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## Taxation

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## TAXATION

*Craig D. Bell* \*

### I. INTRODUCTION

This article reviews significant developments in the law affecting Virginia taxation. Each section covers recent legislative changes, judicial decisions, and selected opinions or pronouncements from the Virginia Department of Taxation and the Attorney General of Virginia over the past year. The overall purpose of this article is to provide Virginia tax and general practitioners with a concise overview of the recent developments in Virginia taxation most likely to have an impact on their practices. This article will not, however, discuss many of the numerous technical legislative changes to the State Taxation Code of Title 58.1.

### PART ONE: TAXES ADMINISTERED BY THE VIRGINIA DEPARTMENT OF TAXATION

#### II. INCOME TAX

##### *A. Recent Significant Legislative Activity*

##### 1. Fixed Date Conformity

The conformity of terms to the Internal Revenue Code, mandated by Virginia Code section 58.1-301, was amended by the

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2007 General Assembly to advance Virginia's fixed date conformity to the Internal Revenue Code from December 31, 2005 to December 31, 2006.<sup>1</sup> Virginia continues, however, to disallow the federal bonus depreciation deduction and the five-year net operating loss carry-back period for state income tax purposes.<sup>2</sup> The new conforming date enables the state to adopt the federal amendments made by the Tax Increase Prevention and Reconciliation Act of 2005,<sup>3</sup> the Pension Protection Act of 2006,<sup>4</sup> and the Tax Relief and Health Care Act of 2006<sup>5</sup> to the Internal Revenue Code.

## 2. Bank Franchise Tax and S Corporations

The 2007 General Assembly amended Virginia Code section 58.1-322 to allow a shareholder of an S corporation that was subject to the bank franchise tax to subtract the shareholder's allocable share of income or gain of the S corporation, to the extent that it was included in his federal adjusted income.<sup>6</sup> The legislation also provides that the shareholder's allocable share of the losses or deductions of such S corporation is to be added back.<sup>7</sup> These taxpayers would also be required to add back any distribution paid or distributed to the shareholders of an S corporation to the extent that such distributions are excluded from federal adjusted gross income.<sup>8</sup> This legislation is designed to allow shareholders of banks organized as S corporations to avoid being taxed at both the entity and individual level.

The Virginia bank franchise tax is imposed at a rate of one percent of the net capital of banks and trust companies.<sup>9</sup> Localities are permitted to impose a local bank franchise tax not to exceed

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1. Act of Mar. 23, 2007, ch. 782, 2007 Va. Acts 1195 (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2007)). For additional guidance, see VIRGINIA DEP'T OF TAXATION, TAX BULLETIN 07-1 (Feb. 23, 2007), available at <http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf> (follow "Tax Bulletins" hyperlink; then follow "2007" hyperlink; then follow "VTB 07\_1 (PD 07-7)" hyperlink) (last visited Sept. 26, 2007).

2. See VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2007).

3. Pub. L. No. 109-222, 120 Stat. 345 (2006).

4. Pub. L. No. 109-280, 120 Stat. 780 (2006).

5. Pub. L. No. 109-432, 120 Stat. 2922 (2006).

6. Act of Mar. 13, 2007, ch. 359, 2007 Va. Acts 491 (codified as amended at VA. CODE ANN. § 58.1-322(G) (Cum. Supp. 2007)).

7. VA. CODE ANN. § 58.1-322(G) (Cum. Supp. 2007).

8. *Id.*

9. See *id.* § 58.1-1202, -1204 (Repl. Vol. 2004).

eighty percent of the state rate.<sup>10</sup> Banks and trust companies are granted a credit against the state bank franchise tax equal to the local tax imposed.<sup>11</sup> Banks and trust companies pay the bank franchise tax in lieu of the Virginia corporate income tax, the local business, professional, and occupational license (“BPOL”) tax, and the merchants’ capital tax.<sup>12</sup> Additionally, banks and trust companies can exclude certain personal property from tangible personal property taxation.<sup>13</sup>

Banks are subject to the bank franchise tax no matter how they are organized.<sup>14</sup> The result is that if a bank organizes as an *S* corporation, a pass-through entity, it will be taxed at the entity level. Because of this entity-level tax, shareholders in *S* corporation banks must first pay the entity-level bank franchise tax and then pay individual income tax on the income or gain that has been passed through to the taxpayer.<sup>15</sup> This legislation removes the impact of the second tax and is viewed as a matter of tax fairness.

### 3. Withholding Requirements Enacted for Pass-Through Entities

The 2007 General Assembly enacted two new sections of the State Taxation Code to impose a withholding tax on pass-through entities that have income derived from Virginia sources and allocates income to a non-resident owner.<sup>16</sup> The amount of withholding tax payable by the pass-through entity shall be at five percent of the non-resident’s share of income from Virginia sources of all non-resident owners.<sup>17</sup> When determining the amount of withholding due, the pass-through entity is allowed to apply any tax credits allowable under the Virginia Code to the pass-through entity that pass through to the non-resident owners; however, the

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10. *Id.* §§ 58.1-1208 to -1210 (Repl. Vol. 2004).

11. *Id.* § 58-1-1213 (Repl. Vol. 2004).

12. *Id.* § 58-1-1202 (Repl. Vol. 2004).

13. *Id.*

14. *See id.*

15. *See* 26 U.S.C. § 1366 (2000).

16. Act of Mar. 23, 2007, ch. 796, 2007 Va. Acts 1216 (codified as amended at VA. CODE ANN. §§ 58.1-486.1, -486.2 Cum Supp. 2007)).

17. VA. CODE ANN. § 58.1-486.2(B)(1) (Cum. Supp. 2007).

application of any credit or credits cannot reduce the non-resident owner's tax liability to less than zero.<sup>18</sup>

No withholding would be required for any non-resident corporation that is exempt from the Virginia income tax.<sup>19</sup> The pass-through entity would be allowed to rely on a written statement from the non-resident owner claiming to be exempt from the tax if the pass-through entity disclosed the name and federal identification number for all such owners on its return for the taxable year.<sup>20</sup> In situations where the withholding would cause hardship to the pass-through entity, the Virginia Tax Commissioner is provided with discretion to exempt the pass-through entity from the withholding requirements.<sup>21</sup> The pass-through entity must file a written petition for exemption from the withholding requirement and set forth the reasons for the undue hardship.<sup>22</sup> The legislation does not provide a list of hardship factors that may be considered by the Tax Commissioner. The new statute does, however, provide that the Tax Commissioner shall take into account "the ability of a pass-through entity to comply at reasonable cost with the withholding requirements" and "the cost to the Commonwealth of collecting the tax directly from a nonresident owner who does not voluntarily file a return and pay the amount of tax due" with respect to his allocable share of Virginia taxable income.<sup>23</sup>

The pass-through entity is required to pay the withholding tax at the time it is required to file its pass-through entity tax return.<sup>24</sup> This new withholding tax is applicable for taxable years beginning on or after January 1, 2008.<sup>25</sup> Each non-resident owner will be allowed a credit against the owner's Virginia income tax liability for that owner's share of the tax withheld and paid by the pass-through entity.<sup>26</sup>

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18. *Id.* § 58.1-486.2(B)(2) (Cum. Supp. 2007).

19. *Id.* § 58.1-486.2(C)(2) (Cum. Supp. 2007).

20. *Id.* § 58.1-486.2(C)(1)-(C)(2) (Cum. Supp. 2007).

21. *Id.* § 58.1-486.2(C)(3) (Cum. Supp. 2007).

22. *Id.*

23. *Id.*

24. *Id.* § 58.1-486.2(D)(1) (Cum. Supp. 2007).

25. *Id.* § 58.1-486.2(G) (Cum. Supp. 2007).

26. *Id.* § 58.1-486.2(E)(1) (Cum. Supp. 2007).

#### 4. Abusive Tax Transactions Statue of Limitations Enacted

The 2007 General Assembly amended Virginia Code section 58.1-312 to provide for a six-year limitations period to assess taxes on a return where a taxpayer knowingly fails to disclose an abusive tax avoidance transaction.<sup>27</sup> The legislation requires the Virginia Tax Commissioner to publish a list of abusive tax avoidance transactions as provided in section 58.1-204.<sup>28</sup> The new statutory provision also provides that a false or fraudulent return may be subject to an assessment at any time, regardless of whether or not the falsity or fraud is related to the abusive tax avoidance transaction.<sup>29</sup>

#### 5. Tax Credit for Machinery and Equipment to Process Recyclable Materials Expanded and Extended

The 2007 General Assembly extended the sunset date of the tax credit applicable for purchases of recycling machinery and equipment against corporate and personal income taxes from January 1, 2007 to January 1, 2015.<sup>30</sup> The legislature also expanded the tax credit to allow taxpayers to claim the credit against the personal income tax.<sup>31</sup> Prior to this change, the credit was only available against corporate income tax.<sup>32</sup>

The credit amount attributable to a pass-through entity (i.e., partnership, S corporation, or limited liability company) must be allocated to the individual partners, shareholders, or members in proportion to their ownership interests.<sup>33</sup> In the event a corporation converts to a pass-through entity, the pass-through entity may claim any unused credits that the corporation earned.<sup>34</sup>

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27. Act of Mar. 19, 2007, ch. 524, 2007 Va. Acts 713 (codified as amended at VA. CODE ANN. § 58.1-312(B) (Cum. Supp. 2007)).

28. See VA. CODE ANN. § 58.1-312(B) (Cum. Supp. 2007).

29. *Id.*

30. Act of Mar. 20, 2007, ch. 593, 2007 Va. Acts 807 (codified as amended at VA. CODE ANN. § 58.1-439.7(A) (Cum. Supp. 2007)); Act of Mar. 19, 2007, ch. 529, 2007 Va. Acts 725 (codified as amended at VA. CODE ANN. § 58.1-439.7(A) (Cum. Supp. 2007)).

31. Act of Mar. 20, 2007, ch. 593, 2007 Va. Acts 807 (codified as amended at VA. CODE ANN. § 58.1-439.7(A) (Cum. Supp. 2007)); Act of Mar. 19, 2007, ch. 529, 2007 Va. Acts 725 (codified as amended at VA. CODE ANN. § 58.1-439.7(A) (Cum. Supp. 2007)).

32. VA. CODE ANN. § 58.1-439.7 (Cum. Supp. 2007).

33. *Id.* § 58.1-439.7(E) (Cum. Supp. 2007).

34. *Id.*

The credit for recyclable materials processing equipment is an income tax credit that is claimed for purchases made during the taxable year for machinery and equipment used exclusively at the premises of manufacturing facilities or plants that manufacture, process, compact, or produce items of tangible personal property from recyclable materials within Virginia for sale.<sup>35</sup> The credit is ten percent of the qualifying expenditures and cannot exceed forty percent of the Virginia income tax liability for the year.<sup>36</sup> The Virginia Department of Environmental Quality must certify that the equipment is integral to the recycling process before the taxpayer is entitled to claim the credit.<sup>37</sup> Unused credits may be carried over for the next ten succeeding taxable years from the date that the credit was first allocable until the credit is used.<sup>38</sup>

#### 6. Deduction Increased for Contributions to Virginia College Savings Plans

Virginia Code section 58.1-322 provides a deduction from Virginia adjusted gross income to the purchaser or contributor for the amount paid or contributed during the year for a prepaid tuition contract or savings trust account with the Virginia College Savings Plan.<sup>39</sup> The amount of the deduction is currently limited to \$2,000 on any individual income tax return.<sup>40</sup> The 2007 General Assembly increased the deduction limit for tax years beginning on or after January 1, 2009 to \$4,000.<sup>41</sup>

#### 7. Livable Home Tax Credit Expanded

The Virginia legislature adopted several pieces of legislation designed to lessen the economic burden of home improvements that facilitate access to a residence for disabled persons. The 2007 General Assembly amended Virginia Code section 58.1-339.7 to expand the livable home credit against Virginia's personal income tax for new homes, as well as existing homes that improved ac-

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35. *Id.* § 58.1-439.7(A) (Cum. Supp. 2007).

36. *Id.* § 58.1-439.7(A)-(B) (Cum. Supp. 2007).

37. *Id.* § 58.1-439.7(A) (Cum. Supp. 2007).

38. *Id.* § 58.1-439.7(C) (Cum. Supp. 2007).

39. *Id.* § 58.1-322(D)(7)(a) (Cum. Supp. 2007).

40. *Id.*

41. Act of Apr. 10, 2007, ch. 942, 2007 Va. Acts 2647 (codified as amended at VA. CODE ANN. § 58.1-322(D)(7)(a) (Cum Supp. 2007)).

cessibility.<sup>42</sup> For taxable years beginning on or after January 1, 2008, the livable home credit is \$500 for a new residence that satisfies the criteria promulgated by the Virginia Department of Housing and Community Development.<sup>43</sup> For existing residences, the credit is equal to the lesser of \$500 or twenty-five percent of the amount spent on retrofitting the existing home.<sup>44</sup>

## 8. Organ Donor Deduction Enacted

The 2007 General Assembly enacted Virginia Code section 58.1-322(D)(13) to create a deduction from Virginia adjusted gross income for individual taxpayers for the lesser of \$5000 or the amount paid for unreimbursed expenses related to an organ or living tissue donation.<sup>45</sup> The expense must be directly related to the donation and arise within twelve months of such donation.<sup>46</sup> This new deduction is not available if the taxpayer took a medical expense deduction under Internal Revenue Code section 213.<sup>47</sup> The deduction may be taken either in the taxable year when the donation is made or the taxable year when the twelve-month period expires.<sup>48</sup>

## 9. Tax Return Filing Threshold and Personal Exemption Amount Increased

The 2007 General Assembly amended Virginia Code sections 58.1-321 and 58.1-322 to increase the personal income tax filing threshold and personal exemption amount.<sup>49</sup> The personal exemption was increased from \$900 to \$930 for taxable years beginning on or after January 1, 2008.<sup>50</sup> The filing threshold

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42. Act of Mar. 13, 2007, ch. 68, 2007 Va. Acts 64; Act of Mar. 23, 2007, ch. 765, 2007 Va. Acts 1172 (codified as amended at VA. CODE ANN. § 58.1-339.7 (Cum. Supp. 2007)).

43. See VA. CODE ANN. § 58.1-339.7 (Cum. Supp. 2007).

44. *Id.*

45. Act of Mar. 20, 2007, ch. 636, 2007 Va. Acts 963 (codified as amended at VA. CODE ANN. § 58.1-322(D)(13) (Cum. Supp. 2007)).

46. VA. CODE ANN. § 58.1-322(D)(13) (Cum. Supp. 2007).

47. *Id.*

48. *Id.*

49. Act of Mar. 19, 2007, ch. 527, 2007 Va. Acts 716 (codified as amended at VA. CODE ANN. §§ 58.1-321, -322(D)(2)(a) (Cum. Supp. 2007)); Act of Mar. 19, 2007, ch. 543, 2007 Va. Acts 741 (codified as amended at VA. CODE ANN. §§ 58.1-321, -322(D)(2)(a) (Cum. Supp. 2007)).

50. VA. CODE ANN. § 58.1-322(D)(2)(a) (Cum Supp. 2007).



amounts for single filers and married filers are set out in the following table:

Single Filers<sup>51</sup>

<u>Tax Year</u>	<u>Filing Threshold</u>
2007	\$7,000
2008	\$11,250
2009	\$11,250
2010	\$11,650
2011	\$11,650
2012 and beyond	\$11,950

Married Filers<sup>52</sup>

<u>Tax Year</u>	<u>Filing Threshold</u>
2007	\$14,000
2008	\$22,500
2009	\$22,500
2010	\$23,300
2011	\$23,300
2012 and beyond	\$23,900

### III. RETAIL SALES AND USE TAX

#### A. *Recent Significant Legislative Activity*

##### 1. Exemption for Multi-Fuel Heating Stoves

The 2007 General Assembly enacted Virginia Code section 58.1-609.10(18) to provide an exemption from Virginia sales and use tax for multi-fuel heating stoves purchased for use in heating an individual purchaser's residence.<sup>53</sup> Multi-fuel heating stoves are defined as "stoves that are capable of burning a wide variety

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51. *Id.* § 58.1-321(A)(1) (Cum. Supp. 2007).

52. *Id.* § 58.1-321(A)(2) (Cum. Supp. 2007).

53. Act of Feb. 21, 2007, ch. 84, 2007 Va. Acts 87 (codified as amended at VA. CODE ANN. § 58.1-609.10(18) (Cum. Supp. 2007)).

of alternative fuels, including, but not limited to, shelled corn, wood pellets, cherry pits, and olive pits.”<sup>54</sup> The exemption is effective for purchases made on or after July 1, 2007, and ending on July 1, 2012.<sup>55</sup>

## 2. Exemption for Railroad Rolling Stock by its Manufacturer

The 2007 General Assembly amended Virginia Code section 58.1-609.3(16) to provide an exemption from sales and use tax on the sale or lease of railroad rolling stock by the manufacturer of such rolling stock.<sup>56</sup> Railroad rolling stock is defined as: “locomotives, of whatever motive power, autocars, railroad cars of every kind and description, and all other equipment determined by the Tax Commissioner to constitute railroad rolling stock.”<sup>57</sup> This legislation provides an exemption for the sale and lease of railroad rolling stock to businesses that are not public service corporations engaged in such businesses as a common carrier of property or passengers by railways, for use or consumption by such common carrier directly in the rendition of its public service.<sup>58</sup> Such public service corporations already have an exemption applicable to their public service activities.<sup>59</sup> The new exemption applies to the sale or lease of such railroad rolling stock regardless of whether the purchaser is a public service corporation or not.<sup>60</sup>

### B. Recent Judicial Decisions

#### 1. Real Property Contractor Not Subject to Use Tax

The circuit court for the City of Richmond has held, as a matter of law, that real property contractors are not liable for use tax on tangible personal property transferred in connection with services

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54. VA. CODE ANN. § 58.1-609.10(18) (Cum. Supp. 2007).

55. *Id.*

56. Act of Mar. 23, 2007, ch. 751, 2007 Va. Acts 1139 (codified as amended at VA. CODE ANN. §§ 58.1-602, -609.3(16) (Cum. Supp. 2007)).

57. VA. CODE ANN. § 58.1-602 (Cum. Supp. 2007).

58. Compare VA. CODE ANN. § 58.1-609.3(3) (Cum. Supp. 2007), with VA. CODE ANN. § 58.1-609.3(16) (Cum. Supp. 2007) (interpreting subsection (16) to apply to all types of businesses because of the absence of specific mention to public service corporations as exists in subsection (3)).

59. VA. CODE ANN. § 58.1-603.3 (Cum. Supp. 2007).

60. See *id.* § 58.1-609.3(16) (Cum. Supp. 2007).

performed on real property in any and all contexts, and, in this particular case, the contractor at issue was not subject to use tax on calcium chloride applied to roadways.<sup>61</sup>

The taxpayer at issue, Calcium Chloride Sales, Inc. (“CCSI”), applied calcium chloride to the roadways with the use of one of its trucks.<sup>62</sup> In one scenario, CCSI sold calcium chloride to the Virginia Department of Transportation (“VDOT”) and applied it directly to roadways.<sup>63</sup> In the other scenario, an unrelated third-party had contracted with VDOT for the sale and application of calcium chloride. CCSI was retained by this third party as a subcontractor to simply apply the third-party’s calcium chloride to the roadways.<sup>64</sup>

The Virginia Department of Taxation (the “Department”) assessed CCSI with use tax on the value of the calcium chloride applied in both scenarios.<sup>65</sup>

### *Scenario #1*

In support of its assessment of use tax against CCSI when CCSI both sold the calcium chloride to VDOT and applied it to the roadways, the Department relied upon section 58.1-610(A) of the Virginia Code. Section 58.1-610(A) provides that:

Any person who contracts orally, in writing, or by purchase order to perform construction, reconstruction, installation, repair, or *any other service with respect to real estate* or fixtures thereon, and in connection therewith to furnish tangible personal property, shall be deemed to have purchased such tangible personal property for use or consumption.<sup>66</sup>

The Department asserted that applying calcium chloride to the roadways was “any other service with respect to real estate,” and, as a result, CCSI was deemed to be the taxable user of the calcium chloride under section 58.1-610(A).<sup>67</sup>

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61. Calcium Chloride Sales, Inc. v. Va. Dep’t of Taxation, 71 Va. Cir. 231, 234 (Cir. Ct. 2006) (Richmond City).

62. *Id.* at 231.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 232 (quoting VA. CODE ANN. § 58.1-610(A) (emphasis added by the court)).

67. *Id.* at 232–33.

The court rejected this statutory interpretation.<sup>68</sup> In finding that the phrase “any other service with respect to real estate,” did not include the application of calcium chloride to roadways, the court applied the doctrine of *ejusdem generis* in construing section 58.1-610(A).<sup>69</sup> That doctrine holds that when general words follow words of specific meaning, the general words are not given their broadest interpretation, but rather are construed to be in the same class as the specific words they follow.<sup>70</sup> Under this rule of construction, the court opined that the phrase “any other service with respect to real estate” is limited to other services that fall in the same class of services as construction, reconstruction, installation, and repair.<sup>71</sup>

Ultimately, the court determined that applying calcium chloride to Virginia roadways was mere delivery of that calcium chloride.<sup>72</sup> Mere delivery, according to the court, was not a service that fell within the enumerated and limiting classes of construction, reconstruction, installation, and repair of real estate under Virginia Code section 58.1-610(A).<sup>73</sup> As a result, that section did not enable CCSI to be the taxable user of the calcium chloride at issue.<sup>74</sup>

The court’s logical interpretation of the phrase “any other service with respect to real property” as being limited to services which fall within the same class of services as construction, reconstruction, installation and repair makes perfect sense as a matter of law. Based on CCSI’s apparent factual showing that the application of calcium chloride to the roadways was less expensive and time consuming than “delivery” of calcium chloride to a tank owned by VDOT and should be treated as nothing more than the mere delivery of calcium chloride, the court’s conclusion that mere delivery was not in the same class of services as construction, reconstruction, installation, and repair appears sound.

What is puzzling, however, is why the decision, the Department’s trial memorandum, and apparently the trial evidence

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68. *Id.* at 233.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 234.

73. *Id.* at 233.

74. *Id.*

failed to develop the reasons why VDOT wished to have calcium chloride applied to Virginia's roadways. This "missing" information would, it seems, have likely made the decision more difficult. While, of course, this is mere conjecture in the absence of a fully developed trial record, cursory research reveals that calcium chloride is applied to roadways in order to: (1) act as an accelerant for melting ice; and (2) help compact the surface of unpaved roadways, thereby preventing potholes and providing a smoother surface.

It would seem that applying calcium chloride to new paving or new unpaved roads ought to be characterized as a constituent element of a construction project, or, at the very least, a service of similar nature to construction. More interesting, perhaps, is the application of calcium chloride to already existing roadways—both paved and unpaved. If applying calcium chloride helped melt ice, maintain compaction, or prevent pot holes, it would seem that at a minimum it served a "maintenance" function. Preventive maintenance in an effort to avoid the necessity of repairs should be viewed as falling within the class of "other services" similar in nature to actual repairs themselves. *Black's Law Dictionary* defines "repair" as: "[t]o mend, remedy, restore, renovate."<sup>75</sup> If the calcium chloride was spread to melt ice on roadways, it arguably serves to restore that service to its pre-iced condition.

In any event, the entire line of discussion and reasoning did not appear to have been presented to the court for consideration. Unlike commentators, the court does not have the luxury of conjecture based on facts not developed at trial. Faced with a factual record that only equated the application of calcium chloride to mere delivery in a tank, the court necessarily was forced to conclude that mere delivery was not in the same class of services as those enumerated in Virginia Code section 58.1-610(A).<sup>76</sup>

### *Scenario #2*

In the second scenario (where CCSI applied calcium chloride sold by a third-party to VDOT under separate contract), the Department again relied on Virginia Code section 58.1-610, but this

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75. BLACK'S LAW DICTIONARY 1298 (6th ed. 1990) (emphasis added).

76. See *Calcium Chloride*, 71 Va. Cir. at 233.

time pointed to subsection (B) rather than subsection (A).<sup>77</sup> Subsection (B) of Virginia Code section 58.1-610 provides:

Any person who contracts to perform services in this Commonwealth and is furnished tangible personal property for use under the contract by the person, or his agent or representative, for whom the contract is performed, and a sales or use tax has not been paid to this Commonwealth by the person supplying the tangible personal property, shall be deemed to be the consumer of the tangible personal property so used, and shall pay a use tax based on the fair market value of the tangible personal property so used, irrespective of whether or not any right, title, or interest in the tangible personal property becomes vested in the contractor.<sup>78</sup>

In this transaction, CCSI was hired to spread calcium chloride provided by a third-party contractor.<sup>79</sup> Under Scenario 1, the court's fundamental holding is that CCSI was not performing a "service."<sup>80</sup> Instead, the court viewed CCSI as selling calcium chloride and merely effecting delivery by applying it to the roadways.<sup>81</sup> Given that, the court's conclusion that subsection (B) of Virginia Code section 58.1-610 did not apply to transactions whose true object was simply the sale and delivery of tangible personal property makes perfect sense.<sup>82</sup> Any other conclusion may well lead to absurd results. For example, treating CCSI as the user of chemicals simply because it delivered them could similarly require common carriers or other sub-contractors retained to deliver tangible personal property in more conventional situations to be treated as "users" of the goods they deliver. In holding that the "legislature did not intend for [Virginia] Code § 58.1-604 to apply to this type of transaction,"<sup>83</sup> the court avoids these sorts of potential arguments and appears to limit subsection (B) of Virginia Code section 58.1-610 to those situations where the true object of the contract at issue is a service to real property akin to construction, reconstruction, installation, repair or similar service.

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77. *Id.*

78. VA. CODE ANN. § 58.1-610(B) (Repl. Vol. 2004).

79. *Calcium Chloride*, 71 Va. Cir. at 231, 233.

80. *See id.* at 234.

81. *Id.*

82. *Id.*

83. *Calcium Chloride*, 71 Va. Cir. at 234.

## 2. Software Used to Access Data Base not Subject to Use Tax

Virginia's circuit court for Fairfax County has held that a corporation was not required to pay use tax on the purchase of software it used to access data needed to provide credit services to its subscribers.<sup>84</sup>

The taxpayer, Intersections, Inc. ("Intersections"), entered into an agreement with Digital Matrix Systems ("DMS") in 1999.<sup>85</sup> That agreement was captioned a "Software License Agreement," and provided for the delivery of two software packages to Intersections on disk.<sup>86</sup> Based on delivery by disk, the Department assessed Intersections with use tax on the purchase.<sup>87</sup>

Intersections acquired the software to perform credit-monitoring services that were previously out-sourced to DMS. In general, these services included accessing data from the credit bureaus through DMS's server, manipulating the data and converting it into several usable forms, and periodic updating and monitoring of the data.<sup>88</sup>

All of the services could be performed with the two software applications Intersections acquired from DMS. One of the applications enabled Intersections to connect to DMS's server to retrieve the necessary credit data.<sup>89</sup> The other application acquired from DMS was obsolete from the beginning of the agreement.<sup>90</sup>

Despite the obsolescence of one of the software applications, Intersections continued to pay the \$125,000 monthly license fee to DMS.<sup>91</sup> That payment for inoperable software helped persuade the court that access to DMS's computer and database, rather than the software itself, was Intersections' primary motivation for entering into the agreement.<sup>92</sup>

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84. See *Intersections, Inc. v. Va. Dep't of Taxation*, CL-2005-4731, 2006 Va. Cir. LEXIS 213, at \*1-2, \*9-10 (Cir. Ct. Nov. 8, 2006) (Fairfax County) (unpublished decision).

85. *Id.* at \*1.

86. *Id.* at \*1-3.

87. *Id.* at \*2-3.

88. *Id.* at \*1-2.

89. *Id.* at \*7-8.

90. *Id.*

91. *Id.* at \*8.

92. See *id.*

Finding that Intersections had purchased both access to electronic data and tangible software, the court turned to the true object of the transaction to determine whether Intersections had purchased a non-taxable service or taxable tangible personal property.<sup>93</sup> Applying the true object test, according to the court, required a determination of whether the “Agreement was for Intersections to merely possess the [ ] software . . . or whether Intersections licensed these software applications to access DMS’ services.”<sup>94</sup> The former was a taxable purchase of tangible personal property; the latter a purchase of exempt services.

Before concluding that Intersections’s motivation was access to DMS’s server rather than the software itself, the court first cited section 10-210-4040(D) of title 23 of the Virginia Administrative Code.<sup>95</sup> That regulation specifically addresses how the true object test should be applied when tangible personal property is transferred in connection with a service that provides access to electronic data:

The object of any transaction which includes the transmittal of information through electronic means (e.g., current stock market quotations via a terminal) is deemed to be a service since the object of the transaction is to obtain the service of electronic information transmittal and the tangible personal property included serves only as the medium for securing the service.<sup>96</sup>

The court’s conclusion is not surprising given the fact that the Department’s regulations appeared to be directly on point. It is even less surprising when various Department administrative rulings supporting taxpayers are added into the mix.

What is surprising about this case is that it went to trial, which presents an opportunity to learn a lesson. Care should always be taken when drafting agreements calling for the provision of electronic information and the transfer of tangible personal property. In this case, the overriding purpose of the software was to access the seller’s servers to obtain data. Despite that motivation, the agreement was captioned “Software License Agreement” leading one to believe that the software, rather than the electronic access,

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93. *See id.* at \*7.

94. *Id.*

95. *Id.* at \*4.

96. 23 VA. ADMIN. CODE § 10-210-4040(D) (1996).



is the primary motivation for the agreement.<sup>97</sup> When acquiring software that enables the purchaser to access data, it is important that the agreement state this purpose explicitly to prevent any confusion as to the true object of the transaction.

## PART TWO: TAXES ADMINISTERED BY LOCALITIES

### IV. REAL PROPERTY TAX

#### A. *Recent Significant Legislative Activity*

##### 1. Tax Deferral for Elderly and Disabled Amended

The Virginia Taxation Code provides for an exemption or deferral of real property taxes of certain elderly and handicapped persons.<sup>98</sup> These exemption and deferral programs provide tax relief for persons sixty-five years of age or older and for those who are permanently and totally disabled.<sup>99</sup>

The governing body of any locality may elect to adopt an exemption program, a deferral program, a combination of both, or none of the above.<sup>100</sup> The law authorizes localities, by ordinance, to provide for the exemption from or deferral of that portion of the tax that represents the increase in tax liability from the year the taxpayer reached the age of sixty-five or became disabled, or the year the ordinances become effective, whichever is later.<sup>101</sup> Income and net financial worth restrictions are incorporated in the exemption and deferral programs to direct tax relief to those whose incomes and financial worth are sufficiently low to merit such relief.<sup>102</sup>

Prior to July 1, 2007, the real estate must have been owned by and occupied as the sole dwelling of an individual who is either sixty-five years of age or older or who is found to be permanently

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97. *See Intersections*, 2006 Va. Cir. LEXIS 213 at \*1.

98. VA. CODE ANN. §§ 58.1-3210 to -3219.1 (Repl. Vol. 2004 & Cum. Supp. 2007).

99. *Id.* § 58.1-3210(A) (Repl. Vol. 2004 & Cum. Supp. 2007).

100. *Id.* § 58.1-3210(A) (Cum. Supp. 2007).

101. *Id.*

102. *See id.* § 58.1-3211 (Cum. Supp. 2007).

and totally disabled.<sup>103</sup> While the law currently permits the real estate to be jointly owned by husband and wife, provided at least one spouse meets the age or disability requirement, in all other instances in which there is joint ownership, all owners must have met the age or disability requirements.<sup>104</sup> The 2007 General Assembly amended the statutes of this program to authorize local governing bodies, by ordinance, to extend the real estate tax relief for the elderly or disabled to dwellings that are jointly held by individuals, even when all owners do not meet the age or disability requirements.<sup>105</sup> In order to qualify for the exemption or deferral programs, the dwelling would have to be occupied as the sole dwelling of every joint owner.<sup>106</sup> Joint owners would only qualify for this exemption if their combined net financial worth does not exceed the following statutory limits:

- \$500,000 for joint owners living in Arlington County, Clarke County, Fairfax County, Fauquier County, Loudoun County, Prince William County, Stafford County, any incorporated town located in any such county, the City of Alexandria, the City of Fairfax, the City of Falls Church, the City of Manassas, or the City of Manassas Park.<sup>107</sup>
- \$324,075 for joint owners living in Chesterfield County, Goochland County, Henrico County, the City of Charlottesville, the City of Chesapeake, the City of Norfolk, the City of Portsmouth, the City of Richmond, the City of Suffolk, or the City of Virginia Beach,<sup>108</sup> and
- \$185,200 for joint owners living in any other county or city of the Commonwealth.<sup>109</sup>

The income limitations otherwise applicable would apply using the income of all joint owners.<sup>110</sup> Provided the qualifications are met, the tax relief will be prorated by multiplying the amount of the exemption or deferral by a fraction with the numerator as the percentage of ownership interest in the dwelling held by all of the joint owners who meet the age or disability requirements, and the

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103. *Id.* § 58.1-3210(A) (Cum. Supp. 2007).

104. *See id.*

105. Act of Mar. 13, 2007, ch. 357, 2007 Va. Acts 488 (codified as amended at VA. CODE ANN. §§ 58.1-3210, -3211.1, -3213, -3215 (Cum. Supp. 2007)).

106. VA. CODE ANN. § 58.1-3211.1(A) (Cum. Supp. 2007).

107. *Id.* § 58.1-3211.1(A)(a) (Cum. Supp. 2007).

108. *Id.* § 58.1-3211.1(A)(b) (Cum. Supp. 2007).

109. *Id.* § 58.1-3211.1(A)(c) (Cum. Supp. 2007).

110. *Id.*

denominator as 100%.<sup>111</sup> In order to be eligible for the exemption or deferral program, the joint owners will be required to furnish sufficient evidence to the relevant local officer of each of their ownership interests in the dwelling.<sup>112</sup> The new legislation also permits the local governing body to annually increase, by election, the net combined financial worth limit by an amount equivalent to the Consumer Price Index percentage increase.<sup>113</sup>

## 2. Separate Classification Created for Energy-Efficient Buildings

The 2007 General Assembly enacted a new statute to create a separate classification for real property tax purposes for certain energy-efficient buildings.<sup>114</sup> Virginia Code section 58.1-3221.2 now authorizes localities to tax energy-efficient buildings at a lower tax rate than that imposed on the general class of real property.<sup>115</sup> An energy-efficient building is defined in the new statute as any building that “exceeds the energy efficiency standards prescribed in the Virginia Uniform Statewide Building Code” by thirty percent.<sup>116</sup> The land on which energy efficient buildings are located would not be part of this separate classification.<sup>117</sup>

Any qualified licensed engineer or contractor, not related to the taxpayer, is authorized to determine whether the building qualifies to be certified as an energy-efficient building.<sup>118</sup> The licensed engineer or contractor must also certify to the taxpayer that he or she has the qualifications to provide the certification.<sup>119</sup>

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111. *Id.*

112. *Id.*

113. *Id.* § 58.1-3211(B)(1) (Cum. Supp. 2007).

114. Act of Mar. 13, 2007, chs. 328, 354, 2007 Va. Acts 465, 487 (codified as amended at VA. CODE ANN. § 58.1-3221.2 (Cum. Supp. 2007)).

115. VA. CODE ANN. § 58.1-3221.2 (Cum. Supp. 2007).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

## B. *Recent Judicial Decisions*

### 1. The 2003 Amendment to the Virginia Constitution Did Not Repeal Property Tax Exemptions

The circuit court for Madison County held that the 2003 amendment to Article X, Section 6(a)(6) of the Virginia Constitution did not repeal the property tax exemptions set forth in Virginia Code section 58.1-3606.<sup>120</sup> The court addressed this issue as a result of a demurrer filed by Madison County challenging Rapidan Baptist Camp and Conference Center's claim of exemption from real property taxes pursuant to Virginia Code section 58.1-3606.<sup>121</sup> Madison County asserted in its demurrer that these property tax exemptions were repealed as a result of the 2003 amendments to Article X, Section 6(a)(6) of the Virginia Constitution.<sup>122</sup> The court disagreed and held the property tax exemptions were not repealed by the amendment to the Virginia Constitution.<sup>123</sup>

In reaching its decision the court noted that the amendment contained no provision that explicitly repealed any of the property tax exemptions which existed at the time of the amendment's passage.<sup>124</sup> The court also noted that the amendment contained no language that would even remotely suggest that any repeal of the property tax exemptions was intended.<sup>125</sup> In fact, the court stated that "in authorizing localities to grant exemptions, the amendment did not alter or modify the substantive law regarding what types of exemptions could be granted."<sup>126</sup> The ratified amendment left the power to exempt "by classification or designation property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes" intact.<sup>127</sup> The court continued its analysis by stating: "Only the method or procedure by which exemptions could be

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120. *Rapidan Baptist Camp & Conference Ctr. v. Madison County*, 70 Va. Cir. 309, 311 (Cir. Ct. 2006) (Madison County).

121. *Id.* at 309.

122. *Id.* at 309-10.

123. *Id.* at 311.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

granted was changed by the passage of the amendment. It shifted the power to exempt from one branch of the government [legislature] to another [executive].<sup>128</sup> The court concluded that the amendment did not alter the types of property eligible for exemption.<sup>129</sup> Rather, when the amendment became effective on January 1, 2003, "the local governing body then became vested with the power to grant exemptions subject to the limits set by the General Assembly" when it enacted Virginia Code section 58.1-3651(E).<sup>130</sup>

## 2. Assessor Must Consider All Valid Valuation Methodologies to Ascertain Property's Fair Market Value

The Virginia Supreme Court, reversing the circuit court of Albemarle County, held the taxpayer need only demonstrate an assessment is erroneous when the locality's assessor fails to consider the accepted methodologies to ascertain a property's fair market value.<sup>131</sup> In 2003, Albemarle County performed its biennial reassessment of real estate values for 2003 and 2004.<sup>132</sup> The county assessed the golf club facility owned by Keswick Club, L.P. at \$12,771,500 for 2003.<sup>133</sup> Keswick Club owned an eighteen-hole golf course, pro shop, and club house with a restaurant, spa, swimming pools, tennis courts, exercise room, and other amenities.<sup>134</sup> The facility is a private club that had a long string of years in which the facility continued to lose money.<sup>135</sup>

In 2002, Keswick Club was acquired by Orient Express Hotels, Inc. for \$3.7 million.<sup>136</sup> The price was established in 1999 in an option agreement executed between Orient Express and the former Keswick Club owner, Metropolaris, Inc.<sup>137</sup> Orient Express

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128. *Id.*

129. *Id.*

130. *Id.* at 311–12. For additional analysis on the impact of Virginia Code section 58.1-3651, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 39 U. RICH. L. REV. 413, 440–41 (2004).

131. *Keswick Club, L.P. v. County of Albemarle*, 273 Va. 128, 141, 639 S.E.2d 243, 250 (2007).

132. *Id.* at 132, 639 S.E.2d at 245.

133. *Id.*

134. *Id.*, 639 S.E.2d at 244–45.

135. *Id.* at 133, 639 S.E.2d at 246.

136. *Id.* at 133–34, 639 S.E.2d at 246.

137. *Id.* at 134, 639 S.E.2d at 246.

began taking steps to turn around the Keswick Club and make it in to a profitable facility.<sup>138</sup>

Upon receipt of the 2003 assessment from Albermarle County, Keswick Club engaged an independent appraiser to value its facilities.<sup>139</sup> The appraiser considered all three valuation methodologies; income approach, sales approach, and cost approach, but ruled out using the cost approach and relied on the income and sales approach to reach his valuation of \$2.9 million for the 2003 tax year.<sup>140</sup>

The county based its value solely upon the cost approach.<sup>141</sup> In fact, at trial, the county assessor admitted that he valued all of the golf course facilities located in the county using the cost approach.<sup>142</sup> The county assessor testified further that he did not request any financial data on Keswick Club's operations and also refused to look outside the geographical boundaries of Albermarle County for comparable sales.<sup>143</sup> Finding no such sales within the county, the assessor relied solely on the cost approach to reach his determination of value for the Keswick Club facilities.<sup>144</sup> Furthermore, the county's assessor refused to consider the 2002 sale of the very property in question stating the sales price was based on an agreed upon price established earlier in 1999.<sup>145</sup> In fact, the assessor made no attempt to obtain any facts or conduct an investigation to learn about the terms of the 2002 sale.<sup>146</sup>

The Supreme Court of Virginia noted that the county's failure to request income data from the Keswick Club, coupled with its categorical decision to value all golf club facilities in the county under the cost approach was erroneous.<sup>147</sup> The supreme court stated the county's failure to learn anything about the 2002 sale of the very club at issue in this case, coupled with the county's lack of effort to obtain any financial records of the operating history for Keswick Club resulted in the court's holding that the

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138. *Id.* at 133, 639 S.E.2d at 246.

139. *Id.* at 132, 639 S.E.2d at 245.

140. *Id.*

141. *Id.* at 133, 639 S.E.2d at 245.

142. *See id.* at 134, 639 S.E.2d at 246.

143. *Id.*

144. *Id.*

145. *Id.* at 134-35, 639 S.E.2d at 246.

146. *Id.*

147. *See id.* at 138-39, 639 S.E.2d at 248-49.

county failed to properly consider and reject the income and sales approaches before utilizing the cost approach alone in assessing the fair market value of the club.<sup>148</sup> The Supreme Court of Virginia concluded the assessments were not entitled to a presumption of validity and the proper standard of review was a less stringent one that requires the taxpayer only to prove the county's assessment was erroneous.<sup>149</sup> The taxpayer did not have to prove the assessor committed manifest error.<sup>150</sup> The court reversed the circuit court decision and remanded the case back to the trial court to apply the less stringent standard of review to the facts established at trial.<sup>151</sup>

### *C. Recent Significant Opinion of the Attorney General*

The Virginia Attorney General issued a formal opinion addressing the effect of a property's sale after the January 1 valuation date for purposes of an assessment of value.<sup>152</sup> In his opinion Attorney General Robert McDonnell concluded that the sale of real property after January 1 does not impact real property assessments for the current tax year.<sup>153</sup> The Attorney General did provide that the post-January 1 sale may be considered when determining the fair market value for the property during the annual assessment.<sup>154</sup>

## V. TANGIBLE PERSONAL PROPERTY TAX

### *A. Recent Significant Legislative Activity*

#### 1. Machinery and Tools Tax Changes

The 2007 General Assembly enacted several changes to Virginia Code section 58.1-3507 involving certain machinery and

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148. *Id.* at 139–40, 639 S.E.2d at 249–50.

149. *Id.* at 141, 639 S.E.2d at 250.

150. *Id.*

151. *Id.*

152. Op. to Hon. Kristen Amundson (Mar. 5, 2007), available at <http://www.vaag.com/OPINIONS/2007opns/06-095-Amundson.pdf>.

153. *Id.*

154. *Id.*

tools segregated for local taxation.<sup>155</sup> First, the legislation provides that when a locality values machinery and tools for purposes of the local machinery and tools property tax, it must, at the written request of the taxpayer, consider any bona fide, independent appraisal submitted by the taxpayer.<sup>156</sup> Second, the legislation codifies the long standing position of the Virginia Department of Taxation that idle machinery and tools are to be classified as intangible personal property not subject to local taxation.<sup>157</sup>

The third principle aspect of this legislation is the adoption of a statutory definition of idle machinery and tools.<sup>158</sup> The term "idle machinery and tools" refers to machinery and tools that "have been discontinued in use continuously for at least one year prior to any tax day."<sup>159</sup> The amendment also provides that machinery and tools qualify as "idle machinery and tools" if on and after January 1, 2007, the taxpayer specifically identifies, in writing, that the taxpayer intends to withdraw the machinery and tools from service not later than the next tax day and "are not in use on the tax day and no reasonable prospect exists" that they will be returned to use during the tax year.<sup>160</sup>

The legislation places an affirmative obligation on a taxpayer, who returns to service or uses machinery and tools that were previously treated as idle machinery and tools, to identify such machinery and tools to the locality in writing.<sup>161</sup> Lastly, the legislation requires the Virginia Department of Taxation to promulgate guidelines for local governments so they may apply these new rules, and authorizes the Virginia Tax Commissioner to issue advisory opinions relating to idle machinery and tools.<sup>162</sup> The new

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155. Act of Mar. 9, 2007, ch. 191, 2007 Va. Acts 269 (codified as amended at VA. CODE ANN. § 58.1-3507 (Cum. Supp. 2007)); Act of Mar. 9, 2007, ch. 159, 2007 Va. Acts 222 (codified as amended at VA. CODE ANN. § 58.1-3507 (Cum. Supp. 2007)).

156. VA. CODE ANN. § 58.1-3507(B) (Cum. Supp. 2007).

157. See *id.* § 58.1-3507(A) (Cum. Supp. 2007); see also *id.* §§ 58.1-1100 to -1118 (Cum. Supp. 2007). For additional information concerning the history of Virginia's unique classification of certain tangible personal property as intangible personal property, the latter of which is not currently taxed by the State or the localities, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 30 U. RICH. L. REV. 1543, 1582-95 (1996).

158. See VA. CODE ANN. § 58.1-3507(D) (Cum. Supp. 2007).

159. *Id.*

160. *Id.*

161. *Id.* § 58.1-3507(E) (Cum. Supp. 2007).

162. *Id.* § 58.1-3507(F)-(G) (Cum. Supp. 2007).



guidelines required by this legislation are to be issued on or before January 1, 2008.<sup>163</sup> The provisions of the Virginia Administrative Process Act<sup>164</sup> do not need to be followed for this undertaking.<sup>165</sup>

## 2. Separate Classification Created for Wireless Broadband

The 2007 General Assembly created a separate classification for personal property tax purposes for any tangible personal property owned and operated by a service provider who is not a CMRS (wireless telephone service) provider and who is not licensed by the Federal Communications Commission that is used to provide wireless broadband internet service.<sup>166</sup> Wireless broadband internet service is defined by the statute to mean a “service that enables customers to access, through a wireless connection at an upload or download bit rate of more than one megabyte per second, Internet service, . . . as part of a package of services sold to customers.”<sup>167</sup>

## VI. LOCAL TAXES

### A. *Recent Significant Legislative Activity*

#### 1. Application of Grantor’s Recordation Tax Rate Changed

The 2007 General Assembly amended the grantor’s recordation tax to impose the rate of the tax upon the greater of the consideration paid for an interest of real property or the value of the interest conveyed.<sup>168</sup> Prior to this change, the grantor tax was applied to the consideration paid for the real property interest, or

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163. *Id.* § 58.1-3507(F) (Cum. Supp. 2007).

164. *Id.* § 2.2-4000 to -4031 (Cum. Supp. 2007).

165. *Id.* § 58.1-3507(F) (Cum. Supp. 2007).

166. Act of Mar. 13, 2007, ch. 322, 2007 Va. Acts 455 (codified as amended at VA. CODE ANN. § 58.1-3506(A)(37) (Cum. Supp. 2007)).

167. *Id.*

168. Act of Mar. 23, 2007, ch. 748, 2007 Va. Acts 1138 (codified as amended at VA. CODE ANN. § 58.1-802(A) (Cum. Supp. 2007)); Act of Mar. 23, 2007, ch. 768, 2007 Va. Acts 1174 (codified as amended at VA. CODE ANN. § 58.1-802(A) (Cum. Supp. 2007)).

the actual value, with no concern for the greater of the two amounts.<sup>169</sup>

## 2. Local Coal and Gas Road Tax Sunset Extended

The 2007 General Assembly extended the sunset date for the local coal and gas road improvement severance tax from December 31, 2007 to December 31, 2012.<sup>170</sup> This tax is levied on businesses engaged in severing coal and gas from the earth at a rate not to exceed one percent of the gross receipts from the sale of such coal or gas.<sup>171</sup> The revenues from this tax are used to improve public roadways and other local infrastructure.<sup>172</sup>

## PART THREE: PRACTICE AND PROCEDURE

### VII. GUIDELINES ON ADMINISTRATIVE APPEALS OF STATE LEVEL TAXES

The Virginia Department of Taxation has issued guidelines for filing administrative appeals of assessments of state taxes administered by the Department.<sup>173</sup> These guidelines do not apply to assessments of local taxes that are currently appealable to the Virginia Tax Commissioner.<sup>174</sup> The Department intends to formally adopt these guidelines as regulations through the procedures established under the Virginia Administrative Process Act.<sup>175</sup>

With two exceptions, these guidelines do not make any substantive changes to the current administrative appeals process

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169. VA. CODE ANN. § 58.1-802(A) (Repl. Vol. 2004).

170. Act of Mar. 20, 2007, ch. 586, 2007 Va. Acts 796 (codified as amended at VA. CODE ANN. § 58.1-3713(C) (Cum. Supp. 2007)); Act of Feb. 19, 2007, ch. 57, 2007 Va. Acts 55 (codified as amended at VA. CODE ANN. § 58.1-3713(C) (Cum. Supp. 2007)).

171. VA. CODE ANN. § 58.1-3713(A) (Cum Supp. 2007).

172. *Id.*

173. VIRGINIA DEPT OF TAXATION, PUB. DOC. 06-140 (Nov. 29, 2006), available at <http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf> (follow "Rulings of the Tax Commissioner" hyperlink, then follow "2006" hyperlink, then follow "PD 06-140" hyperlink) (last visited Oct. 27, 2007).

174. *Cf. id.* § 1 (referring only to appeals for tax assessments issued by the Department of Taxation with no reference to appeals to the Tax Commissioner).

175. *Id.* § 1. While the guidelines are silent as to when they become effective, the author has been advised by the Tax Department that they are in effect now for all pending and future appeals.

that has evolved over the years. The two exceptions are (1) the guarantee of an informal appeals conference for most appeals of state taxes, and (2) the establishment of a procedure for reconsiderations of the Tax Commissioner's determinations.<sup>176</sup>

Under the new guidelines, prior to the issuance of a determination of an appeal of state taxes to the Virginia Tax Commissioner, any taxpayer assessed with a state tax may request and receive an informal conference with the Department.<sup>177</sup> Informal conferences are not, however, guaranteed to taxpayers if the appeal is deemed frivolous or if the purpose of the appeal is to delay payment of a proper assessment.<sup>178</sup>

The request for an informal conference may only be made after a complete appeal has been filed with the Department.<sup>179</sup> In general, a complete appeal must include all of the relevant facts concerning the assessment, the remedy sought in the appeal, the alleged error in the assessment, and the controlling legal authority.<sup>180</sup> The conference attendees will be the Tax Commissioner or her representative and the analyst assigned to the appeal.<sup>181</sup> The taxpayer and the taxpayer's representative may attend the conference, but the taxpayer's attendance is not required.<sup>182</sup> The conferences may be held in person or by telephone.<sup>183</sup>

The second major change concerns taxpayer requests for reconsiderations. As evidenced by a handful of the Tax Commissioner's rulings over the years, the Tax Commissioner will reconsider prior determinations based on issues such as an error in the prior determination or additional evidence that was not available at the time of the original appeal.<sup>184</sup> Until the issuance of these guidelines, the Department has never provided guidance on reconsiderations.

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176. *Id.* §§ 1, 5, 6.

177. *Id.* § 5.

178. *See id.*

179. *Id.*

180. *Id.* § 4.2(A).

181. *Id.* § 5(G).

182. *Id.* § 5(G)(2).

183. *Id.* § 5(F)(1).

184. *See id.* § 6(A).

Under the guidelines, a request for reconsideration of a prior appeal of an assessment of state taxes to the Tax Commissioner must be received within forty-five days after the final determination and must demonstrate that either (1) the facts were misstated or inaccurate, (2) the law upon which the original determination was made was changed effective for the tax periods at issue, (3) the law was misapplied in the original determination, or (4) additional evidence has been discovered that was not available at the time of the original appeal.<sup>185</sup> In addition to these requirements, the request for reconsideration must include the information required for a complete appeal as described above.<sup>186</sup> If the request for reconsideration meets all of the foregoing requirements, collection action will be suspended on the portion of the assessment related to the reconsideration.<sup>187</sup> Unlike original appeals, informal conferences on reconsiderations are granted solely at the discretion of the Department.<sup>188</sup>

Finally, these guidelines restate several important requirements in the current administrative appeals process. A taxpayer assessed with any tax administered by the Department who wishes to appeal the assessment must file the appeal within ninety days from the date of the assessment.<sup>189</sup> The guidelines provide more detail on the proper methods of delivery of the appeal as well as the application on the ninety-day window to file the appeal.<sup>190</sup> Further, upon receipt within the ninety days of either the complete appeal or a notice of intent to appeal an assessment, the Department will suspend collection activity.<sup>191</sup> Under current law, the Department is allowed to begin collection activity thirty days after the date of a notice of assessment.<sup>192</sup> If a notice of intent to appeal is filed but a complete appeal is not subsequently filed within ninety days of the assessment giving rise to the notice of intent to appeal, the Department will release the suspension of collection activity.<sup>193</sup>

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185. *Id.*

186. *See id.* §§ 6(A), 4.2(A).

187. *Id.* § 6(B).

188. *Id.* § 6(C).

189. *Id.* § 3.

190. *Id.*

191. *Id.* § 4.2(E)(1).

192. *See* VA. CODE ANN. § 58.1-1821 (Cum. Supp. 2007).

193. VIRGINIA DEP'T OF TAXATION, PUB. DOC. 06-140, § 4.2(E)(2) (Nov. 29, 2006).

The issuance of these guidelines provides a very helpful and useful tool for all tax practitioners. Until now, the Department's administrative appeal procedures for state taxes had not been represented in one clear and concise document. Additionally, formal procedures for reconsiderations did not exist. The addition of a guaranteed appeals conference should prove valuable to increase the faith that tax practitioners and taxpayers have in the current administrative appeals process.