438.6.

Hotel & Motel Taxes

- **SB270: Collection of tax by hotel marketplace facilitators**

  Provides for the collection of the hotel occupancy tax by marketplace facilitators which have gross revenues of $100,000 or more or who are involved in 200 or more separate transactions, beginning January 1, 2022. The tax must be remitted to the local taxing authority.

  The tax must be separately stated on bills, invoices, accounts, books of account, and records relating to the consideration paid for the occupancy or use of the hotel room.

  This bill was signed by the Governor on March 18, and is effective June 7, 2021.

Severance Tax

- **SB718: Coal severance tax rebate**

  This bill makes additional tweaks to the coal severance tax rebate that was enacted in 2019 (amendments were also made in 2020).

  The changes in this bill include defining certain terms and providing for a rebate of severance tax when a capital investment is made in new machinery and equipment that is directly used in severance of coal or in coal preparation and

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processing plants. Repair costs to tangible personal property used in coal production may now be part of the qualified investment, as may infrastructure upgrades to real property, including the construction of access roads belt lines and ventilation fans. The base period for calculation of the rebate has also been changed, and is now based on a five-year annual average of the state's portion of the eligible taxpayer's coal severance tax liability. To qualify for the rebate, the taxpayer must increase production over the production during the base period, and must increase employment in the claim year over the base period.

- **HB2808: Remove salt from definition of "mineral" for purposes of severance tax**

  Exempts salt produced for human consumption from severance taxes.

Miscellaneous

- **SB263: Permitting online raffles to benefit nonprofit organizations**

  Allows charitable and public service organizations to raise funds by conducting charitable raffles and bingo virtually over the Internet.

- **SB532: Limiting claims for state tax credits and rebates**

  Establishes limitations on claims for state tax credits based on capital investments to prevent duplicative claims. This bill is essentially a clarification of existing law, and the Tax Department already monitors tax credit claims to ensure that multiple tax credits are not being claimed for the same capital investment.

- **HB2499: Tax reduction for arms and ammo manufacturing**

  This bill provides several tax changes to small arms and ammunition manufacturers. It expands the qualified capital addition special valuation program for property tax purposes to manufacturers of arms and ammunition when the facility will cost $2 million or more; expands the Manufacturing

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Investment Tax Credit to apply to such manufacturers, with the credit amount increased from the 5% allowed for other manufacturers to 50%; and establishes a new tax credit against income tax for federal excise taxes imposed upon small arms and ammunition manufacturers.

The bill also exempts purchases of small arms and ammunitions from the consumer sales and service and use tax.

Signed by the Governor on April 8.

- **HB2794: Extending the Neighborhood Investment Program and increasing the amount of allowable credit**

  This bill extends the Neighborhood Investment Program, which was set to expire on July 1, 2021, to July 1, 2026. Annually, $3 million of tax credits are granted for individuals or businesses that make eligible contributions to community-based nonprofit organizations.

- **SB160: Tax Department Rules Bill**

  This bill authorizes recent legislative rules filed by the West Virginia State Tax Department, including rules for the tax credit for providing vehicles to low-income workers, the downstream natural gas manufacturing investment tax credit, and the high-wage growth business tax credit. It also directs the Tax Department to amend the rule for valuation of farmland and structures for property tax purposes, particularly relating to the taxability of "high tunnels."

  This bill was signed by the Governor on March 31.

For more information, contact Craig Griffith of Frost Brown Todd's Tax Practice Group.

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