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Taxation

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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 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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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 2011 General Assembly amended Virginia Code section 58.1-301, which mandates conformity to the terms of the Internal Revenue Code ("IRC"), to advance Virginia's fixed date of conformity from January 22, 2010, to December 31, 2010.[1] Virginia continues, however, to disallow the federal bonus depreciation deductions, except for any bonus depreciation allowed under IRC § 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 conformity date enables the state to adopt a number of tax provisions contained in five laws enacted by Congress since January 22, 2010, which affect income taxation in Virginia.[3] These five new laws include the Health Care and Education Reconciliation Act of 2010,[4] in combination with the Patient Protection and Affordable Care Act,[5] which together expand healthcare coverage and provide several tax-related requirements

1. Act of Apr. 6, 2011, ch. 866, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2011)); Act of Feb. 16, 2011, ch. 2, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2011)). For additional guidance, see VA. DEP'T OF TAXATION, PUB. DOC. 11-22 (Feb. 18, 2011) [hereinafter TAX BULLETIN 11-22], *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Tax Bulletins" hyperlink; then follow "2011" hyperlink; then follow "VTB 11-1 (PD 11-22)" hyperlink).

2. TAX BULLETIN 11-22, *supra* note 1, at 2–3; VA. CODE ANN. § 58.1-301(B)(2) (Repl. Vol. 2009 & Cum. Supp. 2011); *see* I.R.C. § 168(n) (2006 & Supp. III 2009).

3. TAX BULLETIN 11-22, *supra* note 1, at 2.

4. Pub. L. No. 111-152, 124 Stat. 1029 (codified in scattered sections of 42 U.S.C.).

5. Pub. L. No. 111-148; 124 Stat. 119 (codified in scattered sections of 42 U.S.C.).

and incentives.[6] The new conformity date permits Virginia to conform to the increase in expensing of certain depreciable business assets set forth in the Hiring Incentives to Restore Employment Act.[7]

In addition, the various tax provisions contained in the Education Jobs and Medicaid Assistance Act of 2010,[8] the Small Business Jobs Act of 2010,[9] and the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010[10] are all conformed as a result of the Virginia legislature moving the Virginia Tax Code's conformity date to December 31, 2010.[11] Perhaps the most important of these tax changes for Virginians will be the temporary increase in the federal earned income tax credit pursuant to IRC § 32(b)(3) for taxable year 2010.[12] Additionally, the IRC § 179 expense in lieu of depreciation amount was increased to $500,000, and the phase-out threshold amount applicable to businesses seeking to take advantage of the increased annual expense limit was raised to $2 million for taxable years 2010 and 2011.[13]

The conformity legislation also continues to allow the partial deferral of some of the income tax deductions related to cancellation of debt income realized in connection with a requisition of business debt at a discount for specified debt reacquired for part of taxable year 2010.[14] For taxable year 2010, taxpayers with cancellation of debt income resulting from transactions on or before April 21, 2010 may elect to report the addition required by conformity in equal amounts over three taxable years: 2010, 2011, and 2012.[15] Taxpayers must add back the entire amount of any cancellation of debt income resulting from transactions after April 21, 2010.[16] Virginia's new conformity legislation also repealed the provision adopted in the 2010–2012 Appropriations

6. TAX BULLETIN 11-22, *supra* note 1, at 2.
7. *Id.*; Pub. L. No. 111-14, 124 Stat. 71 (codified in scattered sections of 26 U.S.C.).
8. Pub. L. No. 111-226, 124 Stat. 2389 (codified in scattered sections of 26 U.S.C.).
9. Pub. L. No. 111-240, 124 Stat. 2504 (codified in scattered sections of 15 U.S.C.).
10. Pub. L. No. 111-312, 124 Stat. 3296 (codified in scattered sections of 26 U.S.C.).
11. TAX BULLETIN 11-22, *supra* note 1, at 2.
12. *Id.*; *see* I.R.C. § 32(b)(3) (2006 & Supp. III 2009).
13. I.R.C. § 179(b)(2) (2006 & Supp. III 2009).
14. VA. CODE ANN. § 58.1-301(B)(4) (Cum. Supp. 2011).
15. *Id.*
16. *Id.*

Act that disallows the deduction for qualified motor vehicle taxes pursuant to IRC § 164(a)(6) because the federal deduction was only applicable to qualified vehicles purchased in 2009.[17]

B. *Barge and Rail Usage Tax Credit Enacted*

The 2011 General Assembly enacted new Virginia Code section 58.1-439.12:09 to provide a tax credit that can be claimed by qualifying international trade facilities and applied against various types of tax liability.[18] "The amount of the credit [is] $25 per 20-foot equivalent unit (TEU) moved by barge or rail rather than by trucks or other motor vehicles on [Virginia's] highways."[19] The credit is available to a company that meets the definition of an international trade facility for taxable years beginning on and after January 1, 2011, but before January 1, 2015.[20] The credit may be allowed against corporate and personal income taxes, fiduciary tax, bank franchise tax, insurance license tax, or the license tax imposed on public service companies furnishing water, heat, light, or power.[21]

For purposes of this credit, an "international trade facility" is defined as a company that:

> (1) is doing business in [Virginia] and engaged in port-related activities, including but not limited to warehousing, distribution, freight forwarding, and handling, and goods processing; (2) has the sole discretion and authority to move cargo in containers originating or terminating in [Virginia]; (3) uses maritime port facilities located in [Virginia]; and (4) uses barges and rail systems to move cargo containers through port facilities in [Virginia] rather than trucks or other motor vehicles on [Virginia's] highways.[22]

An international trade facility will not be allowed to claim the tax credit unless it applies to the Department of Taxation and the

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17. Act of Feb. 16, 2011, ch. 2, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301, -301(B)(7) editor's note (Cum. Supp. 2011), *repealing id.* § 58.1-301(B)(7) (Supp. 2010); I.R.C. § 164(a)(6) (2006 & Supp. III 2009).

18. Act of Apr. 6, 2011, ch. 861, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439-12:06(B) (Cum. Supp. 2011)); Act of Apr. 6, 2011, ch. 820, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:09(B) (Cum. Supp. 2011)).

19. VA. CODE ANN. § 58.1-439.12:09(B) (Cum. Supp. 2011).

20. *Id.*

21. *Id.*

22. *Id.* § 58.1-439.12:09(A) (Cum. Supp. 2011).

Tax Department approves the credit.[23] "The Department [of Taxation will] determine the credit amount allowable for the year and [will] provide a written certification to the international trade facility."[24] The "certification [must] report the amount of the tax credit approved by the [Tax] Department," and the international trade facility must "attach the certification to the applicable tax return."[25] The Tax Commissioner cannot issue more than $1.5 million in tax credits in any fiscal year of Virginia.[26]

> The amount of any credit attributable to a partnership . . . []S corporation[], or limited liability company [must] be allocated to the individual partners, shareholders, or members, respectively, in proportion to their ownership or interest in such business entities. Any credit not usable for the taxable year may be carried over for the next five taxable years or until such credit is fully taken, whichever occurs first. The amount of credit allowed . . . [must] not exceed the tax imposed for the taxable year. No credit [can] be carried back to a preceding taxable year. . . . If a taxpayer that is subject to the tax limitation . . . is allowed another credit . . . or has a credit carryover from a preceding taxable year, [that] taxpayer [will] be considered to have first utilized any credit that does not have a carryover provision, and then any credit that is carried forward from a preceding taxable [credit], before using [this] credit.[27]

C. *Port Volume Increase Income Tax Credit Enacted*

The 2011 General Assembly enacted an income tax credit that can be claimed by a "taxpayer engaged in the manufacturing of goods or the distribution of manufactured goods that uses port facilities in [Virginia] and increases its port cargo volume at these facilities by a minimum of [5%] in a single calendar year over its base year port cargo volume."[28] The tax credit may be used against corporate and personal income taxes in an amount determined by the Virginia Port Authority.[29] The credit is available

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23. *Id.* § 58.1-439.12:09(C) (Cum. Supp. 2011).
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* § 58.1-439.1209(D)–(E) (Cum. Supp. 2011).
28. Act of Apr. 6, 2011, ch. 872, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:10(B)(1) (Cum. Supp. 2011)); Act of Apr. 6, 2011, ch. 831, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:10(B)(1) (Cum. Supp. 2011)).
29. VA. CODE ANN. § 58.1-439.12:10(B)(1) (Cum. Supp. 2011).

for taxable years beginning on or after January 1, 2011, but before January 1, 2016.[30]

The legislation provides a number of definitions specific to this tax credit. "'Base year port cargo' volume means the total amount of net tons of noncontainerized cargo or TEUs of cargo actually transported by way of a waterborne ship or vehicle through a port facility during the period from January 1, 2010 through December 31, 2010."[31] To be eligible for the credit, a taxpayer's "[b]ase year port cargo volume must be at least 75 net tons of noncontainerized cargo or 10 loaded TEUs."[32] The legislation provides that:

> [F]or a taxpayer that does not ship that amount in the year ending December 31, 2010, including the taxpayer who locates in Virginia after December 31, 2010, its base cargo volume will be measured by the initial January 1 through December 31 calendar year in which it meets the requirements of 75 net tons of noncontainerized cargo or 10 loaded TEUs. Base year port cargo volume must be recalculated each calendar year after the initial base year.[33]

A "majority facility" defined in the statute means "a new facility to be located in Virginia that is projected to import or export cargo through a port in excess of 25,000 TEUs in its first calendar year."[34] "Port cargo volume" is defined in the statute as "the total amount of net tons of noncontainerized cargo or containers measured in TEUs of cargo transported by way of a waterborne ship or vehicle through a port facility."[35] A "port facility" is defined as "any publicly or privately owned facility located within [Virginia] through which cargo is transported by way of a waterborne ship or vehicle to or from destinations outside [Virginia] and which handles cargo owned by third parties in addition to cargo owned by the port facility's owner."[36] Lastly, "TEU" means "a volumetric measure based on the size of a container that is 20-feet long by [8] feet wide by [8] feet, [6] inches high."[37]

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30. *Id.*
31. *Id.* § 58.1-439.12:10(A) (Cum. Supp. 2011).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*

To qualify for this port volume increase income tax credit, qualifying taxpayers must increase their port cargo volume by a minimum of 5% in a qualifying calendar year in order to receive a $50 credit for each TEU above the base year port cargo volume.[38]

> A qualifying taxpayer that is a major facility . . . [will] receive a $50 credit . . . for each TEU transported through a port facility during the major facility's first calendar year. A qualifying taxpayer may not receive more than $250,000 [credit] for each calendar year. . . . The maximum amount of credits allowed for all qualifying taxpayers . . . [must] not exceed $3.2 million for each calendar year. . . .[39] If on March 15 of each year the $3.2 million amount of credit is not fully allocated among qualifying taxpayers, then those taxpayers who have been allocated a credit for the prior year [must] be allowed a pro rata share of the remaining allocated credit up to $3.2 million. If on March 15 of each year, the cumulative amount of tax credits requested by qualifying taxpayers for the prior year exceeds $3.2 million, then the $3.2 million in credits [must] be prorated among the qualifying taxpayers who requested the credit.[40]

Any excess amount may be carried forward and claimed against income taxes for the next five taxable years, if the amount of the credit exceeds a taxpayer's liability for that year.[41]

Furthermore, the statute requires that "[c]redits 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 interests in such business entities."[42]

The legislation requires a taxpayer to own the cargo at the time the port facilities are used in order to claim the credit.[43] "For every year in which a taxpayer claims the credit, the taxpayer [must] submit an application to the Virginia Port Authority by March 1 of the calendar year after the calendar year in which the increase in port cargo occurs."[44] The new statute sets forth the required information to be included in the taxpayer's credit application.

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38. *Id.* § 58.1-439.12:10(B)(2) (Cum. Supp. 2011).
39. *Id.*
40. *Id.* § 58.1-439.12:10(C)(2) (Cum. Supp. 2011).
41. *Id.* § 58.1-439.12:10(B)(3) (Cum. Supp. 2011).
42. *Id.* § 58.1-439.12:10(D) (Cum. Supp. 2011).
43. *Id.* § 58.1-439.12:10(B)(4) (Cum. Supp. 2011).
44. *Id.* § 58.1-439.12:10(C)(1) (Cum. Supp. 2011).

D. *International Trade Facility Tax Credit Enacted*

The 2011 General Assembly created a new tax credit for either a capital investment in an international trade facility or increasing jobs related to an international trade facility.[45]

> For taxable years beginning on and after January 1, 2011, but before January 1, 2015 . . . [t]he amount of credit [available must be equal] to either (i) $3,000 per qualified full-time employee that results from increased qualified trade activities by the taxpayer or (ii) an amount equal to [2%] of the capital investment made by the taxpayer to facilitate the increased qualified trade activities.[46]

In a tobacco-dependent locality, as defined in Virginia Code section 58.1-439.13, if an international trade facility creates jobs or makes capital investments, then it must be entitled to tax credits twice the amount than otherwise available.[47] The amount of the credit allowed may not exceed 50% of the taxpayer's liability for the taxable year and any unused credit may be carried forward for ten years.[48]

Taxpayers can elect either credit, but are not permitted to claim both credits for the same activities that occur in a calendar year.[49] Additionally, no more than $250,000 in tax credits may be issued in any fiscal year of Virginia.[50] "If the amount of tax credits requested . . . exceeds $250,000, such credits shall be allocated proportionately among all qualified taxpayers."[51] If the number of qualified full-time employees in any of the five years succeeding the taxable year in which a credit has been earned falls below the average number of qualified full-time employees employed during the credit year, the credit is subject to recapture.[52] The legislation provides a number of definitions that enable a taxpayer to determine what expenditures will qualify as a "capital investment," what constitutes a "new permanent full-time position" and a

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45. Act of Mar. 10, 2011, ch. 49, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:06 (Cum. Supp. 2011)).

46. VA. CODE ANN. § 58.1-439.12:06(B) (Cum. Supp. 2011).

47. *Id.* § 58.1-439.12:06(I) (Cum. Supp. 2011).

48. *Id.* § 58.1-439.12:06(D) (Cum. Supp. 2011).

49. *Id.* § 58.1.439.12:06(B) (Cum. Supp. 2011).

50. *Id.* § 58.1-439.12:06(C) (Cum. Supp. 2011).

51. *Id.*

52. *Id.* § 58.1-439.12:06(H) (Cum. Supp. 2011). This section sets forth the manner in which the recapture provisions are implemented to reduce the credit amount previously issued to the taxpayer. *Id.*

"qualified full-time employee," as well as explaining what the legislature intended to constitute as an "international trade facility" and "qualified trade activities."[53]

E. *Research and Development Tax Credit Enacted*

The 2011 General Assembly enacted Virginia's first general income tax credit for research and development expenses.[54] For taxable years beginning on or after January 1, 2011, but before January 1, 2016, the legislation allows individuals and businesses to claim refundable income tax credits for qualified research and development expenses.[55] The credit is available in an amount equal to:

> (i) 15[%] of the first $167,000 in Virginia qualified research and development expenses paid or incurred by the taxpayer during the taxable year or (ii) 20[%] of the first $175,000 in Virginia qualified research and development expenses paid or incurred by the taxpayer during the taxable year if the Virginia qualified research was conducted in conjunction with a Virginia public or private college or university, to the extent the expenses exceed the Virginia base amount for the taxpayer. The total amount of credits granted for each fiscal year . . . [is not permitted to] exceed $5 million.[56]

Any taxpayer who claims a research and development expenses credit will not be allowed to use the same expenses as the basis for claiming any other Virginia tax credit.[57] The new tax credit statute also prohibits taxpayers from claiming the credit if the otherwise qualified research and development expenses are "paid for or incurred by a taxpayer for research conducted . . . on human cells or tissue derived from induced abortions or from stem cells obtained from human embryos."[58] The legislation also directs the Department of Taxation to develop guidelines specifying that the credit will "not be refundable if the taxpayer conducts re-

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53. *Id.* § 58.1-439.12:06(A) (Cum. Supp. 2011).

54. Act of Mar. 28, 2011, ch. 745, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:08 (Cum. Supp. 2011)); Act of Mar. 28, 2011, ch. 742, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:08 (Cum. Supp. 2011)).

55. VA. CODE ANN. § 58.1-439.12:08(B) (Cum. Supp. 2011).

56. *Id.*

57. *Id.* § 58.1-439.12:08(E) (Cum. Supp. 2011).

58. *Id.* § 58.1-439.12:08 editor's note (Cum. Supp. 2011). The provision does not apply if the research was conducted using non-embryonic stem cells. *Id.*

search . . . on human cells or tissue derived from induced abortions or from stem cells obtained from human embryos."[59]

F. *Land Preservation Tax Credit Amended*

The 2011 General Assembly continued the annual trend of addressing various issues involving the Land Preservation Tax Credit when it 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 amended Virginia Code section 58.1-512(D)(4)(a) relating to the annual maximum cap of available land preservation credits.[60] Effective July 1, 2011, the annual amount of land preservation credits that may be issued in any calendar year by the Department of Taxation is $100 million plus any previously issued credits that have been disallowed or invalidated by the Tax Department.[61] In this same legislation, the General Assembly also approved a process that would allow a second appraisal to be conducted in order to determine the fair market value of a taxpayer's donation for purposes of the land preservation tax credit.[62] The Tax Commissioner is specifically allocated the power to require a donor to obtain a second appraisal if the Tax Commissioner provides written notice to the donor within thirty days of the filing of the application to receive credits.[63] Additionally, unless a donor has filed an appeal, the Tax Commissioner must make a final determination within 180 days of such notice.[64]

The legislature also amended Virginia Code section 58.1-512(C)(1) to provide that a land preservation credit may "not be reduced by amount of unused credit that could have been claimed in a prior year by the taxpayer but was unclaimed."[65] This legislation was intended to reverse a position taken by the Department

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59. *Id.*

60. Act of Mar. 18, 2011, ch. 296, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-512(D)(4)(a) (Cum. Supp. 2011)); Act of Mar. 16, 2011, ch. 212, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-512(D)(4)(a) (Cum. Supp. 2011)).

61. VA. CODE ANN. § 58.1-512(D)(4)(a) (Cum. Supp. 2011).

62. Ch. 296, 2011 Va. Acts ___ ; ch. 212, 2011 Va. Acts ___.

63. VA. CODE ANN. § 58.1-512(D)(4)(a) (Cum. Supp. 2011).

64. *Id.*

65. Act of Mar. 22, 2011, ch. 377, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-512(C)(1) (Cum. Supp. 2011)).

of Taxation with respect to a taxpayer claiming a Virginia recycling credit.[66] In Public Document 99-48, a taxpayer had not claimed a recycling credit in the year that it had been earned, and the three-year period for amending the tax return had expired.[67] Although no refund could be granted for the expired year, the Tax Commissioner allowed the taxpayer to claim the credit for the purpose of claiming carryover credits in subsequent years for which amended returns could be filed.[68] However, the Tax Commissioner held that the carryover amounts had to be reduced by the amount of credit that could have been claimed in the years for which refunds were barred by the statute of limitations.[69] As a result of this new legislation, Virginia law allows taxpayers to claim credits in any order they wish.[70]

The third change made to the land preservation program requires the Virginia Department of Conservation and Recreation to include additional information on riparian buffers required by deed restriction on land qualifying for the land preservation credit in its annual report regarding land preservation credits.[71]

G. *Telework Expenses Tax Credit Enacted*

The 2011 General Assembly enacted an income tax credit for expenses incurred by employers in allowing their employees to telework pursuant to a telework agreement.[72] For tax years beginning on or after January 1, 2012, and before January 1, 2014, an income tax credit is available for employers incurring "eligible telework expenses" in an amount up to $1200 for each participat-

66. *See* VA. DEP'T OF TAXATION, PUB. DOC. 99-48 (April 2, 1999) [hereinafter RULINGS OF THE TAX COMM'R 99-48], *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Rulings of the Tax Commissioner" hyperlink; then follow "1999" hyperlink; then follow "P.D. 99-48" hyperlink). This legislation was part of the Virginia Bar Association's legislative package for the 2011 General Assembly, sponsored by its Tax Section, with the express intent to reverse the Tax Department's position on unused credits. *2011 Legislation Highlights*, VBA NEWS J., Spring 2011, at 612.

67. RULINGS OF THE TAX COMM'R 99-48, *supra* note 66.

68. *Id.*

69. *Id.*

70. *See* VA. CODE ANN. § 58.1-512(C)(1) (Cum. Supp. 2011).

71. *Id.* § 58.1-512(C)(2) (Cum. Supp. 2011).

72. Act of Mar. 23, 2011, ch. 417, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:07 (Cum. Supp. 2011)); Act of Mar. 23, 2011, ch. 409, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-439.12:07 (Cum. Supp. 2011)).

ing employee to begin to telework.[73] Such expenses include, but are not limited to: the purchase of computers, modems, data processing equipment hardware and software, telecommunications equipment, computer security software, and delivery and installation fees.[74] In addition, a telework assessment may also be included as an eligible telework expense so long as it does not cost more than $20,000.[75] The credit is capped at $50,000 per employer for the 2012 and 2013 calendar years.[76] The credit cannot be carried back or carried forward.[77]

In order to obtain the credit, an employer must "submit a reservation application to the Tax Commissioner . . . between September 1 and October 31 of the year preceding the taxable year for which the tax credit is . . . earned."[78] The Tax Commissioner will then provide tentative approval of the application by December 31 of the year during which the employer submitted its application; once the application and amount of credits have been tentatively approved, the employer must make the approved purchases during the following taxable year so it may receive the credits.[79] The telework expenses tax credit is capped at $1 million annually for taxable years 2012 and 2013.[80] "In the event the credit amounts on the applications filed with the Tax Commissioner exceed the maximum aggregate amount of tax credits, then the tax credits shall be allocated on a pro rata basis" based on the amounts contained in the timely filed applications by the eligible employers.[81]

H. *Agricultural Best Management Practices Tax Credit Becomes a Refundable Credit*

The 2011 General Assembly amended Virginia Code section 58.1-339.3(C)(2) to enable an individual earning an agricultural best management practices tax credit to receive a refund for 100%

73. VA. CODE ANN. § 58.1-439.12:07(A) (Cum. Supp. 2011).
74. *Id.*
75. *Id.*
76. *Id.* § 58.1-439.12:07(B) (Cum. Supp. 2011).
77. *Id.* § 58.1-439.12:07(D) (Cum. Supp. 2011).
78. *Id.* § 58.1-439.12:07(E) (Cum. Supp. 2011).
79. *Id.*
80. *Id.* § 58.1-439.12:07(F) (Cum. Supp. 2011).
81. *Id.*

of the credit amount.[82] Pursuant to the new legislation, the Department of Taxation is required to issue the requested refund within ninety days of the filing date of the tax return claiming the refund.[83] Nothing in the new law prohibits taxpayers who have previously earned the credit but are carrying forward unused credits from claiming a refund of unused carry over credits.[84] The legislation also enacts a new subsection E of Virginia Code section 58.1-339.3 to permit pass-through entities to designate a general partner, member-manager, or shareholder as a tax-matters representative for purposes of interactions with the Department of Taxation relating to the credit.[85]

I. *Farm Wineries and Vineyards Tax Credit Enacted*

The 2011 General Assembly enacted legislation creating an income tax credit for establishing a new farm winery or vineyard or improving upon an existing operation.[86] For taxable years beginning on or after January 1, 2011, a credit against Virginia personal and corporate income tax is available for "qualified capital expenditures made in connection with the establishment of new Virginia farm wineries or vineyards and capital improvements made to existing Virginia farm wineries or vineyards."[87] The credit is equal to 25% of such capital expenditures.[88] Qualified capital expenditures are defined as:

> [A]ll expenditures made by the taxpayer for the purchase and installation of barrels, bins, bottling equipment, capsuling equipment, chemicals, corkers, crushers and destemmers, dirt, fermenters or other recognized fermentation devices, fertilizer and soil amendments, filters, grape harvesters, grape plants, hoses, irrigation equipment, labeling equipment, poles, posts, presses, pumps, refrac-

82. Act of Mar. 22, 2011, ch. 352, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-339.3(C)(2) (Cum. Supp. 2011)).

83. VA. CODE ANN. § 58.1-339.3(C)(2) (Cum. Supp. 2011).

84. *Id.*

85. Act of Mar. 22, 2011, ch. 352, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-339.3(E) (Cum. Supp. 2011)).

86. Act of Mar. 16, 2011, ch. 226, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-339.12(B) (Cum. Supp. 2011)); Act of Mar. 16, 2011, ch. 214, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-339.12(B) (Cum. Supp. 2011)).

87. VA. CODE ANN. § 58.1-339.12(B) (Cum. Supp. 2011).

88. *Id.*

> tomers, refrigeration equipment, seeders, tanks, tractors, vats, weeding and spraying equipment, wine tanks, and wire.[89]

Further, for a calendar year, the total amount of tax credits available must not exceed $250,000.[90] Unused credits may be carried forward for ten years or "until the total credit amount has been taken, whichever occurs first."[91] Additionally, the credit may "not be claimed to the extent the taxpayer has claimed a deduction for the same expenses for federal income tax purposes under § 179 of the [IRC], as amended."[92]

J. *Livable Home Tax Credit Amended*

The 2011 General Assembly amended the livable home credit to allow a licensed contractor to take a credit against corporate or personal income taxes for a portion of the total amount expended in constructing new residences or retrofitting existing residences for the purpose of improving accessibility or providing universal visitability.[93] The legislation also increases the maximum credit from $2000 to $5000 for the purchase or construction of each new residential structure or unit, or for retrofitting an existing residence.[94] Unused tax credits may be carried over for seven years "or until the total amount of the tax credit issued has been taken, whichever is sooner."[95]

Each year the Virginia Department of Housing and Community Development ("DHCD") is required to "allocate $500,000 in tax credits for the purchase or construction of new residences and $500,000 in tax credits for the retrofitting or renovation of existing residences."[96] Any portion of the $500,000 reserved for the purchase or construction of a new residence that is not used shall be allocated to the remaining balance of tax credits authorized for the retrofitting or renovation of existing residences.[97] Similarly,

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89. *Id.* § 58.1-339.12(A) (Cum. Supp. 2011).
90. *Id.* § 58.1-339.12(C) (Cum. Supp. 2011).
91. *Id.* § 58.1-339.12(D) (Cum. Supp. 2011).
92. *Id.* § 58.1-339.12(F) (Cum. Supp. 2011); *see also* I.R.C. § 179 (2006 & Supp. III 2009).
93. Act of Mar. 22, 2011, ch. 365, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-339.7(A) (Cum. Supp. 2011)).
94. VA. CODE ANN. § 58.1-339.7(B) (Cum. Supp. 2011).
95. *Id.* § 58.1-339.7(D) (Cum. Supp. 2011).
96. *Id.* § 58.1-339.7(C) (Cum. Supp. 2011).
97. *Id.*

any portion of the $500,000 reserved for retrofitting or renovating existing residences that is not used "shall allocate the remaining balance of such tax credits for the purchase or construction of new residences."[98] The DHCD shall pro rate the tax credits among the eligible taxpayers on a pro rata basis if the total amount of tax credits applied for exceeds the amounts allocated by the DHCD.[99]

The new legislation prohibits the issuance of credits for "transactions or dealings between affiliated entities . . . to the same or different persons [for] the same retrofitting, renovation, or construction project[,]"[100] or "for the purchase, construction, retrofitting, or renovation of residential rental property."[101]

K. *Long-Term Care Insurance Credit Expanded*

Prior to January 1, 2011, the Virginia Code permitted a taxpayer to claim a credit against their individual income tax liability equal to 15% "for [qualified] long-term care insurance premiums paid by the [taxpayer] during the taxable year pursuant to an insurance policy entered into on or after January 1, 2006."[102] In order to qualify, the premiums paid by a taxpayer must be for long-term care insurance coverage for himself or herself.[103] Furthermore, total credits allowed "over the life of any policy [could not] exceed 15% of the amount of premiums paid for [during] the first [twelve] months of coverage."[104] The 2011 General Assembly amended this last provision to increase the amount of the credit a taxpayer may claim against personal income taxes for long-term care insurance premiums to 30% of the amount paid.[105] To become effective, this legislation must be reenacted by the General Assembly in the 2012 legislative session.[106]

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* § 58.1-339.7(B) (Cum. Supp. 2011).
102. *Id.* § 58.1-339.11 (Repl. Vol. 2009).
103. *Id.*; *see also* I.R.C. § 7702(B)(b)(1) (2006 & Supp. III 2009).
104. VA. CODE ANN. § 58.1-339.11 (Repl. Vol. 2009).
105. Act of Mar. 26, 2011, ch. 723, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-339.11(A) (Repl. Vol. 2011)).
106. Ch. 723, 2011 Va. Acts ___.

L. *Several Tax Credit Sunset Dates Extended*

The 2011 General Assembly extended the sunset dates for three different tax credits. First, the sunset date for the Virginia Coal Employment and Production Incentive Tax Credit was extended from July 1, 2011 to July 1, 2016.[107] Second, the sunset date for the Clean Fuel Vehicle and Advanced Cellulosic Biofuels Job Creation Tax Credit was extended from the 2011 taxable year to the 2014 taxable year.[108] Third, the sunset date for corporate and personal income tax credits available under the Neighborhood Assistance Act Tax Credit program was extended from July 1, 2011 to July 1, 2014.[109] The legislature also expanded the Neighborhood Assistance Act Tax Credit to permit trusts to be eligible for this income tax credit[110] and to include pharmacists who donate pharmaceutical services to patients of a non-profit free clinic to qualify for this tax credit.[111]

III. RECENT SIGNIFICANT ACTIVITY AFFECTING SALES AND USE TAX

A. *Exemption Enacted for Aircraft Purchased or Used By Qualified Companies*

The 2011 General Assembly enacted an exemption from the Virginia Aircraft Sales and Use Tax for "any aircraft purchased or used by a qualified company . . . [that is] an aviation-related company, limited liability company, partnership, or a combination of such entities that have a common ownership interest."[112] The legislation also provides an exemption for any aircraft sold in Virgin-

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107. Act of Mar. 18, 2011, ch. 294, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-433.1(B) (Cum. Supp. 2011)).

108. Act of Mar. 15, 2011, ch. 176, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439.1(B) (Cum. Supp. 2011)).

109. Act of Mar. 12, 2011, ch. 317, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439.20(F) (Cum. Supp. 2011)).

110. Act of Mar. 22, 2011, ch. 370, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439.18 (Cum. Supp. 2011)).

111. Act of Mar. 15, 2011, ch. 132, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439.22(C) (Cum. Supp. 2011)).

112. Act of Mar. 24, 2011, ch. 492, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-1505(C) (Cum. Supp. 2011)).

ia but removed from the state within sixty days and registered outside Virginia.[113]

The sales and use tax exemption for aircrafts purchased or used by a qualified company begins on July 1, 2011 and ends December 31, 2014.[114] Subsection D reads:

> For purposes of this [exemption], a qualified company [is] an aviation-related company, limited liability company, partnership, or a combination of such entities that have a common ownership interest through a parent, as direct or indirect subsidiary of a parent, or as affiliated brother-sister entities that (i) is headquartered in [Virginia], (ii) between January 1, 2010, and December 31, 2014, makes a new capital investment of at least $4 million in aviation-related real estate and real estate improvements in [Virginia] on publicly-owned, public-use airports, (iii) between January 1, 2010, and December 31, 2014, creates at least [fifty] new jobs that pay at least one and a half times the prevailing average wage in the locality in which the jobs are located, (iv) owns or uses aircraft that are used primarily for intrastate, interstate, or foreign commerce, and (v) has entered into a memorandum of understanding with the Virginia Economic Development Partnership, after consultation with the Virginia Department of Aviation, on or before December 31, 2014, that at a minimum provides the details for determining the amount of capital investment made and the number of new jobs created, the timeline for achieving the capital investment and new job goals, the repayment obligations should those goals not be achieved, and any conditions under which repayment . . . may be required. If the aircraft is removed from [Virginia] within [sixty] days of [its] purchase, the time between the date of purchase and the removal of the aircraft [is] not counted for purposes of determining whether the aircraft is subject to [Virginia's] use tax imposed . . . on aircraft that are based in the [state] for over [sixty] days in any [twelve] month period.[115]

B. *Collection Requirement for Certain Contractors Amended*

The 2011 General Assembly amended Virginia Code section 58.1-610 by adding a subsection G that treats "any person or entity primarily engaged in the business of furnishing and installing tangible personal property that provides electronic or physical security on real property for the use of a financial institution [as] a retailer of such property for purposes of the Virginia retail sales

113. VA. CODE ANN. § 58.1-1505(D) (Cum. Supp. 2011).
114. *Id.* § 58.1-1505(C) (Cum. Supp. 2011).
115. *Id.* § 58.1-1505(C)–(D) (Cum. Supp. 2011).

and use tax."[116] As a retailer, the business would be required to collect the tax from purchasers, rather than the business paying the tax on its purchase of the materials even in situations in which such property is installed on real property that is not for the use of a financial institution.[117]

C. *Agricultural Produce and Egg Exemption Enacted*

The 2011 General Assembly enacted an exemption for agricultural produce and eggs that are "raised and sold by an individual at local farmers markets and [at] roadside stands, [provided the] individual's annual income from such sales does not exceed $1000."[118] The legislation also exempts from the litter tax an "individual who raises and sells agricultural produce . . . in local farmers markets or at roadside stands, provided that [the individual's] annual income from such sales does not exceed $1000, and that any container [the producer] provides to hold purchased items has been previously used."[119] Absent these exemptions, an agricultural producer would have to register as a dealer and collect and remit the tax due on these retail sales.

D. *Certain Exemption Sunset Dates Extended*

The 2011 General Assembly extended the sunset date for the Virginia Retail Sales and Use Tax Exemption for "raw materials, fuel, power, energy, supplies, machinery or tools or repair parts therefor or replacement thereof, used directly in the drilling, extraction, or processing of natural gas or oil and the reclamation of the well area," from July 1, 1994 to July 1, 2016.[120]

The legislature also removed the sunset date of the sales and use tax exemption for personal property involved in spaceport ac-

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116. Act of Mar. 22, 2011, ch. 360, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-610(G) (Cum. Supp. 2011)).

117. *See* VA. CODE ANN. § 58.1-610(G) (Cum. Supp. 2011).

118. Act of Mar. 24, 2011, ch. 466, 2011 Va. Acts ___ (codified at VA. CODE ANN. §§ 58.1-609.2(7), -1707 (Cum. Supp. 2011)).

119. VA. CODE ANN. § 58.1-1707(A)–(B) (Cum. Supp. 2011).

120. Act of Mar. 15, 2011, ch. 183, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-609.3(12) (Cum. Supp. 2011)).

tivities.[121] The sales and use tax exemption had been set to expire on July 1, 2011.[122]

IV. RECENT SIGNIFICANT LEGISLATIVE ACTIVITY AFFECTING STATE TAX ADMINISTRATION

A. *Interest Accrual on Protested Tax Assessments May Be Reduced*

A taxpayer may contest an assessed state tax within ninety days from the date of assessment by filing a written application for correction with the Virginia Tax Commissioner.[123] While the taxpayer's application is undergoing consideration by the Tax Commissioner, the Department of Taxation must refrain from collecting the contested portion of the tax until a final decision is made, unless the Tax Commissioner determines that collection is in jeopardy.[124] Interest accrues on the outstanding tax liability at a rate established by Virginia Code section 58.1-15.[125] Generally, unless otherwise specifically provided, Virginia Code section 58.1-15 provides that interest on omitted taxes and assessments is to be computed at a rate equal to the rate published for federal underpayments pursuant to IRC § 6621(a)(2) plus 2%.[126] The federal underpayment rate pursuant to § 6621(a)(2) is equal to the federal short-term rate plus three percentage points.[127] The 2011 General Assembly amended Virginia Code section 58.1-1822 to reduce the interest rate in situations where the Tax Commissioner has not decided an assessment appeal, filed by a taxpayer, pursuant to Virginia Code section 58.1-1821, within nine months of the Tax Department's receipt of the taxpayer's application for correction.[128] Specifically, for administrative assessment appeals filed on or after July 1, 2011,

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121. Act of Mar. 18, 2011, ch. 286, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-609.3(13) (Repl. Vol. 2009 & Cum. Supp. 2011)).

122. VA. CODE ANN. § 58.1-609.3(13) (Repl. Vol. 2009 & Cum. Supp. 2011).

123. *Id.* § 58.1-1821 (Repl. Vol. 2009).

124. *Id.*

125. *Id.* § 58.1-15(A) (Repl. Vol. 2009).

126. *Id.*

127. I.R.C. § 6621(a)(2) (2006 & Supp. III 2009).

128. *See* Act of Mar. 18, 2011, ch. 295, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-1822 (Cum. Supp. 2011)).

> interest shall accrue on the outstanding liability at the rate prescribed by § 58.1-15 until nine months from the date of assessment. From nine months after the date of the related assessment until the Tax Commissioner issues a determination under this section, interest shall [accrue] at the "[f]ederal short-term rate" established pursuant to § 6621(b) of the IRC.[129]

The net effect of this legislation is to reduce the interest accrual rate charged on state tax assessments by 5% when the Tax Department has not made a determination on a taxpayer's appeal of an assessment. If the Tax Department "determines that any portion of the assessment is correct . . . accrual of interest at the rate prescribed in [Virginia Code section] 58.1-15 shall resume [thirty] days after the date of the Tax Commissioner's action on the [taxpayer's] application for correction."[130]

B. *Tax Department Guidelines Provided Judicial Notice*

The 2011 General Assembly amended Virginia Code section 58.1-205 to provide that tax bulletins, guidelines, and other published documents by the Department of Taxation are to be accorded judicial notice in court proceedings.[131] The legislation does nothing to prevent a party to litigation from offering contradicting evidence or otherwise disputing the matter which is the subject of the document judicially noticed. The new legislation also requires the Department of Taxation to publish tax bulletins and guidelines and allows for posting these documents on the Tax Department's website as a permitted publication method instead of distribution to national and state tax services and other publications.[132]

C. *Filing Tax Returns by Commercial Delivery*

The 2011 General Assembly amended Virginia Code section 58.1-9 to recognize tax returns or payment of taxes that are remitted "by means of a recognized commercial delivery service . . . in a sealed envelope or container bearing . . . a confirmation of

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129. VA. CODE ANN. § 58.1-1822 & editor's note (Cum. Supp. 2011) (codified at I.R.C. § 6621(b) (2006)).

130. VA. CODE ANN. § 58.1-1822 (Cum. Supp. 2011).

131. Act of Apr. 6, 2011, ch. 800, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-204(4), -205(3) (Cum. Supp. 2011)).

132. VA. CODE ANN. § 58.1-204(A), (C) (Cum. Supp. 2011).

shipment on or before midnight of the day of [the] return," as timely filed.[133] This legislation is intended to permit commercial delivery service companies to receive the same treatment as the U.S. Postal Service for purposes of determining when timely filing occurs. Under current law, a tax return or payment remitted by mail and bearing a postmark from the U.S. Postal Service on or before the due date is considered timely filed as of that day, regardless of when the taxing entity actually receives the return or payment.[134] The amended statute treats tax returns or payment of taxes that are remitted by means of a commercial delivery service the same as returns and payments delivered by the U.S. mail.[135]

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 2011 General Assembly made a number of changes to local government real estate assessment proceedings, as well as other administrative and procedural changes relating to real estate assessment challenges by landowners. The first change pertains to the burden of proof placed on a taxpayer who appeals an assessment. Beginning on January 1, 2012, a taxpayer will have the burden on appeal of rebutting the presumption that the valuation determined by the assessor for local Virginia property tax purposes is correct, and, for showing "by a preponderance of the evidence that the property . . . is valued at more than its fair market value or that the assessment is not uniform in its application."[136]

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133. Act of Mar. 22, 2011, ch. 368, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-9(A) (Repl. Vol. 2009 & Cum. Supp. 2011)).

134. VA. CODE ANN. § 58.1-9(A) (Repl. Vol. 2009 & Cum. Supp. 2011).

135. *Id.*

136. Act of Mar. 18. 2011, ch. 232, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-3331(E), -3379(B), -3984 (Cum. Supp. 2011)); Act of Mar. 15, 2011, ch. 184,

In addition, the legislation provides that in any appeal of an assessment by an owner of real property containing less than four residential units, the assessor is required to provide written notice to the owner at least forty-five days before the appeal informing him of his right "to review and obtain copies of all the assessment records pertaining to the [assessor's] determination of fair market value . . . [and] to request that the assessor make a physical examination of the subject property."[137] The assessor will have fifteen days from the written request of the property owner to provide the assessment records or will be required to "present the following into evidence . . . at the hearing: (i) copies of the assessment records maintained by the assess[or] . . . (ii) testimony [to] explain [] the methodologies [used] . . . to determine the assessed value of the property, and (iii) testimony that states that the assessed value was arrived at in accordance with generally accepted appraisal practices."[138]

In appeals to a circuit court, the taxpayer will be required to make the written request for assessment records "no later than [forty-five] days prior to trial," unless otherwise ordered by the court.[139] Nothing in these sections is to "be construed to change or have any effect upon the presumptions, burdens, and standards applicable to applications for the correction of erroneous assessments of any local tax other than real property taxes."[140]

The 2011 General Assembly also clarified when a real estate assessor may require an owner of real property with four or fewer residential units that is operated in whole or in part as affordable rental housing "to furnish to [the] assessor . . . statements of the income and expenses attributable" to the property when the owner applies to the locality to have the real property assessed as affordable rental housing for local property tax purposes.[141]

2011 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-3331(E), -3379(B), -3984 (Cum. Supp. 2011)).

137. VA. CODE ANN. §§ 58.1-3331(E), -3379(B), -3984(B) (Cum. Supp. 2011).

138. *Id.* § 58.1-3379(B) (Cum. Supp. 2011) (providing that section 58.1-3379 is set out twice; one section is applicable to tax years beginning on or after January 1, 2012 and the other section is effective for tax years beginning before January 1, 2012).

139. *Id.* § 58.1-3984(B) (Cum. Supp. 2011).

140. *Id.* § 58.1-3984(C) (Cum. Supp. 2011).

141. Act of Mar. 15, 2011, ch. 137, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3295(A)(3) (Cum. Supp. 2011)).

In another legislative change, the 2011 General Assembly clarified that in local Virginia real property tax appeals, statements of income and expense may be used "in a complaint before a board of equalization . . . as long as [the statements are] submitted to the board no later than the appeal filing deadline of [the] board."[142]

The 2011 General Assembly also amended Virginia Code sections 58.1-3219.4(C) and 58.1-3220(C) to require a local governing board to provide written notification to land owners of partially exempt property "located in a redevelopment or conservation area or rehabilitation district" of the amount of the property that is exempt from real property exemption.[143] For assessments for tax years beginning on or after January 1, 2011, the local governing body, in which partial exemptions for structures in redevelopment or conservation areas or rehabilitation districts are available must "provide written notification to the property owner of the amount of the assessment of the property that will be exempt from real property taxation and the period of [the] exemption."[144] The new law also applies to real property in any locality in which the governing body has provided for the partial exemption from taxation of real estate on which any structure or other improvement no less than fifteen years of age has undergone substantial rehabilitation, renovation, or replacement for residential use.[145]

The "exempt amount shall be a covenant that runs with the land for the period of the exemption," and local governing bodies are prohibited from reducing that amount during the period of the exemption unless the property owner has received written notification from the local governing body or its designee "that the exempt amount may be decreased during the period of [the] exemption."[146] The partial exemption may not "result in totally exempting the value of the structure."[147]

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142. Act of Mar. 16, 2011, ch. 200, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3294 (Cum. Supp. 2011)).

143. Act of Mar. 24, 2011, ch. 423, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-3219.4(A), -3220(C) (Cum. Supp. 2011)).

144. VA. CODE ANN. §§ 58.1-3219.4(A)–(C), -3220(B)–(C), -3220 editor's note (Cum. Supp. 2011).

145. *Id.* §§ 58.1-3219.4(B), -3220(B) (Cum. Supp. 2011).

146. *Id.* §§ 58.1-3219.4(C), -3220(C) (Cum. Supp. 2011).

147. *Id.*

2. Registered Virginia Landmark Buildings Are Now a Separate Class of Property

The 2011 General Assembly enacted a new statute for the classification of certain historical buildings for tax purposes.[148] "Buildings . . . listed on the Virginia Landmarks Register, not including the real estate or land on which they are located, [have been] declared to be a separate class of property," from all other real estate for local taxation.[149] The legislation authorizes localities to tax this property at a lower rate than the general class of real property, "so long as the building is maintained in a condition such that it retains the characteristics for which it was listed on the Virginia Landmarks Register."[150]

3. Localities Provided Authority to Establish Criteria for Elderly and Disabled for Real Property Tax Relief

The 2011 General Assembly enacted legislation that provides the necessary statutory authorization required by the constitutional amendment to article X, section 6(b) of the Virginia Constitution, adopted in 2010, to permit local governments to establish their own income or financial worth limitations for purposes of granting real property tax relief for homeowners who are at least sixty-five years old or permanently and totally disabled.[151]

> If the governing body establishes an annual income limitation, annual income [must] be computed by adding together the total income received during the preceding calendar year, without regard to whether a tax return is actually filed, by (i) owners of the dwelling who use it as their principal residence, (ii) owner's relatives who live in the dwelling, and (iii) at the option of each locality, nonrelatives of the owner who live in the dwelling except for bona fide tenants or bona fide paid caregivers of the owner. Income [is limited to] those sources of gross income that are subject to tax under federal income tax laws, regulations, rules, or policies. If the governing body establishes a net financial worth limitation, net financial worth [must] be

148. Act of Mar. 25, 2011, ch. 581, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3221.5 (Cum. Supp. 2011)); Act of Mar. 25, 2011, ch. 571, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3221.5 (Cum. Supp. 2011)).

149. VA. CODE ANN. § 58.1-3221.5 (Cum. Supp. 2011).

150. *Id.*

151. Act of Mar. 24, 2011, ch. 496, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-3211.1(A), -3212 (Cum. Supp. 2011)); Act of Mar. 24, 2011, ch. 438, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-3211.1(A), -3212 (Cum. Supp. 2011)).

> computed by adding together the total net financial worth, including the present value of all equitable interests, as of December 31 of the immediately preceding calendar year, of the owners, and of the spouse of any owner, of the dwelling.[152]

Localities that provide exemptions or deferrals are also authorized to exempt or defer the real property taxes on up to ten acres of land where the qualifying dwelling is situated.[153]

4. Property Tax Exemption for Certain Disabled Veterans

The 2011 General Assembly enacted Virginia Code sections 58.1-3219.5 and 58.1-3219.6 to implement the statutory authorization required by the constitutional amendment to article X, section 6-A of the Virginia Constitution, adopted in 2010, to exempt from property taxation real property that is the principal residence of a veteran (or a widow or widower of a veteran), if the veteran "has been rated by the U.S. Department of Veterans Affairs . . . to have a 100[%] service-connected, permanent, and total disability."[154] In addition, the land, which cannot exceed one acre, upon which the dwelling is situated, would also be exempt from taxation.[155] However, if the locality "provides for an exemption from or deferral of real property taxes of more than one acre" for the elderly and handicapped, the locality must "also provide an exemption for the same number of acres" for veterans and surviving spouses.[156]

The legislation allows the surviving spouse of a veteran to be eligible for the exemption "so long as the death of the veteran occurs on or after January 1, 2011, the surviving spouse does not remarry, and the surviving spouse continues to occupy the real property as his principal place of residence."[157] Application for the exemption will be made pursuant to the procedures set out in Virginia Code section 58.1-3219.6.[158]

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152. VA. CODE ANN. § 58.1-3212 (Cum. Supp. 2011).

153. *Id.*

154. Act of Apr. 6, 2011, ch. 840, 2011 Va. Acts ___ (codified at VA. CODE ANN. §§ 58.1-3219.5(A)–(B), -3219.6 (Cum. Supp. 2011)); Act of Apr. 6, 2011, ch. 769, 2011 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3219.5(A) (Cum. Supp. 2011)).

155. VA. CODE ANN. § 58.1-3219.5(C) (Cum. Supp. 2011).

156. *Id.*

157. *Id.* § 58.1-3219.5(B) (Cum. Supp. 2011).

158. *Id.* § 58.1-3219.6 (Cum. Supp. 2011).

B. *Recent Significant Judicial Decisions*

1. *FFW Enterprises v. Fairfax County*

In *FFW Enterprise v. Fairfax County*, the Supreme Court of Virginia sustained a local ordinance that permitted a special tax on commercial and industrial property within a transportation district even though the tax did not apply to residential properties.[159] The court also held that the uniformity clause did not require a universal rule of conformity.[160] FFW Enterprise (the "Corporation") owned commercially zoned property in Fairfax County.[161] The property assessed taxes pursuant to Virginia Code sections 58.1-3221.3 and 58.1-435.[162] The Corporation challenged the constitutionality of these two tax statutes.[163]

The Corporation contended that the two provisions were facially unconstitutional because they were in violation of the uniformity clause of article X, section 1, of the Virginia Constitution. The provisions imposed taxes on commercial and industrial real properties within a county while excluding other property.[164] The Corporation urged the court "to adopt the 'rule of universality' and to hold that the [uniformity clause] mandate[s] that all real property" within a given jurisdiction be treated as a single, indivisible class for the purpose of taxation, except for the exceptions specifically mentioned in the Virginia Constitution.[165] The Corporation additionally asserted that even if the General Assembly did have the constitutional authority to classify real property within a jurisdiction, the classifications used in the provisions were unconstitutional because they lacked any reasonable basis.[166]

The court held that the authority to define and classify taxable subjects was among the powers of the General Assembly expressly recognized by the Virginia Constitution.[167] The Corporation's

159. 280 Va. 583, 596, 701 S.E.2d 795, 803 (2010).
160. *Id.* at 593–94, 701 S.E.2d at 802.
161. *Id.* at 586, 701 S.E.2d at 797.
162. *Id.*
163. *Id.*
164. *Id.* at 589–90, 701 S.E.2d at 799.
165. *Id.*
166. *Id.* at 594, 701 S.E.2d at 802.
167. *Id.* at 592–93, 701 S.E.2d at 801–02.

argument with respect to the "rule of universality" was "based upon the incorrect premise that the [Virginia] Constitution delegate[d] powers and specifi[ed] authority."[168] In contrast to the U.S. Constitution, the Virginia Constitution "[was] not a grant of legislative powers to the General Assembly, but [was] a restraining instrument only, and except as to matters ceded to the federal government, the legislative powers of the General Assembly [were] without limit."[169] Accordingly, the Supreme Court of Virginia held that "Virginia law [did] not support [the Corporation's] argument that the [Virginia] Constitution contained an unstated, implied ban on the ability of the General Assembly to classify commercial and industrial real estate differently from other real estate for taxation purposes."[170]

Because the Corporation presented a facial challenge to the constitutionality of the tax classifications, it bore "the burden of negating every basis that might [have] reasonably support[ed] the General Assembly's presumptively constitutional decisions to classify specified kinds of real property as objects of taxation."[171] The Corporation, however, asserted that it needed only to demonstrate that others who were untaxed would benefit from the transportation improvements funded by the taxes.[172] The court held that this claim did not prove to be persuasive, and there was no evidence in the record that others would benefit as much or more from the improvements as the property owners in the taxed class.[173] Moreover, "a majority of the taxpayers subject to the tax [in this case] have declared that they [would] benefit specially from the proposed transportation improvements."[174] The Corporation provided no other evidence to support its claim that the tax classifications were "unreasonable or arbitrary."[175]

168. *Id.* at 593, 701 S.E.2d at 801.
169. *Id.* (quoting Harrison v. Day, 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959)).
170. *Id.* at 593–94, 701 S.E.2d at 802.
171. *Id.* at 594, 701 S.E.2d at 802.
172. *Id.*
173. *Id.* at 595–96, 701 S.E.2d at 803.
174. *Id.* at 596, 701 S.E.2d at 803.
175. *Id.*

2. *TB Venture, L.L.C. v. Arlington County*

In *TB Venture, L.L.C. v. Arlington County*, an appeal involving a taxpayer's petition to correct erroneous local property tax assessments, the Supreme Court of Virginia ruled that the taxpayer failed to carry its burden to present evidence establishing the fair market value of twenty-one condominium units.[176] The units were part of a condominium development that consisted of residential units and ground-level retail space.[177] The agreement between the condominium developer and the County required the units "to be rented to qualifying, low-income households . . . and specifi[ed] limitations on rental amounts and occupancy."[178]

The taxpayer alleged that the County's assessments for the tax years violated the applicable tax assessment provision because they "were greatly in excess of 100% of the fair market value of each of the [u]nits."[179] However, in order to satisfy the statutory requirement of showing that the real property was assessed at more than its fair market value, the taxpayer "was required to produce evidence to show the fair market value of each individual unit [because] . . . each condominium unit constitute[d] for all purposes a separate parcel of real estate."[180]

The taxpayer's real estate appraisal expert did not separately appraise each unit. Instead,

> [h]e valued the twenty-one units as a whole and then allocated an amount to each unit based on the unit's pro rata share of the overall income . . because, in his opinion, there [was] no market for "one rent-restricted" condominium. Similarly, [the taxpayer] argue[d] on appeal that allocating each unit's fair market value pro rata based on income [was] warranted "because income [was] the only distinguishing feature that separate[d] these units."[181]

The court acknowledged that market-driven impediments to selling the units individually and limitations on the rental income that could be realized may affect each unit's fair market value.[182] Nevertheless, these factors "did not alter the statutory require-

176. 280 Va. 558, 560, 701 S.E.2d 791, 792 (2010).
177. *Id.*
178. *Id.* at 561, 701 S.E.2d at 792.
179. *Id.*, 701 S.E.2d at 793 (internal quotation marks omitted).
180. *Id.* at 564, 701 S.E.2d at 794.
181. *Id.* at 565, 701 S.E.2d at 795.
182. *Id.*

ment that condominiums be treated as separate parcels of real estate and separately assessed" or the taxpayer's "burden to establish each unit's fair market value in order to show that its real property was assessed at more than [its] fair market value."[183]

3. *Jackson Warehouse, L.P. v. City of Richmond*

In *Jackson Warehouse, L.P. v. City of Richmond*, the Circuit Court for the City of Richmond denied a landowner's petition challenging the property tax assessment on its renovated warehouse that had been converted to a residential apartment complex for tax years 2005 through 2007.[184] The City, after rejecting the income approach and using a sales comparison approach, assessed the value of the property at $2 million for each of the tax years at issue in the case.[185] The court noted that "[t]he issues revolve[d] around the sales comparison approach which was used and the income or income capitalization method which the landowner urge[d] should have been used."[186]

The landowner asserted that the property is located in the City in an area known as Shockoe Bottom, which is known to be flood-prone and a significant factor for valuation.[187] The landlord for the property also pointed out "that rents on the subject property include[d] all utilities," some of which included in other rental properties marketed as including utilities such as electric, cable TV, and high-speed Internet.[188] The City contended that in addition to using the sales approach in its valuations, it also utilized the income approach through the use of a gross income multiplier.[189] The City Assessor testified that the multiplier served as a "check" on the sales approach.[190] The City contended that its use of the multiplier satisfied its obligation to consider, and properly reject, all other approaches.[191] The circuit court agreed and held

183. *Id.*
184. 80 Va. Cir. 563, 536, 566 (2010) (Richmond City).
185. *Id.* at 563.
186. *Id.*
187. *Id.* at 564.
188. *Id.*
189. *Id.*
190. *Id.* at 564–65.
191. *Id.* at 564.

the assessor did consider data concerning unique rent structure necessary to perform appraisals.[192] While the landowner contended that "the income approach, and not the sales approach, [was] the proper [method] to yield the fair market value,[the court stated] there was no right to a preferred method of valuation."[193] Accordingly, the court stated that the City's tax assessment presumption of validity was preserved.[194] The court also noted that while valuation of property is an inexact science, the landowner did not demonstrate any manifest error in the City's assessment.[195] The court denied the landowner's petition to correct the assessment.[196]

VI. RECENT SIGNIFICANT LEGISLATIVE ACTIVITY AFFECTING TANGIBLE PERSONAL PROPERTY: SEPARATE CLASS OF PROPERTY CREATED FOR NATIONAL DEFENSE MACHINERY AND TOOLS

The 2011 General Assembly created a separate classification for machinery and tools designed and used directly in manufacturing or processing materials, components, or equipment for national defense.[197] Under this legislation, local governments would be authorized to tax such machinery and tools at a rate that is less than the rate generally applicable to machinery and tools.[198] The legislation also authorizes local governments to establish, by ordinance, local defense production zones including incentives and regulatory flexibility for the design, development, or production by a defense production business of materials, components, or equipment for national defense.[199]

The new legislation defines a "defense production business" as "a business engaged in the design, development, or production of materials, components, or equipment required to meet the needs

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. Act of Apr. 29, 2011, ch. 877, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3508.4 (Cum. Supp. 2011)); Act of Apr. 29, 2011, ch. 875, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3508.4 (Cum. Supp. 2011)).
198. VA. CODE ANN. § 58.1-3508.4 (Cum. Supp. 2011) (stating that "[t]he governing body of any country, city, or town may levy a tax on such machinery and tools at a . . . rate ["*different*"] from . . . [t]he rate . [but may] not *exceed* that applicable to [other machinery and tools]") (emphasis added).
199. *Id.* § 58.1-3853(A)–(B), (D) (Cum. Supp. 2011).

of national defense."[200] Localities would also be authorized to include under this definition any business that performs functions ancillary to or in support of the design, development, or production of such materials, components, or equipment.[201] The incentives permissible under this new legislation include, but are not limited to, reduction of permit fees, user fees, and any type of gross receipts tax.[202] Localities would be authorized to provide such incentives for up to twenty years.[203] Local governing bodies are also authorized to

> enter into agreements for the payment of economic development incentive grants to defense production businesses located in defense production zones with payment of the grants conditioned upon the businesses making certain real property or capital investments, creating and maintaining new jobs, or performing or meeting other economic development objectives.[204]

In establishing defense production zones, localities are not precluded from also designating these areas as enterprise zones.[205] Localities are also authorized to offer regulatory flexibility in such zones, including, but not limited to: "(i) special zoning for the district, (ii) permit process reform, (iii) exemption from ordinances, and (iv) any other incentive adopted by ordinance."[206] Localities may offer these regulatory incentives for a period of up to twenty years.[207]

VII. BUSINESS, PROFESSIONAL, AND OCCUPATIONAL LICENSE TAX

A. *Recent Legislative Activity*

1. Local Business, Professional, and Occupational License Exemption Allowed for Unprofitable Business

The 2011 General Assembly enacted a provision authorizing localities to "exempt, by ordinance," tax or fees of "any business

200. *Id.* § 58.1-3853(A) (Cum. Supp. 2011).
201. *Id.*
202. *Id.* § 58.1-3853(C) (Cum. Supp. 2011).
203. *Id.*
204. *Id.*
205. *Id.* § 58.1-3853(F) (Cum. Supp. 2011).
206. *Id.* § 58.1-3853(D) (Cum. Supp. 2011).
207. *Id.*

that does not have an after-tax profit for the taxable year."[208] The legislation requires a business to offer its income tax return to the local commissioner of the revenue as proof.[209] Eligibility is determined annually, and the business owner must submit the applicable income tax return.[210] Absent this new exemption and a locality's implementing ordinance, a business is required to pay a Business, Professional, and Occupational License ("BPOL") tax that is on the gross receipts of the business, regardless of whether the business is profitable or not for income tax purposes.[211]

2. Business License Incentive Program Authorized

The 2011 General Assembly authorized a locality to establish by ordinance a business license incentive program that may include an exemption, refund, rebate, or other relief from the Virginia local BPOL tax for a period of up to two years for businesses that locate for the first time in the locality.[212] A business is not deemed to locate for the first time in a locality on the basis of "merger, acquisition, similar business combination, name change, or a change in business form."[213]

3. Localities Authorized to Offer BPOL Tax or Gross Receipts or Taxable Income

The 2011 General Assembly provided localities with the option to impose the BPOL "tax on [either] the gross receipts or the Virginia taxable income of a business,"[214] except for certain public service corporations.[215] Public service corporations remain subject to the normal BPOL tax base and rates.[216]

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208. Act of Mar. 15, 2011, ch. 188, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3703(D) (Cum. Supp. 2011)).

209. VA. CODE ANN. § 58.1-3703(D) (Cum. Supp. 2011).

210. *Id.*

211. *Id.* § 58.1-3703(A) (Rep. Vol. 2009 & Cum. Supp. 2011).

212. Act of Mar. 9, 2011, ch. 25, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3703(D) (Cum. Supp. 2011)).

213. VA. CODE ANN. § 58.1-3703(D) (Cum. Supp. 2011).

214. Act of Mar. 26, 2011, ch. 685, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3702 (Cum. Supp. 2011)).

215. VA. CODE ANN. § 58.1-3703(C)(1) (Cum. Supp. 2011).

216. *See id.*

B. *Recent Significant Judicial Decision: Ford Motor Credit Co.'s BPOL Tax Must Be Apportioned*

Local government's aggressive tax positions are again kept in check by the Supreme Court of Virginia. In *Ford Motor Credit Co. v. Chesterfield County*, the Supreme Court of Virginia reversed the holding of the Circuit Court of Chesterfield County regarding the local BPOL tax.[217] The supreme court held that a multi-state financial service provider's receipts from an office located in a Virginia locality were not 100% attributable to the actions performed in the office, when the loans originated in the Virginia office, but were funded and serviced through offices outside of Virginia.[218] The decision continues the court's recent trend of enforcing the BPOL tax apportionment provisions to prevent localities from seeking to tax gross receipts generated outside the geographical boundaries of the locality.[219]

In 1996, the Virginia General Assembly reformed the BPOL tax after a three-year study by a joint subcommittee.[220] A major goal of the Virginia General Assembly's 1996 BPOL reform was to provide state-wide uniformity of administration and interpretation of the BPOL tax. Since the reform was enacted, appeals of BPOL tax to the Virginia Tax Commissioner have steadily decreased.[221] The decrease in appeals is possibly a sign that localities and the Virginia business community both understand how the BPOL tax is properly administered.[222]

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217. 281 Va. 321, 707 S.E.2d 311 (2011) (5-2 decision).

218. *Id.* at 326–30, 339–42, 707 S.E.2d at 313–16, 320–22. For a complete discussion of the trial court's decision in this case, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 45 U. RICH. L. REV. 377, 398–401 (2010).

219. *See* Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 44 U. RICH. L. REV. 599, 627–28 (2009).

220. Act of Apr. 6, 1996, ch. 720, 1996 Va. Acts 1247 (codified as amended in scattered sections of VA. CODE ANN. tit. 58.1 (Cum. Supp. 1996)).

221. The number of BPOL appeal decisions decreased from 109 in 1997 to only nine in 2008. Craig D. Bell & J. Christian Tennant, *Is Your Client Overpaying BPOL Tax?*, VA. LAW., Oct. 2009, at 24. Part of the BPOL reform was allowance of taxpayers to request advisory rulings and appeal the results of local audits to the Virginia Tax Commissioner for an impartial determination or review. VA. CODE ANN. § 58.1-3703.1(A)(5) (Repl. Vol. 2009 & Cum. Supp. 2011).

222. Bell & Tennant, *supra* note 221, at 24 ("The number of BPOL rulings and appeal decisions . . . decreases significantly as the administration of the BPOL tax becomes more standard or uniform across the state.").

The Supreme Court of Virginia had its first opportunity to review the reformed BPOL tax in 2009. In *City of Lynchburg v. English Construction Co.*, the supreme court restricted a locality's ability to tax certain gross receipts earned by a local business.[223] The court determined that the Virginia Code did not provide localities with any authority to tax a business's gross receipts earned in other localities where the business maintained a definite place of business.[224] In this case, the City attempted to "throw back" gross receipts earned by English Construction Company in a Virginia locality that did not impose the BPOL tax.[225]

For purposes of the BPOL tax, the Virginia Code specifies that "as a general rule . . . 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 business.'"[226] Furthermore, the Virginia Code "contains no language granting [any locality] 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."[227] In *English Construction*, the City sought such authority by implication.[228] The court refused to recognize any authority to impose the tax by implication, and noted that the City's interpretation renders parts of the Code meaningless and "ignores the clear legislative intent underlying the General Assembly's 1996 revision of the [BPOL] tax laws."[229]

English Construction is a very important case as it represents the very principles espoused by the 1996 BPOL reform. The BPOL tax should be uniformly administered by Virginia localities, and the gross receipts earned by Virginia businesses should only be subject to the BPOL tax once. Now, in a relatively short amount of time, *English Construction* has a sister case that both Virginia businesses and Virginia localities may use for guidance.

In *Ford Motor Credit Co. v. Chesterfield County*, the Supreme Court of Virginia again dealt with a locality imposing the BPOL tax on gross receipts generated outside its geographical bounda-

223. 277 Va. 574, 583–84, 675 S.E.2d 197, 202 (2009).

224. *Id.*

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

226. *Id.* at 583, 675 S.E.2d at 201 (quoting VA. CODE ANN. § 58.1-3703.1(A)(3) (Repl. Vol. 2009 & Cum. Supp. 2011)).

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

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

229. *Id.*

ries.[230] The taxpayer, Ford Motor Credit Company ("FMCC"), "was a financial services provider, primarily in the automobile purchase or loan lessee environment."[231] The court stated that

> [u]ntil its closing in 2007, the [County] Branch was one of FMCC's 300 sales branches and, at one time, was one of three operating in [Virginia]. Approximately 75[%] of the [County] Branch's business was . . . consumer financing for the purchase of vehicles . . . . The [County] Branch was tasked with contacting and training dealers to increase vehicle sales and the number of loans made by FMCC, approving loan applications, determining loan interest rates, and providing programs and training for dealers concerning FMCC's financing programs. During the period in question, the [County] Branch reported to a regional office in Chantilly, Virginia, while offices in Baltimore, Maryland, Nashville, Tennessee; Omaha, Nebraska; Mesa, Arizona; and Livonia, Michigan also played a role in managing and administering loans that originated in FMCC's [County] Branch . . . . FMCC also had centers that dealt with loans originating in the [County] Branch, and elsewhere, that subsequently went into default.[232]

Typically, the County Branch "reviewed loan applications from customers who sought to 'purchase or lease a vehicle' from a [Ford Motor Company] dealership, and decided 'whether or not to approve the loan . . . based on procedures set out by [FMCC headquarters in] Dearborn,'" Michigan.[233] The court noted that while the County Branch sometimes determined interest rates for well-qualified customers, "most of the interest rates were set by the headquarters in Michigan." [234] In cases where the County Branch approved a loan application, "it notified the dealership, where the customer actually executed the installment loan contract."[235]

The headquarters in Michigan wired funds electronically to the dealership's bank account which were used to finance the customer's purchase.[236] After the documents were signed and returned to the County Branch, all of the documents were forwarded to an office outside of the County, which then serviced the

230. 281 Va. 321, 326, 707 S.E.2d 311, 313 (2011).
231. *Id.* (citation omitted) (internal quotation marks omitted).
232. *Id.* at 326–27, 707 S.E.2d at 313–14.
233. *Id.* at 328, 707 S.E.2d at 314.
234. *Id.*
235. *Id.*
236. *Id.*

loan.[237] The County Branch did not handle any aspect of the loan after forwarding the documents to another office.[238]

The local Commissioner of Revenue determined that all of the gross receipts of FMCC's loans were generated by the County Branch and were not apportionable.[239] "Pursuant to [Virginia] Code §§ 58.1-3702 and -3703(A), and Chesterfield County Code § 6–4, the [locality] levied BPOL taxes against FMCC in the amounts of $327,137.85, $306,435.65, $432,620.96, and $449,740.59 for the tax years 2001, 2002, 2003, and 2004, respectively."[240] FMCC paid the taxes and applied for a refund, which was denied.[241] FMCC then filed suit in Chesterfield County Circuit Court and argued that the gross receipts should have been apportioned to the County "to reflect the limited contribution of [the County] Branch to [FMCC's] nationwide business."[242] Ultimately, the circuit court rejected FMCC's arguments by finding that the County Branch's "marketing and closing operations generated gross receipts in the form of interest and fees," and the other FMCC locations merely serviced and collected the gross receipts.[243]

FMCC appealed the circuit court's ruling to the Supreme Court of Virginia based on three issues. First, FMCC argued that the County Branch's gross receipts were subject to apportionment.[244] FMCC also argued that the gross receipts must be apportioned by payroll, per Virginia Code section 58.1-3703.1(A)(3), as it was "impractical or impossible to determine to which definite place of business gross receipts should be attributed."[245] Finally, FMCC argued that it was entitled to a deduction under Virginia Code section 58.1-3732(B)(2) as "[t]hat statute provide[d] that '[a]ny receipts attributable to business conducted in another state . . . in which the taxpayer . . . is liable for an income or other tax based

237. *Id.*
238. *Id.*
239. *Id.* at 331–32; 707 S.E.2d at 316.
240. *Id.* at 325, 707 S.E.2d at 313.
241. *Id.* at 326, 707 S.E.2d at 313.
242. *Id.* (citations omitted) (internal quotation marks omitted).
243. *Id.* at 332–33, 707 S.E.2d at 316–17 (citation omitted).
244. *Id.* at 336, 707 S.E.2d at 319.
245. *Id.* (quoting VA. CODE ANN. § 58.1-3703.1(A)(3)(b) (Repl. Vol. 2009 & Cum. Supp. 2011) (internal quotation marks omitted).

upon income [should be] deducted from gross receipts . . . that would otherwise be taxable.'"[246]

The Supreme Court of Virginia agreed with FMCC that the gross receipts are subject to apportionment and should be apportioned by payroll.[247] In its analysis, the court relied heavily on *City of Winchester v. American Woodmark Corp. (Woodmark II)*.[248] In *Woodmark II*, the supreme court previously determined under the Commerce Clause that the City could not subject 100% of American Woodmark's gross receipts to the BPOL tax.[249] The court reached this decision because American Woodmark's business operations had twenty-four facilities, including manufacturing and distribution centers as well as service and sales offices, in thirteen different states, and only its corporate headquarters were located in the City.[250] The court held that the income the City attributed to American Woodmark's operations conducted in the City were out of proportion to, and had no rational relationship to, the business transacted in the City.[251] The court determined that "[c]ommon sense compell[ed] the conclusion that these [out-of-jurisdiction] operations added value to American Woodmark's business product and were revenue producing activities."[252] Furthermore, American Woodmark's "[in-the- City] operations could not possibly produce 100[%] of the revenues."[253]

Likewise, FMCC's operations in the County could not produce 100% of its gross receipts.[254] The locality essentially argued that gross receipts were derived from the exercise of FMCC's licensed privilege to conduct a financial services business as the gross receipts were generated when a loan was made to a customer.[255] The court said, "[t]o accept the County's position . . . would mean

246. *Id.* at 342–43, 707 S.E.2d at 322–23 (quoting VA. CODE ANN. § 58.1-3732(B)(2) (Repl. Vol. 2009)).

247. *Id.* at 342, 707 S.E.2d at 322. The Virginia Supreme Court remanded the issue regarding the deduction to the circuit court to determine how much of a deduction FMCC is entitled to under Virginia Code section 58.1-3732(B)(2). *Id.*, 707 S.E.2d at 323.

248. City of Winchester v. Am. Woodwork Corp., 252 Va. 98, 471 S.E.2d 495 (1995).

249. *Id.* at 103, 471 S.E.2d at 498.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. Ford Motor Credit Co. v. Chesterfield Cnty., 281 Va. 321, 340, 707 S.E.2d 311, 321 (2011).

255. *Id.* at 339, 707 S.E.2d at 321.

that all services necessary to FMCC's deriving gross receipts from its consumer installment and inventory financing operations were provided at the [County] Branch."[256] The court rejected the locality's argument since these were not the facts of the case. The court noted that only a receivable was created in the County and not gross receipts.[257]

Next, the court dealt with whether it was "impractical or impossible to determine to which definite place of business gross receipts should be attributed."[258] An expert provided by FMCC at trial testified that "[t]here's no way to take . . . one payment or . . . [$1] of interest . . . and distribute it among all of the activities that may come into play on that loan."[259] The locality did not contradict this testimony at trial. The expert's testimony led the court to "conclude that it would be impossible or, at least, impractical to perform that process on every one of the approximately 20,000 loans processed annually by [the] County Branch."[260]

Under the principles of BPOL reform, the meaning of the relevant Virginia Code statutes is apparent. These statutes provide an attribution rule that ensures only gross receipts from the performance of services are included in the taxable measure if such "gross receipts [are] attributed to the exercise of a privilege subject to licensure at a definite place of business within this jurisdiction."[261] Such gross receipts are "attributed to the definite place of business at which the services are performed or, if not performed at any definite place of business, then to the definite place of business from which the services are directed or controlled."[262] Thus, only gross receipts "directly attributable to the taxable privilege exercised within this jurisdiction" may be taxed.[263]

The locality tried to tax FMCC's gross receipts, not based on what FMCC did in the locality, but based on all of the activities performed by FMCC in connection with the administration, ser-

256. *Id.*

257. *Id.*, 707 S.E.2d at 320–21.

258. *Id.* at 342, 707 S.E.2d at 322 (citing VA. CODE ANN. § 58.1-3703.1(A)(3)(a)(4) (Repl. Vol. 2009 & Cum. Supp. 2011) (internal quotation marks omitted).

259. *Id.* (internal quotation marks omitted).

260. *Id.*

261. VA. CODE ANN. § 58.1-3703.1(A)(3)(a) (Repl. Vol. 2009 & Cum. Supp. 2011).

262. *Id.* § 58.1-3703.1(A)(3)(a)(4) (Repl. Vol. 2009 & Cum. Supp. 2011).

263. *Id.* § 58.1-3703.1(A)(7)(d)(9) (Repl. Vol. 2009 & Cum. Supp. 2011).

vicing, and collection of its loan receivables, including those activities performed at its locations outside of the locality to generate its gross receipts.[264] Essentially, the locality decided to ignore the 1996 BPOL tax reform attribution rules.[265] Such autonomy is exactly what the Virginia General Assembly sought to avoid in 1996, as it did not look to the many-headed-hydra of local government for this important role.[266] Rather, it placed that function squarely in the hands of the Virginia Department of Taxation.[267]

Now with two opinions from the Supreme Court of Virginia regarding the BPOL tax issued within two years of each other, businesses and localities have been provided with helpful guidance that enunciates the changes the Virginia General Assembly made to the BPOL tax in 1996. In general, all Virginia localities should understand that if a business's gross receipts are attributable to operations conducted outside of the locality, the locality may not tax all of the gross receipts unless it has specific statutory authority in the Virginia Code to do so, and only when the Commerce Clause is not violated.[268]

VIII. MISCELLANEOUS LOCAL TAXES

A. *Recent Legislation Impacting Local Tax Collections*

The 2011 General Assembly amended Virginia Code section 58.1-3919.1 to reduce the period of delinquency before which private collection agents may be used to collect delinquent local taxes from six months to three months.[269] The legislation also removed the exclusion of local real property taxes from the local taxes that a treasurer may refer to private collection agents for collection.[270] As a result of this legislation local treasurers may now refer real estate taxes to private collection agents.

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264. *See Ford Motor Credit* Co., 281 Va. at 339–40, 707 S.E.2d at 321.

265. *See id.* at 340, 707 S.E.2d at 321 (citing VA. CODE ANN. § 58.1-3703.1(A)(3)(a) (Repl. Vol. 2009 & Cum. Supp. 2011)).

266. Act of Apr. 6, 1996, ch. 720, 1996 Va. Acts 1247, 1249 (codified as amended at VA. CODE ANN. § 58.1-3701 (Repl. Vol. 2009 & Cum. Supp. 2011)).

267. *Id.*

268. City of Winchester v. Am. Woodmark Corp., 252 Va. 98, 101–04, 471 S.E.2d 495, 497–99 (1995).

269. Act of Mar. 23, 2011, ch. 383, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3919.1 (Cum. Supp. 2011)).

270. VA. CODE ANN. § 58.1-3919.1 (Cum. Supp. 2011).

B. *Recent Significant Opinion of the Attorney General: Recordation Taxes Due on Deed Debt, Not Market Value*

The Clerk of the Circuit Court of Henrico County inquired of the Attorney General, about "an apparent conflict between the *Code of Virginia* and the Virginia Administrative Code, [regarding] how to calculate the recordation tax on deeds of trust when the amount secured under the deed is greater than the fair market value of the property subject to the deed."[271] In response, the Attorney General opined that the amount of recordation tax due from a real property sale should be based on the deed of trust debt yet to be paid, not the fair market value of the property.[272] The Attorney General stated that the Virginia Code section 58.1-803(A) requires a fair market value calculation when the debt on a property cannot be ascertained, but the Virginia Code is silent as to the recordation tax base when the amount of indebtedness is known.[273] The Attorney General noted that "[t]he underlying purpose of the statute confirms that the recordation tax is ordinarily to be based on the amount stated in the obligations that are secured, not the fair market value of the property."[274] After examining the relevant Virginia Code language, pertinent regulations, and previous attorney general and state tax commissioner opinions, the Attorney General concluded that if the amount of debt is known, such debt becomes the basis for the recordation tax calculation.[275]

271. Op. to Hon. Yvonne G. Smith (May 27, 2011).
272. *Id.*
273. *Id.* (citing VA. CODE ANN. § 58.1-803(A) (Repl. Vol. 2009 & Cum. Supp. 2011)).
274. *Id.*
275. *Id.*