



MULTISTATE INCOME/FRANCHISE TAX

West Virginia finalized regulations addressing pass-through entity tax Tax Alert

Overview

On July 28, 2023, the West Virginia Tax Division finalized [regulations](#) to implement the new law allowing some pass-through entities to make an annual election to pay an entity level state income tax for taxable years beginning on and after January 1, 2022. See this [Tax Alert](#) for more details on the enactment of the West Virginia pass-through entity tax (“PET”).

This Tax Alert summarizes some of the PET guidance in these regulations.

Pass-through entity tax credit

- An owner of an electing pass-through entity may claim a credit for their share of PET against the owner’s West Virginia individual income or fiduciary income tax. If the credit exceeds the owner’s tax due, the excess may be carried forward by the owner for up to five taxable years.
- A trust (other than a trust that is disregarded for income tax purposes) that is an owner of an electing S corporation may claim the PET credit that it receives on its fiduciary income tax return or distribute any portion of the credit to its beneficiaries as may be appropriate.
- Eligible owners of an electing pass-through entity must wait until the electing pass-through entity makes the PET election and pays the tax at the entity level before claiming the PET credit.

How to make the pass-through entity tax election

- For taxable year 2023 and forward, the election can be made by timely filing a form, as directed by the West Virginia Tax Commissioner. Once the form for electing to pay the PET has been submitted, the election is binding for that taxable year.

- Each electing pass-through entity must obtain consent from its owners. Once the election is made, an owner may not opt-out of the election for that taxable year.

Passthrough entity tax calculation

- The calculation of an electing pass-through entity's taxable income must include all items of income, gain, loss, and deduction to the extent they would flow through and be included in the income of owners that are subject to West Virginia personal income tax.
- Pass-through entity taxable income includes each resident owner's share of the electing pass-through entity's income or loss, subject to modifications, regardless of the pass-through entity's allocation and apportionment.
- Pass-through entity taxable income includes each nonresident owner's share of the electing pass-through entity's income or loss, subject to modifications, attributable to West Virginia.
- The electing pass-through entity may exclude income from the calculation of the pass-through entity taxable income to the extent the pass-through entity can establish that the amount is properly allocated to an owner who is not subject to tax on such amount (e.g., exempt retirement income under IRC § 114).
- Economic development credits and other credits allowed by law to be passed through to the owners of a pass-through entity may be applied against the PET.

Annual pass-through entity tax return

- Electing pass-through entities are required to file an annual tax return by the 15th day of the third month following the close of the taxable year. West Virginia allows an automatic 6-month extension for filling the return.
- If the annual return is filed within the automatic extension period, but less than 100% of the tax due was paid on or before the original due date, a penalty will apply and may include the revocation of the pass-through entity tax election, with the tax liability and penalties and interest being assessed against the owner of the pass-through entity.

Quarterly estimated tax payments

- For tax year 2022, an electing pass-through entity is not required to make estimated payments and will not be subject to penalties or interest for not making estimated tax payments.
- For taxable years beginning on or after January 1, 2023, an electing pass-through entity is required to make quarterly estimated tax payments if the estimated tax for the taxable year can reasonably be expected to exceed \$2,400.

Nonresident withholding and composite tax returns

- If nonresident withholding payments were made prior to the pass-through entity making the PET election, the electing pass-through entity should request the nonresident withholding payments to be treated as an estimated payment for PET or request a refund.
- An electing pass-through entity may not file a composite return on behalf of its nonresident owners. If a nonresident owner's only West

Virginia source income is through an electing pass-through entity that fully pays the tax, that nonresident owner is not required to file a West Virginia nonresident tax return.

Credit for taxes paid to other states

- Effective for taxable years beginning on and after January 1, 2022, residents may claim a credit against their West Virginia individual income tax for their share of PETs paid to another state if the income tax imposed by the other state on a pass-through entity is substantially similar to West Virginia's PET.
- Any such credit may also be included as a credit against the PET liability as determined by such individual resident owner's includable income in any PET liability to the extent paid on behalf of such owner through nonresident withholding, a composite return, or a similar PET in such other state.

Get in touch

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Have a question relating to this or any other pass-through entity tax regime? Reach out to one of our national multistate pass-through entity tax specialists.

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