



West Virginia State Tax Department

Publication TSD-391
(Rev. December 2007)

General Information Regarding Income Tax Withholding Under § 11-21-71a For Nonresident Partners, S Corporation Shareholders, or Beneficiaries of Estate or Trusts

Partnerships, S corporations, estates and trusts doing business in West Virginia or deriving income from real or tangible personal property located in West Virginia are required to withhold West Virginia income taxes from distributions, whether actual or deemed, of taxable West Virginia source income to partners, shareholders or beneficiaries who are not residents of West Virginia.

Withholding is required for taxable years of partnerships, S corporations, estates and trusts which begin after **December 31, 1991**.

This publication provides general information regarding the withholding requirements imposed by W. Va. Code § 11-21-71a, as amended in 1992. This publication is not a substitute for tax laws or regulations. Specific questions should be addressed to the West Virginia State Tax Department.

Questions concerning this publication should be addressed to the:

West Virginia State Tax Department
Taxpayer Services Division
P. O. Box 3784
Charleston, WV 25337-3784

Telephone: (304) 558-3333 or
Toll free: 1-800-WVATAXS (1-800-982-8297)

TDD service for the hearing impaired: 1-800-2TAXTDD (1-800-282-9833)

To order forms or publications call:
(304) 344-2068 or
Toll free: 1-800-422-2075

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A. WHEN PAYMENT OF WITHHOLDING TAX IS REQUIRED

A partnership, S corporation, trust, or estate treated as a pass-through entity for Federal income tax purposes for the taxable year (hereinafter "pass-through entity"), which is doing business in West Virginia or deriving rents or royalties from real or tangible personal property located in West Virginia, and which derives taxable income for the taxable year from or connected with West Virginia sources which is allocable to a partner, S corporation shareholder, or beneficiary of a trust or estate, who is a nonresident of West Virginia (hereinafter "nonresident distributee"), is required to pay a withholding tax computed under W. Va. Code § 11-21-71a(b), except as provided in subsection § 11-21-71a(c) or (k). W. Va. Code § 11-21-71a(a).

B. KEY DEFINITIONS

1. **"Corporation"** includes associations, joint stock companies, and other entities which are taxed as corporations for federal income tax purposes.

"C corporation" means a corporation which is not an S corporation for federal income tax purposes.

"S corporation" means a corporation for which a valid election under IRC § 1362(a) is in effect for the taxable period.

2. **"Distributee"** includes any partner of a partnership, any shareholder of an S corporation, and any beneficiary of an estate or trust which is treated as a pass-through entity for federal income tax purposes for the taxable year of the entity, with respect to all or a portion of its income.
3. **"Internal Revenue Code"** means the Internal Revenue Code of 1986, as amended through the date specified in W. Va. Code § 11-21-9, as amended.
4. **"Nonresident distributee"** includes any individual, estate, or trust treated as a nonresident of this State under the West Virginia Personal Income Tax Act; and any partnership or corporation, whose commercial domicile is located outside West Virginia.
5. **"Nonresident Estate or Trust."** — A nonresident estate or trust is an estate or trust which is not a resident of West Virginia.

"Resident Estate or Trust." — A resident estate or trust includes:

- a. The estate of a decedent who at his or her death was domiciled in West Virginia,

- b. A trust created by the will of a decedent who at his or her death was domiciled in West Virginia, and
- c. A trust created by or consisting of property of, a person domiciled in West Virginia.

6. **"Nonresident Individual."** -- A nonresident individual is an individual who is not a resident individual for purposes of the West Virginia personal income tax.

"Resident Individual." -- A resident individual is an individual:

- a. Who is domiciled in West Virginia, unless the individual maintains no permanent place of abode in West Virginia, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than 30 days of the taxable year in West Virginia, or
- b. Who is not domiciled in West Virginia but maintains a permanent place of abode in West Virginia and spends in the aggregate more than 183 days of the taxable year in West Virginia.

7. **"Partner"** includes a member of a partnership.

8. **"Partnership"** includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation or venture is carried on, and which is not a trust or estate, a corporation or a sole proprietorship. A limited liability company is a partnership for West Virginia income tax purposes when it is treated as a partnership for Federal income tax purposes.

"Partnership" does not include a unincorporated organization which, under IRC § 761, is not treated as a partnership for the taxable year for federal income tax purposes.

9. **"Pass-through entity"** means a partnership, S corporation, estate, or trust which is treated as a conduit of some or all of its income for federal and West Virginia income tax purposes.

10. **"Taxable period"** means, in the case of an S corporation, any taxable year or portion of a taxable year during which a corporation is an S corporation for federal income tax purposes.

11. **"Taxable year of the pass-through entity"** means the taxable year of the pass-through entity for federal income tax purposes. If a pass-through entity does not have a taxable year for federal income tax purposes, its tax year is the calendar year.

12. "**West Virginia Corporation Net Income Tax Act**" or "**WVCNIT**" means the corporation net income tax codified in article 24, chapter 11 of the West Virginia Code of 1931, as amended.
13. "**West Virginia Personal Income Tax Act**" or "**WVPIT**" means the personal income tax codified in article 21, chapter 11 of the West Virginia Code of 1931, as amended.

C. AMOUNT OF WITHHOLDING TAX PAYABLE

The amount of § 11-21-71a withholding tax payable by a pass-through entity is four percent (4%) of the "effectively connected taxable income" of the pass-through entity, which may be lawfully taxed by West Virginia, and which is allocable to a nonresident distributee. W. Va. Code § 11-21-71a(b)(1). For taxable years beginning on or after January 1, 2008, the rate to be withheld shall be equal to 6.5%.

The term "effectively connected taxable income" means, for purposes of withholding under § 11-21-71a:

"the taxable income or portion thereof of a ... [pass-through entity] which is derived from or attributable to West Virginia sources as determined under ... [§ 11-21-32] and such regulations as the tax commissioner may prescribe, whether such amount is actually distributed or is deemed to have been distributed for federal income tax purposes." W. Va. Code § 11-21-71a(e).

When determining the amount due under § 11-21-71a, the pass-through entity may apply any tax credits allowable, under chapter 11 of the West Virginia Code, to the pass-through entity which pass-through to nonresident distributees. In no event, however, may application of these credits reduce the tax liability of the distributee to less than zero. W. Va. Code § 11-21-71a(b)(2).

D. WHEN WITHHOLDING IS NOT REQUIRED

A pass-through entity is required to withhold tax under § 11-21-71a except in five (5) situations:

1. **Tax exempt noncorporate distributee.** — On distributions to a person, other than a corporation, who is exempt from paying West Virginia personal income tax. A person is exempt from paying WVPIT only if such person is, by reason of such person's purpose or activities, exempt from paying Federal income taxes on such person's West Virginia source income. W. Va. Code § 11-21-71a(c)(1).

Statement of distributee. — The pass-through entity may rely on the written statement of the person claiming to be exempt from WVPIT provided the pass-through entity discloses the name and federal taxpayer identification number of all persons who claim this exemption in the return filed by the pass-through entity for the taxable year under article 21 or 24, chapter 11 of the West Virginia Code.

2. **Tax exempt corporate distributee.** — On distributions to a corporation which is exempt from paying WVCNIT. A corporation is exempt from paying WVCNIT only if the corporation is, by reason of its purpose or activities, exempt from paying Federal income taxes on the corporation's West Virginia source income. W. Va. Code § 11-21-71a(c)(2).

Unrelated business taxable income. — Even though a corporation is generally exempt from paying Federal income taxes by reason of its purpose or activities, it may nevertheless be taxable on its "unrelated business taxable income," as defined in the Internal Revenue Code, for both Federal and WVCNIT purposes. If, and to the extent the West Virginia source income is unrelated business taxable income in the hands of the nonresident distributee which is taxable by West Virginia, withholding is required with respect to that income.

Statement of distributee. — The pass-through entity may rely on the written statement of the person claiming to be exempt from the West Virginia corporation net income tax provided the pass-through entity discloses the name and federal taxpayer identification number of all corporations who claim this exemption in the return filed by the pass-through entity for the taxable year under the West Virginia Corporation Net Income Tax Act.

3. **Undue hardship.** — On distributions when compliance will cause undue hardship on the pass-through entity. W. Va. Code § 11-21-71a(c)(3). This exemption is not automatic, however.

Petition for undue hardship exemption. — If a pass-through entity believes it will incur undue hardship by complying with the withholding requirements of § 11-21-71a, it may file a written petition with the Tax Commissioner claiming exemption from the requirements due to undue hardship.

Contents. — An undue hardship petition must be filed timely and must set forth, with particularity, the facts upon which the claim of undue hardship is based.

Timely filing. — A petition is filed timely if it is mailed before the end of the taxable year of the pass-through entity for which relief from withholding is requested, postage prepaid to the following address:

West Virginia State Tax Department
Internal Auditing Division-PITPU
P. O. Box 2585
Charleston, WV 25329-2585

Granting Petition Is Discretionary. — Approval of a petition claiming undue hardship is discretionary. In analyzing whether or not a petition should be granted, the Tax Commissioner will consider the ability of the pass-through entity to comply, at reasonable cost, with the § 11-21-71a withholding requirements and the cost to the State of collecting the tax directly from a nonresident distributee who does not voluntarily file a return and pay timely the amount of West Virginia income tax due.

4. **761 nonpartnership ventures.** — On distributions by an unincorporated organization which has elected, under I.R.C. § 761, to not be treated as a partnership for Federal income tax purposes.

Information reports. — A nonpartnership venture is required, however, to file with the Tax Commissioner a true and accurate report of information under § 11-21-58(c) setting forth: (1) the amount of fixed or determinable gains, profits and income of the unincorporated organization, and (2) the name, address and taxpayer identification numbers of persons receiving fixed or determinable gains, profits or income from such nonpartnership venture. W. Va. Code § 11-21-71a(c)(4).

Form WV/NRW-3, Information Report of 761 Nonpartnership Ventures is to be used for this purpose. If the nonpartnership venture furnishes its members with Federal Form 1099, a copy of that form may be filed in lieu of Form WV/NRW-3.

Person required to file. — This information report must be filed by the operator of the property, such as the operator of a gas well owned by a 761 nonpartnership venture, or if there is no such person, then by the person designated as the tax matters partner for the venture.

A copy of **Form WV/NRW-3, Information Report of 761 Nonpartnership Ventures**, is reproduced on the next page.

**INFORMATION REPORT
OF 761 NONPARTNERSHIP VENTURES**

● **Read Instructions On Reverse Side**

ORGANIZATION NAME AND MAILING ADDRESS	NONRESIDENT'S NAME AND MAILING ADDRESS
Name (please type or print) _____	Name (please type or print) _____
Street or Other Mailing Address _____	Street or Other Mailing Address _____
City, Town, or Post Office State Zip Code _____	City, Town, or Post Office State Zip Code _____
West Virginia Identification Number _____	Social Security Number West Virginia Identification Number _____
Federal Identification Number _____	Check One: <input type="checkbox"/> Resident <input type="checkbox"/> Nonresident
Amount of fixed or determinable gains, profits, and income of the organization \$ 	Amount of fixed or determinable gains, profits, or income received
Taxable Year of Organization Beginning _____ , 19____ and Ending _____ , 19 ____	



**INFORMATION REPORT OF 761 NONPARTNERSHIP VENTURES
INSTRUCTIONS**

Who Must File: An unincorporated organization which has elected, under I.R.C. § 761, to not be treated as a partnership for federal income tax purposes must file WV/NRW-3, Information Report of 761 Nonpartnership Ventures, and report the following information:

- (1) The amount of fixed or determinable gains, profits, and income of the unincorporated organization, and
- (2) The name, address and taxpayer identification number of persons receiving fixed or determinable gains, profits or income from such nonpartnership venture.

Federal Form 1099, containing the required information may be used in lieu of this form.

When and Where to File: Form WV/NRW-3 must be filed with the West Virginia Department of Tax and Revenue, Internal Auditing Division - PITPU, P.O. Box 2585, Charleston, West Virginia 25329-2585 on or before February 28, of the preceding year.

A duplicate copy of this statement must be furnished by the organization to each member of the organization to be attached to the individual's West Virginia Personal income Tax Return.

5. **Distributee tax payment agreement.** — On distributions to a nonresident distributee who executed and timely filed with the pass-through entity a West Virginia Nonresident Income Tax Agreement, Form WV/NRW-4, that has not been revoked either by the maker or the Tax Commissioner. (See part E for additional information.)

E. DISTRIBUTE TAX PAYMENT AGREEMENTS

The Tax Commissioner will permit a nonresident distributee to avoid withholding under § 11-21-71a by timely filing with the pass-through entity a **West Virginia Nonresident Income Tax Agreement**, Form WV/NRW-4. If a nonresident distributee receives West Virginia source income from more than one pass-through entity, a separate Form WV/NRW-4 must be filed with each pass-through entity. The election out of withholding applies only to the pass-through entity with which Form WV/NRW-4 is filed.

Under this Agreement, the nonresident distributee agrees:

To timely file returns and make timely payment of all taxes imposed by the West Virginia Personal Income Tax Act (or the West Virginia Corporation Net Income Tax Act in the case of a C corporation), on the distributee with respect to the effectively connected taxable income of the pass-through entity allocated to the distributee; and

To be subject to personal jurisdiction in West Virginia for purposes of collecting any unpaid West Virginia income tax, together with related interest, penalties, additional amounts and additions to tax, owed by the nonresident distributee, for taxable years during which the Agreement was in effect.

Effective date of agreement. — A nonresident distributee electing to execute a West Virginia Nonresident Income Tax Agreement must file a complete and properly executed Agreement, on Form WV/NRW-4, with each pass-through entity for which this election is made, on or before the last day of taxable year of the pass-through entity in respect of which the agreement first applies. W. Va. Code § 11-21-71a(k)(2).

NOTE: Since 1992 is the first calendar year for which withholding is required under § 11-21-71a, the Tax Commissioner will allow a West Virginia Nonresident Income Tax Agreement filed after December 31, 1992, to apply to the 1992 calendar year if the Agreement is made effective as of December 31, 1992.

Effect of agreement; revocation. — Upon receipt of a properly executed West Virginia Nonresident Income Tax Agreement, Form WV/NRW-4, the pass-through entity is not to withhold tax under § 11-21-71a for the taxable year of the pass-through entity to which the agreement applies, or

for any taxable year subsequent thereto, until either (1) the nonresident distributee notifies the pass-through entity, in writing, to begin withholding tax under § 11-21-71a, or (2) the Tax Commissioner directs the pass-through entity, in writing, to begin withholding tax under § 11-21-71a due to the distributee's continuing failure to comply with the terms of the West Virginia Nonresident Income Tax Agreement, Form WV/NRW-4.

Entity files copy with Tax Commissioner. — The pass-through entity must attach a copy of all West Virginia Nonresident Income Tax Agreements received by the pass-through entity during a taxable year to its annual information return filed for that year under the West Virginia Personal Income Act, Form IT-141 or IT-165, or the West Virginia Corporation Net Income Tax Act, Form WV/CNT-112S. W. Va. Code § 11-21-71a(k)(5).

Failure to file copy with Tax Commissioner. — If a pass-through entity fails to attach a copy of the West Virginia Nonresident Income Tax Agreement, Form WV/NRW-4, executed by its nonresident distributees to its Form IT-141, IT-165, or WV/CNT-112S the pass-through entity must remit to the Tax Commissioner an amount equal to the amount that should have been withheld under § 11-21-71a from the nonresident distributee. The pass-through entity may recover payment made pursuant to the preceding sentence from the distributee on whose behalf the payment was made. W. Va. Code § 11-21-71a(k)(5).

A copy of **Form WV/NRW-4, West Virginia Nonresident Income Tax Agreement**, is reproduced on the next page.

WEST VIRGINIA NONRESIDENT INCOME TAX AGREEMENT

INSTRUCTIONS

Who May File: Any Nonresident individual or C corporation who has West Virginia source income derived from a partnership, S corporation, estate, trust, or limited liability company ("Organization") who desires to not have West Virginia income tax withheld by that Organization as provided in W.Va. Code § 11-21-71a, must complete a West Virginia Nonresident Income Tax Agreement (Form WV/NRW-4) and timely file it with the Organization. A corporation is a nonresident if its commercial domicile is located in another State.

When and Where to File: This Form must be completed and filed with the Organization on or before the last day of the Organization's taxable year. If the Distributee receives West Virginia source income from more than one such Organization, a separate Form WV/NRW-4 must be filed with each Organization in order to avoid withholding by that Organization. The Organization may copy this form or use a facimile to distribute as follows: (1) one copy to be filed with the Organization's West Virginia income tax return, (2) one copy to be retained by the pass-through entity, and (3) one copy for the nonresident distributee.

West Virginia Income Tax Withholding for Nonresidents: Every Organization distributing West Virginia source income to a nonresident distributee is required to withhold West Virginia income tax on the amount thereof distributed to Nonresident Distributees **unless** the Nonresident Distributee timely files this Form with the Organization and the Organization attaches a copy of it to its West Virginia income tax return filed for the taxable year of its receipt. The withholding tax rate is 4% of distributions of West Virginia source income (**whether actual or deemed distributions**). The amount of tax withheld and remitted by the Organization is allowed as a credit against the Distributee's West Virginia income tax liability for that taxable year. For taxable years beginning on or after January 1, 2008, the rate of tax to be withheld shall be equal to 6.5%.

Nonresident Agreement: Once this agreement is executed, it must be filed with the Organization to avoid having withholding tax deducted from further distributions (actual or deemed). This agreement first applies to the taxable year of the Organization during which the Organization receives a properly executed agreement from the Nonresident Distributee.

Duration of Agreement: Once this Agreement is filed with the Organization, it remains in effect until it is revoked by the Nonresident Distributee, or by the Tax Commissioner.

Revocation:

1. A Nonresident Distributee may revoke this Agreement by completing this Form and filing it with the Organization through which it receives West Virginia source income. Revocation applies prospectively, meaning that it first applies to taxable years of the Organization which begin after revocation is filed with that Organization.

2. The Tax Commissioner may revoke this Agreement if the Nonresident Distributee fails to file a West Virginia income tax return (IT-140NR or WV/CNT-112) for more than 60 days after the due date of the return (determined by including any authorized extension(s) of time for filing such return, or to timely pay West Virginia income tax for any taxable year covered by this agreement).

F. PAYMENT OF WITHHELD TAX

Withholding tax due from the pass-through entity must be paid to the Tax Commissioner no later than:

1. **S Corporations.** — The fifteenth day of the third month following the close of the taxable year of the S corporation along with the annual information return, Form WV/CNT-112S, due under West Virginia Corporation Net Income Tax Act unless, and then only to the extent, a composite annual return is filed for such nonresident individuals under § 11-21-51a.
2. **Partnerships, Estates and Trusts.** — The fifteenth day of the fourth month following the close of the taxable year of the partnership, estate or trust, with the annual return of the partnership, Form IT-165, or of the estate or trust, Form IT-141, due under the West Virginia Personal Income Tax Act unless, and then only to the extent, a composite annual return is filed for such nonresident individuals under § 11-21-51a.

Special Rules. — Three special rules may apply:

1. **Where extension of time to file return.** — An extension of time to file any of the above-referenced returns does not extend the time for paying the amount of withholding tax due under § 11-21-71a, or the time for paying the tax due with a composite return filed under § 11-21-51a.

When a pass-through entity is allowed an extension of time to file its Federal return, the pass-through entity is automatically allowed a like extension of time to file its West Virginia return, Form IT-141, IT-165, or WV/CNT-112S, as the case may be. However, at least ninety percent (90%) of the withholding tax due for the taxable year, or one hundred percent (100%) of the tax paid under § 11-21-71a for the prior taxable year, if such taxable year was a taxable year of twelve months and tax was paid under § 11-21-71a for that taxable year, must be paid on or before the unextended statutory due date of the West Virginia return. Remittance must be attached to **Form WV/NRW-1, Extension Of Time To File Information Returns**, and mailed to:

West Virginia State Tax Department
Internal Auditing Division-PITPU
P.O. Box 2585
Charleston, WV 25329-2585

A copy of WV/NRW-1 appears on page 14.

WV/NRW-1 (4/93)	EXTENSION OF TIME TO FILE INFORMATION RETURNS	WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE
1. TYPE OF ORGANIZATION: (CHECK <input checked="" type="checkbox"/> ONLY ONE) <input type="checkbox"/> PARTNERSHIP FILING FORM IT-165 <input type="checkbox"/> ESTATE OR TRUST FILING FORM IT-141 <input type="checkbox"/> S CORPORATION FILING FORM WV/CNT-112S 2. TAXABLE YEAR ENDING: _____		REASON FOR FILING THIS RETURN: (CHECK <input checked="" type="checkbox"/> ONLY ONE) 3. <input type="checkbox"/> FEDERAL EXTENSION REQUESTED - AUTOMATIC WEST VIRGINIA EXTENSION (IF TAX IS DUE ENTER BELOW; IF NOT ENTER ZERO) 4. <input type="checkbox"/> WEST VIRGINIA EXTENSION OF TIME TO FILE - NO NONRESIDENT WITHHOLDING AND/OR FIDUCIARY INCOME TAX DUE (ENTER EXTENSION PERIOD REQUESTED BELOW) 5. <input type="checkbox"/> WEST VIRGINIA EXTENSION OF TIME TO FILE - NONRESIDENT WITHHOLDING AND/OR FIDUCIARY INCOME TAX DUE (ENTER EXTENSION PERIOD REQUESTED AND TAX DUE BELOW) 6. _____ 7. ENTER EXTENSION PERIOD REQUESTED \$ _____ 8. FIDUCIARY INCOME TAX DUE \$ _____ 9. NONRESIDENT WITHHOLDING TAX DUE \$ _____
WEST VIRGINIA ACCOUNT IDENTIFICATION NUMBER, NAME & ADDRESS _____ _____ _____		
SIGNATURE ▼	DATE ▼	TOTAL TAX DUE (DO NOT USE THIS SPACE)



Use this form to request an extension of time to file any of the information returns noted on the front. File this form on or before the due date of your information return. S corporation - 15th day of 3rd month following the end of the your taxable year. Partnerships, estates, and trusts - 15th day of the 4th month following the end of your taxable year. An extension of time to file does not extend the time for paying the tax. The tax is due by the unextended due date of the return to avoid interest and applicable additions to tax.

PAYMENT OF FIDUCIARY INCOME TAX. Estates and trusts must remit their income tax due for the year with this request.

PAYMENT OF NONRESIDENT WITHHOLDING TAX. West Virginia tax law (Code § 11-21-71a) requires partnerships, S corporations, estates, and trusts to withhold income tax on distributions of West Virginia source income to nonresident partners, shareholders, and beneficiaries. The withholding tax rate is 4% of distributions of West Virginia source income (whether actual or deemed distributions).

The nonresident withholding tax is due and payable with this request. You must remit by the unextended due date 90% of the nonresident withholding tax due for the taxable year or 100% of the tax paid for the prior taxable year, if such tax year was 12 months and tax was paid. If the balance due on your annual return is paid by the last day of your extension and the amount due is 10% or less of the tax due for the taxable year, no additions to tax will be imposed on the balance remitted. Overpayments may be refunded or credited to next years withholding.

You will only be notified if the request for extension of time to file is denied. You must attach a copy of this form to your annual return when it is filed.

MAKE CHECKS PAYABLE TO AND MAIL TO:
WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE
INTERNAL AUDITING DIVISION-PITPU
P. O. BOX 2585
CHARLESTON, WV 25329-2585
FOR ASSISTANCE CALL 304-558-3333
TOLL FREE WITHIN WV 1-800-982-8297
TDD SERVICE FOR HEARING IMPAIRED 1-800-282-9833

The remaining balance of tax due, if any, must be paid at the time the pass-through entity files its Form IT-141, IT-165, or WV/CNT-112S, as the case may be, for the taxable year, or the composite return is filed under § 11-21-51a.

If the remaining balance of tax due is paid by the last day of the extension period for filing such return and the amount of tax due with such return is ten percent or less of the tax due under § 11-21-71a for the taxable year, or with the composite return for the taxable year, no additions to tax will be imposed under W. Va. Code § 11-10-18 with respect to balance so remitted.

2. **When there is over withholding under § 11-21-71a.** — If the amount of withholding tax due under § 11-21-71a for the taxable year is less than the withholding taxes payable for the taxable year by the pass-through entity, the excess must be refunded to the pass-through entity or, at its election, paid over to the Tax Commissioner and established as a credit against withholding tax due under § 11-21-71a for the then current taxable year of the pass-through entity.
3. **Deposit in trust for Tax Commissioner.** — The Tax Commissioner may, if the Commissioner believes such action is necessary for the protection of trust fund moneys due this State, require any pass-through entity to pay over to the Commissioner the tax deducted and withheld under § 11-21-71a at any earlier time or times. W. Va. Code § 11-21-71a(d)(2)(B).

G. COMPOSITE WVPIT RETURNS

Some or all of the nonresident distributees of a pass-through entity may elect to have the pass-through entity file a composite WVPIT return on their behalf.

Date due. — A composite WVPIT return and the amount of tax due for the year are due on

1. the fifteenth day of the fourth month after the close of the taxable year of the nonresident individuals included in the composite return, along with a \$50 filing fee. W. Va. Code § 11-21-51a(a)(3).

Over withholding. — If a pass-through entity withholds more tax than the amount required

2. to be remitted with the composite return, the pass-through entity must return the excess withholding to the nonresident beneficiaries from which the excess amount was withheld.

Filing a composite return is relatively straight forward when the taxable years of the pass-through entity and of the nonresident distributees included in the composite return are the same. When, however, the taxable year of the pass-through entity is a fiscal year but the taxable year of the nonresident distributees included in the composite return is the calendar year, the composite return is due April 15th for the preceding calendar year and is based upon the distributions, whether actual

or deemed, for the taxable year of the pass-through entity that ends during the calendar year for which the composite return is filed.

H. TREATMENT OF NONRESIDENT DISTRIBUTEES

Allowance of credit. — Each nonresident partner, nonresident shareholder, or nonresident beneficiary from whom tax is withheld under § 11-21-71a, is allowed a credit for such partner's or shareholder's or beneficiary's share of the tax withheld by the partnership, S corporation, estate, or trust, under § 11-21-71a.

When the distribution is to a corporation taxable under the West Virginia Corporation Net Income Tax Act, the credit allowed by § 11-21-71a is applied against the distributee corporation's liability for that tax.

Withheld tax treated as distributed to nonresident distributee. — Except as provided in regulations, a nonresident partner's share, a nonresident shareholder's share or a nonresident beneficiary's share of any withholding tax paid by the partnership, S corporation, estate, or trust under § 11-21-71a is treated as distributed to such partner by such partnership, or to such shareholder by such S corporation, or to such beneficiary by such estate or trust, on the earlier of:

1. The day on which such tax was paid to the Tax Commissioner by the partnership, S corporation, estate or trust; or
2. The last day of the taxable year for which such tax was paid by the partnership, S corporation, estate or trust.

I. INFORMATION STATEMENTS

Every person required to deduct and withhold tax under § 11-21-71a must furnish to each nonresident distributee a written statement, as prescribed by the Tax Commissioner, showing:

1. The amount of West Virginia effectively connected taxable income, whether distributed or not distributed for Federal income tax purposes by such partnership, S corporation, estate, or trust to such nonresident distributee;
2. The amount deducted and withheld as tax under § 11-21-71a; and
3. Such other information as the Tax Commissioner may require.

Form WV/NRW-2, Statement Of West Virginia Income Tax Withheld For Individual Or Organization, is to be used for this purpose. However, this form need not be used by a pass-through entity if the information required by Form WV/NRW-2 is clearly shown on the Federal Schedule K-1 the entity furnishes to its nonresident distributee, or in an attachment thereto.

A copy of the information statements required by subsection § 11-21-71a(h) must be filed with the West Virginia return, Form IT-165 or IT-141, filed under the West Virginia Personal Income Tax Act (or the West Virginia Corporation Net Income Tax Act, Form WV/CNT-112S, in the case of S corporations) by the pass-through entity for its taxable year to which the distribution relates.

This information statement must be furnished to each nonresident distributee on or before the due date of the pass-through entity's return under the West Virginia Personal Income Tax Act, Form IT-141 or IT-165 (or the West Virginia Corporation Net Income Tax Act, Form WV/CNT-112S) for the taxable year, including extensions of time for filing such return, or such later date as may be allowed by the Tax Commissioner.

A request for extension of time to file Form WV/NRW-2, or its substitute, to a date after the pass-through entity files its return, Form IT-141, IT-165, or WV/CNT-112S, must (1) be in writing, (2) set forth in detail why additional time is needed, and (3) be mailed to:

West Virginia State Tax Department
Internal Auditing Division-PITPU
P. O. Box 2585
Charleston, WV 25329-2585

A copy of **Form WV/NRW-2**, Statement of West Virginia Income Tax Withheld For Individual or Organization, is reproduced on the next page.

J. LIABILITY FOR WITHHELD TAX

Every person required to deduct and withhold tax under § 11-21-71a is statutorily liable for payment of the amount of tax due under that section for taxable years of the pass-through entity beginning after December 31, 1991, except as otherwise provided in § 11-21-71a.

The amount of tax required to be withheld and paid over to the Tax Commissioner is deemed by statute to be the tax of the pass-through entity for purposes of the West Virginia Tax Procedure and Administration Act, W. Va. Code § 11-10-1 et seq., and the West Virginia Tax Crimes and Penalties Act, W. Va. Code § 11-9-1 et seq.

Any amount of tax withheld under § 11-21-71a is held in trust for the Tax Commissioner until it is paid over to the Commissioner.

No partner, S corporation shareholder, or beneficiary of a trust or estate, has a right of action against the partnership, S corporation, estate or trust, in respect to any moneys withheld from such person's distributive share and paid over to the Tax Commissioner in compliance with, or intended compliance with, § 11-21-71a.

K. FAILURE TO WITHHOLD

If any pass-through entity fails to deduct and withhold tax as required by § 11-21-71a and, thereafter, the tax against which such tax may be credited is paid, in whole or in part, by the nonresident distributee(s), the Tax Commissioner may not collect the amount so paid from the pass-through entity.

However, payment of West Virginia income taxes by nonresident distributee(s) from whom withholding was required, does not relieve the pass-through entity from liability for payment of any interest, penalties or additions to tax otherwise applicable in respect to its failure to withhold, or relieve the pass-through entity from liability for payment of delinquent withholding tax attributable to nonresidents from whom withholding was required when such nonresident does file a West Virginia income tax return and pay the amount of tax due.

L. WEST VIRGINIA SOURCE INCOME

The West Virginia source income of a nonresident individual is limited by statute, W. Va. Code § 11-21-32 (1992), to the net amount of income, gain, loss and deduction entering into the nonresident's Federal adjusted gross income for the taxable year that is derived from or connected with West Virginia sources. W. Va. Code § 11-21-32(a).

West Virginia source income includes a nonresident individual's:

1. Distributive share of partnership income, gain, loss and deduction, determined under § 11-21-37;
2. Pro-rata share of S corporation income, gain, loss and deduction, determined under § 11-21-37, increased by the reductions for taxes described in IRC § 1366(f)(2) and (3);
3. Share of estate or trust income, gain, loss and deduction determined under § 11-21-39; and

Items of income, gain, loss and deduction derived from or connected with:

4.
 - a. The ownership of any interest in real or tangible personal property located in West Virginia;
 - b. A business, trade, profession or occupation carried on in West Virginia; or
 - c. Disposition of stock in an S corporation, to the extent determined under § 11-21-37.

Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property constitute income from West Virginia sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in West Virginia. W. Va. Code § 11-21-32(b)(2).

Accordingly, income of nonresident individuals from rents or royalties for the use of, or for the privilege of using in West Virginia, patents, copyrights, secret processes and formulas, good-will, trade-marks, trade brands, franchises, and other like property is taxable if such property has a business situs in West Virginia. Income of nonresidents from other intangible personal property such as shares of stock in C corporations, bonds, notes, bank deposits and other indebtedness is taxable if such property has a business situs in West Virginia.

Intangible personal property has a business situs in West Virginia if it is employed as capital in West Virginia, or the possession and control of the property has been localized in connection with a business, trade, profession, or occupation carried on in West Virginia so that its substance and value attach to and become an asset of the business, trade, profession, or occupation carried on in West Virginia.

To illustrate, a trustee is required to withhold tax from income generated by the rental or sale of real or tangible personal property located in West Virginia, and from royalties attributable to a trust's interest in coal, oil, gas, or other natural resource in place if such property is located in West Virginia.

Interest and dividend income derived from stock in C corporations, bonds, notes and other forms of investments, generally characterized as portfolio income, will, as a general rule, not be subject to withholding under § 11-21-71a. Income of a nonresident derived from intangible personal property is subject to withholding only when it is derived from intangible personal property which has a business situs in West Virginia, as above defined.

Income generated through the ownership of shares of stock of an S corporation, or interest in a partnership, which owns real or tangible personal property located in West Virginia, or which is doing business in West Virginia, is subject to withholding under § 11-21-71a. However, withholding is required only to the extent the income is taxable West Virginia source income. A more detailed analysis of the income is required when the S corporation, or partnership, has nonbusiness as well as business income, or is doing business in more than one State, necessitating division of income, whether it be business or nonbusiness income, in order to determine the portion thereof that is taxable West Virginia source income allocable to the nonresident distributees and, therefore, subject to withholding under § 11-21-71a.

In this regard, the character of items of income, gain, loss and deduction in the hands of the pass-through entity flow through to its distributees as if the distributee had directly earned the income, realized the gain, or incurred the loss or expense. W. Va. Code § 11-21-37(d)(2) (character of partnership items determined under § 11-21-17(a)); § 11-21-37(e)(2) (character of S corporation items determined under § 11-21-17a(b)); § 11-21-39(a)(2)(B) (character of estate and trust items).

Deductions with respect to capital losses and net operating losses are allowed solely with respect to income, gain, loss and deduction derived from or connected with West Virginia sources, under regulations of the Tax Commissioner, but otherwise determined in the same manner as corresponding federal deductions for capital losses and net operating losses. W. Va. Code § 11-21-32(b)(3).

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