

11-1-2015

Taxation

William L.S. Rowe

Hunton & Williams LLP, Richmond, Virginia

Emily J.S. Winbigler

Hunton & Williams, LLP, Richmond, Virginia

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [State and Local Government Law Commons](#), and the [Taxation-State and Local Commons](#)

Recommended Citation

William L. Rowe & Emily J. Winbigler, *Taxation*, 50 U. Rich. L. Rev. 177 (2015).

Available at: <https://scholarship.richmond.edu/lawreview/vol50/iss1/8>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

TAXATION

*William L.S. Rowe **
*Emily J.S. Winbigler ***

INTRODUCTION

This article reviews significant recent developments in the laws affecting Virginia state and local taxation. Each section covers legislative activity, judicial decisions, and selected opinions from the Virginia Department of Taxation (the “Department”) and the Virginia Attorney General over the past year.

Part I of this article addresses state taxes. Part II of this article covers local taxes, including real and personal property taxes and business professional and occupational license (“BPOL”) taxes.

I. TAXES ADMINISTERED BY THE VIRGINIA DEPARTMENT OF TAXATION

A. *Significant Legislative Activity*

1. Fixed Date of Conformity

The Virginia General Assembly advanced Virginia’s fixed date of conformity from January 2, 2013 to December 31, 2014, effective for tax years beginning on and after January 1, 2014.¹ This

* Partner, Hunton & Williams LLP, Richmond, Virginia. J.D., 1973, University of Virginia School of Law; B.A., 1970, Washington and Lee University.

** Associate, Hunton & Williams LLP, Richmond, Virginia. J.D., 2009, University of Iowa, Order of the Coif; B.A., 2004, The College of William & Mary.

1. Act of Mar. 10, 2015, ch. 61, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-301 (Cum. Supp. 2015)); see VA. DEPT OF TAXATION, PUB. DOC. 15-22 (Feb. 19, 2015), <http://tax.virginia.gov/laws-rules-decisions/tax-bulletins/15-1>. Because Congress did not enact federal tax legislation that would have affected Virginia taxable income, the General Assembly did not advance Virginia’s date of conformity to the Internal Revenue Code during the 2014 Session. See VA. DEPT OF TAXATION, PUB. DOC. 14-18 (Feb. 20, 2014), <http://tax.virginia.gov/laws-rules-decisions/tax-bulletins/14-1>. It did, however, extend Virginia’s conformity to the federal enhanced Earned Income Tax Credit under I.R.C.

advancement allows Virginia to conform to the federal Tax Increase Prevention Act of 2014,² which included an extension of the following expiring deductions:

1. The above-the-line deduction for certain expenses of elementary and secondary school teachers;
2. The increased deduction for certain types of property pursuant to § 179 of the Internal Revenue Code of 1986, as amended (the "I.R.C.");
3. The deduction for mortgage insurance premiums;
4. The deduction for qualified tuition and related expenses;
5. The deduction for state and local sales tax;
6. The exclusion from gross income for individual retirement account (IRA) distributions for charitable purposes; and
7. The exclusion from gross income for the discharge of qualified principal residence indebtedness.³

As in prior years, there are federal tax provisions that are disallowed in Virginia, including the bonus depreciation allowed for certain assets under I.R.C. § 168(k), applicable high yield discount obligations under I.R.C. § 163(e)(5)(F), and income tax exclusions related to cancellation of debt income realized in connection with a reacquisition of business debt at a discount after December 31, 2008 and before January 1, 2011.⁴

2. Single Sales Factor: Enterprise Data Centers

Newly enacted Virginia Code section 58.1-422.2 permits certain enterprise data center operators to apportion their corporate taxable income using a single sales factor.⁵ A qualifying enterprise data center must enter into a memorandum of understanding with the Virginia Economic Development Partnership ("VEDP") and agree to make a capital investment of at least \$150 million in

§ 32(b)(3) for taxable years ending before January 1, 2018. Ch. 61, 2015 Va. Acts __, __.

2. VA. DEP'T OF TAXATION, PUB. DOC. 15-22 (Feb. 19, 2015), <http://tax.virginia.gov/laws-rules-decisions/tax-bulletins/15-1>.

3. *Id.*; see Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, §§ 101, 102, 104, 105, 107, 108, 127, 128 Stat. 4010, 4012-14, 4017-18.

4. Act of Mar. 10, 2015, ch. 61, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2015)); VA. DEP'T OF TAXATION, PUB. DOC. 15-22 (Feb. 19, 2015), <http://tax.virginia.gov/laws-rules-decisions/tax-bulletins/15-1>.

5. VA. CODE ANN. § 58.1-422.2 (Cum. Supp. 2015).

Virginia.⁶ The modified method of apportionment would apply beginning with the taxable year for which VEDP provides a written certification to such taxpayer that the new capital investment has been completed and is subject to phase-in provisions from July 1, 2016 to July 1, 2017.⁷

An “enterprise data center” means

[O]perations that (i) physically house information technology equipment such as servers, switches, routers, data storage devices, or related equipment; (ii) manage and process digital data and information to provide application services or management for data processing, such as web hosting, Internet, intranet, telecommunication, and information technology; (iii) are developed and owned by the taxpayer; and (iv) are operated by the taxpayer or any of its affiliates substantially for their own use.⁸

The legislative purpose of this statute is to attract capital investment in data centers in Virginia.⁹ It complements the existing exemption from sales and use taxes on certain data center equipment, including software, first enacted in 2009.¹⁰

3. Technology Capital Gains

The sunset date for making investments in certain high technology businesses that qualify for the individual and corporate income tax subtraction for certain long-term capital gains is extended five years, from June 30, 2015 to June 30, 2020.¹¹ Accordingly, pursuant to Virginia Code sections 58.1-332 and 58.1-402, a taxpayer investing in a technology business may claim an individual or corporate income tax subtraction for any long-term capital gain or investment services partnership interest income attributable to an investment in a qualifying business, provided that investment is made on or before June 30, 2020.¹² A qualifying business generally must be engaged in certain technology-related fields, have its principal office or facility in Virginia, and have

6. *Id.*

7. *Id.*

8. *Id.* § 58.1-422.2(B) (Cum. Supp. 2015).

9. Act of Mar. 10, 2015, ch. 92, 2015 Va. Acts __, __ (codified at VA. CODE ANN. § 58.1-422.2(D) (Cum. Supp. 2015)).

10. VA. CODE ANN. § 58.1-609.3(17)-(18) (Repl. Vol. 2013 & Cum. Supp. 2015).

11. Act of Mar. 19, 2015, ch. 336, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-322(C)(35), -402(C)(24) (Cum. Supp. 2015)).

12. VA. CODE ANN. §§ 58.1-332(C)(35), -402(C)(24) (Cum. Supp. 2015).

less than \$3 million in annual revenues in the fiscal year prior to the investment.¹³

4. Recyclable Material Tax Credit

Effective for taxable years beginning on and after January 1, 2015, Virginia Code section 58.1-439.7 was amended to increase the income tax credit from 10% to 20% of the purchase price for machinery equipment used to manufacture property from recyclable materials, with a \$2 million cap per fiscal year.¹⁴ The General Assembly modified the test so the credit applies to “machinery and equipment used *predominantly* in or on the premises of manufacturing facilities or plant units which manufacture, process, compound, or produce items of tangible personal property from recyclable materials, within the Commonwealth, for sale.”¹⁵ Prior to the amendment, the machinery and equipment had to be used *exclusively* in the manufacturing process in order to qualify for an exemption.¹⁶

5. Land Preservation Tax Credits

The General Assembly further limited the use of Land Preservation Tax Credits by reducing the annual cap for all such credits from \$100 million to \$75 million beginning with the 2015 taxable year.¹⁷ The amount of credits usable in taxable years 2015 and 2016 by any individual was reduced from \$100,000 to \$20,000; individuals may use \$50,000 of credit for 2017 and future taxable years.¹⁸ Credits claimed for fee simple donations of land are subject to a higher cap of \$100,000 for each taxable year.¹⁹

13. *Id.*

14. Act of Mar. 10, 2015, ch. 49, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-439.7 (Cum. Supp. 2015)).

15. *Id.* (codified as amended at VA. CODE ANN. § 58.1-439.7(A)(1) (Cum. Supp. 2015)) (emphasis added).

16. VA. CODE ANN. § 58.1-439.7(A) (Repl. Vol. 2013) (prior to amendment).

17. Act of Mar. 17, 2015, ch. 235, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-512(D)(4)(C) (Cum. Supp. 2015)).

18. *Id.* (codified as amended at VA. CODE ANN. § 58.1-512(C)(1) (Cum. Supp. 2015)).

19. *Id.*

6. Forest Products Tax

House Bill 1724 amended the Forest Products Tax, Virginia Code sections 58.1-1601 et. seq., in several fundamental respects. In order to better comport with industry practice, the tax burden is now carried by the first manufacturer using or consuming forest products.²⁰ Prior to the amendment, the tax was payable by every person engaged in business in Virginia “as a manufacturer or shipper of forest products for sale, profit, or commercial use.”²¹ In addition, there are now three separate tax rates for each of the following types of chips: (1) pine, (2) non-pine species, and (3) pine and non-pine species.²² Taxpayers no longer need to determine the ratio of pine and other species in each load to calculate the amount of tax due.²³ The bill is intended to be revenue neutral.²⁴

7. Bullion

The Virginia General Assembly amended Virginia Code section 58.1-609.1 to add an exemption from the retail sales and use tax for gold, silver, or platinum bullion whose sales price exceeds \$1000.²⁵ The exemption is aimed at rare metals acquired for investment and specifically excludes jewelry or works of art.²⁶ The exemption applies to purchases occurring on or after July 1, 2015 but before January 1, 2019.²⁷

20. Act of Mar. 16, 2015, ch. 170, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-1602 (Cum. Supp. 2015)); VA. DEP'T OF TAXATION, 2015 FISCAL IMPACT STATEMENT FOR H.B. 1724-ENROLLED (Mar. 16, 2015).

21. VA. CODE ANN. § 58.1-1602 (Repl. Vol. 2013) (prior to amendment).

22. Ch. 170, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-1605(6) (Cum. Supp. 2015)).

23. VA. DEP'T OF TAXATION, 2015 FISCAL IMPACT STATEMENT FOR H.B. 1724-ENROLLED 2 (Mar. 16, 2015).

24. *Id.*

25. Act of Mar. 26, 2015, ch. 620, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-609.1(19) (Cum. Supp. 2015)).

26. *Id.*

27. *Id.*

B. *Significant Opinions of the Virginia Tax Commissioner*

1. Corporate Income Tax

The Department continues with its controversial interpretation of the “Add-Back statute,” Virginia Code section 58.1-402(B)(8).²⁸ In a recent ruling, the Department held that only an apportioned deduction for royalties paid to an intangible holding company is allowed even though the royalties were subject to tax in another jurisdiction.²⁹ Interest expense was also required to be added back based on the fact that the taxpayer held intangibles which were licensed to affiliates.³⁰ The Tax Commissioner notes his authority to make an “equitable adjustment” under Virginia Code section 58.1-446 even if the Department’s Add-Back policies are incorrect.³¹ Note that Virginia’s definition of “interest expense” does not permit the Add-Back of interest paid to an affiliate unless it is related to royalties or other intangible property.³² Thus, interest paid on arm’s length loans to related entities are not subject to the Add-Back statute unless, for example, the loaned funds derive from royalties paid by affiliates on patents, copyrights, or similar property.

2. Individual Income Tax

On October 6, 2014, the Supreme Court of the United States denied review of the Fourth Circuit Court of Appeals decision in *Bostic v. Schaefer* that overturned Virginia’s ban on same-sex marriage.³³ Accordingly, same-sex marriages that are valid under the law of any state are now recognized for Virginia income tax

28. VA. DEPT OF TAXATION, PUB. DOC. 14-71 (May 27, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-71> (citing VA. CODE ANN. § 58.1-402(B)(8) (Cum. Supp. 2015)).

29. *Id.*

30. *Id.*

31. *Id.* (citing VA. CODE ANN. § 58.1-446 (Repl. Vol. 2013)). On March 26, 2015, the Virginia legislature retroactively applied the interpretation of the Add-Back statute to a budget bill passed on June 23, 2014. Act of March 26, 2015, ch. 665, 2015 Va. Acts 1, 550 (amending Act of June 23, 2014, ch. 2, 2014 Va. Acts 1, 447).

32. VA. CODE ANN. § 58.1-302 (Repl. Vol. 2013).

33. *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014), *cert. denied sub nom. Schaefer v. Bostic*, 135 S. Ct. 308 (2014).

purposes.³⁴ Individuals in a valid same-sex marriage may file joint Virginia income tax returns, and compute items on those returns as married individuals, or may file as married couples filing separately.³⁵ A same-sex married couple who filed a joint federal income tax return and separate Virginia income tax returns in a previous taxable year may, but is not required to, amend their Virginia income tax returns to file joint Virginia income tax returns within the three-year statute of limitations.³⁶

3. Sales and Use Tax Exemption for Internet Service Providers

The Department continues to deny a sales tax exemption for purchases made by wholesale internet service providers (“ISPs”).³⁷ Generally, pursuant to Virginia Code section 58.1-609.6(2), certain broadcasting and related equipment that ISPs purchase for use in providing internet and related services are exempt from sales and use tax.³⁸ Internet service means “a service that enables users to access proprietary and other content, information electronic mail, and the Internet as part of a package of services sold to end-user subscribers.”³⁹

A 2005 Fairfax County Circuit Court decision held that the exemption applied not only to ISPs that provide “retail” services to end-users but also to those ISPs that provide “wholesale” services to end-users.⁴⁰ The Department has refused to acquiesce in that decision except with respect to property purchased for use in Fairfax County.⁴¹ In recent rulings, the department has reiterated its position that the exemption is only available to retail ISPs

34. VA. DEP’T OF TAXATION, PUB. DOC. 14-174 (Oct. 7, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-174>.

35. *Id.*

36. *Id.*

37. VA. DEP’T OF TAXATION, PUB. DOC. 14-92 (June 16, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-92> (citing VA. CODE ANN. § 58.1-609.6(2) (Repl. Vol. 2013)).

38. VA. CODE ANN. § 58.1-609.6(2) (Repl. Vol. 2013).

39. *Id.* § 58.1-602 (Cum. Supp. 2015).

40. *Cisco Systems, Inc. v. Thorsen*, 68 Va. Cir. 385, 395–96 (2005) (Fairfax County).

41. VA. DEP’T OF TAXATION, PUB. DOC. 14-132 (Aug. 7, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-132>; VA. DEP’T OF TAXATION, PUB. DOC. 14-92 (June 16, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-92>.

that provide internet and related services to end-user consumers.⁴²

4. Land Preservation Tax Credits

Recent rulings regarding Virginia Land Preservation Tax Credits (“LPCs”) pit the taxpayer’s appraisal against the Department’s appraisal. In each case, the Department determined that the taxpayer’s appraisal failed to take into account certain factors, such as a flood plain, wetlands, local zoning ordinances, availability of water and sewer, or previously accepted proffers that should have lowered the fair market value of the conveyed property.⁴³ Having concluded that the taxpayer’s appraisal did not properly reflect the value of the property, it adopts the value shown in its own appraisal, and, if LPCs were sold, it upholds assessments against any subsequent purchasers of the LPCs.⁴⁴

The Department recently held that its ability to adjust the valuation of the conveyed property, and issue an assessment for omitted taxes, extends to any year in which the LPCs have been carried forward by the taxpayer.⁴⁵ In this case, the taxpayer, a limited liability company (“LLC”), donated a fee simple interest in 2008 and was awarded LPCs based on the value shown in its independent appraisal.⁴⁶ The LPCs were allocated to the owners of the LLC, who used the credits to offset their income tax liability for the 2008 and 2009 tax years.⁴⁷ No credit was used in 2010 and 2011 because their tax returns reported a loss.⁴⁸ On review, the Department lowered the value of the donated property based on

42. VA. DEP’T OF TAXATION, PUB. DOC. 14-132 (Aug. 7, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-132>; VA. DEP’T OF TAXATION, PUB. DOC. 14-92 (June 16, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-92>.

43. VA. DEP’T OF TAXATION, PUB. DOC. 14-169 (Sept. 12, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-169>; VA. DEP’T OF TAXATION, PUB. DOC. 14-61 (Apr. 30, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-61>; VA. DEP’T OF TAXATION, PUB. DOC. 14-7 (Jan. 21, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-7>.

44. VA. DEP’T OF TAXATION, PUB. DOC. 14-7 (Jan. 21, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-7>.

45. VA. DEP’T OF TAXATION, PUB. DOC. 15-79 (Apr. 22, 2015), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/15-79>.

46. *Id.*

47. *Id.*

48. *Id.*

its appraisal.⁴⁹ While the Department was time-barred from adjusting the amount of the credit claimed for the 2008 and 2009 tax years, it determined it could still reduce the amount of the unused credit carried forward.⁵⁰ Considering that LPCs can be carried forward for up to thirteen years, taxpayers who carry forward the credit should be aware that the Department may reduce the amount of credit during that time.⁵¹

5. Procedure: Collections Activity and Deadlines

The Department continues to interpret broadly its ability to collect unpaid tax assessments beyond the statutory period of limitations normally applicable to collections. Virginia Code section 58.1-1802.1 provides that:

[w]here the assessment of any tax imposed by this subtitle has been made within the period of limitation properly applicable thereto, such tax may be collected by levy, by a proceeding in court, or by any other means available to the Tax Commissioner under the laws of the Commonwealth, but *only if such collection effort is made or instituted within seven years* from the date of the assessment of such tax.⁵²

In Public Document 14-177, the Department reiterated its opinion that as long as *any* lawful means of collecting taxes is initiated within seven years, collection may continue beyond seven years.⁵³ The statute is unclear as to the “effort” that must be

49. *Id.*

50. *Id.* (explaining that in order to make adjustments to the taxpayers' 2008 and 2009 returns, the assessments needed to have been issued by May 1, 2012 and May 1, 2013, respectively). The Department is generally prohibited from assessing omitted taxes to within three years of the due date of the return or the actual date that the return was filed. VA. CODE ANN. § 58.1-1812 (Repl. Vol. 2013); *see also id.* § 58.1-104 (Repl. Vol. 2013) (“Except as provided in Chapter[] 3 . . . any tax imposed by this subtitle shall be assessed within three years from the last day prescribed by law for the timely filing of the return.”); *id.* § 58.1-312 (Repl. Vol. 2013) (statute of limitations in special circumstances).

51. VA. DEPT OF TAXATION, PUB. DOC. 15-79 (Apr. 22, 2015), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/15-79>. A taxpayer is generally permitted to carry forward unused LPCs for ten years, but any taxpayers affected by the 2009-2011 credit limitation can carry forward unused credits for thirteen years. VA. CODE ANN. § 58.1-512(D)(5)(a) (Cum. Supp. 2015). Taxpayers to whom a credit has been transferred must use that credit within eleven years after it has been issued by the Department, fourteen years for taxpayers affected by the 2009-2011 credit limitation. *Id.* § 58.1-512 (D) (5)(b) (Cum. Supp. 2015).

52. VA. CODE ANN. § 58.1-1802.1 (Repl. Vol. 2013 & Cum. Supp. 2015) (emphasis added).

53. VA. DEPT OF TAXATION, PUB. DOC. 14-177 (Oct. 17, 2014), <http://www.tax.virginia.gov>.

made within seven years. Query whether the Department may send a notification of tax due to the taxpayer in the first year and then claim it can collect on the debt twenty years later because it made some effort within the first seven years. It would be more consistent with the statute to say that, whatever the method used to collect, e.g., a lawsuit, that particular method or effort must be instituted within the seven years.

Not only does the Department have broad powers to collect unpaid taxes, it strictly enforces a taxpayer's right to file an amended return claiming a refund. Generally, amended returns must be filed within three years "from the last day prescribed by law for the timely filing of the return"⁵⁴ (generally May 1). A taxpayer may request an automatic six month filing extension of the original due date in certain circumstances.⁵⁵ The Department recently held that if a taxpayer requests an extension and actually files the return within the extended time period, then he has three years from the extended due date to file an amended return.⁵⁶ If, however, the taxpayer requests an extension but fails to file before the extended due date, then the taxpayer is treated as if no extension had been granted, and the deadline for filing is three years from the original due date of the return⁵⁷ (typically May 1). Furthermore, a properly filed extension of a federal income tax return does not act as a request for an extension to file a Virginia income tax return.⁵⁸

gov/laws-rules-decisions/rulings-tax-commissioner/14-177.

54. VA. CODE ANN. § 58.1-499(D) (Repl. Vol. 2013).

55. *Id.* § 58.1-344(A) (Repl. Vol. 2013).

56. VA. DEP'T OF TAXATION, PUB. DOC. 14-149 (Aug. 27, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-149>.

57. VA. DEP'T OF TAXATION, PUB. DOC. 14-123 (July 25, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-123>; VA. DEP'T OF TAXATION, PUB. DOC. 14-119 (July 24, 2014), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-119>.

58. VA. DEP'T OF TAXATION, PUB. DOC. 15-45 (Mar. 18, 2015), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/15-45>.

II. TAXES ADMINISTERED BY LOCALITIES

A. *Real and Tangible Personal Property*

1. Significant Legislative Activity

The Virginia General Assembly created a new classification of machinery and tools, including repair and replacement parts, “used directly in producing or generating renewable energy.”⁵⁹ The tax rate imposed by localities on this new class of property must be less than the rate applicable to the general class of machinery and tools.⁶⁰ The new classification does not apply to machinery and tools owned by public service corporations, unless the rate of tax applicable to the new classification for renewable energy machinery and tools would result in a lower property tax on such property.⁶¹

2. Significant Judicial Decision

In *CVAS 2, LLC v. City of Fredericksburg*, the Supreme Court of Virginia held that the City of Fredericksburg’s June 13, 2013, suit to force a sale of the taxpayer’s property to collect delinquent real estate taxes and special assessments was unlawful because the City of Fredericksburg failed to follow proper procedures.⁶² In its opinion, the supreme court discussed the differences between special taxes and special assessments, as well as the statutory procedures that must be followed to collect them.⁶³ It noted that a special assessment is “a charge upon property, imposed by proper authority, usually in return for special benefits conferred upon such property by an improvement of a public character”⁶⁴

The Virginia Code recognizes that special assessments imposed on behalf of a community development authority (“CDA”) are to

59. Act of Mar. 17, 2015, ch. 230, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3508.6 (Cum. Supp. 2015)).

60. VA. CODE ANN. § 58.1-3508.6 (Cum. Supp. 2015).

61. *Id.*

62. *CVAS 2, LLC v. City of Fredericksburg*, 289 Va. 100, 107, 122–23, 766 S.E.2d 912, 912–14, 922 (2015).

63. *Id.* at 110–15, 766 S.E.2d at 915–22.

64. *Id.* at 117, 766 S.E.2d at 919 (citing WILLIAM HERBERT PAGE & PAUL JONES, A TREATISE ON THE LAW OF TAXATION BY LOCAL AND SPECIAL ASSESSMENTS 4 (1909)).

be used to “[f]inance the services and facilities it provides to abutting property within the district” under the CDA’s oversight.⁶⁵ By contrast, a special tax levied by a locality on behalf of a CDA is used to “finance the services and facilities provided by” the CDA.⁶⁶ A tax “is a ‘recurring charge’ that ‘is levied for the purpose of raising revenue for paying the expenses of the government,’ [while a] special assessment . . . is only levied ‘occasionally’ and for purposes of paying for the ‘special benefits conferred upon’ the property owner.”⁶⁷

The trial record was insufficient to determine whether the taxpayer owed a special tax or special assessment, but the supreme court held that the City of Fredericksburg failed to adhere to the procedures for collecting delinquent special taxes and special assessments in all events.⁶⁸ By statute, a locality cannot force a sale to pay delinquent real estate taxes until the December 31 two years following the anniversary of when the taxes became due, unless a city passes an ordinance that shortens the period to one year.⁶⁹ Delinquent special taxes must be collected in a similar fashion.⁷⁰ Collection of delinquent special assessments, however, may be “collected as a lien upon the property” but only “if the locality has passed an ordinance allowing for special assessments to be made effective in such a manner.”⁷¹ Fredericksburg had not passed the requisite ordinance. Its suit, filed prior to December 31, 2013, was therefore insufficient to permit the sale to recover delinquent special taxes and special assessments for the 2012 year. In response to the outcome of this case, the 2015 Virginia General Assembly amended Virginia Code section 15.2-5158 by adding a new subsection (A)(9):

Any special tax levied pursuant to subdivision 3 and any special assessment imposed pursuant to subdivision 5, whether previously or hereafter levied or imposed, constitute a lien on real estate ranking on parity with real estate taxes, and any such delinquent special tax

65. VA. CODE ANN. § 15.2-5158(A)(5) (Cum. Supp. 2015).

66. *Id.* § 15.2-5158(A)(3) (Cum. Supp. 2015).

67. *CVAS 2, LLC*, 289 Va. at 117–18, 766 S.E.2d at 919–20 (citing WILLIAM HERBERT PAGE & PAUL JONES, A TREATISE ON THE LAW OF TAXATION BY LOCAL AND SPECIAL ASSESSMENTS 59–62 (1909)).

68. *Id.* at 119–20, 766 S.E.2d at 921–22.

69. VA. CODE ANN. §§ 58.1-3965, -3965.1 (Repl. Vol. 2013 & Cum. Supp. 2015).

70. *Id.* § 15.2-5158(A)(3) (Cum. Supp. 2015).

71. *CVAS 2, LLC*, 289 Va. at 121, 766 S.E.2d at 922 (citing VA. CODE ANN. § 15.2-5158(A)(5) (Cum. Supp. 2015)).

or delinquent special assessment may be collected in accordance with the procedures set forth in Article 4 (§ 58.1-3965 et seq.) of Chapter 39 of Title 58.1.⁷²

This subsection eliminates the need for a locality to enact an ordinance allowing special assessments to be treated as liens upon the land.⁷³ It also permits a locality to utilize the recovery methods applicable to real estate taxes to recover delinquent special taxes and special assessments.⁷⁴

This amendment is immediately effective.⁷⁵

3. Significant Administrative Decisions

The proper valuation of machinery and tools is becoming an increasingly disputed issue. On the one hand, the Virginia Constitution requires property to be taxed at fair market value.⁷⁶ On the other hand, Virginia Code section 58.1-3507(B) provides that machinery and tools “shall be valued by means of depreciated cost or a percentage or percentages of original total capitalized cost excluding capitalized interest.”⁷⁷ A recent opinion of the Attorney General held that the term “original capitalized cost” as used in Virginia Code section 58.1-3507(B) means “the original cost paid by the original purchaser of the property from the manufacturer or dealer and not the price paid by the current owner.”⁷⁸

The taxpayer in this opinion purchased in a bankruptcy sale, arguably below market value, machinery and tools.⁷⁹ Hanover County’s practice, which was affirmed by the Attorney General, was to tax the property at a percentage of original cost paid by the first purchaser of the property.⁸⁰ In drawing this conclusion, the Attorney General affirmed its earlier opinion, which held that the term “original cost” in Virginia Code section 58.1-3503(A)(17)

72. Act of Mar. 6, 2015, ch. 39, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 15.2-5158(A)(9) (Cum. Supp. 2015)).

73. Ch. 39, 2015 Va. Acts __, __.

74. VA. CODE ANN. § 15.2-5158(A)(9) (Cum. Supp. 2015).

75. *Id.*

76. VA. CONST. art. X, § 2 (“All assessments of real estate and tangible personal property shall be at their fair market value . . .”).

77. VA. CODE ANN. § 58.1-3507(B) (Repl. Vol. 2013 & Cum. Supp. 2015).

78. Op. to Hon. T. Scott Harris (June 26, 2014).

79. *Id.*

80. *Id.*

means “the cost paid by the original, or first, purchaser of such personal property.”⁸¹ The Attorney General recognized the tension between Hanover County’s interpretation of the tax base and the constitutional requirement that property be valued at fair market value, but nonetheless determined that Hanover County’s interpretation did not violate Article X, section 2 of the Virginia Constitution:

The fair market value of an asset generally might exceed the purchase price paid for that asset at bankruptcy or similar foreclosure sale. . . . This does not, however, necessarily lead to taxation based upon more than fair market value in violation of Article X, § 2 of the Constitution of Virginia. As the Supreme Court of Virginia has stated,

“The fair market value of property, as that term is here used means the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.”

Thus, this construction of §§ 58.1-3503(A) and 58.1-3507(B) is in accord with the constitutional requirements of uniformity and fair market value.⁸²

The Attorney General’s confidence that assessments at “original total capitalized cost” and “original cost” do not conflict with the constitutional requirement of fair market value seems overstated. In a particular case, such amounts may accurately reflect fair market value, or a taxpayer may not be able to carry its burden to prove that the amount exceeds the property’s actual value, and what that value is. But when such proof is available, assessments based on cost should fall.⁸³

81. Op. to Hon. Emmett W. Hanger, Jr. (Feb. 25, 2009). Virginia Code section 58.1-3503(A)(17) is the “catch-all” category for personal property employed in a trade or business. VA. CODE ANN. § 58.1-3503(A)(17) (Cum. Supp. 2015). The Department of Taxation has issued rulings with similar results. See VA. DEP’T OF TAXATION, PUB. DOC. 13-20 (Feb. 15, 2013), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/13-20> (the term “original total capitalized cost” means “the purchase price of the owner that first purchased the machinery and tools,” not the current taxpayer’s cost); VA. DEP’T OF TAXATION, PUB. DOC. 12-27 (Mar. 16, 2012), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/12-27> (proper tax base for assets purchased at a bankruptcy sale was the cost paid by the owner who first purchased the property, not the current taxpayer).

82. Op. to Hon. T. Scott Harris (June 26, 2014) (quoting *American Viscose Corp. v. Roanoke*, 205 Va. 192, 194, 135 S.E.2d 795, 797 (1964)).

83. Bd. of Supervisors of Fairfax Cty. v. *Telecomm. Indus.*, 246 Va. 472, 477–78, 436 S.E.2d 442, 445 (1993) (evidence of technological obsolescence supported taxpayer’s claim

B. *Business License Tax*

1. Significant Legislative Activity

Virginia Code section 58.1-3710 is amended by adding subsection B that allows a company that is no longer engaged in business but is still collecting and settling accounts on business previously done to pay its BPOL tax based on an estimate of the current year's receipts.⁸⁴ Under current law, a business that is subject to BPOL tax on its gross receipts generally calculates its tax liability for the license year using its prior year's gross receipts, unless the local ordinance provides for a different period for measuring the gross receipts of a business.⁸⁵

2. Significant Judicial Decision

Nielsen Co. (US), LLC v. Arlington County marks the end of a long-standing dispute between localities and taxpayers about how the statutory BPOL deduction for out-of-state receipts is applied when the taxpayer uses payroll apportionment to determine taxable receipts.⁸⁶ When it is "impractical or impossible" to use the usual rules of Virginia Code section 58.1-3703.1A(3)(a) to determine the local receipts of a business, the taxpayer can elect to use payroll apportionment.⁸⁷ From those "otherwise taxable receipts," Virginia Code section 58.1-3732(B)(2) then allows a deduction for "receipts attributable to business conducted in another state . . . in which the taxpayer . . . is liable for an income [tax]" (the "interstate deduction").⁸⁸

Since 1996 and the enactment of BPOL tax reform, local government has viewed the interstate deduction as a taxpayer-favored "double dip," authorizing a reduction of the tax base both when apportionment is used to determine receipts and when

that property's tax basis exceeded fair market value).

84. Act of Mar. 17, 2015, ch. 250, 2015 Va. Acts ___, __ (codified as amended at VA. CODE ANN. § 58.1-3710(B) (Cum. Supp. 2015)).

85. VA. CODE ANN. § 58.1-3710 (Repl. Vol. 2013) (prior to amendment).

86. *Nielsen Co. (US), LLC v. Cty. Bd. of Arlington*, 289 Va. 79, 85, 767 S.E.2d 1, 3 (2015).

87. *Id.* at 97, 767 S.E.2d at 9; *See* VA. CODE ANN. § 58.1-3703.1(A)(3)(b) (Repl. Vol. 2014).

88. VA. CODE ANN. § 58.1-3732(B)(2) (Repl. Vol. 2013 & Cum. Supp. 2015).

those receipts are reduced to reflect interstate business.⁸⁹ The business community's view was that the deduction was enacted to prevent the abuses under prior law when localities claimed to tax virtually all of a taxpayer's revenues if it had even one small, local office.⁹⁰

When the issues were brought before the Department, local assessing officers asserted that a taxpayer had the burden to prove exactly which of the receipts earned by a business' local office were attributable to activities conducted in another state and therefore eligible for the interstate deduction.⁹¹ The Department initially agreed with the localities.⁹² On rehearing, however, the Department recognized that this was essentially a "Catch 22" argument—if the taxpayer had to use payroll apportionment because it was impossible to trace its revenues by state and office, it would be impossible to trace the deductions as well.⁹³ Reversing its previous ruling, the Department held that the taxpayer could use payroll apportionment to determine its interstate deduction as long as it could prove that its local office had some role in generating the out-of-state receipts.⁹⁴ As localities resisted the Department's instructions, those instructions became more specific.⁹⁵

89. See Brief for Local Government Attorneys of Virginia et al. as Amici Curiae Supporting Appellees at 8, *Nielsen Co. (US), LLC v. Cty. Bd. of Arlington*, 2014 Va. S. Ct. Briefs LEXIS 301 [hereinafter *Local Government Amicus Brief*]. Contrary to the taxpayer's interpretation, "the plain language [of the interstate deduction] contemplates that the taxpayer can only deduct receipts that were situated to the definite place of business in Virginia via the first apportionment state, hence the phrase 'otherwise taxable.'" *Id.*

90. *City of Winchester v. Am. Woodmark Corp.*, 252 Va. 98, 103, 471 S.E.2d 495, 498 (1996) (holding that assessment based on company's total revenues was unconstitutional because not fairly apportioned); Reply Brief for the Virginia Chamber of Commerce as Amicus Curiae Supporting Appellant at 1, *Nielsen Co. (US), LLC v. Cty. Bd. of Arlington*, 2014 Va. S. Ct. Briefs LEXIS 300 [hereinafter *Chamber of Commerce Amicus Brief*] ("The legislature determined that state-wide uniformity and consistency could be achieved only by placing the administration and interpretation function squarely in the hands of the Virginia Department of Taxation").

91. VA. DEPT OF TAXATION, PUB. DOC. 09-146 (Oct. 8, 2009), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/09-146>.

92. *Id.*

93. VA. DEPT OF TAXATION, PUB. DOC. 10-229 (Sept. 29, 2010), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/10-229>; VA. DEPT OF TAXATION, PUB. DOC. 10-228 (Sept. 29, 2010), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/10-228>.

94. VA. DEPT OF TAXATION, PUB. DOC. 10-228 (Sept. 29, 2010), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/10-228>.

95. VA. DEPT OF TAXATION, PUB. DOC. 12-146 (Aug. 31, 2012), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/12-146>.

In PD 12-146 (August 31, 2012), the Nielsen Company (US) LLC (“Nielsen”) appealed the Arlington County Commissioner of Revenue’s determination that Nielsen had not carried its burden of proving where its interstate deduction was earned.⁹⁶ Nielsen calculated its interstate deduction using the same payroll factor used to determine the situs of its gross receipts.⁹⁷ Arlington County rejected this approach, claiming that the interstate deduction could be calculated only by direct tracing of receipts to out-of-state jurisdictions.⁹⁸ The Department upheld Nielsen’s use of payroll apportionment and set forth a three-step analysis for determining the receipts that can be deducted pursuant to Virginia Code section 58.1-3732(B)(2).⁹⁹ If a business had receipts “attributable to business conducted in another state . . . in which the taxpayer . . . is liable for an [income tax],” then the taxpayer must:

1. Ascertain whether any employees at the Virginia definite place of business participated in interstate transactions by, for example, shipping goods to customers in other states, participating with employees in other offices in transactions, etc. If there has been no participation in interstate transactions, then there is no deduction. If there has been participation, then;

2. Ascertain whether any of this interstate participation can be tied to specific receipts. If so, then those receipts are deducted; however, if payroll apportionment had to be used to assign receipts to the definite place of business, then it is very unlikely that any of those apportioned receipts can be specifically linked to interstate transactions. If not, or if only some of the participation can be tied to specific receipts, then;

3. The payroll factor used for the Virginia definite place of business would be applied to the gross receipts assigned to definite places of business in states in which the taxpayer filed an income tax return. Note that payroll apportionment would probably be needed to assign receipts to definite places of business in other states.¹⁰⁰

The Department recognized that this method is not tailored perfectly to every taxpayer’s situation, but it nonetheless “(1) re-

96. *Id.* Nielsen’s name was redacted from Pub. Doc. 12-146. Nielsen Co. (US), LLC v. Cty. Bd. of Arlington Cty., No. 140422, 2015 Va. Cir. LEXIS 6, 3 (Cir. Ct. Jan. 8, 2008) (Arlington County).

97. VA. DEPT OF TAXATION, PUB. DOC. 12-146 (Aug. 31, 2012), <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/12-146>.

98. *Id.*

99. *Id.*

100. *Id.*

sults in a reasonable approximation of the deduction, (2) is straightforward to administer, and (3) can be applied uniformly.”¹⁰¹

Arlington County appealed the Department’s ruling.¹⁰² The Circuit Court of Arlington County agreed with its Commissioner of Revenue and ruled against Nielsen.¹⁰³ Nielsen then appealed the case to the Supreme Court of Virginia.¹⁰⁴ A great deal of the supreme court’s opinion is dedicated to the amount of influence the Department’s decision in PD 12-146 should have on its opinion. Recognizing that a court should accord no *deference* to an administrative interpretation of a statute, because statutory interpretation is the province of the courts, it also held that no *weight* should be given to the administrator’s interpretation when the statute is unambiguous.¹⁰⁵ The supreme court determined that no weight should be given to the Department’s analysis in PD 12-146 because the interstate deduction statute, Virginia Code section 58.1-3732(B)(2), was not ambiguous.¹⁰⁶ Similarly, even if the Department’s interpretations have been inconsistent in the past, that is irrelevant because none of them are entitled to be accorded any weight.¹⁰⁷ Only if the rulings or policies are expressed in regulations may a court give them any weight.¹⁰⁸

On the merits of the case, Nielsen made a simple statutory argument. Virginia Code section 58.1-3732(B)(2) requires the deduction of the receipts that have otherwise been included in taxable receipts.¹⁰⁹ If payroll apportionment is used to include, it must by instruction of the statute be used to exclude the identical receipts.¹¹⁰ The supreme court disagreed.¹¹¹ It also rejected Arling-

101. *Id.*

102. Final Order at 1, No. CL12-2872 (Va. Cir. Ct. Dec. 19, 2013) (Arlington County).

103. *Id.*

104. Nielsen Co. (US), LLC v. Cty. Bd. of Arlington 289 Va. 79, 85–86, 767 S.E.2d 1, 3 (2015).

105. *Id.* at 87–89, 767 S.E.2d at 4–5 (2015) (stating “[d]eference’ refers to a court’s acquiescence of an agency’s position without stringent, independent evaluation of the issue. ‘Weight’ refers to the degree of consideration a court will give an agency’s position in the course of the court’s wholly independent assessment of an issue.”) (internal citations omitted).

106. *Id.* at 89, 767 S.E.2d at 5.

107. *Id.* For inconsistent interpretations see *supra* notes 81–82, 84.

108. Nielsen Co. (US), LLC, 289 Va. 79, 90, 767 S.E.2d 1, 5 (2015).

109. *Id.* at 93–94, 767 S.E.2d at 7.

110. *Id.*

ton's insistence that "manual accounting" be used to trace exactly which receipts of Nielsen's Arlington office were attributable to business conducted in other states.¹¹² The supreme court ruled that the statute did not "mandate or prohibit any particular methodology to determine which receipts captured in the pool of taxable gross receipts are subject to deduction."¹¹³

Turning to the Department's three-step analysis in PD 12-146, which is accorded only "judicial notice," the supreme court held that it "falls within the scope of accounting methodologies permitted by Code § 58.1-3732(B)(2)."¹¹⁴ Furthermore, and to some extent agreeing with Nielsen's argument, the supreme court noted that the "binary scheme" of requiring manual accounting or payroll apportionment in the event that manual accounting is impractical or impossible "follows the structure of the scheme expressly set forth by the General Assembly when creating the pool of taxable gross receipts."¹¹⁵

The supreme court therefore reversed the trial court's holding that the Department's determination in PD 12-146 was arbitrary and capricious.¹¹⁶ The supreme court remanded the case to the circuit court to calculate the amount of interstate deduction to which Nielsen was entitled.¹¹⁷ On remand, Nielsen would bear the burden of showing that it "can satisfy each step of the Tax Commissioner's analysis in order to take and correctly calculate the [interstate] deduction."¹¹⁸ The supreme court further noted that the determination of this case was solely in the hands of the trial court because the statutory procedure did not allow the matter to be further referred to the Commissioner of Revenue.¹¹⁹

There was no hearing on remand because Arlington County agreed in settlement to the refund calculated by Nielsen using

111. *Id.*

112. *Id.*

113. *Id.* at 94, 767 S.E.2d at 8.

114. *Id.* at 95-96, 767 S.E.2d at 8-9.

115. *Id.* at 97, 767 S.E.2d at 9.

116. *Id.*

117. *Id.*

118. *Id.* at 99, 767 S.E.2d at 10.

119. *Id.* at 97, 767 S.E.2d at 9.

payroll apportionment to determine both its taxable receipts in Arlington and its interstate deduction.¹²⁰

Although the supreme court's opinion should bring an end to this local tax saga, there are indications that the localities will pursue their complaints in the legislature. Amicus curiae briefs were filed by Fairfax County and by the Local Government Attorneys of Virginia, the Virginia Association of Counties, and Virginia Municipal League, all predicting the filing of large refund claims and financial disaster if Nielsen prevailed.¹²¹ The Virginia Chamber of Commerce, as amicus for Nielsen, responded that the financial exposure the localities faced resulted not from Nielsen's victory, but from not following the Department's instructions in administering this tax.¹²² In any event, the larger amounts involved indicate the possibility that local governments and the business community will find themselves back to their same positions as in 1996, arguing to the General Assembly whether the interstate deduction should be allowed.

C. *Miscellaneous Local Taxes*

1. Significant Legislative Activity

Virginia Code section 58.1-3110 is amended to permit a commissioner of revenue to require taxpayers to produce documents related to an audit, to administer oaths when questioning taxpayers, and to serve their summons, either in person or by the sheriff.¹²³ A Commissioner of Revenue is still prohibited from issuing a summons to a taxpayer with respect to tax liability that is the subject of litigation.¹²⁴

120. Agreed Final Order at 1, *Cty. Bd. of Arlington v. Nielsen Co. (US), LLC*, No. CL 12-2872 (Va. Cir. Ct. Mar. 23, 2015).

121. Brief for County of Fairfax, Virginia, and the Board of Supervisors of Fairfax County as Amicus Curiae Supporting Appellee at 1, *Nielsen Co. (US), LLC v. Cty. Bd. of Arlington*, 2014 Va. S. Ct. Briefs LEXIS 304; Local Government Amicus Brief, *supra* note 89, at 25 ("For example, the Arlington Commissioner of Revenue advises that the Tax Commissioner's formula could produce a one-time loss of up to \$15,144,347 in refunds and a reduction of about \$3.2 million in ongoing BPOL collections.").

122. Chamber of Commerce Amicus Brief, *supra* note 90, 13-5.

123. Act of Mar. 19, 2015, ch. 378, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3110 (Cum. Supp. 2015)).

124. VA. CODE ANN. § 58.1-3110 (Cum. Supp. 2015).

CONCLUSION

The 2015 session of the Virginia General Assembly, while busy, produced relatively targeted changes in the tax laws. State law makers appeared interested in attracting certain kinds of business into the Commonwealth, and so data centers, small technology firms, and renewable energy businesses are most likely to benefit from the new laws. Land preservation tax credits continue to get squeezed, both from a legislative decrease in the amount of available credits and a stronger administrative review of taxpayers' appraisals. The resolution in *Nielsen* of the decades-old dispute between localities and the business community regarding the BPOL interstate deduction might be revisited in the 2016 legislative session. In the interim, local tax administrators now have definitive guidance on a proper accounting methodology to calculate the BPOL interstate deduction.
