University of Richmond Law Review

Volume 44
Issue 1 *In Memoriam: Robert E. Shepherd, Jr.*

Article 22

11-1-2009

Taxation

Craig D. Bell
McGuireWoods L.L.P.

TAXATION

Craig D. Bell *

I. INTRODUCTION

This article reviews significant recent developments in the law affecting Virginia taxation. Each section covers 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. Part One of this article discusses legal developments regarding taxes imposed and administered by the Commonwealth. Section II addresses changes made to Virginia corporate and individual tax law, Section III covers legal changes pertaining to retail sales and use taxes, and Section IV covers changes to state tax administration. Part Two of this article documents legal developments of local government taxes. Sections V and VI address changes to the law regarding Virginia real and personal property taxes, respectively. Section VII discuses a judicial decision regarding Virginia's business professional occupation license tax. The final section, Section VIII, addresses a variety of miscellaneous local taxes and tax administration applicable to local government taxing authorities.

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 that will most likely impact their practices. This article does not, however, discuss many of the numerous technical legislative changes to title 58.1 of the Virginia Code, which covers taxation.

---

* Partner, McGuireWoods LLP, Richmond, Virginia. LL.M. in Taxation, 1986, Marshall-Wythe School of Law, College of William & Mary; J.D., 1983, State University of New York at Buffalo; M.B.A., 1980, Syracuse University; B.S., 1979, Syracuse University. Mr. Bell practices primarily in the areas of state and local taxation, and civil and criminal tax litigation. He is a Fellow of the American College of Tax Counsel, a Barrister of the J. Edgar Murdock Inn of Court (U.S. Tax Court), an adjunct professor of tax law at the College of William & Mary School of Law, and a past chair of both the Tax and Military Law Sections of the Virginia State Bar and the Tax Section of the Virginia Bar Association.

PART ONE: TAXES ADMINISTERED BY THE VIRGINIA DEPARTMENT OF TAXATION

II. INCOME TAX

A. *Recent Significant Legislative Activity*

1. Fixed Date of Conformity

The 2009 General Assembly amended Virginia Code section 58.1-301, which mandates conformity of terms to the Internal Revenue Code, to advance Virginia's fixed date of conformity from December 31, 2007 to December 31, 2008.[1] Virginia continues, however, to disallow the federal bonus depreciation deductions except for any bonus depreciation allowed under Internal Revenue Code section 168(n), which is designed to benefit qualified disaster assistance property.[2] The new date of conformity enables the state to adopt provisions from five federal tax acts adopted by Congress since December 31, 2007. The first provision is from the Economic Stimulus Act of 2008, which increased Internal Revenue Code section 179 expensing levels.[3] The second set of provisions are from the Heartland, Habitat, Harvest, and Horticulture Act of 2008, which provided targeted tax relief to conservation and agricultural interests.[4] The third set of provisions is from the Heroes Earnings Assistance and Relief Tax Act of 2008, which provided tax benefits to those serving in the military and in the Peace Corps.[5] The fourth area of conformed provisions comes from the Housing Assistance Tax Act of 2008, which modified certain

---

1. Act of Feb. 11, 2009, ch. 2, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Repl. Vol. 2009)); Act of Feb. 11, 2009, ch. 3, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Repl. Vol. 2009)). For additional guidance, see VA. DEP'T OF TAXATION, PUB. DOC 09-24 (Feb. 12, 2009), *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Tax Bulletins" hyperlink; then follow "2009" hyperlink; then follow "VTB 09-1 (PD 09-24)" hyperlink).

2. *See* VA. CODE ANN. § 58.1-301(B) (Repl. Vol. 2009); *see generally* I.R.C. § 168(n) (West Supp. 2009).

3. Pub. L. No. 110-185, § 102, 122 Stat. 613, 618 (to be codified as amended at 26 U.S.C. § 179 & note).

4. Pub. L. No. 110-234, tit. XV, 122 Stat. 1484 (to be codified as amended in scattered sections of 19, 26, and 42 U.S.C.).

5. Pub. L. No. 110-245, 122 Stat. 1624 (to be codified as amended in scattered sections of 26 U.S.C.).

rules applicable to bonds and provides other forms of tax relief.[6] Finally, the new conforming date enables the state to extend the exclusion of discharges of principal residence indebtedness from gross income of individuals and provided a variety of other targeted tax benefits.[7] If the date of conformity had not been advanced to December 31, 2008, none of the provisions of these acts would have flowed through to Virginia taxable income.

2. Addback Created for Captive REITs

The Virginia legislature amended Virginia Code section 58.1-402 to require a Real Estate Investment Trust ("REIT") that is more than fifty percent owned by a corporation (a "captive REIT") to add back any federal deduction for dividends paid by the REIT to its shareholders.[8] This legislation was enacted to combat a state tax minimization strategy for businesses that own a substantial amount of real property assets (i.e., national retailers and financial institutions) who took steps to reduce their state income tax in separate return states where the businesses had business operations. The strategy called for the corporate taxpayer to transfer its real property assets to a subsidiary that was qualified as a REIT under the Internal Revenue Code. The captive REIT would then lease its real property assets back to its parent corporation, thereby creating rental expenses for the parent corporation and rental income for the captive REIT. State income tax liability on the captive REIT's rental income could be eliminated to the extent that the separate return states allowed the captive REIT to deduct the dividends that it paid to its parent corporation and the other shareholders while also allowing the parent corporation to claim the dividends received deduction for the dividends that it received from the captive REIT.[9] Virginia is

6. Pub. L. No. 110-289, div. C, 122 Stat. 2877 (to be codified as amended in scattered sections of 26 U.S.C.).

7. *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, div. A, tit. III, 122 Stat. 3765 (to be codified as amended in scattered sections of 26 U.S.C.).

8. Act of Mar. 27, 2009, ch. 426, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-402(B)(10)(a)(2) (Repl. Vol. 2009)); Act of Mar. 27, 2009, ch. 558, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-402(B)(10(a)(2) (Repl. Vol. 2009)).

9. Internal Revenue Code sections 856 through 860 provide a set of requirements applicable to an entity for it to qualify as a REIT entitling the entity to qualify for the dividends paid deduction that confers a pass-through entity status on the REIT. *See* IRC §§ 856–860 (West 2009). One of the requirements is that the REIT have 100 or more "persons" owning the REIT's shares or beneficial ownership interests. *Id.* § 856(a)(5). A captive

a separate return state, so this tax planning strategy could be a viable strategy to minimize Virginia corporate income taxes.[10] If the tax planning strategy worked, the captive REIT would not be taxable at all in the separate return states, while the parent corporation of the captive REIT would be able to deduct rental expenses on its state tax returns without having to pay any state taxes on its dividend income from the captive REIT. In other words, the captive REIT has zero REIT taxable income because it distributes all of its net income to its shareholders while the parent is able to deduct its dividend income from the captive REIT by means of a dividend received deduction. The result is the captive REIT generally will not have any taxable income at the state level.[11]

As amended, Virginia Code section 58.1-402(B)(10) will require a captive REIT to add back any federal deduction for dividends paid by the REIT to its shareholders.[12] For the purposes of section 58.1-402(B)(10), a REIT is considered a captive REIT if (1) it is not regularly traded on the securities market, (2) fifty percent or more of the shares are owned by a taxable entity (i.e., a corporation or an association taxed as a corporation under the Internal Revenue Code), and (3) more than twenty-five percent of its income consists of rent from real property.[13] The legislature added several statutory exceptions to the captive REIT addback provisions. First, an affiliated group of REITs will not be considered captive REITs unless a single corporate entity maintains ultimate ownership of the group.[14] Second, entities organized under the laws of Australia as property trusts and entities organized under the laws of other foreign countries that are similar to REITs also will not be considered captive REITs if they are widely held by the public.[15] The add back provision is effective for taxable years

---

REIT usually will have 99 employees or officers of the parent corporation serve as shareholders and the 100th shareholder is the parent corporation. The 100 shareholder requirement in the Internal Revenue Code is designed to have the REIT not be closely held or owned. *See id.* § 856(h)(1)(A).

10. *See* VA. CODE ANN. § 58.1-442(A) (Repl. Vol. 2009).

11. *See, e.g.*, Dep't of Revenue v. Autozone Dev. Corp., No. 2006-CA-002175-MR, 2007 Ky. App. LEXIS 401, at *10 (Ky. Ct. App. Oct. 12, 2007) (unpublished decision) (allowing a REIT to claim a dividends-paid deduction to compute its state corporate income tax liability).

12. VA. CODE ANN. § 58.1-402(B)(10)(a) (Repl. Vol. 2009).

13. *Id.*

14. *See id.* § 58.1-402(B)(10(b)(1)–(2) (Repl. Vol. 2009).

15. *Id.* § 58.1-402(B)(10)(b)(3)–(4), (d) (Repl. Vol. 2009).

beginning on or after January 1, 2009;[16] however, it is reduced by one-half for the 2009 and 2010 tax years.[17]

3. Land Preservation Tax Credit Temporarily Reduced

The 2009 General Assembly enacted legislation temporarily reducing the maximum amount of land preservation tax credits that may be claimed on returns for taxable years 2009 and 2010 from $100,000 to $50,000 per taxpayer.[18] In an effort to mitigate the harm caused by this temporary reduction to taxpayers with existing land preservation credits or to those credits earned in 2009 or 2010, the General Assembly provided two extra years, for a total of twelve years, to carry over tax credits that cannot be claimed as a result of this legislation.[19] Prior to this amendment, the normal maximum land preservation tax credit carry over was ten years.[20]

4. Installment Sale Method Allowed for Certain Dispositions of Real Property

The 2009 General Assembly enacted new Virginia Code sections 58.1-322(H) and 58.1-402(F) to allow taxpayers to recognize income from certain dispositions of real property under the installment sale method for Virginia corporate income and personal income tax purposes, even though taxpayers are required to report the entire gain as income in the year the real property is disposed of for federal income tax purposes.[21] To qualify for the elec-

---

16. *Id.* § 58.1-402(B)(10)(a) (Repl. Vol. 2009).

17. *See* Act of Mar. 27, 2009, ch. 426, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-402(B)(10)(a) ed. note (Repl. Vol. 2009)); Act of Mar. 27, 2009, ch. 558, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-402(B)(10)(a) ed. note (Repl. Vol. 2009)).

18. Act of Mar. 27, 2009, ch. 510, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-512(C)(1) (Repl. Vol. 2009)); Act of Feb. 23, 2009, ch. 12, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-512(C)(1) (Repl. Vol. 2009)).

19. Act of Mar. 27, 2009, ch. 510, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-512(C)(1), (D)(5)(a) (Repl. Vol. 2009)); Act of Feb. 23, 2009, ch. 12, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-512(C)(1), (D)(5)(a) (Repl. Vol. 2009)).

20. VA. CODE ANN. § 58.1-512(C)(1), (D)(5)(a) (Cum. Supp. 2008). For more information on the 2009 legislative changes to the Virginia Land Preservation Tax Credit, see VA. DEP'T OF TAXATION, PUB. DOC. 09-61 (May 6, 2009), *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Tax Bulletins" hyperlink; then follow "2009" hyperlink; then follow "VTB 09-4 (PD 09-61)" hyperlink).

21. *See* Act of Mar. 27, 2009, ch. 508, 2009 Va. Acts ___ (codified as amended at VA.

tion, the real property must be disposed of on or after January 1, 2009.[22] In addition, the real property must be held by the taxpayer for sale to customers in the ordinary course of the taxpayer's trade or business.[23] The election for installment sale method must be made on or before the due date of the taxpayer's tax return for the taxable year in which the disposition occurred (including extensions).[24] The legislation also requires the Virginia Department of Taxation to establish guidelines that set forth the conditions or restrictions with qualifying dispositions and address the recapture of income under certain circumstances.[25] The development of these guidelines is exempt from the provisions of the Administrative Process Act.[26]

5. Clean Fuel Vehicle Job Creation Tax Credit Expanded

The 2009 General Assembly expanded the types of fuels to which new jobs created by a corporation seeking to qualify for the clean fuel vehicle job creation tax credit must relate.[27] The legislature amended Virginia Code section 58.1-439.1 to expand the definition of eligible fuels to include fuels "derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass or algae."[28] The Code defines the types of jobs a corporation can create to quality for the credit as jobs created in either

> (i) the manufacture of the major components of the energy storage, energy supply, or engine, motor, and power train mechanisms unique to a vehicle fueled by clean special fuels; (ii) the manufacture of components uniquely used to convert vehicles designed to operate on gasoline or diesel fuel to operate on clean special fuels or advanced biofuels; (iii) the conversion of vehicles designed to operate on gasoline or diesel fuel to operate on clean special fuels or advanced biofuels; (iv) the manufacture of vehicles designed to operate on clean special fuels; (v) the manufacture of components designed to

---

CODE ANN. §§ 58.1-322(H), -402(F) (Repl. Vol. 2009)); *see also* I.R.C. § 453(b)(2)(A) (2006).

22. VA. CODE ANN. §§ 58.1-322(H), -402(F) (Repl. Vol. 2009).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Act of Mar. 30, 2009, ch. 730, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439.1 (Repl. Vol. 2009)).

28. Act of Mar. 30, 2009, ch. 730, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439.1(A) (Repl. Vol. 2009)).

> produce, store, and dispense clean special fuels or advanced biofuels; or (vi) the production of advanced biofuels.[29]

The amount of the tax credit remains $700 for each new qualifying job created in a taxable year.[30] The amendments apply to taxable years beginning on or after January 1, 2009.[31]

6. Single Sales Factor for Manufacturers

The 2009 General Assembly enacted a new Virginia Code section, section 58.1-422, to permit manufacturing companies to use a single-factor apportionment based on sales to determine their Virginia taxable income.[32] Currently, all corporations except motor carriers, financial institutions, construction corporations, and railway companies apportion income to Virginia by way of a three-factor fraction.[33] The numerator of the fraction is "the property factor plus the payroll factor, plus twice the sales factor, and the denominator of which is four."[34] Each of the three factors—property, payroll, and sales—are further defined in the Virginia Code.[35]

The new corporate apportionment formula for manufacturers will be based on only one factor—the sales factor—once the new legislation is fully phased in for taxable years beginning on or after July 1, 2014.[36] Prior to this date, manufacturers will be able to use the traditional three-factor apportionment formula with a triple-weighted sales factor for taxable years beginning on or after July 1, 2011 through June 30, 2013.[37] For taxable years beginning on or after July 1, 2013 through June 30, 2014, a manufacturer may use a quadruple-weighted sales factor.[38] The statute provides that once a manufacturer elects to use the single-factor apportionment formula, it must use this alternative apportion-

---

29. VA. CODE ANN. § 58.1-439.1(B) (Repl. Vol. 2009).
30. *Id.*
31. *See* Act of Mar. 30, 2009, ch. 730, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439.1 ed. note (Repl. Vol. 2009)).
32. Act of Apr. 8, 2009, ch. 821, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-422 (Repl. Vol. 2009)).
33. *See* VA. CODE ANN. § 58.1-408 (Repl. Vol. 2009).
34. *Id.*
35. *See id.* §§ 58.1-409, -412, -414 (Repl. Vol. 2009).
36. *See id.* § 58.1-422(A)(3) (Repl. Vol. 2009).
37. *See id.* § 58.1-422(A)(1) (Repl. Vol. 2009).
38. *Id.* § 58.1-422(A)(2) (Repl. Vol. 2009).

ment formula for three taxable years before the election can be revoked.[39]

Section 58.1-422 also requires an electing manufacturer to maintain a base year level of employment in Virginia for the first three years after the manufacturer elects to use the single-factor apportionment formula.[40] The statute defines "base year employment" as the average number of full-time employees employed by the manufacturer in Virginia in the taxable year ending immediately prior to the first taxable year in which the manufacturer uses the single-factor apportionment formula.[41] In the event the electing manufacturer fails to maintain the base year employment levels, the new statute requires the Virginia Department of Taxation to impose a supplemental tax assessment equal to the difference between the taxes calculated under the traditional three-factor apportionment formula and the new "sales only" apportionment formula, plus a penalty equal to ten percent of the additional taxes.[42] Interest will accrue on the supplemental tax assessment and penalty from the due date for filing the tax return until full payment is made.[43]

One interesting element of the new single-factor apportionment formula is that the statute contains a non-severability clause.[44] States often use tax incentives to entice out-of-state companies to relocate their facility to that state, yet many lawsuits have challenged such tax incentives as violative of the United States Constitution's Commerce Clause.[45] In the event the new Virginia apportionment formula is held to deny the election of a single-factor formula to a company that shifts employees from Virginia to other states, a court could hold that the legislation discriminates against an out-of-state business. Should a court make this deter-

39. *Id.* § 58.1-422(B) (Repl. Vol. 2009).
40. *See id.* § 58.1-422(C) (Repl. Vol. 2009).
41. *Id.* § 58.1-422(D) (Repl. Vol. 2009).
42. *Id.* § 58.1-422(C) (Repl. Vol. 2009).
43. *Id.*
44. *See id.* § 58.1-422(E) (Repl. Vol. 2009).
45. *See, e.g.*, S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999); Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71 (1992); Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).

mination, the employment requirement "shall not be deemed severable" from the rest of Virginia Code section 58.1-422.[46]

7. Minimum Tax on Noncorporate Telecommunication Companies Restored

Corporations in Virginia are generally subject to a corporate income tax instead of a gross receipts tax.[47] However, since 1988 the Virginia Code has imposed a gross receipts-based minimum tax on telecommunications companies in lieu of the corporate income tax to ensure that Virginia receives a minimum amount of tax from telecommunications companies.[48] The minimum tax on telecommunications companies is applicable if the computed minimum tax exceeds the corporate income tax that a telecommunications company would pay.[49] While the minimum tax statute is located in the Virginia Code section applicable to the imposition of income tax on corporations, the Virginia Department of Taxation also applied the minimum tax to telecommunications companies that were organized as noncorporate entities.[50]

On September 12, 2008, the Supreme Court of Virginia held that the minimum tax on telecommunications companies did not apply to noncorporate companies.[51] Subsequently, the 2009 General Assembly amended Virginia Code section 58.1-400.1 to make the minimum tax apply to telecommunication companies that are organized as noncorporate entities (i.e., a limited liability company, partnership, corporation that has made an election under subchapter S of the Internal Revenue Code, or other pass-through entity),[52] thereby legislatively overruling the supreme court's decision.

---

46. VA. CODE ANN. § 58.1-422(E) (Repl. Vol. 2009).

47. *See id.* § 58.1-400 (Repl. Vol. 2009).

48. *See id.* § 58.1-400.1(A) (Repl. Vol. 2009).

49. *Id.*

50. *See* 23 VA. ADMIN. CODE § 10-120-89 (1990). This regulation reconciled the statute, which does not exclude noncorporate entities from the definition of "telecommunication companies," with the fact that noncorporate entities are not liable for the corporate income tax. The regulation provides that unless specifically exempt from the minimum tax, every telecommunications company is subject to the minimum tax, even if the company is exempt from the corporate income tax. *Id.*

51. Va. Cellular LLC v. Va. Dep't of Taxation, 276 Va. 486, 492, 666 S.E.2d 374, 377 (2008).

52. Act of Mar. 6, 2009, ch. 152, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-400.1(A) (Repl. Vol. 2009)).

B. *Recent Judicial Decision: Telecommunications Tax Applies Only to Corporations*

In *Virginia Cellular LLC v. Virginia Department of Taxation*, the Supreme Court of Virginia overturned a trial court decision and held that the minimum tax imposed on telecommunications companies applies only to corporations and does not apply to pass-through entities.[53] Virginia Cellular LLC ("Virginia Cellular"), a telecommunications company, conducted operations in Virginia.[54] During the years 2001 through 2004, Virginia Cellular filed the Telecommunications Companies Minimum Tax and Credit Schedule but reported no tax liability because it claimed it was exempt from the tax as a pass-through entity.[55] Following an audit of Virginia Cellular, the Virginia Department of Taxation assessed the company with the minimum tax, plus penalties and interest, for all four years.[56] Virginia Cellular initiated a lawsuit in the Richmond City Circuit Court claiming it was not subject to the minimum tax on telecommunications companies.[57]

The parties agreed that Virginia Cellular "was a telecommunications company as defined by [Virginia] Code [section] 58.1-400.1(D) and that it was not a corporation, but rather a limited liability company taxed as a partnership and pass-through entity pursuant to Virginia income taxation laws."[58] With no facts in dispute, the parties filed cross-motions for summary judgment, and the trial court held that Virginia Cellular was subject to the minimum tax.[59] On appeal to the supreme court, Virginia Cellular argued that the plain meaning of the statute excluded pass-through entities.[60] The company also argued that title 23, section 10-120-89 of the Virginia Administrative Code—which provided that the minimum tax was applicable to all telecommunications companies, whether a corporation or a pass-through entity—was invalid because it contradicted the plain meaning of the minimum

53. 276 Va. 486, 494, 666 S.E.2d 374, 378 (2008).
54. *See id.* at 489, 666 S.E.2d at 376.
55. *Id.*
56. *Id.*
57. *See id.*
58. *Id.* at 489–90, 666 S.E.2d at 376.
59. *Id.* at 490, 666 S.E.2d at 376.
60. *Id.*

tax statute.[61] The supreme court agreed with Virginia Cellular's arguments and reversed the trial court's decision.[62] To arrive at its decision, the supreme court employed the rules of statutory construction to decipher the interaction between article 9 (pass-through entities) and article 10 (corporations) of title 58.1 of the Virginia Code, finding that the application of the minimum tax to pass-through entities conflicted with the plain meaning of section 58.1-400.1.[63] Final judgment was entered for Virginia Cellular.[64]

As discussed earlier in this article, the 2009 General Assembly legislatively overruled the supreme court's decision in *Virginia Cellular* when it amended Virginia Code section 58.1-400.1 to specifically apply to corporations and pass-through entities.[65]

III. RETAIL SALES AND USE TAX

A. *Recent Significant Legislative Activity*

1. Rules on Fabrication of Foodstuffs Changed

The 2009 General Assembly enacted an exemption to the Virginia retail sales and use tax on the fabrication of animal meat, grains, vegetables, and other foodstuffs.[66] The exemption applies "when the purchaser . . . supplies the foodstuffs and they are consumed by the purchaser or his family . . . ."[67] Prior to the adoption of this exemption, fabrication labor was subject to the retail sales and use tax pursuant to Virginia Code section 58.1-602, which provides that the definition of a "sale" includes "the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication."[68] Subjecting fabrication labor to the sales and use tax caught many butchers and foodstuffs handlers by surprise during field audits by the

---

61. *See id.*
62. *See id.* at 493, 666 S.E.2d at 378.
63. *See id.* at 490–93, 666 S.E.2d at 376–78.
64. *Id.* at 493, 666 S.E.2d at 378.
65. Act of Mar. 6, 2009, ch. 152, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-400.1(A) (Repl. Vol. 2009)).
66. Act of Apr. 8, 2009, ch. 833, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-609.10(19) (Repl. Vol. 2009)); Act of Feb. 23, 2009, ch. 36, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-609.10(19) (Repl. Vol. 2009)).
67. VA. CODE ANN. § 58.1-609.10(19) (Repl. Vol. 2009).
68. *Id.* § 58.1-602 (Cum. Supp. 2008).

Virginia Department of Taxation because the meat or grain products had not been sold. For example, a hunter or farmer takes a cow, pig, turkey, chicken, or deer carcass to a butcher to have the meat processed into various cuts of meat for the customer's family. The customer owns the meat product, and the butcher, through his labor, fabricates the animal carcass into useable cuts of meat. In this scenario, the butcher's labor charge was deemed to be a retail sale and subject to Virginia sales tax.[69] The new exemption now excludes from the sales and use tax the fabrication of animal meat, grains, vegetables, and other foodstuffs that are provided by the customer and intended for consumption by the customer or the customer's family.[70]

The statute also exempts fabrication labor from the sales and use tax when certain nonprofit entities provide the meat, grains, vegetables, or other foodstuffs for their own use or when such foodstuffs are donated to an organization exempt from income tax under Internal Revenue Code section 501(c)(3) or 501(c)(4).[71]

2. Occasional Sale Exemption Expanded for Nonprofit Organizations

Virginia provides an exemption from sales and use tax for "occasional sales."[72] An occasional sale is defined as:

> [A] sale of tangible personal property not held or used by a seller in the course of an activity for which he is required to hold a certificate of registration, including the sale or exchange of all or substantially all the assets of any business and the reorganization or liquidation of any business, provided such sale or exchange is not one of a series of sales and exchanges sufficient in number, scope and character to constitute an activity requiring the holding of a certificate of registration.[73]

The issue frequently arises when a nonprofit organization conducts fundraising activities such as seasonal sales, food and meal

69. The author has represented butchers who butchered the deer carcass into deer steaks, stew meat, and similar products for the hunter and the hunter's family. In each representation, the butcher presumed that his or her labor was a nontaxable service and not a sale because the butcher never had title to the meat carcass which he or she butchered.

70. *See* VA. CODE ANN. § 58.1-610(19) (Repl. Vol. 2009).

71. *Id.*

72. *See id.* § 58.1-609.10(2) (Repl. Vol. 2009).

73. *Id.* § 58.1-602 (Repl. Vol. 2009).

sales, and similar activities more than three times per year. Does the nonprofit organization have to register with the Virginia Department of Taxation, become a dealer, and then collect and remit sales tax on sales at its fundraising events?

The 2009 General Assembly decided to broaden the occasional sales exemption for nonprofit organizations who are exempt from sales and use tax on its own purchases, pursuant to Virginia Code section 58.1-609.11, by providing an additional exemption for certain sales activities.[74] Specifically, the nonprofit organization will qualify for the occasional sale exemption on its sales of (1) food, prepared food, and meals and (2) tickets to events that include the provision of food, prepared food, and meals, provided that such sales take place less than twenty-four times per calendar year.[75]

3. New Digital Media Fee Enacted

The 2009 General Assembly enacted a levy on in-room rentals and purchases of movies, television shows, video games, and similar audio programming.[76] The fee is "equal to 10 percent of the price of all in-room purchases or rentals of digital media in hotels, motels, bed and breakfast establishments, inns, and other facilities offering guest rooms rented out for continuous occupancy for fewer than 90 consecutive days."[77] While the new digital media fee is not a sales and use tax, it is administered by the Virginia Department of Taxation in the same manner as the sales and use tax.[78] The digital media fee will not apply to charges made for Internet access or telephone service.[79]

---

74. Act of Mar. 27, 2009, ch. 338, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-609.10(2) (Repl. Vol. 2009)).

75. VA. CODE ANN. § 58.1-609.10(2) (Repl. Vol. 2009).

76. Act of Mar. 27, 2009, ch. 531, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-1731 (Repl. Vol. 2009)).

77. VA. CODE ANN. § 58.1-1731 (Repl. Vol. 2009).

78. *See id.* § 58.1-1732 (Repl. Vol. 2009).

79. *Id.* § 58.1-1731 (Repl. Vol. 2009). For additional guidance, see VA. DEP'T OF TAXATION, PUB. DOC. 09-71 (May 21, 2009), *available at* http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf (follow "Tax Bulletins" hyperlink; then follow "2009" hyperlink; then follow "VTB 09-5 (PD 09-71)" hyperlink).

IV. STATE TAX ADMINISTRATION

The 2009 General Assembly amended Virginia Code section 58.1-1834(B) to solidify the requirement that the Virginia Department of Taxation provide to a taxpayer's representative, who has filed a valid power of attorney form with the Department of Taxation, copies of all correspondence, documentation, or other materials related to the tax matter for which the power of attorney has been filed.[80] The copy or copies must be furnished to the taxpayer's authorized representative named in the power of attorney at the same time the information is provided to the taxpayer and under the same delivery method used.[81] This requirement to provide or furnish documentation to the taxpayer's authorized representative is designed to mirror the same practice followed by the Internal Revenue Service.[82] Over the past several years, the Department of Taxation's compliance with providing copies of correspondence and documentation to a taxpayer's authorized representative under a power of attorney had become irregular or sporadic at times. The Virginia legislature codified the requirement to ensure that the taxpayer's power of attorney receives these documents and so that the Department of Taxation may seek appropriations to fund the requirement.[83]

---

80. Act of Mar. 27, 2009, ch. 503, 2009 Va. Acts ___ (to be codified as amended at VA. CODE ANN. § 58.1-1834(B)). Chapter 503, clause 2 of the 2009 Acts of Assembly provides: "[T]he provisions of this act shall not become effective unless an appropriation effectuating the purposes of this act is included in the general appropriation act passed by the 2009 Regular Session of the General Assembly that becomes law." *Id.* While the appropriation was not made, see H.B. 1600, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Apr. 8, 2009, ch. 781, 2009 Va. Acts ___), the General Assembly nevertheless provided the money to fund the provision. *See* REPORT OF THE STAFFS OF THE H. APPROPRIATIONS COMM. & S. FIN. COMM., SUMMARY OF 2008-2010 BUDGET ACTIONS 48 (May 21, 2009).

81. Act of Mar. 27, 2009, ch. 503, 2009 Va. Acts ___ (to be codified as amended at VA. CODE ANN. § 58.1-1834(B)).

82. *See* Treas. Reg. § 601.506(a) (2009).

83. The author was involved in getting this legislation passed on behalf of the Virginia Bar Association's Taxation Section. The author participated in several meetings and telephone conversations with various personnel from the Virginia Department of Taxation to apprise them of the problems stemming from inconsistent communication and possible ways to remedy the issue. This legislation is the result of these efforts. A special thanks is given to J. Christian Tennant, Chair, VBA Taxation Section, for his leadership on this matter.

PART TWO: TAXES ADMINISTERED BY LOCALITIES

V. REAL PROPERTY

A. *Recent Significant Legislative Activity*

1. Incentives for Green Roofs Adopted

The 2009 General Assembly adopted a new statute that is designed to provide incentives to encourage the use of green roofs.[84] The statute authorizes local governments to "grant incentives or provide regulatory flexibility to encourage the use of green roofs in the construction, repair, or remodeling of residential and commercial buildings."[85] The incentives and regulatory flexibility provisions are to be provided through local ordinances adopted by the county, city, or town as appropriate.[86] A "green roof" is defined in the statute to mean a solar roof or a vegetative roof.[87] A "solar roof" is defined as "a solar roofing system that generates reusable energy, which reusable energy accounts for at least 2.5 percent of the total electric energy used by the building to which the solar roofing system is attached."[88] A "vegetative roof" is "a roofing system designed in accordance with the Virginia Stormwater Management Program's standards and specifications for green roofs . . . in which at least 50 percent of the total roofing area is vegetative."[89] The incentives and regulatory flexibility provisions are not defined but may include a reduction in permit fees, a streamlined process for the approval of building permits when green roofs are used, or a reduction in any gross receipts tax on green roof contactors as defined by the locality's ordinance.[90]

---

84. Act of Mar. 27, 2009, ch. 604, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3852 (Repl. Vol. 2009)); Act of Feb. 23, 2009, ch. 17, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3852 (Repl. Vol. 2009)).

85. VA. CODE ANN. § 58.1-3852(B) (Repl. Vol. 2009).

86. *See id.*

87. *Id.* § 58.1-3852(A) (Repl. Vol. 2009).

88. *Id.*

89. *Id.*

90. *Id.* § 58.1-3852(C) (Repl. Vol. 2009).

2. Agricultural Use Real Estate

The 2009 General Assembly relaxed the rules applicable to assessments relating to real estate devoted to agricultural use, horticultural use, and open-space use.[91] The amended statute provides that real property that otherwise qualifies for agricultural, horticultural, forest, or open-space use assessment will not be disqualified from such favorable special land use classification because a portion of such property is being used for a different purpose pursuant to a special use permit or as otherwise allowed by zoning.[92] The portion of the property being used for a different purpose will be deemed to be a separate piece of real property for purposes of assessment.[93] The presence of utility lines, zoning designations, and special use permits will not be considered in determining whether the property is devoted to agricultural, horticultural, forest, or open-space use.[94]

B. *Recent Significant Judicial Decisions*

1. Designation of Property Tax Exemption for Religious Organization Upheld

The Supreme Court of Virginia upheld a property tax exemption for a religious organization when it overturned the decision of the Botetourt County Circuit Court in *Virginia Baptist Homes, Inc. v. Botetourt County*.[95] Virginia Baptist Homes, Inc. ("VBH") was formed as a non-stock, not-for-profit corporation in 1946 by the Baptist General Association of Virginia "to provide a home for aged Baptists in Virginia."[96] In 1976, the General Assembly classified VBH as a tax-exempt corporation, thereby exempting its personal and real property from ad valorem taxation so long as the property was used in accordance with VBH's purpose.[97] Botetourt County ("County") argued at trial that VBH strayed from its original purpose when it opened a new residential home for the

---

91. *See* Act of Apr. 8, 2009, ch. 800, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3230 (Repl. 2009)).
92. *See* VA. CODE ANN. § 58.1-3230 (Repl. Vol. 2009).
93. *See id.*
94. *See id.*
95. 276 Va. 656, 669, 668 S.E.2d 119, 125 (2008).
96. *Id.* at 659, 668 S.E.2d at 120.
97. *Id.*

elderly that was open to all residents regardless of their religious beliefs.[98] Furthermore, the County argued that residents were only accepted to the new facility upon proof that the prospective resident could pay for all costs of residing at the home, suggesting a lack of benevolence on the part of VBH.[99] The trial court held for the County and denied VBH the property tax exemption for its new residential community facility.[100]

In reversing the trial court, the supreme court examined the plain meaning of Virginia Code section 58.1-3650.33(A), which suggested that when the General Assembly adopted the property tax exemption for VBH in 1976, the legislature "considered operating retirement homes for the elderly to qualify as a religious purpose."[101] The court did not question the legislature's determination and, therefore, only addressed whether VBH's new retirement community operated on a nonprofit basis.[102] The court noted that there was no evidence in the record that the new retirement community conducted any service other than its operation as a retirement community for the elderly.[103] No other functions or commercial ventures were performed on the premises of the retirement community.[104] Therefore, "[g]iving deference to the legislative designation," the court held that the retirement community was used for religious purposes and entered final judgment for VBH.[105]

2. Manifest Error May Be Established by Showing Real Property Is Assessed at More Than Fair Market Value

In an appeal involving numerous applications for relief from an alleged erroneous assessment of real property taxes on multiple parcels of real estate situated in a business park, the Supreme Court of Virginia held that in order to show manifest error, the taxpayers did not have to prove what information the taxing au-

98. *See id.* at 660–62, 668 S.E.2d at 120–21.

99. *See id.* at 661, 668 S.E.2d at 121.

100. *Id.* at 662, 668 S.E.2d at 121. For a complete discussion of the trial court's decision in this case, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 43 U. RICH. L. REV. 405, 424–27 (2008).

101. *See Va. Baptist Homes*, 276 Va. at 668, 668 S.E.2d at 125.

102. *Id.* at 669, 668 S.E.2d at 125.

103. *Id.*

104. *Id.*

105. *Id.*

thority considered and how it arrived at the challenged assessments.[106] The court also ruled that when a locality determines the fair market value of a parcel of property, the presumption of correctness will not be rebutted solely on a prior sale of the parcel in which the parcel was a small part of a bulk land purchase.[107]

West Creek Associates, LLC v. County of Goochland involved 144 separate limited liability companies (collectively referred to as "West Creek") that purchased approximately 2,500 acres of real estate located in the West Creek Business Park in Goochland County ("County").[108] Each company was only conveyed a small portion, but the total purchase price for the 144 separate parcels was approximately $34.1 million.[109] Prior to this sale, the County assessed the 2,500 acres as twenty separate parcels with a total value of $54.8 million.[110] In 2001, one year after West Creek purchased the property, the County performed a quadrennial reassessment and classified the 2,500 acres as 144 separate parcels to reflect the 144 recorded deeds.[111] Forty of the parcels were assessed a value of $35,000 per acre while most of the remaining parcels were assessed at $75,000 per acre.[112] Thus, the 2001 total assessed value of the 144 parcels was $105.4 million.[113]

West Creek claimed that the assessed value substantially exceeded the property's fair market value and challenged the assessment in the Goochland County Circuit Court.[114] After West Creek presented its case, the County moved to strike the evidence, asserting that "West Creek had failed to establish a sufficient record from which the circuit court could conclude that the County had assessed the relevant parcels in violation of [Virginia] Code [section] 58.1-3984."[115] The County argued that West Creek only proved how the appraiser valued the real estate but failed to demonstrate how the County's Board of Assessors used that in-

106. W. Creek Assocs., LLC v. County of Goochland, 276 Va. 393, 397, 665 S.E.2d 834, 836 (2008).

107. *See id.* at 415, 665 S.E.2d at 846.

108. *Id.* at 397–98, 665 S.E.2d at 836.

109. *Id.* at 398, 665 S.E.2d at 836.

110. *Id.*

111. *Id.*

112. *Id.* at 398–99, 665 S.E.2d at 836.

113. *Id.* at 398, 665 S.E.2d at 836.

114. *See id.* at 399, 665 S.E.2d at 837.

115. *Id.* at 402–03, 665 S.E.2d at 839.

formation.[116] In addition, the County claimed that West Creek "did not show what information the [Board of Equalization] considered in making the adjustments to the assessments set by the [Board of Assessors]."[117] The circuit court granted the County's motion to strike the evidence regarding the forty parcels assessed at $35,000 per acre on the basis that West Creek "presented no evidence [as to] the 'manner' in which the County arrived at the assessment . . . nor any evidence from which it could infer the methodology used."[118] As to the remaining parcels, the circuit court overruled the County's motion to strike,[119] but at trial the court held that West Creek had not established manifest error because it had not shown "what information the assessing authority had, how that evidence was considered and weighed," or the basis for the assessment.[120]

West Creek appealed the circuit court's decision to the Supreme Court of Virginia.[121] The supreme court determined that the lower court had improperly granted the County's motion to strike the evidence as to the parcels valued at $35,000 per acre.[122] The supreme court stated that it has "never explicitly held that manifest error cannot be established simply by evidence showing that real property is assessed at more than its fair market value."[123] In the opinion, the court cited several cases where manifest error was demonstrated by presenting evidence that the real property was assessed with a value higher than the fair market value.[124]

For the remaining parcels, the court determined that West Creek had not presented credible evidence of fair market value with regard to the contested assessments on the parcels.[125] West

116. *Id.* at 403, 665 S.E.2d at 839.
117. *Id.*
118. *Id.* (internal quotation marks omitted).
119. *Id.*
120. *See id.* at 407–08, 665 S.E.2d at 841–42.
121. *Id.* at 408, 665 S.E.2d at 842.
122. *Id.* at 418, 665 S.E.2d at 848.
123. *Id.* at 414, 665 S.E.2d at 845.
124. *See id.* at 413, 665 S.E.2d at 845 (citing City of Martinsville v. Commonwealth Boulevard Assocs., LLC, 268 Va. 697, 699–700, 604 S.E.2d 69, 70–71 (2004); Fray v. County of Culpeper, 212 Va. 148, 151, 183 S.E.2d 175, 178 (1971); City of Harrisonburg v. Taubman, 212 Va. 28, 30, 181 S.E.2d 654, 656 (1971); Washington County Nat'l Bank v. Washington County, 176 Va. 216, 222, 10 S.E.2d 515, 518 (1940)).
125. *See id.* at 417, 665 S.E.2d at 847.

Creek had claimed that the bulk sale price demonstrated fair market value.[126] The supreme court disagreed, stating that a "recent sale price of real property is 'merely one of the factors to be taken into consideration' when determining whether such property has been assessed at more than fair market value."[127] While the sale price of a property is given substantial weight, it is not conclusive evidence of a property's fair market value.[128] Accordingly, the court held that "West Creek did not carry its burden of showing that the parcels [were] assessed at more than fair market value," because the evidence it presented "did not rebut the presumption of correctness afforded the assessments."[129]

C. *Recent Significant Opinion of the Attorney General*

The Dinwiddie County Attorney inquired as to "whether a county board of supervisors may prevent an assessor for a general reassessment from complying with [Virginia Code section] 58.1-3300, which governs reassessment records, on the sole basis that the board of supervisors disagrees with the results of such general reassessment."[130] In response, the Attorney General opined that "a county board of supervisors may not prevent a statutorily appointed professional assessor for a general reassessment from complying with [Virginia Code section] 58.1-3300 on the sole basis that the board disagrees with the results of such reassessment."[131] Applying Dillon's Rule,[132] the Attorney General stated:

> The General Assembly has not authorized a county to appoint an assessor to begin to undertake the general reassessment process and then prevent such assessor from complying with the requirements of § 58.1-3300 because the county's board of supervisors disagrees with the reassessment results. Prior opinions of the Attorney General similarly conclude that a board of supervisors has no power to change

126. *See id.* at 414–15, 665 S.E.2d at 846.

127. *Id.* at 415, 665 S.E.2d at 846 (quoting Am. Viscose Corp. v. City of Roanoke, 205 Va. 192, 196, 135 S.E.2d 795, 798 (1964)).

128. *Id.* (citations omitted).

129. *Id.* at 417–18, 665 S.E.2d at 847.

130. Op. to John C. Blair, II, Dinwiddie County Attorney (Mar. 19, 2009), *available at* http://www.oag.state.va.us/OPINIONS/2009opns/09-008-Blair.pdf.

131. *Id.*

132. "[Dillon's R]ule provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable. When a local ordinance exceeds the scope of this authority, the ordinance is invalid." Bd. of Supervisors v. Countrywide Inv. Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (internal citations omitted).

the assessment of real property as ascertained by the assessor during a general reassessment and has no authority to raise or lower the ratio of assessment of real property.[133]

VI. TANGIBLE PERSONAL PROPERTY

A. *Recent Significant Legislative Activity*

1. Exemption for Certified Pollution Control Equipment and Facilities

The 2009 General Assembly amended Virginia Code section 58.1-3660 to exempt certified pollution control equipment and facilities from state and local taxation, removing the option for localities to determine whether or not to offer the exemption from local taxes.[134] The statewide exemption will go into effect for tax years beginning after 2010.[135] The statute specifically carves out from the exemption the land on which the facilities and equipment are located.[136]

2. Precision Investment Castings Separate Classification for Machinery and Tools Tax

The 2009 General Assembly enacted Virginia Code section 58.1-3508.3, which creates a separate classification for local property taxation for "machinery and tools used directly in the manufacture of precision investment castings."[137] Local governments may tax this new precision investment castings classification at rates or assessment ratios that are less than those for other machinery and tools.[138]

---

133. Op. to John C. Blair, II, *supra* note 130.

134. Act of Mar. 30, 2009, ch. 671, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3660(A) (Repl. Vol. 2009)).

135. *See* Act of Mar. 30, 2009, ch. 671, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3660 ed. note (Repl. Vol. 2009)).

136. VA. CODE ANN. § 58.1-3660(B) (Rep. Vol. 2009).

137. Act of Mar. 27, 2009, ch. 528, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3508.3 (Repl. Vol. 2009)).

138. VA. CODE ANN. § 58.1-3508.3 (Repl. Vol. 2009).

3. Separate Property Classification for Electric Vehicles

The 2009 General Assembly created a separate classification for local property tax purposes for "motor vehicles powered solely by electricity."[139]

B. *Recent Significant Judicial Decision on Business Property Valuation*

The Hopewell City Circuit Court addressed the issue of whether independent appraisals of value of business property, provided by the taxpayer, must be considered by the local taxing authority when assessing the fair market value of machinery and tools property.[140] The taxpayer, Honeywell International, Inc. ("Honeywell"), owned and operated a manufacturing facility in Hopewell, Virginia.[141] Consequently, the machinery and tools in the Hopewell facility were subject to the machinery and tools tax pursuant to Virginia Code section 58.1-3507.[142] The Commissioner of the Revenue for the City of Hopewell ("City") assessed Honeywell a machinery and tools tax of $2,610,789.56 for 2002 and $2,485,852.30 for 2003.[143] Each of the City's assessments were based on a net original capitalized cost as reported by Honeywell on its tax returns for the respective year.[144]

While Honeywell timely paid its 2002 tax assessment, it filed an amended 2003 tax return after receiving the Commissioner's assessment and reported a much lower net adjusted original capitalized cost for its machinery and tools.[145] Honeywell then reassessed the tax on the machinery and tools based on its amended 2003 tax return and timely paid that lower assessment.[146]

Honeywell also filed applications for correction of its 2002 and 2003 assessments with the City "on the grounds that the valua-

---

139. Act of Feb. 23, 2009, ch. 44, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3506(A)(40) (Repl. Vol. 2009)).

140. Honeywell Int'l, Inc. v. City of Hopewell, No. CL06-438, slip op. at 1 (Va. Cir. Ct. Sept. 26, 2008) (Hopewell City) (order overruling demurrer).

141. *Id.* slip op. at 2.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

tion of the taxable machinery and tools exceeded fair market value."[147] The City denied both applications for corrections.[148] In response to the City's denial of the application for correction of the 2003 assessment, Honeywell filed an administrative appeal to the State Tax Commissioner, who ultimately denied Honeywell's appeal.[149]

In connection with its administrative assessment appeals, Honeywell engaged independent appraisal companies to value its machinery and tools as of January 1, 2002 and January 1, 2003.[150] Both appraisals found the fair market value of the machinery and tools to be far less than the values established by the City's Commissioner of the Revenue, which were based on net original capitalized cost for the machinery and tools and not the fair market value.[151] The independent appraisal determined that the January 1, 2002, fair market value of the machinery and tools was $76,471,000, a value approximately $9,700,000 lower than the City's assessed value.[152] As of January 1, 2003, the fair market value was appraised at $71,854,000, which was also approximately $9,700,000 lower than the City's 2003 assessment.[153]

Honeywell filed a Complaint and Application for Correction of Erroneous Assessments in the Hopewell City Circuit Court, arguing that "the City's choice of valuation methods produce[d] an impermissible result" under the Constitution of Virginia.[154] Article X, section 2 of the constitution requires all assessments of tangible personal property, including machinery and tools, to be at fair market value.[155] Honeywell also argued that the City could consider Honeywell's independent appraisal "to the extent that it casts doubt upon the accuracy of the percentage of original total capitalized cost method" the City used to reach the fair market value of the various items of tangible personal property.[156]

---

147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *See id.*
153. *See id.*
154. *Id.* slip op. at 1, 5.
155. VA. CONST. art. X, § 2.
156. *Honeywell*, slip op. at 5.

The City filed a demurrer in response to Honeywell's complaint, asserting three grounds upon which the demurrer could be granted.[157] First, the City asserted that Honeywell's proposed method to determine the taxable value of the machinery and tools was a method not authorized by law.[158] Second, the City argued that "[v]aluing Honeywell's machinery and tools using the method advocated by Honeywell would violate the Virginia constitutional requirement of uniformity of taxation."[159] Third, the City contended that Honeywell's claim regarding the 2002 assessment was untimely.[160]

In support of its demurrer, the City argued that only two valuation methods are available to the Commissioner of the Revenue under Virginia Code section 58.1-3507(B): (1) depreciated cost or (2) a percentage or percentages of original total capitalized cost excluding capitalized interest.[161] According to the City, using an independent appraisal would violate this statute.[162] Honeywell contended that it did not want the independent appraisals to be used as a method of assessment, but, instead, that the appraisals should "serve as factual evidence used to demonstrate that the property was assessed in excess of fair market value."[163] Accordingly, the City may consider such independent appraisals in circumstances when an assessment is challenged.[164] The circuit court agreed with Honeywell, finding that "a locality may consider an independent appraisal and other evidence offered by the taxpayer to determine if the locality's assessments for the property in dispute reflect fair market value."[165]

The circuit court also ruled that consideration of an independent appraisal does not violate the uniformity requirement under the Constitution of Virginia.[166] The court noted that since all taxpayers subject to the machinery and tools tax had an equal oppor-

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* At the hearing on the demurrer, the City conceded that Honeywell's 2002 assessment claim was timely. *Id.* slip. op. at 5 n.4.
161. *Id.* slip op. at 5 (citing VA. CODE ANN. § 58.1-3507(B) (Repl. Vol. 2009)).
162. *See id.*
163. *Id.* slip op. at 6.
164. *Id.*
165. *Id.* slip op. at 7.
166. *Id.* slip op. at 8.

tunity to challenge the fair market value of the assessment, the uniformity requirement was satisfied.[167] Thus, the court held:

> [T]he Commissioner is permitted to consider such independent appraisals to assist her in making a factual determination of whether the property was assessed at fair market value upon a challenge by the taxpayer that it was not. However, [the Commissioner] may not substitute the fair market value stated in an independent appraisal as the assessed value of the property as that would violate Va. Code § 58.1-3507(B).[168]

The circuit court also ruled that a court may similarly consider independent appraisals in determining whether a property was assessed at fair market value.[169] When the taxpayer proves an erroneous assessment, the court must decide the fair market value of the property based on the evidence before the court, including the taxpayer's independent appraisal.[170] The court relied on Virginia Code sections 58.1-3507(B) and 58.1-3987 to reach its decision.[171] Section 58.1-3507(B) specifically authorizes the commissioner of the revenue, in valuing machinery and tools, to consider any bona fide independent appraisal presented by the taxpayer.[172] Subsequently, section 58.1-3987

> vests the Court not only with the Commissioner's powers and duties as of the time of assessment, but also with "all powers and duties conferred by law upon such authority between the time such assessment was made and the time such application is heard." Thus, the Court . . . has not only the power, but also the duty, to review independent appraisals.[173]

Thus, the City's demurrer was overruled by the court.[174]

C. *Recent Significant Opinion of the Attorney General*

Senator Emmett Hanger asked the Attorney General to define the meaning of the term "original cost" as it is used in Virginia

---

167. *See id.*
168. *Id.*
169. *See id.* slip op. at 9.
170. *See id.*
171. *See id.*
172. *Id.* (citing VA. CODE ANN. § 58.1-3507(B) (Repl. Vol. 2009)).
173. *Id.* (quoting VA. CODE ANN. § 58.1-3987 (Repl. Vol. 2009)) (internal citation omitted).
174. *Id.* slip op. at 10.

Code section 58.1-3503(A)(17).[175] This section of the Virginia Code provides that, for valuation purposes, "[a]ll tangible personal property employed in a trade or business . . . shall be valued by means of a percentage or percentages of *original cost*."[176]

Senator Hanger suggested that "the original cost of personal property employed in a trade or business could be defined as either the price paid for the personal property when it originally was purchased from a manufacturer or dealer or the price paid by a subsequent purchaser."[177] Senator Hanger also observed that Virginia Code section 58.1-3503(A)(17) does not define "original cost."[178]

In response, the Attorney General opined that the meaning of the term "original cost" is "the cost of the personal property employed in a trade or business paid by the owner who *first* purchased the personal property from either a manufacturer or dealer."[179] Effectively, if a business purchases a piece of used equipment, the equipment's value will be based on its cost when it was purchased by the original owner, not the cost to the current owner who purchased the equipment used.[180]

This opinion will likely prevent businesses from using a sales-leaseback transaction to reduce the value of their equipment. Previously, many businesses may have considered selling their equipment to a capital firm at an appraised price of its current value and leasing the equipment as a method of reducing their basis for business tangible personal property tax purposes. This opinion likely means that Virginia localities will not recognize the new appraised value in such a transaction for business tangible personal property tax purposes.

D. *Recent Significant Opinion of the Virginia Tax Commissioner*

In what appears to be a change in policy, the Virginia Tax Commissioner ruled, in an advisory opinion, that the intangible

---

175. Op. to Hon. Emmett W. Hanger, Jr. (Feb. 25, 2009), *available at* http://oag.state.va.us/OPINIONS/2009opns/08-109-Hanger.pdf.

176. VA. CODE ANN. § 58.1-3503(A)(17) (Repl. Vol. 2009) (emphasis added).

177. Op. to Hon. Emmett W. Hanger, Jr., *supra* note 175.

178. *Id.*

179. *Id.* (emphasis added).

180. *See id.*

personal property classification provided for manufacturers in Virginia Code section 58.1-1101(A)(2) does not extend to a single-member limited liability company that is classified as a disregarded entity for federal and Virginia income tax purposes.[181] In this ruling, the taxpayer was in the business of natural gas exploration and extraction.[182] The taxpayer wholly owned a limited liability company ("LLC"), and the LLC owned an aircraft used by the taxpayer's employees for business purposes, including flights to locations where the taxpayer owned natural gas wells.[183] The LLC had no other property, payroll, or expenses, and all of the aircraft's operational and maintenance expenses were paid by the taxpayer.[184] The aircraft, which was housed in a hanger at a local airport, was never used to transport natural gas.[185] The taxpayer raised three questions concerning the application of the business tangible personal property ("BTPP") tax to the aircraft.[186]

The first question the taxpayer raised was whether natural gas exploration and extraction was considered "mining" for purposes of the BTPP tax.[187] The Tax Commissioner determined that the extraction of natural gas is included in the term "mining" for the purposes of Virginia Code section 58.1-1101(A)(2), which classifies certain tangible personal property as intangible personal property for state taxation purposes.[188] While the Virginia Code does not define the term "mining," the Tax Commissioner referred to Black's Law Dictionary, which defines "mining" as "[t]he process of extracting ore or mineral from the ground; the working of a mine . . . [t]his term also encompasses oil and gas drilling."[189] Additionally, the Tax Commissioner noted that the Supreme

181. VA. DEP'T OF TAXATION PUB. DOC. 09-22 (Feb. 6, 2009), *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Rulings of the Tax Commissioner" hyperlink; then follow "2009" hyperlink; then follow "PD 09-22" hyperlink) [hereinafter TAX RULING].

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*; *see* VA. CODE ANN. § 58.1-1101(A)(2) (Repl. Vol. 2009).

189. TAX RULING, *supra* note 181 (quoting BLACK'S LAW DICTIONARY 1016 (8th ed. 2004)).

Court of Virginia has held the term "mineral" to include all petroleum, oil, and gas.[190]

The second question raised by the taxpayer was whether the aircraft, as used by the taxpayer, was subject to the machinery and tools tax.[191] Virginia Code section 58.1-3507 subjects the machinery and tools of a mining business to local taxation.[192] The Tax Commissioner determined that "[u]nless an aircraft owned by a mining company is used to transport any of the materials that were mined, [it is] highly unlikely that it could be classified as property subject to the [machinery and tools] tax."[193] In this case, the aircraft was used to transport employees and was not considered to be machinery and tools subject to local taxation.[194]

The third, and final, question presented by the taxpayer inquired as to whether the LLC's ownership of the aircraft affected the aircraft's classification for BTPP purposes.[195] The Tax Commissioner confirmed a prior ruling which held that "the exemption provided for manufacturers in Va. Code § 58.1-1101(A)(2) does not extend to separate legal entities that perform no manufacturing activities."[196] However, in this earlier ruling, the Tax Commissioner also determined that a wholly owned corporate affiliate of a taxpayer that held a certificate of incorporation from the State Corporation Commission ("SCC") and had its own federal employer identification number ("FEIN") for federal income tax purposes was considered a separate taxable entity from the other members of its corporate family for BTPP tax purposes.[197]

However, if the exemption for manufacturers does not extend to separate legal entities that perform no manufacturing activities, why did the Tax Commissioner bother discussing vertical integration, the SCC certificate of incorporation, and the affiliate's FEIN if those facts made no difference in the outcome?

---

190. *Id.* (citing Warren v. Clinchfield Coal Corp., 166 Va. 524, 525, 529, 186 S.E. 20, 21–22 (1936)).

191. *Id.*

192. *See* VA. CODE ANN. § 58.1-3507 (Repl. Vol. 2009).

193. TAX RULING, *supra* note 181.

194. *Id.*

195. *Id.*

196. *Id.* (citing VA. DEP'T OF TAXATION PUB. DOC. 07-191 (Nov. 21, 2007) *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Rulings of the Tax Commission" hyperlink; then follow "PD 07-191" hyperlink) [hereinafter TAX RULING].

197. TAX RULING, *supra* note 196.

VII. BUSINESS PROFESSIONAL OCCUPATION LICENSE TAX

The Supreme Court of Virginia held that the City of Lynchburg ("City") could not impose a tax on gross receipts for services performed by the taxpayer in other Virginia localities, despite not being taxed by the other localities.[198] English Construction Company, Inc. and W.C. English, Inc. (collectively referred to as "English") were construction contractors with a principal place of business in Lynchburg.[199] English also maintained definite places of business in other localities.[200] In *City of Lynchburg v. English Construction Co.*, the City argued that under Virginia Code section 58.1-3715(A), it could assess gross receipts that were not taxed by the other localities because English has its principal place of business in Lynchburg.[201] Accordingly, the City assessed English with its business, professional, and occupation license ("BPOL") tax on all of the gross receipts English received from projects in other localities that were not subject to a BPOL tax in those localities.[202] English initiated its lawsuit challenging the City's assessment on its BPOL receipts received, but not taxed, in the other localities.[203] After the circuit court held that the City had no express statutory authority to support the challenged assessments, the City filed an appeal with the Supreme Court of Virginia.[204]

The supreme court agreed with the circuit court that the Virginia Code did not provide the City with any authority to tax English's gross receipts earned in other localities, asserting that a local governing body must have clear statutory authority to impose a tax.[205] To support its holding, the supreme court noted that Virginia Code section 58.1-3703.1(A)(3)(a) specifies as a general rule for BPOL purposes that "the gross receipts to be included in the taxable measure shall be only those attributable to 'the exercise of a privilege subject to licensure at a definite place of busi-

---

198. City of Lynchburg v. English Constr. Co., 277 Va. 574, 584, 675 S.E.2d 197, 202 (2009).

199. *Id.* at 578, 675 S.E.2d at 199.

200. *See id.* at 579, 675 S.E.2d at 199.

201. *Id.* at 578, 675 S.E.2d at 199.

202. *Id.* at 578–79, 675 S.E.2d at 199.

203. *Id.* at 579, 675 S.E.2d at 199.

204. *Id.* For a complete discussion of the trial court's decision, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 43 U. RICH. L. REV. 405, 431–33 (2008).

205. *See English Constr. Co.*, 277 Va. at 583–84, 675 S.E.2d at 202.

ness within [the] jurisdiction.'"[206] Furthermore, Virginia Code section 58.1-3715 "contains no language granting the City authority to levy a tax on gross receipts from services performed by a contractor in other localities in which he has a definite place of business."[207] While asserting that the City sought such authority by implication,[208] the supreme court refused to recognize any authority to impose the tax by implication and noted that the City's interpretation of the Virginia Code "ignores the clear legislative intent underlying the General Assembly's 1996 revision of the business license tax laws."[209]

VIII. MISCELLANEOUS LOCAL TAXES

A. *Priority in Claims for Setoff Against Tax Refunds Established*

The 2009 General Assembly enacted legislation that establishes classifications for determining the priority of multiple claims to federal, state, and local personal income tax refunds for purposes of debt setoff.[210] Virginia Code section 58.1-530 classifies the claims to be set off and prioritizes them as follows:

> 1. Claims of the [Virginia] Department [of Taxation];
> 2. Claims filed by the Department of Social Services, Division of Child Support Enforcement;
> 3. Claims filed by any court or other administrative unit of state government;
> 4. Claims filed by any county, city, or town; and
> 5. Claims filed by the Internal Revenue Service.[211]

Under the new priority setoff legislation, claims within the same classification are determined by the order in which the claimant agency has filed a written notice with the Virginia Department of Taxation of its intent to effect collection through setoff.[212] Section 58.1-530 further provides that "[c]laims filed by counties, cities, and towns for an offset of federal income tax re-

---

206. *Id.* at 583, 675 S.E.2d at 201 (quoting VA. CODE ANN. § 58.1-3703.1(A)(3)(a) (Repl. Vol. 2009)).

207. *Id.* at 583–84, 675 S.E.2d at 202.

208. *Id.* at 584, 675 S.E.2d at 202.

209. *Id.*

210. Act of Mar. 27, 2009, ch. 571, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-530 (Repl. Vol. 2009)).

211. VA. CODE ANN. § 58.1-530 (Repl. Vol. 2009).

212. *Id.*

funds are limited to claims for delinquent local taxes."[213] However, this new setoff legislation will not become effective until the effective date of legislation passed by the U.S. Congress that would allow local governments to collect delinquent local tax debts using offsets from federal income tax refunds.[214]

B. *New Exemptions from Local Meals Tax*

The 2009 General Assembly created a series of new exemptions from the local meals tax and county food and beverage tax.[215] Examples of the new exemptions include the meals, food, and beverages: (1) sold by restaurants to employees as part of their compensation; (2) sold by schools to their students or employees; (3) sold by hospitals and extended care facilities to patients; (4) sold by day care centers; (5) sold by homes for the aged, infirm, handicapped, battered women, narcotic addicts, or alcoholics; (6) sold by age-restricted apartment complexes or residences when included in rental fees; (7) when used or consumed and paid for by the Commonwealth, any political subdivision of the Commonwealth, or the United States; (8) provided by a public or private nonprofit charitable organization to elderly, blind, handicapped, or needy persons; and (9) provided by private establishments that contract with the appropriate agency to elderly, infirm, blind, handicapped, or needy persons.[216]

The legislation also expands the tax exemptions to include meals, food, and beverages sold as a fundraising activity—not to exceed three times per year—by volunteer fire departments and rescue squads, churches and other educational and charitable organizations.[217] Additionally, the local meals tax exemptions were amended to include meals served by churches to their members "as a regular part of their religious observances."[218] Food and bev-

---

213. *Id.*

214. *See* Act of Mar. 27, 2009, ch. 571, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-530 ed. note (Repl. Vol. 2009)).

215. Act. of Mar. 27, 2009, ch. 415, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-3833(A), -3840(A) (Repl. Vol. 2009)).

216. *See* VA. CODE ANN. §§ 58.1-3833(A), -3840(A) (Repl. Vol. 2009).

217. *See id.*

218. *Id.* § 58.1-3840(A) (Repl. Vol. 2009).

erages sold by churches to their members were already exempt from the county food and beverage tax.[219]

C. *Recordation Tax Civil and Criminal Penalties*

The 2009 General Assembly amended Virginia Code section 58.1-812(C) to increase the criminal penalty for "[a]ny person who knowingly misrepresents the consideration for the interest in property conveyed by a deed or other instrument or any of the other information requested by the clerk of the court" to a Class 1 misdemeanor.[220] The legislation also provides that "[i]f an understatement of the consideration is false or fraudulent with the intent to evade a tax, a penalty equal to 100 percent of the tax due on the understatement shall be added to the amount of the tax due," plus accrued interest until the time the tax is paid.[221]

---

219. *See id.* § 58.1-3833(A) (Cum. Supp. 2008); *Id.* § 35.1-25(5) (Repl. Vol. 2005).

220. Act. of Mar. 30, 2009, ch. 686, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-812(C) (Repl. Vol. 2009)); Act of Feb. 25, 2009, ch. 95, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-812(C) (Repl. Vol. 2009)).

221. VA. CODE ANN. § 58.1-812(C) (Repl. Vol. 2009).