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Taxation

Craig D. Bell

McGuireWoods L.L.P., Richmond, Virginia

TAXATION

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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. Section VII discusses judicial and administrative interpretations, as well as legislative changes regarding Virginia's business professional occupation license tax. Section VIII addresses several miscellaneous local taxes and tax administration applicable to local government taxing authorities.

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* Partner, McGuireWoods L.L.P., 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 Fellow of the Virginia Law Foundation, 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. Mr. Bell is an Emeritus Director of The Community Tax Law Project, a nonprofit pro bono provider of tax law services for the working poor, and is its recipient of the Lifetime Pro Bono Achievement Award for his pro bono work in representing hundreds of Virginians before the IRS and in U.S. Tax Court and federal district court, as well as developing and training many lawyers in the area of federal tax law to expand pro bono tax representation for low income taxpayers.

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.

PART ONE: TAXES ADMINISTERED BY THE VIRGINIA DEPARTMENT OF TAXATION

II. RECENT SIGNIFICANT LEGISLATIVE ACTIVITY AFFECTING INCOME TAX

A. *Fixed Date of Conformity*

The 2010 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, 2008 to January 22, 2010.[1] Virginia continues, however, to disallow the federal bonus depreciation deductions except for any bonus depreciation allowed under I.R.C. § 168(n), which is designed to benefit qualified disaster assistance property and any five-year carryback of federal net operating loss deductions.[2] The new date of conformity enables the state to adopt most of the provisions of the American Recovery and Reinvestment Act of 2009[3] for taxable year 2009, including the increase in the federal earned income tax credit,[4] the itemized deduction for sales taxes on a new car,[5] the equalization of transit and parking benefits,[6] and the expensing of certain depreciable business assets.[7]

1. Act of May 17, 2010, ch. 874, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2010)); Act of May 7, 2010, ch. 872, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2010)). For additional guidance, see VA. DEP'T OF TAXATION, PUB. DOC. 10-4 (Mar. 30, 2010), *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Tax Bulletins" hyperlink; then follow "2010" hyperlink; then follow "VTB 10-4 (PD10-4)" hyperlink).

2. *See* VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2010); I.R.C. § 168(n) (2006 & Supp. III 2009).

3. Pub. L. No. 111-5, 123 Stat. 115 (codified in scattered sections of U.S.C.).

4. I.R.C. § 32(a)(1), (b)(3) (2006 & Supp. III 2009).

5. *Id.* § 164(a)(6) (2006 & Supp. III 2009).

6. *Id.* § 132(f) (2006 & Supp. III 2009).

7. *Id.* § 179 (2006 & Supp. III 2009).

However, Virginia will disallow the income tax exclusions related to cancellation of debt income when realized in connection with a reacquisition of business debt at a discount after December 31, 2008, and before January 1, 2011.[8] Under I.R.C. § 108(i), the income realized upon the reacquisition of certain business debt during 2009 and 2010 may be deferred and reported in taxable years 2014 through 2018.[9] Virginia provides for a limited partial deferral for specified debt reacquired in tax year 2009 only, with reporting required in equal amounts in 2009, 2010, and 2011.[10]

Virginia will also disallow the income tax deductions related to applicable high-yield discount obligations under I.R.C. § 163(e)(5)(F).[11] The American Recovery and Reinvestment Act of 2009 established a provision that suspends the application of the applicable high-yield debt obligation rules for certain debts issued after September 1, 2008, and before January 1, 2009.[12] Virginia will not conform to this federal tax provision.

For taxable years beginning on or after January 1, 2010, Virginia will not conform to the increase in the federal earned income tax credit under I.R.C. § 32(b)(3).[13] Virginia will also not conform to the scheduled increase from 6% to 9% in the federal deduction allowed under I.R.C. § 199 for certain domestic production income.[14] Congress enacted I.R.C. § 199 in 2004 and phased in the federal deduction over a period of years (3% of qualified production activities income of the taxpayer in tax years 2005 and 2006, 6% in 2007 through 2009, and 9% in 2010 and thereafter).[15] Virginia conformed to this provision in 2005.[16] However, Virginia will not conform to the scheduled increase of 9% in 2010 and thereafter. Therefore, beginning in taxable year 2010, taxpayers will

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8. *See* VA. CODE ANN. § 58.1-301(B)(4) (Cum. Supp. 2010); I.R.C. § 108(i) (2010).
9. I.R.C. § 108(i) (2006 & Supp. III 2009).
10. VA. CODE ANN. § 58.1-301(B)(4) (Cum. Supp. 2010).
11. *Id.* § 58.1-301(B)(3) (Cum. Supp. 2010).
12. Pub. L. No. 111-5, § 1232, 123 Stat. 115, 341 (codified at I.R.C. § 163(e)(5)(F) (2006 & Supp. III 2009)).
13. *See* VA. CODE ANN. § 58.1-301(B)(6) (Cum. Supp. 2010); I.R.C. § 32(b)(3) (2006 & Supp. III 2009).
14. *See* VA. CODE ANN. § 58.1-301(B)(5) (Cum. Supp. 2010); I.R.C. § 199 (2006 & Supp. III 2009).
15. American Jobs Creation Act at 2004, Pub. L. No. 108-357, sec. 102, § 199(a), 118 Stat. 1418, 1424 (codified as amended at I.R.C. § 199(a) (2006 & Supp. III 2009)).
16. Act of Feb. 24, 2005, ch. 5, 2005 Va. Acts 5 (codified as amended at VA. CODE ANN. § 58.1-301(B) (Repl. Vol. 2009)).

be required to add back one-third of the federal deduction on their Virginia return.[17]

B. *Green Job Tax Credit Enacted*

The 2010 General Assembly enacted new Virginia Code section 58.1-439.12:05 to provide a corporate and individual income tax credit for each new "green job" that is created in Virginia by the taxpayer.[18] For tax years "beginning on or after January 1, 2010, but before January 1, 2015," this legislation allows the taxpayer a $500 income tax credit against the income tax for each new green job created within Virginia.[19] Section 58.1-439.12:05 provides that "[t]he credit shall be first allowed for the taxable year in which the job has been filled for at least one year and for each of the four succeeding taxable years provided the job is continuously filled during the respective taxable year."[20] Each qualifying taxpayer will be allowed the credit for up to 350 green jobs.[21]

The new statute defines a "green job" as

> employment in industries relating to the field of renewable, alternative energies, including the manufacture and operation of products used to generate electricity and other forms of energy from alternative sources that include hydrogen and fuel cell technology, landfill gas, geothermal heating systems, solar heating systems, hydropower systems, wind systems, and biomass and biofuel systems.[22]

The Virginia Secretary of Commerce and Trade is designated in the legislation to "develop a detailed definition and list of jobs that qualify for the credit."[23] In order to qualify for the credit, "a taxpayer [must] demonstrate that the green job was created by the taxpayer, and that such job was continuously filled in the Commonwealth during the respective taxable year."[24]

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17. VA. CODE ANN. § 58.1-301(B)(5) (Cum. Supp. 2010).

18. Act of Apr. 13, 2010, ch. 722, 2010 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:05) (Cum. Supp. 2010)).

19. VA. CODE ANN. § 58.1-439.12:05(A) (Cum. Supp. 2010) (providing one "$500 income tax credit for each annual salary that is $50,000 or more").

20. *Id.*

21. *Id.*

22. *Id.* § 58.1-439.12:05(B) (Cum. Supp. 2010).

23. *Id.*

24. *Id.* § 58.1-439.12:05(C) (Cum. Supp. 2010).

"The amount of the credit [must] not exceed the total amount of [income] tax imposed . . . for the taxable year in which the green job was continuously filled."[25] If the amount of credit exceeds the taxpayer's tax liability for a taxable year, the excess amount "may be carried over for credit against the income taxes of the taxpayer in the next five taxable years or until the total amount of the tax credit has been taken, whichever is sooner."[26] "Credits granted to a partnership, limited liability company, or . . . (S corporation) [must] be allocated to the individual partners, members, or shareholders, respectively, in proportion to their ownership or interest in such business entities."[27]

If the taxpayer is eligible for the green job creation tax credit and creates green jobs in an enterprise zone, the taxpayer may also qualify for benefits under the Enterprise Zone Grant Program.[28] A taxpayer will not be allowed a green job creation tax credit "for any green job for which the taxpayer is allowed: (i) a major business facility job tax credit, . . . or (ii) a federal tax credit for investments in manufacturing facilities for clean energy technologies that would foster investment and job creation in clean energy manufacturing."[29]

C. *Reporting Requirements for Out of State Tax Credit Amended*

Virginia residents are allowed a credit against their income tax liability when they pay income tax to another state.[30] The purpose of this credit is to grant Virginia residents relief in situations where both Virginia and another state tax them on the same income.[31] In 2006, the General Assembly enacted Virginia Code section 58.1-311.1 to allow taxpayers one year from the final determination of a change made by any other state to file an amended return to request a refund resulting from credits for taxes paid to other states.[32] This statute requires taxpayers to file an amended

25. *Id.* § 58.1-439.12:05(D) (Cum. Supp. 2010).
26. *Id.*
27. *Id.* § 58.1-439.12:05(E) (Cum. Supp. 2010).
28. *Id.* § 58.1-439.12:05(F) (Cum. Supp. 2010). *See generally id.* §§ 59.1-538 to -549 (Repl. Vol. 2006 & Cum. Supp. 2010) (outlining Virginia's Enterprise Zone Grant Program).
29. *Id.* § 58.1-439.12:05(G) (Cum. Supp. 2010).
30. *Id.* § 58.1-332(A) (Repl. Vol. 2009).
31. *See id.*
32. Act of Mar. 24, 2006, ch. 234, 2006 Va. Acts 270 (codified at VA. CODE ANN. § 58.1-

return with the Virginia Department of Taxation to report the effects of such change or correction.[33] Prior to such legislation, if a taxpayer's nonresident tax return was audited by another state and the three-year limitations period to amend a return had expired, such taxpayer would lose out on a Virginia tax refund unless the taxpayer filed a timely protective claim pursuant to Virginia Code section 58.1-1824.[34]

The 2010 General Assembly amended Virginia Code section 58.1-1823(A) to extend the statute of limitations for filing amended individual income tax returns.[35] Virginia residents who are audited and assessed income tax by other states may now claim a credit for taxes paid to other states provided such taxpayer notifies the Virginia Department of Taxation within one year of the other state's action.[36]

D. *Exemption for Income Taxed as Long-Term Capital Gain for Federal Income Tax Purposes*

The 2010 General Assembly amended Virginia Code sections 58.1-322 and 58.1-402 to add provisions that allow individual and corporate income tax subtractions for income taxed for federal income tax purposes as long-term capital gain or as investment services partnership interest income (otherwise known as investment partnership carried interest income).[37] The investments must be related to investments in "qualified businesses" as defined in Virginia Code section 58.1-339.4 or in any technology business approved by the Virginia Secretary of Technology, provided its principal office or facility is in the Commonwealth and it

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311.1 (Repl. Vol. 2009)).

33. VA. CODE ANN. § 58.1-311.1 (Repl. Vol. 2009)).

34. *Id.* § 58.1-1823(A) (Repl. Vol. 2009). *See generally id.* § 58.1-1824 (Repl. Vol. 2009). For a complete discussion of this 2006 legislative change, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 41 U. RICH. L. REV. 283, 287–89 (2006).

35. Act of Apr. 7, 2010, ch. 228, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-1823(A) (Cum. Supp. 2010)).

36. VA. CODE ANN. § 58.1-1823(A) (Cum. Supp. 2010).

37. Act of Apr. 21, 2010, ch. 830, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-322(C)(35), -402(C)(24) (Cum. Supp. 2010)); Act of Apr. 21, 2010, ch. 802, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-322(C)(35), -402(C)(24) (Cum. Supp. 2010)).

has less than $3 million in annual revenues in the fiscal year prior to the investment.[38]

The legislation contains two additional limitations on the ability of a taxpayer to claim the tax subtraction. First, if the taxpayer has claimed a tax credit for an investment in a "qualified business" as defined in Virginia Code section 58.1-339.4, then the taxpayer may not also be eligible for this tax subtraction.[39] Second, the legislation provides that no investment will qualify for this subtraction "if the investment is in a business that performs research in Virginia on human cells or tissue derived from induced abortions or from stem cells obtained from human embryos."[40] However, the foregoing limitation "shall not apply to research performed using stem cells other than human embryonic stem cells."[41] The new subtraction is effective for taxable years beginning on or after January 1, 2011.[42]

E. *Major Business Facility Job Tax Credit Amended*

The 2010 General Assembly amended Virginia Code section 58.1-439 to reduce the number of qualified full-time jobs needed to qualify for the Major Business Facility Job Tax Credit.[43] The legislation became effective on July 1, 2010, requiring a major business facility to create fifty qualified full-time jobs to enable the company to receive a $1000 tax credit for each qualified full-time job.[44] If the qualified full-time jobs are created in an enterprise zone or in an economically distressed area, the threshold is lowered to twenty-five new jobs.[45] Prior to this legislation, the qualified full-time job thresholds were one hundred and fifty, respectively.[46] The new legislation allows this credit to be claimed

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38. VA. CODE ANN. §§ 58.1-322(C)(35), -402(C)(24) (Cum. Supp. 2010).
39. *Id.*; *see id.* § 58.1-339.4 (Repl. Vol. 2009 & Cum. Supp. 2010).
40. *Id.* §§ 58.1-322 note, -402 note (Cum. Supp. 2010).
41. *Id.*
42. *Id.* §§ 58.1-322(C)(35), -402(C)(24) (Cum. Supp. 2010).
43. Act of Apr. 11, 2010, ch. 469, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439(C)(1) (Cum. Supp. 2010)).
44. VA. CODE ANN. § 58.1-439(C)(1), (G) (Cum. Supp. 2010).
45. *Id.* § 58.1-439(K) (Cum. Supp. 2010).
46. *Id.* § 58.1-439(C)(1), (K) (Cum. Supp. 2010).

over two years, instead of three years, through December 31, 2012.[47]

F. *Refundable Motion Picture Film Production Tax Credits Created*

The 2010 General Assembly enacted a refundable income tax credit program that will be available to any motion picture film production company with qualifying expenses of at least $250,000 with respect to a motion picture film production in Virginia.[48] The legislation creates a series of refundable individual and corporate income tax credits for motion picture production companies meeting certain criteria.[49] The credit would be "15 percent of the production company's qualifying expenses or 20 percent of such expenses if the production is filmed in an economically distressed area of the Commonwealth," for any motion picture production company with qualifying expenses of at least $250,000.[50] The credit must "be computed based on all of the taxpayer's qualifying expenses incurred with respect to the production."[51]

The new statute defines "qualifying expenses" as the sum of the following amounts spent in Virginia by a production company for the production of a motion picture film or an episodic television series filmed in Virginia: (1) "goods and services leased or purchased," and (2) compensation and wages.[52] Both of the foregoing expense categories are further qualified under the statute.[53] "For goods with a purchase price of $25,000 or more, the amount included in qualifying expenses is the purchase price less the fair market value of the good at the time the production is completed."[54] As to compensation and wages, for any "individual who directly or indirectly receives compensation in excess of $1 million for personal services with respect to a single production . . . , only the first $1 million of salary shall be considered a qualifying ex-

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47. *Id.* § 58.1-439(G) (Cum. Supp. 2010).

48. Act of Apr. 11, 2010, ch. 599, 2010 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:03(A)) (Cum. Supp. 2010)); Act of Apr. 11, 2010, ch. 419, 2010 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:03(A)) (Cum. Supp. 2010)).

49. *See* VA. CODE ANN. § 58.1-439.12:03 (Cum. Supp. 2010).

50. *Id.* § 58.1-439.12:03(A) (Cum. Supp. 2010).

51. *Id.*

52. *Id.* § 58.1-439.12:03(A), (C) (Cum. Supp. 2010).

53. *Id.*

54. *Id.* § 58.1-439.12:03(A)(1) (Cum. Supp. 2010).

pense."[55] "An individual is deemed to receive compensation indirectly when a production company pays a personal service company or an employee leasing company that pays the individual."[56]

The new legislation also provides an additional tax credit "equal to 10 percent of the total aggregate payroll for Virginia residents employed in connection with the production of a film in the Commonwealth when total production costs in the Commonwealth are at least $250,000 but not more than $1 million."[57] The additional credit is "equal to 20 percent of the total aggregate payroll of such residents when total production costs in Virginia exceed $1 million."[58] There is an additional credit "equal to 10 percent of the total aggregate payroll for Virginia residents employed for the first time as actors or members of a production crew in connection with the production of a film in the Commonwealth."[59]

None of the motion picture production credits "shall be allowed . . . for any production that (i) is political advertising, (ii) is a television production of a news program or live sporting event, (iii) contains obscene material, or (iv) is a reality television production."[60] The legislation designates the Virginia Film Office and the Virginia Department of Taxation to set out the procedures, qualifying criteria, and related requirements to implement these new credits.[61] "[T]he amount of any credit attributable to a partnership, electing small business corporation (S corporation), or limited liability company may be allocated to the individual partners, shareholders, or members, respectively, in proportion to their ownership or interest in such business entities."[62] The Virginia legislature allocated a total of $2.5 million of credits for the "2010-2012 biennium, and $5 million in any biennium thereafter."[63] The new tax credit becomes available for taxable years beginning on or after January 1, 2011.[64]

55. *Id.* § 58.1-439.12:03(A)(2) (Cum. Supp. 2010).
56. *Id.*
57. *Id.* § 58.1-439.12:03(B)(1) (Cum. Supp. 2010).
58. *Id.*
59. *Id.* § 58.1-439.12:03(B)(2) (Cum. Supp. 2010).
60. *Id.* § 58.1-439.12:03(C)(2) (Cum. Supp. 2010).
61. *See id.* § 58.1-439.12:03(D), (E) (Cum. Supp. 2010).
62. *Id.* § 58.1-439.12:03(F) (Cum. Supp. 2010).
63. *Id.* § 58.1-439.12:03(G) (Cum. Supp. 2010).
64. *Id.* § 58.1-439.12:03(A) (Cum. Supp. 2010).

G. *Land Preservation Tax Credit Amended*

The 2010 General Assembly passed a number of bills that impact the amount of credit available for land preservation and made several changes concerning the administration of the land preservation program. First, the legislature reduced the amount of land preservation tax credit that may be claimed for taxable year 2011 from $100,000 to $50,000.[65] Prior to this legislation, the $50,000 limitation was set to expire after the end of the 2010 taxable year.[66] The new legislation also extends the carryover period for unused credits by one year for those taxpayers affected by this limitation.[67]

The Virginia legislature also eliminated the $10,000 cap on the 2% fee for transfers of land preservation credits. [68] Additionally, the legislation provides that up to 50% of the transfer fee revenue will cover the costs incurred by the Virginia Department of Taxation and the Department of Conservation and Recreation to administer the tax credit program, and the remainder of the transfer fees collected will be transferred to the Virginia Land Conservation Fund for distribution to the public or private agencies or organizations that are responsible for enforcing the conservation and preservation purposes of the donated land interests.[69]

The 2010 General Assembly created section 58.1-512(D)(3)(c) to require a taxpayer to have the Virginia Department of Conservation and Recreation verify the conservation value of a donation of land or interest in land if the related application for a land preservation tax credit would result in a credit of $250,000 or more.[70] This new requirement will be applicable only when "the real property that is the subject of the donation was partitioned from or part of another parcel of land and any other portion" of the

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65. Act of Apr. 8, 2010, ch. 246, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-512(C)(1) (Cum. Supp. 2010)).

66. VA. CODE ANN. § 58.1-512(C)(1) (Repl. Vol. 2009).

67. Ch. 246, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-512(C)(1), (D)(5) (Cum. Supp. 2010)).

68. Act of Apr. 8, 2010, ch. 248, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-513(C)(2) (Cum. Supp. 2010)); Act of Apr. 7, 2010, ch. 229, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-513(C)(2) (Cum. Supp. 2010)).

69. VA. CODE ANN. § 58.1-513(C)(2) (Cum. Supp. 2010).

70. Act of Apr. 8, 2010, ch. 265, 2010 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-512(D)(3)(c) (Cum. Supp. 2010)).

original parcel had received a land preservation tax credit or had an application for such a credit pending within three years of the donation.[71]

Lastly, the General Assembly amended Virginia Code section 58.1-512(C)(2) to modify the land preservation tax credit's restriction that prevents certain charitable organizations from qualifying for the credit.[72] This modification permits charitable organizations that hold certain types of conservation easements to claim the credit, provided they fall outside of the statutory definition of holder.[73] The legislation clarifies that only organizations holding conservation easements acquired pursuant to the authority conferred to a "holder" under the Virginia Conservation Easement Act are prevented from qualifying for the credit.[74] Therefore, organizations that hold certain types of conservation easements, but are not "holders" under the Virginia Conservation Easement Act, would qualify to earn the credit.[75] The Virginia Department of Taxation has held administratively that, under current law, any charitable organization that holds one or more conservation easements may not qualify for the land preservation tax credit.[76] This new legislation rectifies the Department of Taxation's administrative interpretation and allows nonprofit organizations to earn the land preservation tax credit provided they are not a "holder" of conservation easements under Virginia Code section 10.1-1009.

71. VA. CODE ANN. § 58.1-512(D)(3)(c) (Cum. Supp. 2010).

72. Act of Apr. 10, 2010, ch. 321, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-512(C)(2) (Cum. Supp. 2010)).

73. VA. CODE ANN. § 58.1-512(C)(2) (Cum. Supp. 2010).

74. *Id.*

75. *Id.*; *see also id.* § 10.1-1009 (Repl. Vol. 2006 & Cum. Supp. 2010) (defining a "holder" under the Virginia Conservation Easement Act).

76. *See, e.g.*, VA. DEP'T OF TAXATION, PUB. DOC. 05-125 (July 26, 2005), *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Rulings of the Tax Commissioner" hyperlink; then follow "2005" hyperlink; then follow "PD 05-125" hyperlink).

III. RECENT LEGISLATIVE ACTIVITY AFFECTING RETAIL SALES AND USE TAX: DEALERS SELLING AND INSTALLING COUNTERTOPS ARE RETAILERS

Virginia law generally treats sellers and installers of tangible personal property that becomes real property after installation as contractors.[77] As such a contractor, the seller-installer accrues use tax on the cost price of its purchases used in the contract and does not charge its customer a sales tax on the finished price of the transaction or contract.[78] Virginia Code section 58.1-610(D) provides a limited exception to this rule for retailers who sell and install certain specified items, including "fences, venetian blinds, window shades, awnings, storm windows and doors, . . . floor coverings[,] . . . cabinets, countertops, kitchen equipment, [and] window air conditioning units or other like or comparable items."[79] Provided these individuals or businesses maintain a retail or wholesale place of business and an inventory of the items listed above, and provided they perform installation as part of or incidental to the sale of the foregoing list of items, they are deemed retailers, and are authorized to collect retail sales tax from their customers on the sale of these items.[80] The 2010 General Assembly amended Virginia Code section 58.1-610(D) to allow dealers who sell and install countertops to qualify as retailers, and not consuming contractors or end-users, of the countertops they sell and install for their customers.[81] The law requires those dealers to collect sales tax from their customers on the contract to sell and install a countertop, rather than paying use tax on their purchases of countertop products they subsequently install for their customers.[82]

77. *See* VA. CODE ANN. § 58.1-610(A) (Cum. Supp. 2010).

78. *Id.*

79. *Id.* § 58.1-610(D) (Cum. Supp. 2010).

80. *Id.*; 23 VA. ADMIN. CODE § 10-210-410(G) (1996).

81. Act of Mar. 11, 2010, ch. 119, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-610(D) (Cum. Supp. 2010)).

82. *Id.*

IV. RECENT SIGNIFICANT LEGISLATIVE ACTIVITY AFFECTING STATE TAX ADMINISTRATION

A. *Collections Statute of Limitations Period Reduced*

The 2010 General Assembly amended Virginia Code section 58.1-1802.1(A) to reduce the period of limitations for the Virginia Department of Taxation to make or institute collection action "by levy, by a proceeding in court, or by any other means available" under the laws of Virginia from twenty years to ten years from the date of the tax assessment.[83]

B. *Penalty Provision for Pass-Through Entities Amended*

Under current Virginia law, pass-through entities doing business in Virginia and having taxable income derived from Virginia sources are required to pay a withholding tax "equal to five percent of the nonresident owners' share of income from Virginia sources."[84] The withholding tax is reported on Virginia Department of Taxation Form 502 and remitted to the Department of Taxation upon the filing of Form 502.[85] If either Form 502 is filed late or the withheld tax is remitted late, certain penalties apply.[86] The legislature amended Virginia Code section 58.1-486.2 and enacted Virginia Code section 58.1-486.3 to conform the pass-through entity withholding tax penalties to the penalties applicable to other taxes administered by the Virginia Department of Taxation.[87] Specifically, if the taxpayer paid the withholding tax within the extension period but had underestimated the balance of tax in excess of ten percent of the actual tax liability, the amended statute adds a penalty in the amount of "two percent per month of the balance of tax due for each month or fraction

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83. Act of Mar. 4, 2010, ch. 30, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-1802.1(A) (Cum. Supp. 2010)).

84. VA. CODE ANN. § 58.1-486.2 (Cum. Supp. 2010).

85. VA. DEP'T OF TAXATION, FORM 502: PASS-THROUGH ENTITY RETURN OF INCOME AND RETURN OF NONRESIDENT WITHHOLDING TAX (2009), *available at* http://www.tax.virginia.gov/taxforms/Business/Corporation%20and%20Pass-through%20Entity%20Tax%20Forms/2009/502.pdf.

86. VA. CODE ANN. § 58.1-486.3 (Cum. Supp. 2010).

87. Act of Mar. 11, 2010, ch. 120, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-486.2(D)(2) (Cum. Supp. 2010); codified at *id.* § 58.1-486.3 (Cum. Supp. 2010)).

thereof from the original due date for the filing of the withholding tax return to the date of payment."[88]

If any payment was not made in full when due, this legislation adds a late payment penalty of 6% of the unpaid balance of tax per month or fraction thereof, not to exceed 30% in the aggregate.[89] Additionally, interest is added "from the date the tax or any unpaid balance of the tax was originally due until paid."[90] For "any month or fraction thereof for which the pass-through entity is subject to the penalty" and the late filing penalty of $200 per month up to $1200, the greater of the two penalties applies.[91]

This legislation also provides that the late payment penalty does not apply to any tax attributable to income that was included on a unified nonresident individual income tax return.[92]

88. VA. CODE ANN. § 58.1-486.2(D)(2) (Cum. Supp. 2010).

89. *Id.* § 58.1-486.3(A) (Cum. Supp. 2010).

90. *Id.*

91. *Id.* § 58.1-486.3(B) (Cum. Supp. 2010).

92. *Id.* § 58.1-486.3(C) (Cum. Supp. 2010); *see id.* § 58.1-395 (Repl. Vol. 2009 & Cum. Supp. 2010).

PART TWO: TAXES ADMINISTERED BY LOCALITIES CONCERNING REAL PROPERTY

V. REAL PROPERTY

A. *Recent Significant Legislative Activity*

1. Changes to Real Property Tax Assessment Procedures

The 2010 General Assembly made a number of changes governing a local government's real estate assessment process, as well as other administrative and procedural changes relating to real estate assessments.[93] The real estate assessment legislation

> (1) sets forth additional requirements an appraiser must satisfy in order to be certified by [the Virginia Department of Taxation] to perform assessments or reassessments of real property; (2) changes the presumption for determining whether a locality has failed to assess at 100% of fair market value; (3) changes the methodology for assessing affordable rental housing containing more than four residential units; (4) requires an assessing officer to furnish certain information regarding the methodology employed in his calculation of a property's assessed value upon request by the taxpayer; (5) requires an assessing officer to provide 14 days notice to the taxpayer concerning a request to increase the assessment on certain real property prior to the hearing on a taxpayer's complaint that the property is over-assessed or that the assessment was not uniform; and (6) specifies the composition of boards of equalization and panels thereof in any locality with a population in excess of 100,000.[94]

In addition to the established certification requirements the Virginia Department of Taxation has for appraisers who perform assessments, the new legislation requires "training in conducting appraisals of certain multi-unit real estate and training in following generally accepted appraisal practices in order to be certified

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93. Act of Apr. 11, 2010, ch. 552, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-3258.1, -3259, -3295, -3331, -3374, -3379 (Cum. Supp. 2010)); Act of Apr. 21, 2010, ch. 824, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3295 (Cum. Supp. 2010)).

94. VA. DEP'T OF TAXATION, 2010 LEGISLATIVE SUMMARY 38 (2010) [hereinafter LEGISLATIVE SUMMARY], *available at* http://www.tax.virginia.gov/Documents/2010-LegislativeSummary.pdf; *see* VA. CODE ANN. §§ 58.1-3258.1, -3259, -3295, -3331, -3374, -3379 (Cum. Supp. 2010).

by the [Department of Taxation] to perform local real estate assessments."[95]

> Under current law, all general reassessments or annual assessments must be made at 100% fair market value. A locality that fails to meet this requirement may forfeit its share of the net profits derived from operation of the alcoholic beverage control system. If the locality has a sales assessment ratio lower than 70% for the year in which the general reassessment or annual reassessment is effective, this constitutes prima facie proof that the locality has failed to assess at 100% of fair market value. The sales assessment ratio is derived by dividing the assessed value of property by its selling price.[96]

In addition to the 70% threshold, the new legislation establishes that when a locality's sales assessment ratio exceeds 130%, it is prima facie proof that the locality did not assess at 100% of fair market value.[97]

The legislation amends Virginia Code section 58.1-3295 to require that real property generating income as affordable rental housing and containing more than four residential units "be assessed using the income approach, based on the property's current use, any income restrictions on the property, and the provisions of any arms length contract entered into with respect to the property."[98] For purposes of determining the value of the applicable rental property, income does not include federal or state tax credits.[99]

Under this amended statute, if a taxpayer requests information regarding the calculation of a property's assessed value, the assessing officer must provide the methodology employed.[100] The officer must provide the "capitalization rate used to determine the property's value, a list of comparable properties or sales figures considered in the valuation, and any other factors considered in determining the value of the property, . . . unless the disclosure of such information is otherwise prohibited."[101] Failure to provide

95. LEGISLATIVE SUMMARY, *supra* note 94, at 39; *see* VA. CODE ANN. § 58.1-3258.1(B) (Cum. Supp. 2010).

96. LEGISLATIVE SUMMARY, *supra* note 94, at 39; *see* VA. CODE ANN. § 58.1-3201, -3259 (Repl. Vol. 2009 & Cum. Supp. 2010).

97. VA. CODE ANN. § 58.1-3259 (Cum. Supp. 2010).

98. LEGISLATIVE SUMMARY, *supra* note 94, at 39; *see* VA. CODE ANN. § 58.1-3295 (Cum. Supp. 2010).

99. VA. CODE ANN. § 58.1-3295(B) (Cum. Supp. 2010).

100. *Id.* § 58.1-3331(C) (Cum. Supp. 2010).

101. LEGISLATIVE SUMMARY, *supra* note 94, at 40; *see* VA. CODE ANN. § 58.1-3331(C)

this information at least five days prior to an appeal proceeding will prevent the introduction or use of the information during the proceeding.[102]

The legislation further provides that in cases before the Board of Equalization ("Board")

> in which the local assessing officer requests that the [B]oard increase the assessment after the taxpayer files an appeal to the [B]oard on a commercial, multifamily residential or industrial property, the local officer must notify the taxpayer of the request not less than 14 days prior to the hearing. If the taxpayer contests the increase, the assessor must either withdraw the request or provide the [B]oard an appraisal performed by an independent contractor, licensed and certified by the Virginia Real Estate Appraiser Board to serve as a general real estate appraiser, and who affirms that the increase in value represents the property's fair market value as of the date of the disputed assessment. The assessor is excused from these requirements if the requested increase is based on mistakes of fact or if the information on which the commissioner or other officer based the requested increase was available to, but not provided by, the taxpayer in response to a request for information made by the commissioner or other officer at the time the challenged assessment was made.[103]

2. Separate Class of Real Property Created for Certified Renewable Energy Manufacturing Equipment

The 2010 General Assembly enacted new Virginia Code section 58.1-3221.4 to create a separate classification of property for tax purposes for "[i]mprovements to real property designed and used primarily for the purpose of manufacturing a product from renewable energy."[104] For purposes of this new classification of property, "renewable energy" is defined as "energy derived from sunlight, wind, falling water, biomass, sustainable or otherwise, . . . energy from waste, municipal solid waste, wave motion, tides, and geothermal power."[105] Renewable energy "also in-

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(Cum. Supp. 2010).

102. VA. CODE ANN. § 58.1-3331(E) (Cum. Supp. 2010).

103. LEGISLATIVE SUMMARY, *supra* note 94, at 40–41; *see* VA. CODE ANN. § 58.1-3379(D) (Cum. Supp. 2010).

104. Act of Apr. 21, 2010, ch. 849, 2010 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3221.4 (Cum. Supp. 2010)); Act of Apr. 8, 2010, ch. 264, 2010 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3221.4 (Cum. Supp. 2010)).

105. VA. CODE ANN. § 56-576 (Cum. Supp. 2010); *id.* § 58.1-3221.4 (Cum. Supp. 2010).

clude[s] the proportion of the thermal or electric energy from a facility that results from the co-firing of biomass."[106]

B. *Recent Significant Opinions of the Attorney General*

1. Subsurface Clay and Sand Subject to Real Property Tax

The Pittsylvania County Commissioner of the Revenue inquired as to "whether certain deposits of clay and sand are subject to assessment as subsurface minerals for purposes of local real property taxes, [and, if] so, . . . at what point in time the assessment of such clay and sand" should be made.[107] In response, the Attorney General opined that "clay and sand that are in place, i.e., beneath the surface of real property, are minerals that are subject to local taxation whether or not the property is under development."[108] The Attorney General further opined that the time at which assessment for the clay and sand should occur is upon the initial discovery of the mineral.[109] The Attorney General also opined that the local assessing officer may use the income capitalization methodology to ascertain the fair market value of the subsurface minerals and such method would comply with the provisions of Virginia Code sections 58.1-3286 and 58.1-3287.[110] "Under this approach, the property's fair market value derives from an estimate of the cash flows that the property will generate, to which a multiplier ("capitalization rate") . . . is applied to arrive at the present capital value of the property."[111] In the opinion of the Attorney General,

> [R]eliance upon the tonnage of extracted minerals reported to the Department of Mines, Minerals and Energy is a reasonable means of estimating the income that would accrue to an owner in mineral land inasmuch as the depletion of minerals beneath the land's surface would diminish the amount of material that the owner would be able to offer for sale.[112]

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106. *Id.*
107. Op. to Hon. Samuel W. Swanson, Jr. (Apr. 26, 2010).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

2. Religious Organization Organized as a Nonprofit Corporation Qualifies for Property Tax Exemption

Virginia State Senator Ken Cuccinelli inquired "whether certain real property and improvements used and occupied by the NorthStar Church Network qualify for exemption from local taxation under § 58.1-3606(A)(5)."[113] The Attorney General responded that the "real property and improvements used and occupied by the NorthStar Church Network do qualify for property tax exemption . . . under § 58.1-3606(A)(5)."[114] In reaching this result, the Attorney General described the pertinent facts to support his analysis. The "NorthStar Church Network ("NorthStar") is a Southern Baptist association of church congregations in Northern Virginia connected to both the state and national Southern Baptist conventions."[115] The NorthStar Foundation held title to the real property at issue.[116] The Foundation's "sole purpose is to provide real estate and other support activities" to NorthStar and its member congregations.[117] The Foundation is operated as a not-for-profit, charitable entity that operates as a religious nonprofit property holding company for NorthStar.[118] The property owned by the Foundation is leased to NorthStar which "exclusively operates and occupies the property as a campus ministry.'"[119] The rent charges are calculated on "the actual cost of owning the real estate."[120] "[T]he Foundation receives no profit from the use or rental of the property or from any of NorthStar's activities."[121]

The Attorney General concluded "that a nonprofit property holding company that is organized for religious purposes retains the same property tax exemption as its sole member, an incorporated church."[122]

113. 2009 Op. Va. Att'y Gen. 178.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

VI. RECENT SIGNIFICANT LEGISLATIVE ACTIVITY AFFECTING TANGIBLE PERSONAL PROPERTY: SEPARATE CLASS OF TANGIBLE PERSONAL PROPERTY CREATED FOR CERTIFIED RENEWABLE ENERGY

The 2010 General Assembly enacted Virginia Code section 58.1-3506(A)(41) and section 58.1-3221.4 to establish a separate class of property for "[t]angible personal property designed and used primarily for the purpose of manufacturing a product from renewable energy."[123] Under the new legislation, local governments "are permitted to levy their Tangible Personal Property Tax on such property at a rate that does not exceed the rate levied on the general class of tangible personal property in the locality."[124]

VII. BUSINESS, PROFESSIONAL, AND OCCUPATIONAL LICENSE TAX

A. *Recent Significant Legislative Activity*

1. Amounts Paid by Security Brokers or Dealers to Independent Registered Representatives Excluded from BPOL Tax

The 2010 General Assembly enacted legislation to exclude amounts paid by a security broker or dealer "to an independent registered representative as a commission on any sale or purchase of a security from the gross receipts of a security broker or security dealer for the purposes of the Business, Professional, and Occupational License ("BPOL") Tax."[125] The security "broker or dealer claiming the exclusion [from gross receipts] shall identify on the person's license application each independent registered representative to whom the excluded receipts have been paid and,

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123. Act of Apr. 21, 2010, ch. 849, 2010 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3221.4 (Cum. Supp. 2010); codified as amended at *id.* § 58.1-3506(A)(41)) (Cum. Supp. 2010)); Act of Apr. 8, 2010, ch. 264, 2010 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3221.4 (Cum. Supp. 2010); codified as amended at *id.* § 58.1-3506(A)(41)) (Cum. Supp. 2010)).

124. LEGISLATIVE SUMMARY, *supra* note 94, at 41; *see* VA. CODE ANN. § 58.1-3506(B) (Cum. Supp. 2010).

125. LEGISLATIVE SUMMARY, *supra* note 94, at 45; *see* Act of Apr. 8, 2010, ch. 283, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3700.1 (Cum. Supp. 2010); codified at *id.* § 58.1-3732.5 (Cum. Supp. 2010)); Act of Apr. 7, 2010, ch. 195, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3700.1 (Cum. Supp. 2010); codified at *id.* § 58.1-3732.5 (Cum. Supp. 2010)).

if applicable, the [Virginia jurisdictions] to which the independent registered representative is subject to business license taxes."[126] Without this legislative change, security brokers or dealers would not be allowed to deduct receipts subsequently paid over to an independent representative unless the broker or dealer could establish it was acting as the agent for the independent representative in each security transaction.[127]

2. Campgrounds, Bed and Breakfast Establishments Subject to BPOL Tax

Prior to the new legislation, no locality could impose a license fee or tax for engaging in the business of renting "real property other than hotels, motels, motor lodges, auto courts, tourist courts, travel trailer parks, lodging houses, rooming houses and boardinghouses."[128] The 2010 General Assembly added campgrounds and bed and breakfast establishments to the list of businesses that are subject to the BPOL Tax.[129]

B. *Recent Significant Opinion of the Attorney General: No BPOL Exemption for Nonprofit Charitable Organization's For-Profit Subsidiary*

The Roanoke County Commissioner of the Revenue inquired "whether a nonprofit charitable organization's exemption from the local . . . BPOL . . . tax . . . also applies to the nonprofit charitable organization's wholly owned, for-profit subsidiary."[130] In response, the Attorney General opined "that the statutory exemption from the BPOL tax contained in § 58.1-3703(C)(18)(a) applies only to an entity that qualifies as a 'nonprofit charitable organization' and would not extend to a wholly owned for-profit subsidiary that fails to meet the statutory definition of a 'nonprofit charitable organization.'"[131] In support of his conclusion, the Attorney

126. VA. CODE ANN. § 58.1-3732.5 (Cum. Supp. 2010).

127. *See* VA. CODE ANN. § 58.1-3732 (Repl. Vol. 2009); DEP'T OF TAXATION 2010 FISCAL IMPACT STATEMENT H.B. 985 (Feb. 26, 2010), *available at* http://legl.state.va.us/cgi-bin/legp504.exe?101+oth+HB985FER161+PDF.

128. VA. CODE ANN. § 58.1-3703(C)(7) (Repl. Vol. 2009).

129. Act of Apr. 11, 2010, ch. 648, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3703(C)(7) (Cum. Supp. 2010)).

130. 2009 Op. Va. Att'y Gen. 150.

131. *Id.*

General noted that "tax exemptions and deductions are strictly construed against the taxpayer" and the BPOL exemption clearly requires an entity to meet the federal criteria for an exempt organization pursuant to I.R.C. §§ 170 or 501(c)(3).[132] The "for-profit" status of the subsidiary does not meet the requirements of these federal tax statutes.[133] The Attorney General also stated that he found "no authority to support the proposition that a separate and taxable corporation that is wholly owned by a charitable nonprofit organization is entitled to the same treatment for purposes of BPOL taxes as . . . its parent organization."[134]

C. *Recent Significant Judicial Decision: Ford Motor Credit Co.'s BPOL Tax Refund Request Denied*

The Chesterfield County Circuit Court denied the BPOL tax refund request of Ford Motor Credit Company ("FMCC") for tax years 2001 through 2004 on the grounds that Chesterfield County proved it had the authority to impose BPOL tax on FMCC's office located in Chesterfield County and that the county employed an appropriate methodology to make the BPOL tax assessments.[135] The trial court also found that there was no legal basis for apportionment of the gross receipts pursuant to Virginia Code section 58.1-3703.1(A)(3)(b).[136] This case represents the second time a court has considered the BPOL statutes following their substantial revision and reformation by the Virginia General Assembly in 1996. Many of the fundamental reforms enacted by the General Assembly in that legislation are present in this case.[137]

"FMCC is a wholly owned subsidiary of Ford Motor Company."[138] The company is headquartered in Dearborn, Michigan, where it manages over three hundred locations worldwide.[139] "Un-

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132. *Id.*

133. *Id.*

134. *Id.*

135. Ford Motor Credit Co. v. County of Chesterfield, No. CL 07-418, slip op. at 3–4 (Va. Cir. Ct. May 19, 2009) (Chesterfield County).

136. *Id.* at 4–5.

137. *See, e.g., Ford Motor Credit Co.*, at 3–5; VA. CODE ANN. §§ 58.1-3700, -3703, -3703.1, -3706, -3708, -3732 (Repl. Vol. 1997). The 1996 BPOL legislation package also repealed VA. CODE ANN. § 58.1-3707. For additional discussion on the BPOL tax fundamental reforms enacted by the 1996 General Assembly, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 30 U. RICH. L. REV. 1543, 1603–08 (1996).

138. *Ford Motor Credit Co.*, at 2.

139. *Id.*

til it was closed in 2007, FMCC operated a sales office, the 'Richmond Branch,' . . . in Chesterfield County, Virginia."[140] The majority of FMCC's business came from three sources: retail financing to customers for sales and leases of motor vehicles; wholesale financing to dealers for the purchase of vehicle inventory; and other financing to dealers for working capital, facilities improvement, and the acquisition of real estate.[141] "The Richmond Branch operated as a loan origination office, performing all three financing functions."[142]

"[T]he Richmond Branch operated within a distinct sales territory to the exclusion of other FMCC sales offices."[143] After closing on the loans, the Richmond Branch transferred the files for loan portfolio management to "service centers" that FMCC operated in three different states, not including Virginia.[144] The service centers were responsible for collecting loan payments, responding to loan questions by its customers, and handling delinquent loan accounts.[145] FMCC also has a national bankruptcy service center to handle loans when its borrowers are in bankruptcy.[146] Additionally, FMCC has regional offices, known as "cost centers," that provide assistance to the Richmond Branch.[147] The trial court noted that neither the service centers nor the cost centers generated receipts.[148]

> When the Richmond Branch closed a loan [the court noted] it generated gross receipts in the form of interest and fees. FMCC recorded the loans as receivables and forwarded them to service centers for servicing and collection.
>
> During the period in question, FMCC utilized an accounting system, known as "MAPS," which allowed the company to accurately track the gross receipts generated by each sales office. Through MAPS, gross receipts generated by the Richmond Branch were attributed to the Richmond Branch only, and gross receipts generated by other sales offices operating in other jurisdictions were not attributed to the Richmond Branch.

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140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 2–3.
148. *Id.* at 3.

> The MAPS accounting system enabled FMCC to calculate the amount of gross receipts generated by the Richmond Branch "to the penny." The gross receipts figures reported by FMCC to the County for tax years 2001 through 2004 were calculated using MAPS.
>
> FMCC asserts the MAPS figures for the Richmond Branch were intended for internal management purposes only and do not reflect economic reality as to where the gross receipts were generated. The Court finds, however, that the MAPS figures accurately reflect the gross receipts generated as the result of the distinct efforts of the Richmond Branch.[149]

The trial court held that the general rule set forth in Virginia Code section 58.1-3703.1(A)(3)(a)(4) for determining the situs of a business engaged in the provision of business services applied to FMCC in this case.[150] The court noted "the evidence clearly demonstrates the Richmond Branch's marketing and closing operations generated gross receipts . . . from a definite place of business in Chesterfield County[;] imposition of BPOL tax on the gross receipts generated by FMCC's Chesterfield location is consistent with the applicable statute."[151]

FMCC argued that the gross receipts should be apportioned pursuant to Virginia Code section 58.1-3703.1(A)(3)(b) among various offices, because FMCC operates more than one definite place of business that is involved in handling or administering the loans FMCC's MAPS attributed to the Richmond Branch.[152] The trial court held apportionment was not appropriate in this case because the service centers and cost centers did not generate receipts.[153]

The trial court also distinguished the recent Virginia Supreme Court opinion in *City of Lynchburg v. English Construction Co.*, affirming a circuit court holding that a locality's assessment of BPOL taxes earned by a contractor at a definite place of business outside the locality was invalid.[154] The Chesterfield County Cir-

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149. *Id.*

150. *Id.* at 4.

151. *Id.*

152. *Id.* at 4–5.

153. *Id.* at 5.

154. *Id.* at 5–6 (citing City of Lynchburg v. English Constr. Co., 277 Va. 574, 584–85, 675 S.E.2d 197, 202 (2009)). For a complete discussion of the trial court's decision in *City of Lynchburg*, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 43 U. RICH. L. REV. 405, 431–33 (2008) and for further discussion regarding the Supreme Court of Virginia's decision, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 44 U. RICH.

cuit Court noted that unlike *City of Lynchburg*, where the parties agreed the gross receipts were generated outside Lynchburg, both FMCC and Chesterfield County dispute where the gross receipts were generated in this case.[155] The trial court carefully noted its factual finding that "the assessments in this case were based solely on gross receipts generated by the Richmond Branch" within Chesterfield County.[156]

The trial court also dismissed FMCC's argument that the BPOL tax paid by FMCC violated the Commerce Clause of the United States Constitution.[157] FMCC subsequently filed a petition for appeal with the Virginia Supreme Court, which the court granted.[158]

VIII. MISCELLANEOUS LOCAL TAXES: SHORT-TERM RENTAL PROPERTY CLASSIFIED AS MERCHANT'S CAPITAL

The 2010 General Assembly enacted legislation that categorizes short-term rental property as a separate classification of merchant's capital and authorizes a locality to tax short-term rental property under either the Merchants' Capital tax or the Short-Term Rental Tax, but not both.[159] The legislation also specifies that short-term rental property does not constitute tangible personal property for purposes of local taxation.[160]

L. REV. 599, 627–28 (2009).

155. *Ford Motor Credit Co.*, at 5–6.

156. *Id.* at 6.

157. *Id.* at 6–8.

158. *Id.*, *appeal granted*, No. 092158 (Va. Mar. 5, 2010).

159. Act of Apr. 8, 2010, ch. 255, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-3500, -3510.4, -3510.6, -3704, -3706) (Cum. Supp. 2010)); Act of Apr. 8, 2010, ch. 295, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-3500, -3510.4, -3510.6, -3704, -3706) (Cum. Supp. 2010)).

160. VA. CODE ANN. § 58.1-3510.6(E) (Cum. Supp. 2010).