Recent West Virginia Tax Legislation

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The West Virginia Legislature's 2022 regular session did not include any major tax reform. In prior sessions, efforts to overhaul personal income taxes and sales and use taxes were unsuccessful. The House passed H.B. 4007, which was designed to significantly reduce personal income taxes, but the Senate declined to consider it. Nevertheless, lawmakers approved 16 tax bills, all of which are discussed in this column.

I. Income Taxes and Tax Credits

S.B. 450, Updating Definitions of the West Virginia Personal Income Tax Act: For decades, West Virginia has fully conformed to the federal definition of federal gross income for personal income tax purposes, and an annual update bill is required to update the definition for state purposes. This measure updates the definition for purposes of tax year 2021.[1]

S.B. 451, Updating Definitions of the West Virginia Corporate Net Income Tax Act: Similarly, West Virginia has traditionally fully conformed to the federal definition of federal gross income for corporate net income tax purposes, and an annual update bill is required to update the definition for state purposes. This bill updates the definition for purposes of tax year 2021.[2]

S.B. 656, Tax Credit for Certain Corporations That Provide Child Care Facilities for Employees: This legislation establishes a new credit against personal income tax and corporate net income tax for expenditures related to the establishment and operation of employer-provided or sponsored child care facilities.[3] The credit is 50 percent of the cost of qualified child care property purchased or acquired by the taxpayer and placed into service in the tax year, with the credit claimed in 20 percent increments over five tax years,[4] with a three-year carryforward available.[5] The credit is transferable for nonprofit corporations.[6]

H.B. 2096, Reinstating the Film Investment Tax Credit: In a 2018 column titled "That's a Wrap on the West Virginia Film Tax Credit," I

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wrote about the elimination of the state's film investment tax credit, noting that "ultimately, West Virginia's film tax credit fell victim to lawmakers' cautious approach when it was started. Limiting the tax credits that could be awarded in a single fiscal year to $10 million - and later $5 million - discouraged larger productions from considering West Virginia as a viable filming destination. The low cap, coupled with the extremely low qualified spend of $25,000, led to mostly smaller productions being filmed in the state." (Footnotes omitted.)

H.B. 2096 reinstates the credit, with the amendments applying to tax years beginning on or after July 1, with a sunset of December 31, 2027. The program, which was formerly administered by the now shuttered West Virginia Film Office, will be administered by the West Virginia Office of Economic Development. The new version of the credit makes several definitional changes and eliminates commercials and promotional videos from the definition of a qualified project. Also, the minimum amount of direct and postproduction annual expenditures incurred in West Virginia for a project to qualify for the credit was raised from $25,000 to $50,000. Perhaps most importantly, the credit limit of $5 million per year that could be awarded has been eliminated, and there is no maximum amount of credits that may be awarded annually.[7]

H.B. 4396, Repeal of Decreasing Modification for Electronically Paid Tolls on West Virginia Toll Roads: Beginning in 2007, a decreasing modification against adjusted gross income was allowed for electronic payments of tolls via a West Virginia Parkways Authority Commuter Card. This bill repeals the decreasing modification.[8]

S.B. 478, Neighborhood Investment Program: West Virginia provides a tax credit for corporations and individuals who contribute cash or property to community-based nonprofits that establish projects to provide neighborhood assistance, community service or crime prevention, or job training or education for some individuals. Since its inception, the names of taxpayers who claimed the credit were published annually. This bill repeals the public reporting requirement effective January 1.[9]

H.B. 4410, Allocation, Apportionment and Treatment of Income of Flow-Through Entities: In 2021 the Legislature, via H.B. 2026,

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overhauled the allocation, apportionment, and treatment of income for C corporations - changing the four-factor allocation formula based on property, payroll, and double-weighted sales to a single sales factor; eliminating the throwout rule that required taxpayers to exclude from their apportionment factor sales from states where they were not subject to income tax; and adopting market-based sourcing for services and tangible personal property.

However, the 2021 bill failed to apply the allocation and apportionment changes to flow-through entities such as S corporations, partnerships, limited liability partnerships, or limited liability companies, and this bill fixes the oversight effective for tax years beginning on or after January 1. Since West Virginia does not have an entity-level tax for flow-through entities, the changes apply to income from nonresidents from multistate business activity.[10]

H.B. 4568, Allowing Phased Rehabilitations for Purposes of Historic Structure Tax Credit: West Virginia has a historic rehabilitated buildings investment tax credit that is modeled after the federal certified historic structure credit; however, unlike the federal credit, the state credit is transferable.

H.B. 4568 amends the state credit to allow for phased rehabilitations of certified historic structures, with a phased rehabilitation defined as including two or more distinct phases.[11] The owner of the building may elect to claim the allowable credit after each completed phase following receipt of a tax credit certificate from the state historic preservation officer, and the credits could be taken before the final Part 3 certification of completed work. Claimed credits are subject to recapture if the applicant fails to submit an approved historic preservation certification application, "Part 3 - Request for Certification of Completed Work," for the rehabilitation within 60 days of the date of the advisory determination by the United States National Park Service stating that all phases have been completed.

The legislation also repeals language regarding maximum amounts of the credit that could be allocated each year. Previously, no more than $10 million of credits could be allocated to a single certified rehabilitation and no more than $30 million of credits could be

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issued for use in a fiscal year.[12]

II. Property Tax

H.B. 4336, Updating Provisions for the Valuation Natural Resources Property: My January 11, 2021, column titled "West Virginia's Malleable Approach to Taxation of Natural Gas" details ongoing disagreements between the West Virginia State Tax Department and oil and natural gas producers regarding the proper valuation of producing oil and natural gas wells for property tax purposes. During the 2021 session, the Legislature passed a rather extensive overhaul of the property tax appeals process, which I detailed in another column, "A Giant Leap Forward for West Virginia Property Tax Appeals." While the latter focused on the appeals process, it noted that H.B. 2581 from the 2021 legislative session had addressed the property taxation of producing oil and gas wells by specifically allowing for the application of actual operating expenses in valuing producing wells and stating that natural gas liquids are now subject to property tax.[13]

H.B. 2581 also required that the tax commissioner propose an emergency rule by July 1, 2021, to address the valuation of producing oil, natural gas, and natural gas liquids - and he complied. [14] The emergency rule replaced the old legislative rule that had been used for several years. However, concurrent with proposing the emergency rule, the tax commissioner submitted an identical legislative rule for consideration by the Legislative Rule-Making Review Committee. The committee took the unusual step of rejecting the proposed legislative rule.[15] The Tax Department is expected to submit a new version of the legislative rule that addresses the issues raised by the Legislative Rule-Making Review Committee.

While the rulemaking process plays out, the Legislature passed H.B. 4336 with amendments primarily focused on key definitions for purposes of the valuation model used for producing wells - including actual annual operating costs, net proceeds, royalty interest receipts, capitalization rate, lease operating expenses, and costs associated with lifting, gathering, processing, separating, fractionating, and transportation of oil, natural gas liquids, and

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natural gas. The legislation also codifies the yield capitalization model that the tax commissioner must use.[16]

H.B. 4451, Updating Specific Requirements Under the Qualified Capital Investment Special Valuation Program: West Virginia has a special property tax valuation program for specific manufacturing facilities in which "qualified capital additions to manufacturing facilities" – including natural gas processing facilities – are appraised for property tax purposes at salvage value, or 5 percent of the original cost of the facility, for the first 10 years of the life of the qualified capital addition.

Since its inception, the special program has required that the capital addition be constructed, located, or installed within 2 miles of a manufacturing facility owned or operated by the person making the capital addition.[17] This bill repeals that requirement for qualified capital additions placed into service on and after January 1, 2023.[18]

III. Severance Tax

S.B. 476, Minimum Severance Tax on Coal: This technical corrections bill, which has no fiscal impact, replaces references to "thin seam" coal with references to coal "mined by underground methods from seams with an average thickness of 45 inches or less.[19] Since 2000, the minimum severance tax on coal has not been imposed on seams with an average thickness of 45 inches or less. This is the sole tax bill that became law without the signature of Gov. Jim Justice (R).

IV. Municipal Business and Occupation Tax

H.B. 4567, Providing for Exemption From Municipal Business and Occupation Tax for Sales of New Vehicles: Effective July 1, 2023, the municipal business and occupation tax on sales proceeds from the sale of new automobiles that have never been registered in the name of an individual will be phased out, with a 50 percent reduction of the total amount of the tax scheduled for July 1, 2023, another 50 percent reduction of collections scheduled for July 1, 2024, and repeal of the tax effective July 1, 2025.[20]

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Historically, sales of new automobiles have been taxed as either retail sales or wholesale sales, with a maximum 0.5 percent rate imposed on retail sales and 0.15 percent on wholesale sales. H.B. 4636, Clarifying Terms Related to Timely Remittance of Business and Occupation Tax: This bill clarifies that municipal business and occupation taxes are considered timely remitted as long as they are postmarked on or before their due date. Municipalities are prevented from imposing rates, fees, and charges for payments that arrive after the due date if the payment is postmarked before the due date.[21]

V. Healthcare Provider Tax

H.B. 4393, Increase of the Managed Care Tax if a Managed Care Organization Receives a Rate Increase: This legislation adds an inflator to the managed care healthcare provider tax in which the rate would increase proportionally as the Medicaid capitation rate rises beginning July 1.[22] The June 30, 2023, sunset for this tax was also repealed.[23]

VI. Miscellaneous

H.B. 4461, Consolidating All Administrative Fees Collected by the Tax Department Into a Tax Administration Services Fund: The Tax Department has a dozen special funds for various taxes and programs that it administers, including the Motor Fuel Tax Administrative Fund, the Oil and Gas County Revenue Administration Fund, the Additional Tax Administration Fund, the Special Audit and Investigative Unit Fund, the Medicaid State Share Administration Fund, the Cemetery Company Registration Fund, the Telemarketer Registration Fund, the Local Sales Tax and Excise Tax Administration Fund, the Wine Tax Administration Fund, the Tax Offset Fee Administration Fund, the Municipal Fines and Fees Collection Fund, and the Magistrate Fines and Fees Collection Fund. Effective July 1, a single Tax Administrative Service Fund will be used in lieu of multiple special funds, and any moneys in the aforementioned funds will be transferred to the Tax Administrative Service Fund.[24]

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Also, the amount of fees the Tax Department is authorized to collect for local sales and use tax administration was reduced from 5 percent to 1 percent.[25]

S.B. 533, Repeal of Soft Drinks Tax: Since 1951, an excise tax has been levied on bottled soft drinks, syrups, and dry mixtures, with all revenue dedicated to the West Virginia University schools of medicine, dentistry, and nursing. Effective July 1, any revenue collected from the tax will no longer be dedicated to those schools, and effective July 1, 2024, the tax will be repealed.[26]

In lieu of allocating soft drinks taxes to West Virginia University, the Legislature will - effective July 1 - allocate a portion of proceeds from the insurance premium tax to three medical schools in the state. Annually, West Virginia University will receive $14 million, Marshall University will receive $5.5 million, and the West Virginia School of Osteopathic Medicine will receive $3.9 million, with payments made quarterly.[27]

Many of the tax bills enacted this session will have minimal impact on practitioners in the state. However, the recent move to single-sales-factor apportionment for both C corporations and flow-through entities is a welcome development for businesses operating in West Virginia. It will also be interesting to gauge whether the resurrected and reinvigorated film investment tax credit results in significant entertainment projects being filmed in West Virginia. Finally, oil and natural gas producers anticipate that the Tax Department will circulate a new draft of the legislative rule to value producing wells in the coming weeks, and look forward to working with the department to formulate a rule that results in a fair market value for producing wells.

For more information, please contact any member of the Frost Brown Todd Tax practice group.

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[1] W. Va. Code section 11-21-9.

[2] W. Va. Code section 11-24-3.

[3] W. Va. Code sections 11-21-97, 11-24-44.

[4] W. Va. Code sections 11-21-97(b), 11-24-44(b).

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[5] W. Va. Code sections 11-21-97(c)(1), 11-24-44(c)(1).

[6] W. Va. Code section 11-24-44(g).

[7] W. Va. Code section 11-13X-5.

[8] W. Va. Code section 11-21-12h.

[9] W. Va. Code section 11-13J-10.

[10] W. Va. Code section 11-21-37a(j).

[11] W. Va. Code section 11-24-23a(b).

[12] Former W. Va. Code section 11-24-23a(b).

[13] W. Va. Code section 11-1C-10(d)(3).

[14] W. Va. Code St. R. section 110-1J-1 et seq. (Emergency Rule, Valuation of Producing and Reserve Oil, Natural Gas Liquids, and Natural Gas for Ad Valorem Property Tax Purposes).

[15] *See* Steven Allen Adams, "West Virginia Lawmakers Reject Natural Gas Property Tax Rule," *The Parkersburg News and Sentinel*, Jan. 10, 2022.

[16] W. Va. Code section 11-1C-10(d)(3).

[17] W. Va. Code section 11-6F-2.

[18] W. Va. Code section 11-6F-6(b).

[19] W. Va. Code section 11-12B-3.

[20] W. Va. Code section 8-13-5(d)(2).

[21] W. Va. Code sections 8-13-5(h), 8-13-13(i).

[22] W. Va. Code section 11-27-10a(b).

[23] W. Va. Code section 11-27-10a(d)(ii).

[24] W. Va. Code section 11-10-27(a)(2)(A).

[25] W. Va. Code section 11-10-27(a)(2)(B).

[26] W. Va. Code sections 11-19-2, 11-19-13.

[27] W. Va. Code section 33-3-14e.

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