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Taxation

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TAXATION

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INTRODUCTION

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

Part I of this article addresses state taxes. Part II of this article covers local taxes, including real and tangible personal property, license taxes, recordation tax, and administrative local tax procedures.

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 them. However, this article does not discuss many of the numerous

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technical legislative changes to Title 58.1 of the Virginia Code, which covers taxation.

I. TAXES ADMINISTERED BY THE VIRGINIA TAX DEPARTMENT

A. *Significant Legislative Activity*

1. Fixed Date of Conformity

The 2017 Virginia General Assembly amended Virginia Code section 58.1-301, which mandates conformity with the terms of the Internal Revenue Code ("IRC"), to advance Virginia's fixed date of conformity from December 31, 2015, to December 31, 2016.¹ This advancement allows Virginia to conform to the federal United States Appreciation for Olympians and Paralympians Act of 2016,² as well as other federal tax legislation enacted during 2016.

As in prior years, there are federal tax provisions that are disallowed in Virginia, including the special bonus depreciation allowance for certain property provided for under IRC sections 168(k), 168(l), 168(m), 1400L, and 1400N,³ as well as the five-year carryback period for certain net operating losses under IRC section 172(b)(1)(H).⁴ Virginia tax law also continues to disallow the income tax deductions related to applicable high-yield discount obligations under IRC section 163(e)(5)(F)⁵ and the deferral of certain income from the debt cancellation under IRC section 108(i), unless the taxpayer elects to include such income ratably over a three-year period beginning with tax year 2009 for transactions completed in tax year 2009, or over a three-year period

1. Act of Feb. 3, 2017, ch. 1, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-301 (Repl. Vol. 2017)).

2. United States Appreciation for Olympians and Paralympians Act of 2016, Pub. L. No. 114-239, 130 Stat. 973 (to be codified at 26 U.S.C. § 74(d)). This legislation excludes from gross income the value of any medal awarded or any prize money received from the United States Olympic Committee for competition in the Olympic Games or Paralympic Games. *Id.* at 973. This income tax exclusion does not apply to an individual if his or her adjusted gross income exceeds \$1 million, or \$500,000 if such individual is married and filing a separate income tax return. *Id.*

3. VA. CODE ANN. § 58.1-301(B)(1) (Repl. Vol. 2017).

4. *Id.* § 58.1-301(B)(2) (Repl. Vol. 2017).

5. *Id.* § 58.1-301(B)(3) (Repl. Vol. 2017).

beginning with tax year 2010 for transactions completed in tax year 2010 on or before April 21, 2010.⁶

2. Subtraction for Virginia Venture Capital Account Created

The Virginia legislature amended Virginia Code sections 58.1-322 and 58.1-402 to create a subtraction for the individual and corporate income tax, respectively, for certain investments in a Virginia venture capital account made on or after January 1, 2018, but before December 31, 2023.⁷ Income eligible for this subtraction includes investment partnership carried interest.⁸ An investment fund must register with the Tax Department and request certification as a Virginia venture capital account.⁹ In order to be certified, the registration statement must include a fund's intent to invest at least fifty percent of the capital committed in qualified portfolio companies (the "investment test") and "documentation that it employs at least one investor who has at least four years of professional experience in venture capital investment or substantially equivalent experience" (the "employment test").¹⁰

A qualified portfolio company is a company that has its principal place of business in Virginia; has a primary purpose of production, sale, research, or development of a product or service; and provides equity in exchange for the investment.¹¹ If the Tax Department determines that an investment fund meets the employment test, it must certify the fund as a Virginia venture capital account at such time as the investment fund actually meets the investment test.¹² No subtraction is allowed for an investment in a company that is owned or operated by an affiliate of the taxpayer.¹³ In addition, no subtraction is allowed for an individual

6. *Id.* § 58.1-301(B)(4) (Repl. Vol. 2017).

7. Act of Mar. 24, 2017, ch. 762, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-322.02(27)(a), -402(C)(25)(a) (Repl. Vol. 2017)).

8. VA. CODE ANN. §§ 58.1-322.02(27)(a), -402(25)(a) (Repl. Vol. 2017).

9. *Id.* §§ 58.1-322.02(27)(b), -402(C)(25)(b) (Repl. Vol. 2017):

10. *Id.* § 58.1-322.02(27)(b) (Repl. Vol. 2017) "Substantially equivalent experience" includes, but is not limited to, an undergraduate degree from an accredited college or university in economics, finance, or a similar field of study." *Id.*

11. *Id.*

12. *Id.*

13. *Id.* §§ 58.1-322.02(27)(a), -402(C)(25)(a) (Repl. Vol. 2017). This prohibition also extends to family members when the taxpayer is an individual, under section 58.1-322.02(27)(a). *Id.* § 58.1-322.02(27)(a) (Repl. Vol. 2017).

taxpayer who claims, with respect to the same investment, a subtraction for long-term capital gain or investment partnership carried interest pursuant to Virginia Code section 58.1-322(24) or a credit for subordinated debt investments pursuant to Virginia Code section 58.1-339.4.¹⁴ A corporate taxpayer may not claim this subtraction if, with respect to the same investment, it claims a subtraction for long-term capital gain or investment partnership carried interest income pursuant to Virginia Code section 58.1-402(24).¹⁵

The legislation requires the Tax Department to publish regulations, prior to December 31, 2017, in accordance with the Administrative Process Act, establishing procedures regarding the (i) registration of an investment fund as a Virginia venture capital account, (ii) documentation satisfying the requirements of the education test, and (iii) certification of an investment fund as a Virginia venture capital account.¹⁶

3. Expansion of Qualifying Expenditures for Enterprise Zone Real Property Investment Grants and Enterprise Zone Real Property Investment Tax Credits

The Virginia legislature amended Virginia Code sections 59.1-280.1 and 59.1-548 to allow otherwise qualifying expenditures to qualify for Enterprise Zone Real Property Investment Grants and Enterprise Zone Real Property Investment Tax Credits, regardless of whether such expenditures are considered properly chargeable to a capital account or deductible as business expenses under federal Treasury Regulations.¹⁷

4. Extension of Sunset Dates for Certain Tax Credits

The Virginia legislature amended Virginia Code sections 58.1-439.6 and 58.1-439.12:07 to extend (i) the sunset date for the

14. *Id.* § 58.1-322.02(27)(a) (Repl. Vol. 2017).

15. *Id.* § 58.1-322(C)(25)(a) (Repl. Vol. 2017); see Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 45 U. RICH. L. REV. 377, 382 (2010); see also Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 47 U. RICH. L. REV. 307, 314 (2012).

16. Act of Mar. 24, 2017, ch. 762, 2017 Va. Acts __, __ (codified as amended, in part, at VA. CODE ANN. §§ 58.1-322, -402 (Repl. Vol. 2017)). Section 2 of this Act requires the Tax Department to promulgate regulations, but that requirement is not codified in Title 58.1 of the Virginia Code. *Id.*

17. Act of Mar. 13, 2017, ch. 451, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 59.1-280.1(A) (Cum. Supp. 2017)).

worker retraining tax credit from taxable years beginning before January 1, 2018, to taxable years beginning before January 1, 2022, (ii) the sunset date for the telework expenses tax credit from taxable years beginning before January 1, 2017, to taxable years beginning before January 1, 2022, and (iii) the date before which an employer must enter into a telework agreement with a participating employee to January 1, 2022.¹⁸

The Virginia legislature also amended Virginia Code section 58.1-439.12:03 to extend the expiration date of the Motion Picture Production Credit from January 1, 2019, to January 1, 2022.¹⁹

5. Clarification that Storage of Inventory Creates Nexus for Sales Tax Purposes

Legislation adopted by the Virginia General Assembly amends Virginia Code section 58.1-612 to clarify that the presence of an out-of-state dealer's inventory within Virginia is sufficient contact, giving rise to nexus with Virginia.²⁰ In order for Virginia to require an out-of-state dealer to register to collect and remit Virginia retail sales and use tax on its sales to Virginia residents, the dealer must have the requisite connection, or nexus, with Virginia.²¹ The Commerce Clause and the Due Process Clause of the United States Constitution, as interpreted by the Supreme Court of the United States, control a nexus determination.²² As interpreted by the Supreme Court, a nexus for sales tax purposes is created only when substantial physical presence is established.²³ Virginia Code section 58.1-612 sets out the activities of a dealer that gives rise to a nexus and thus requires an out-of-state

18. Act of Mar. 13, 2017, ch. 454, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-439.6, -439.12:07 (Repl. Vol. 2017)).

19. Act of Mar. 13, 2017, ch. 425, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-439.12:03 (Repl. Vol. 2017)).

20. Act of Mar. 5, 2017, ch. 808, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-612 (Repl. Vol. 2017)).

21. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

22. The Commerce Clause reserves to Congress the power to regulate commerce among the states and with foreign nations and generally requires a substantial presence in a taxing state by the entity the state desires to tax. U.S. CONST. art. I, § 8, cl. 3; see *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342-43 (1953) (stating that "[i]f there is some jurisdictional fact or event," there may be a substantial presence sufficient to extend the State's taxing powers beyond state lines). The Due Process Clause requires a definite link or minimum connection between the state and the person, property, or transaction it seeks to tax. *Miller Bros. Co.*, 347 U.S. at 344-45.

23. *Miller Bros. Co.*, 347 U.S. at 345.

dealer to collect Virginia Retail Sales and Use Tax.²⁴ Under prior law, it was unclear whether storage of inventory within Virginia created a nexus. The new legislation makes clear that remote sellers who sell to Virginia customers' inventory stored at Virginia fulfillment centers and warehouses owned by unrelated third parties must register as dealers for Virginia sales tax collection purposes.

6. Retailers that Install Certain Fixtures Treated as Consuming Contractors

The Virginia legislature amended Virginia Code section 58.1-610 to repeal the exception for retailers that sell and install certain specified fixtures to be treated as retailers with respect to those sales instead of as consuming contractors.²⁵ Under Virginia law, sellers and installers of tangible personal property that becomes real property after installation are treated as contractors and are required to pay sales tax on their purchase or use of the property they install.²⁶ Under prior law, there was an exception for dealers who both sell and install "fences, venetian blinds, window shades, awnings, storm windows and doors, locks and locking devices, floor coverings . . . , cabinets, countertops, kitchen equipment, window air conditioning units or other like or comparable items."²⁷ This exception permitted those dealers to treat the sales of these items of tangible personal property as retail sales and to collect sales tax from their customers on such sales.²⁸ The Virginia legislature repealed this exception and, accordingly, dealers who sell at retail, but also sell and offer installation of fences, venetian blinds, window shades, awnings, storm windows and doors, locks and locking devices, floor coverings, cabinets, countertops, kitchen equipment, window air conditioning units, or other like or comparable items are treated as consuming contractors for the purposes of the retail sales and use tax.²⁹

24. VA. CODE ANN. § 58.1-612 (Repl. Vol. 2017).

25. Act of Mar. 13, 2017, ch. 449, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-610 (Repl. Vol. 2017)).

26. VA. CODE ANN. § 58.1-610 (Repl. Vol. 2017).

27. *Id.* § 58.1-610(D) (Repl. Vol. 2013).

28. *See id.*

29. *See* ch. 449, 2017 Va. Acts __, __.

7. New Exemption for Aviation Parts

The Virginia legislature amended Virginia Code sections 58.1-609.3 and 58.1-609.10 to provide an exemption from the sales and use tax for parts, engines, and supplies used for maintaining, repairing, or reconditioning aircrafts or any aircraft's avionics system, engine, or component parts.³⁰ The exemption will apply to both manned and unmanned systems, but will not cover tools or equipment not attached to the aircraft.³¹ Under current law, tangible personal property (including tools or equipment)

sold or leased to an airline operating in intrastate, interstate or foreign commerce as a common carrier providing scheduled air service on a continuing basis to one or more Virginia airports at least one day per week, for use or consumption by such airline directly in the rendition of its common carrier service

is exempt from sales and use tax.³² The new legislation will cover unscheduled common carriers and owners of private aircrafts and drones that are not covered by the current exemption. This legislation will become effective on July 1, 2018, and expire on July 1, 2022.³³

8. Automotive Repair Supplies Taxable to Purchaser

The Virginia General Assembly amended Virginia Code section 58.1-602 to require automobile repair businesses to charge and collect sales tax from their customers on separately stated charges for supplies used during the repairs, whether or not title or possession of the supplies passes to the customer.³⁴ Under current law, the repair business pays sales tax on supplies it uses and consumes in its business at the time of purchase; thus, separately stated charges on a customer's invoice for supplies used during the repair of the automobile are not subject to the tax.³⁵ The new legislation permits automobile repairers to purchase such sup-

30. Act of Mar. 24, 2017, ch. 714, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-609.10 (Repl. Vol. 2017)).

31. *Id.*

32. VA. CODE ANN. § 58.1-609.3(6) (Repl. Vol. 2017).

33. Ch. 714, 2017 Va. Acts __, __.

34. Act of Feb. 21, 2017, ch. 104, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-602 (Repl. Vol. 2017)).

35. VA. CODE ANN. § 58.1-602 (Repl. Vol. 2017) (providing the definition of "retail sale").

plies exempt from the tax as sales for resale, but they must collect sales tax from their customers on separately stated charges for supplies.

9. Online Disclosure of Registration Information

The Virginia legislature enacted Virginia Code section 58.1-623.01 to require the Tax Department to provide online access by registered dealers to the names and registration numbers of dealers who are currently registered for the retail sales and use tax.³⁶ The Tax Department has already been authorized to disclose this information,³⁷ but it would only disclose this information by telephone.³⁸ Providing registered dealers with online access to the names and registration numbers of other dealers may facilitate dealers' efforts to validate the legitimacy of resale exemption certificates and perhaps reduce the opportunity for individuals to fabricate dealer resale exemption certificates with invalid dealer registration numbers.³⁹

10. Extensions of Certain Sales Tax Exemptions: Advertising Businesses, Sales Tax Holidays, Audiovisual Productions and Equipment, and Educational Materials

The Virginia legislature amended Virginia Code section 58.1-609.6 to extend the sunset date for the exemption allowed for the purchase of printed materials by advertising businesses located in Virginia when the printed material is distributed outside of Virginia.⁴⁰ The exemption was scheduled to expire July 1, 2017, but is now extended to July 1, 2022.⁴¹

The Virginia legislature also extended by five years the sunset date from July 1, 2017, to July 1, 2022, for the combined sales tax holidays for school supplies and clothing.⁴² The Virginia legisla-

36. Act of Feb. 20, 2017, ch. 49, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-623.01 (Repl. Vol. 2017)).

37. VA. CODE ANN. § 58.1-3(B)(2) (Repl. Vol. 2015).

38. VA. DEP'T OF TAXATION, 2017 FISCAL IMPACT STATEMENT: HB 1810 (2017).

39. *Id.*

40. Act of Mar. 13, 2017, ch. 441, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-609.6 (Repl. Vol. 2017)).

41. *Id.*

42. Act of Mar. 13, 2017, ch. 446, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-611.2 (Repl. Vol. 2017)).

ture also extended the sunset date for qualifying Energy Star and WaterSense products,⁴³ and hurricane preparedness products to July 1, 2022.⁴⁴

The Virginia legislature also extended to July 1, 2022, the sunset date for the exemption for certain audio and video works in Virginia Code section 58.1-609.6.⁴⁵ The Virginia legislature also extended the sunset date to July 1, 2022, for the exemption in Virginia Code section 58.1-609.6 for textbooks and other educational materials withdrawn from inventory at book-publishing distribution facilities when such materials are withdrawn for free distribution to professors and other individuals with an educational focus.⁴⁶

11. Exemption for Legal Tender Coins

In 2015, the General Assembly amended Virginia Code section 58.1-609.1 to exempt from sales tax the sale of gold, silver, and platinum bullion where the sales price for the transaction exceeds \$1000.⁴⁷ However, coins not meeting the definition of gold, silver, and platinum bullion in Virginia Code section 58.1-609.1(19) remained subject to sales and use tax. In the 2017 session of the General Assembly, the legislature amended Virginia Code section 58.1-609.1 to create a new exemption for the sale of legal tender coins where the sales price for the transaction exceeds \$1000.⁴⁸ The definition of “legal tender coins” includes “coins of any metal content issued by a government as a medium of exchange or payment of debts.”⁴⁹ The exemption for sales of legal tender coins becomes effective on January 1, 2018.⁵⁰ The exemptions for gold,

43. *Id.* (codified as amended at VA. CODE ANN. § 58.1-609.1(18) (Repl. Vol. 2017)).

44. *Id.* (codified as amended at VA. CODE ANN. § 58.1-611.3 (Repl. Vol. 2017)).

45. Act of Mar. 13, 2017, ch. 412, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-609.6(6) (Repl. Vol. 2017)).

46. Act of Feb. 20, 2017, ch. 54, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-609.6(7) (Repl. Vol. 2017)).

47. Act of Mar. 26, 2015, ch. 620, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-609.1(19) (Repl. Vol. 2017)); see William L.S. Rowe & Emily J.S. Winbigler, *Annual Survey of Virginia Law: Taxation*, 50 U. RICH. L. REV. 177, 181 (2015).

48. Act of Mar. 13, 2017, ch 445, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-609.1(19) (Repl. Vol. 2017)).

49. VA. CODE ANN. § 58.1-609.1(19) (Repl. Vol. 2017).

50. *Id.*

silver, and platinum bullion, as well as legal tender coins, expire on June 30, 2022.⁵¹

12. Tax Amnesty Program

The legislature enacted Virginia Code section 58.1-1840.2 to authorize the Tax Commissioner to oversee the Virginia Tax Amnesty Program during a period of time ranging between sixty and seventy-five days from July 1, 2017, to June 30, 2018.⁵² This program would apply to any taxpayer who is required to file a return or to pay any tax administered by the Tax Department, but has failed to do so.⁵³ All civil or criminal penalties assessed or assessable and one-half of the interest assessed or assessable, resulting from nonpayment, underpayment, nonreporting, or underreporting of tax liabilities, will be waived upon payment of the taxes and interest.⁵⁴ At the conclusion of the amnesty period, any remaining amnesty-qualified liabilities would be assessed an additional twenty percent penalty.⁵⁵

B. *New Filing Fees*

The Virginia legislature imposed new filing fees for each request for an offer in compromise with respect to doubtful collectability under Virginia Code section 58.1-105 (\$50), a letter ruling under Virginia Code section 58.1-203 (\$275), a local business tax advisory opinion under Virginia Code sections 58.1-3701 or 58.1-3983.1 (\$275), and a corporate income tax filing status change request under Virginia Code section 58.1-442 (\$100).⁵⁶ The fee must be paid contemporaneously with the request.⁵⁷ The Department of Taxation may grant waivers “if the Tax Commissioner finds that

51. *Id.*

52. Act of Mar. 13, 2017, ch 433, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-1840.2 (Repl. Vol. 2017)).

53. VA. CODE ANN. § 58.1-1840.2 (Repl. Vol. 2017).

54. *Id.*

55. *Id.*

56. Act of Apr. 28, 2017, ch. 836, item 275V, 2017 Va. Acts __, __.

57. VA. DEP'T OF TAXATION, TAX BULLETIN 17-5: IMPORTANT INFORMATION REGARDING NEW ADMINISTRATIVE FEES (June 7, 2017), https://tax.virginia.gov/sites/default/files/in-line-files/tb-17-5-new-administrative-fees.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

such fee creates an unreasonable burden on the person making the request.”⁵⁸

II. TAXES ADMINISTERED BY LOCALITIES

A. Significant Legislative Activity

1. Business License Taxes

The legislature has required the Tax Department to promulgate regulations that clarify the appropriate methodology for determining deductible gross receipts attributable to business conducted in another state or foreign country in which the taxpayer (or its shareholders, partners, or members, in lieu of the taxpayer) is liable for an income or other tax based upon income.⁵⁹ “The regulations shall be based on previous Rulings of the Tax Commissioner . . . and the decision of the Supreme Court of Virginia in *The Nielsen Company, LLC v. County Board of Arlington County*, 289 Va. 79 (2015).”⁶⁰ There is no deadline for the Tax Department to publish these regulations.

2. Recordation Taxes: Reinsertion of Exemption for Deeds of Trust or Mortgages Given by Utility Consumer Services Cooperatives or Utility Aggregation Cooperatives

The legislature amended Virginia Code section 58.1-811 to reinsert an exemption from the recordation tax for deeds of trust or mortgages given by utility consumer services cooperatives or utility aggregation cooperatives.⁶¹ This exemption was erroneously deleted from the Virginia Code in 1994, but the exemption has generally continued to be granted since that time.⁶² Because most of the borrowing by these cooperatives is with federal instrumentalities, the cooperatives have generally been claiming that their deeds of trust are exempt from the recordation tax as deeds conveying property to the United States.⁶³

58. *Id.*

59. Act of Feb. 20, 2017, ch. 50, 2017 Va. Acts __, __.

60. *Id.*

61. Act of Mar. 13, 2017, ch. 442, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-811 (Repl. Vol. 2017)); VA. CODE ANN. § 56-231.15 (Repl. Vol. 2012).

62. VA. DEPT OF TAXATION, 2017 FISCAL IMPACT STATEMENT: SB 875 (Feb. 21, 2017).

63. *Id.*

3. Pilot Program Authorized for the City of Danville

The Virginia legislature authorized the City of Danville, after a public hearing, to enact an ordinance authorizing “a pilot project regarding recordation of deeds subject to liens for unpaid taxes.”⁶⁴ Pursuant to this program, the clerk could record certain deeds only if the city director of finance certifies “that there are no liens against [the] property for unpaid local taxes or for other fines or charges assessed by the city.”⁶⁵ Any deed with an assessed value of \$50,000 or less falls within the ambit of this program.⁶⁶ The pilot program may not apply to deeds of trust, deeds of easement, deeds in which a public service company, railroad, or cable system operator is either a grantor or grantee, deeds prepared under the supervision of the Office of the Attorney General, deeds conveying property to the Danville Redevelopment and Housing Authority, or deeds conveying real property to satisfy liens or delinquent taxes.⁶⁷ This pilot program was enacted at the recommendation of the Virginia Housing Commission, and, if enacted by the City of Danville as contemplated, it is expected to aid in the City’s collection of delinquent taxes.⁶⁸

4. Real and Tangible Personal Property

a. Creation of Green Development Zones

The legislature enacted a new statute, Virginia Code section 58.1-3854, and amended Virginia Code section 58.1-3245.12 to authorize local governing bodies to create, by ordinance, one or more green development zones.⁶⁹ Localities are permitted to “grant tax incentives and provide certain regulatory flexibility” inside these zones for a maximum period of ten years to green development businesses and businesses operating in energy-efficient buildings.⁷⁰ A “green development business” is “a busi-

64. See Act of Feb. 21, 2017, ch. 131, 2016 Va. Acts __, __. This Act was not codified.

65. *Id.*

66. *Id.*

67. *Id.*

68. VA. DEPT OF TAXATION, 2017 FISCAL IMPACT STATEMENT: HB 1699 (Feb. 16, 2017).

69. Act of Feb. 17, 2017, ch. 27, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-3245.12, -3854(B) (Repl. Vol. 2017)).

70. VA. CODE ANN. § 58.1-3854(B) (Repl. Vol. 2017).

ness engaged primarily in the design, development, or production of materials, components, or equipment used to reduce negative impact on the environment.”⁷¹

The legislature also authorized local governing bodies to adopt a local enterprise zone development taxation program for the green development zone, regardless of whether the green development zone has been designated by the governor as an enterprise zone, and would make the laws that apply to enterprise zones also applicable to green development zones.⁷²

b. Nonjudicial Sales of Delinquent Property

The legislature made several amendments to Virginia Code section 58.1-3975 concerning nonjudicial sales of tax delinquent real properties valued at less than \$20,000.⁷³ Nonjudicial sales of improved or unimproved properties valued between \$5000 and \$20,000, where the taxes are delinquent for more than three years, are permitted provided an additional requirement is met.⁷⁴ These requirements include that the property (i) is unimproved and measures less than 4000 square feet, (ii) is unimproved and has been determined to be unsuitable for building (the legislation expands the bases on which unsuitability may rest), (iii) has a structure on it that has been condemned by the local building official, (iv) has been declared a nuisance by the locality, (v) contains a derelict building, or (vi) has been declared to be blighted by the locality.⁷⁵ For sales of unimproved property valued at less than \$5000, none of the above requirements need be met in order to proceed with the sale, provided that the taxes are delinquent for more than three years.⁷⁶

The legislature made additional amendments to Virginia Code section 58.1-3975, concerning notice requirements for nonjudicial

71. *Id.* § 58.1-3854(A) (Repl. Vol. 2017).

72. Ch. 27, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-3245.12, -3854(E)-(F) (Repl. Vol. 2017)).

73. Act of Mar. 13, 2017, ch. 437, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3975(B) (Repl. Vol. 2017)).

74. VA. CODE ANN. § 58.1-3975(B) (Repl. Vol. 2017).

75. *Id.*

76. *Id.* § 58.1-3975(A) (Repl. Vol. 2017). Under prior law, unimproved property valued at less than \$10,000 was subject to a nonjudicial sale provided the taxes were delinquent for more than three years, regardless of whether the above requirements were met. *Id.* § 58.1-3975(A) (Cum. Supp. 2016).

sales and payment of attorney's fees for a redemption by owner in lieu of pro rata costs of publication and mailing.⁷⁷ The legislation also specifies that the nonjudicial sale will be made subject to all prior recorded liens, except the locality's tax lien, unless the locality's treasurer gives the lienholder written notice of the sale at least thirty days prior to the sale.⁷⁸ Any excess proceeds would be property of the prior owner, subject to claims of creditors, and the evaluation of claims for such excess proceeds would be handled by the circuit court.⁷⁹

c. Constitutional Amendment for Property Tax Exemptions for Certain Surviving Spouses

On November 8, 2016, Virginia voters ratified an amendment to article X of the Virginia Constitution allowing localities to enact an ordinance "exempt[ing] from taxation the real property of the surviving spouse of any law-enforcement officer, firefighter, search and rescue personnel, or emergency medical services personnel who was killed in the line of duty, who occupies the real property as his or her principal place of residence."⁸⁰ The legislature subsequently amended Virginia Code sections 58.1-3219.13 through 58.1-3219.16 to provide the necessary statutory authorization for localities to implement the new property tax exemption.⁸¹

d. Food and Beverage Tax Referendum Limitation

The legislature amended Virginia Code section 58.1-3833 to impose a three-year moratorium on any referenda initiated by a resolution of the Board of Supervisors to impose a local food and beverage tax once the voters of a county fail to approve the levy of the tax in a referendum.⁸² This legislation also requires any referendum held for the purposes of approving a food and beverage tax to contain language specifying the total percentage of all tax-

77. Ch. 437, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-3975(D), (G) (Repl. Vol. 2017)).

78. VA. CODE ANN. § 58.1-3975(H) (Repl. Vol. 2017).

79. *Id.* § 58.1-395(J) (Repl. Vol. 2017).

80. VA. CONST. art. X, § 6-B.

81. Act of Feb. 24, 2017, ch. 248, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-3219.13, -3219.14, -3219.15, -3219.16 (Repl. Vol. 2017)).

82. Act of Apr. 26, 2017, ch. 833, 2017 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3833(A) (Repl. Vol. 2017)).

es to be assessed on meals including the proposed maximum four percent food and beverage tax.⁸³ Under current law, a county is authorized to levy a tax on food and beverages sold for human consumption by a restaurant at a maximum rate of four percent of the amount charged for such food and beverages.⁸⁴ Generally, in order for a county to impose the tax, the tax must be approved in a referendum within the county.⁸⁵

B. *Significant Judicial Decisions*

1. Real Property

a. *Miller & Rhoads Building, L.L.C. v. City of Richmond*

The issue presented in this real estate and special district tax case is whether the City of Richmond's Tax Abatement for Rehabilitated Real Estate Program (the "Partial Exemption") applies to special district taxes.⁸⁶ On March 17, 2006, Miller & Rhoads Building, L.L.C. ("MRB") acquired Miller & Rhoads Building (the "Building"), which had been vacant.⁸⁷ The Building was located in a special service and assessment district of the City of Richmond.⁸⁸ The Building was subject to the city-wide real estate tax and an annual special district tax.⁸⁹ "Both taxes [were] calculated as a percentage of the property's 'assessed evaluation.'"⁹⁰

MRB planned to rehabilitate the building and develop the property, as well as recoupe some of the costs of rehabilitation by seeking a Partial Exemption from real estate taxes for the property under the City's Tax Abatement for Rehabilitated Real Estate Program.⁹¹ The City determined the Partial Exemption applied to the base real estate tax, but refused to apply the Partial Exemption to the special district tax.⁹² MRB challenged the City's

83. VA. CODE ANN. § 58.1-3833(A) (Repl. Vol. 2017).

84. *Id.*

85. *Id.*

86. *Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 539–40, 790 S.E.2d 484, 485 (2016).

87. *Id.* at 540, 790 S.E.2d at 485.

88. *Id.* at 540, 790 S.E.2d at 485.

89. *Id.* at 540, 790 S.E.2d at 485.

90. *Id.* at 540, 790 S.E.2d at 485.

91. *Id.* at 540, 790 S.E.2d at 485.

92. *Id.* at 540, 790 S.E.2d at 485.

determination that the Partial Exemption did not apply to the special district tax.⁹³ At trial, the circuit court upheld the City's position and stated that, "according to the statutory origin for the imposition of the Special District Tax, its beginning method of calculation and its purposes, and use, [the Special District T]ax is not a real estate tax within the meaning and for the use of the [Partial Exemption]."⁹⁴

On appeal to the Supreme Court of Virginia, MRB argued "that the trial court erred in ruling that the special district tax 'is not a real estate tax within the meaning and for the use of' the Partial Exemption."⁹⁵ The City of Richmond conceded that the special district tax is a real estate tax, but argued the special district tax is a different type of real estate tax that is not subject to the Partial Exemption.⁹⁶ The Supreme Court of Virginia agreed with the City.⁹⁷ The Court stated that proper consideration should be given to the overarching statutory scheme, provided by Richmond City Code section 98-816, not just the Partial Exemption and the special district tax.⁹⁸ Richmond City Code section 98-816 provides that "[a]ll assessments levied under [Article XIV] shall be . . . subject to the following sections of Chapter 98 governing the levy and collection of real estate taxes . . . [under] sections 98-123, 98-124, 98-127 and 98-129."⁹⁹

The supreme court noted that the special district tax is not included within those four enumerated sections, thus signifying that the City did not intend for special district taxes levied under article XIV to be "subject to" those omitted sections, noting the Partial Exemption is contained in the omitted sections.¹⁰⁰ Accordingly, in a 4-3 decision, the court upheld the trial court's decision that the special district tax is not subject to the Partial Exemption, albeit the finding was based on "the wrong reason, in ruling

93. *Id.* at 540, 790 S.E.2d at 485.

94. *Id.* at 541, 790 S.E.2d at 486 (alterations in original) (quoting *Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, No. 151701, 2016 Va. LEXIS 30, at *1 (Feb. 19, 2016)).

95. *Id.* at 541, 790 S.E.2d at 486.

96. *Id.* at 541, 790 S.E.2d at 486.

97. *Id.* at 541, 790 S.E.2d at 486.

98. *Id.* at 543, 790 S.E.2d at 487.

99. *Id.* at 543, 790 S.E.2d at 487 (original alterations omitted) (quoting *CITY OF RICHMOND, VA., CODE* § 98-816 (2004)).

100. *Id.* at 545, 790 S.E.2d at 488.

that the special district tax ‘is not a real estate tax within the meaning and for the use of the [Partial Exemption].’”¹⁰¹

Justice Kelsey wrote a strong and well-reasoned dissent that was joined by Chief Justice Lemons and Justice McClanahan.¹⁰² The dissent argued that the majority should look at the meaning of what the legislature enacted, as opposed to what the legislature intended to enact.¹⁰³ The dissenting opinion argued that the special district tax applies to real estate and that is what the legislation accomplishes through its written statute. Justice Kelsey elaborated, “The controlling text is unambiguous: The [P]artial [E]xemption applies to ‘Real Estate Taxation,’” citing City Code chapter 98, article XIV, division 2.1.¹⁰⁴ The dissent further stated that “[b]y its plain terms, the [P]artial [E]xemption applies to real estate taxes”¹⁰⁵ and that the special district tax is a real estate tax. Accordingly, the dissenting justices believe the partial exemption should apply to the special district tax.¹⁰⁶

b. *PHF II Norfolk, LLC v. City of Norfolk*

The Norfolk Waterside Sheraton Hotel (“PHF”) challenged the City of Norfolk’s real estate tax assessments for tax years 2011 through 2014.¹⁰⁷ What makes this circuit court case interesting is that the tax years at issue straddle a legislative amendment to Virginia Code section 58.1-3984(B) made by the Virginia General Assembly in 2011, effective for the 2012, 2013, and 2014 tax years, which are at issue in this case. The burden imposed on the taxpayer under Virginia Code section 58.1-3984(B) prior to the 2011 legislative change required a taxpayer to prove that the City committed “manifest error,” which can be demonstrated by establishing a significant disparity between the City’s assessed value of the hotel and the proven fair market value of the hotel.¹⁰⁸ For the 2011 tax year, PHF only had to establish fair market value of

101. *Id.* at 545, 790 S.E.2d at 488 (alterations in original) (quoting *Miller & Rhoads Bldg., L.L.C.*, 2016 Va. LEXIS 30, at *1).

102. *Id.* at 545, 790 S.E.2d at 488 (Kelsey, J., dissenting).

103. *Id.* at 548, 790 S.E.2d at 489–90.

104. *Id.* at 549, 790 S.E.2d at 490.

105. *Id.* at 554, 790 S.E.2d at 493.

106. *Id.* at 554, 790 S.E.2d at 493.

107. *PHF II Norfolk, LLC v. City of Norfolk*, 94 Va. Cir. 454, 454 (2016) (City of Norfolk).

108. *Id.* at 461.

the hotel and show that the hotel property was assessed at a higher value than its fair market value, that the assessment was not uniform in its application, or that the assessment is otherwise invalid or illegal.¹⁰⁹

The burden imposed on taxpayers challenging their real estate assessments changed on January 1, 2012, when Virginia Code section 58.1-3984(B) supplanted the former rule with the following new rule:

In circuit court proceedings to seek relief from real property taxes, there shall be a presumption that the valuation determined by the assessor or as adjusted by the board of equalization is correct. The burden of proof shall be on the taxpayer to rebut such presumption and show by a preponderance of the evidence that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, and that it was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations such as the International Association of Assessing Officers (IAAO) and applicable Virginia law relating to valuation of property. Mistakes of fact, including computation, that affect the assessment shall be deemed not to be in accordance with generally accepted appraisal practice.¹¹⁰

Relying upon Virginia Code section 58.1-3984(B), the trial court stated that in order to successfully challenge a tax assessment, PHF must:

(1) establish a [fair market value] for the [p]roperty; (2) prove any one of the following: (i) the City's assessment is not entitled to a presumption of correctness—in which case PHF must merely prove error on the City's part; (ii) the assessed value exceeds [fair market value] because the City committed manifest error or totally disregarded controlling evidence; or (iii) the assessed value has not been calculated in a manner uniform with similar properties; and (3) as of tax year 2012, prove that the City did not comply with [generally accepted appraisal practice] when calculating the assessment.¹¹¹

With respect to the tax year 2011, the trial court concluded that PHF produced a reasonable estimate of the hotel property's fair market value that complies with the dictates of Virginia law.¹¹² The City challenged PHF's expert real estate appraiser's

109. See VA. CODE ANN. § 58.1-3984(B) (Cum. Supp. 2011).

110. *PHF II Norfolk, LLC*, 94 Va. Cir. at 460 (citing VA. CODE ANN. § 58.1-3984(B) (2012)).

111. *Id.* at 461-62.

112. *Id.* at 465.

cost of a presumed Property Improvement Plan, which he deducted as part of his discounted cash flow methodology to reach an opinion of value for the hotel.¹¹³ The trial court, however, found PHF's appraiser to be very experienced and knowledgeable in the field of hotel appraisal, supported by the fact that the appraiser had authored a thorough report on valuations calculated and generally provided credible testimony.¹¹⁴ The court did not find the City's arguments that PHF's expert was overly speculative on income estimates used in his discounted cash flow method persuasive. The court did question certain aspects of the PHF expert's methodology, but generally found his estimates of value credible, although the court did not adopt the PHF expert's fair market value as its own.¹¹⁵

For tax years 2012, 2013, and 2014, however, the trial court held PHF failed to prove the City committed manifest error in assessing the hotel property.¹¹⁶ "The Court [was] satisfied that the City's uniform use of two-year-old financial data when calculating assessments [was] appropriate."¹¹⁷ Further, the trial court stated, "the City is not required to physically inspect properties being assessed."¹¹⁸ The court also determined "that PHF failed to prove that there [was] a significant disparity between the [p]roperty's assessed values and [fair market values] that falls outside the range of a reasonable difference of opinion."¹¹⁹ The court also held that PHF failed to prove the City's assessments of the property were non-uniform with similar properties, and that PHF did not prove that the City's assessments for 2012–2014 did not comply with generally accepted appraisal practice.¹²⁰ Accordingly, PHF prevailed on tax year 2011, under the former version of Virginia Code section 58.1-3984(B), but failed to meet its burden of proof for the later three tax years at issue (2012–2014).¹²¹

113. *Id.* at 464.

114. *Id.* at 465.

115. *Id.* at 465, 470.

116. *Id.* at 471–72.

117. *Id.* at 471.

118. *Id.*

119. *Id.* at 475.

120. *Id.* at 479, 484.

121. *Id.* at 484.

2. Business Professional Occupation and License Tax

a. *Verizon Online LLC v. Horbal*

The decision of the Supreme Court of Virginia in *Verizon Online LLC v. Horbal*¹²² is a significant decision which established several key procedural points all practitioners should understand before initiating any administrative appeal of a local business tax to the State Tax Commissioner, pursuant to Virginia Code section 58.1-3983.1. Before discussing these procedural issues, the substantive tax issue involved is whether Verizon Online's ("Verizon") television set top boxes, also known as "converters" and used in its TV business, are intangible personal property not subject to local taxation by virtue of Virginia Code section 58.1-1101(A)(2a) or whether the set top boxes are machines and subject to tax by localities under Virginia Code section 58.1-3057(B).¹²³

For tax years 2008, 2009, and 2010, Chesterfield County Commissioner of the Revenue, Joseph Horbal, assessed local property machinery and tools tax on Verizon's television set top boxes.¹²⁴ Verizon paid the tax and initiated a local appeal of the 2008–2010 taxes assessed and paid, seeking a refund of \$1,003,657.¹²⁵ Verizon brought its appeal under Virginia Code section 58.1-3983.1(B), providing for appeal to the local commissioner of revenue from local business tax assessment, and section 58.1-3980(A), providing for application to local commissioner of revenue for correction of local tax assessment.¹²⁶ Verizon argued in support of its refund claim that the television set top boxes were intangible personal property used in a cable television business and such assets are segregated for state taxation only.¹²⁷ Virginia does not impose a tax on intangible personal property, so Verizon sought a full refund of the taxes collected by Chesterfield County on the television set top boxes.¹²⁸ Commissioner Horbal denied the tax refund

122. 293 Va. 176, 796 S.E.2d 409 (2017).

123. *Id.* at 179–80, 796 S.E.2d at 410–11.

124. *Id.* at 180, 796 S.E.2d at 411.

125. *Id.* at 180, 796 S.E.2d at 411.

126. *Id.* at 180 & n.2, 796 S.E.2d at 411 & n.2.

127. *Id.* at 180, 796 S.E.2d at 411; *see* VA. CODE ANN. § 58.1-1100 (Repl. Vol. 2017) (stating that intangible personal property is segregated for state taxation only).

128. *Verizon Online LLC*, 293 Va. at 181, 796 S.E.2d at 411.

claim, stating that the set top boxes were “machinery,” thus subject to tax by Chesterfield County.¹²⁹

Verizon appealed Commissioner Horbal’s determination to the State Tax Commissioner pursuant to Virginia Code section 58.1-3983.1(D).¹³⁰ This statute provides for an appeal to the State Tax Commissioner by any person whose administrative appeal to the local commissioner of the revenue has been denied.¹³¹ The State Tax Commissioner reversed the local Commissioner’s decision and held that the television set top boxes were “classified as ‘intangible personal property’ under Code § 58.1-1101(A)(1)(2a) and, thus, not taxable by the County.”¹³² The State Tax Commissioner directed Chesterfield County to issue refunds to Verizon for the local taxes it paid for tax years 2008, 2009, and 2010 on set top boxes it owned.¹³³

Chesterfield County initiated a judicial review of the State Tax Commissioner’s determination in circuit court, pursuant to Virginia Code sections 58.1-3983.1(G) and 58.1-3984.¹³⁴ The County renewed the arguments it raised in defending its local determination before Verizon’s administrative appeal to the State Tax Commissioner on the substantive tax issue relating to the television set top boxes.¹³⁵ Chesterfield Commissioner Horbal, however, raised a new issue in the judicial proceeding he had not raised during Verizon’s administrative appeal to the Commonwealth. Horbal alleged that Verizon’s appeal to the State Tax Commissioner for tax years 2008 and 2009 was untimely, and the State Tax Commissioner was without jurisdiction to order refunds for those years.¹³⁶

The circuit court held that Verizon’s television set top boxes were not machines subject to local taxation, but were intangible personal property within the meaning of Virginia Code section 58.1-1101(A)(2a), thus sustaining the State Tax Commissioner’s determination on this issue.¹³⁷ However, the trial court also held

129. *Id.* at 180, 796 S.E.2d at 411.

130. *Id.* at 181, 796 S.E.2d at 411.

131. *Id.* at 181 & n.4, 796 S.E.2d at 411 & n.4.

132. *Id.* at 181, 796 S.E.2d at 411.

133. *Id.* at 181, 796 S.E.2d at 411.

134. *Id.* at 181, 796 S.E.2d at 411.

135. *See id.* at 181, 796 S.E.2d at 411.

136. *Id.* at 185–86, 796 S.E.2d at 414.

137. *See id.* at 181, 796 S.E.2d at 411–12.

that Verizon was not entitled to a refund for tax years 2008 and 2009 because its appeal to Commissioner Horbal was untimely and the State Tax Commissioner was without jurisdiction to order refunds for those two years.¹³⁸ At trial, Commissioner Horbal contended that “Verizon failed to file its local appeal of the assessments for [2008 and 2009] within one year from the last day of the tax year for which the assessments were made or within one year from the date of the assessments as required by Code § 58.1-3983.1(B)(1).”¹³⁹ The trial court agreed.¹⁴⁰

On appeal to the Supreme Court of Virginia, Verizon argued that Commissioner Horbal waived his right to challenge the State Tax Commissioner’s jurisdiction when he consented to the State Tax Commissioner considering and ruling on the merits on Verizon’s appeal for each of the tax years at issue, and he failed to raise any jurisdictional objection to the State Tax Commissioner.¹⁴¹ Verizon argued that in order to raise and preserve the issue for judicial review, Horbal needed to dispute the State Tax Commissioner’s jurisdiction to the Tax Commissioner himself pursuant to Virginia Code section 58.1-3983.1(D)(3), just as a litigant in a non-tax case would be required to raise before the circuit court any objections he has to the circuit court.¹⁴² On brief, Verizon argued that the circuit court sits as a court of appeals for State Tax Commissioner determinations, reviewing decisions for error.¹⁴³ Continuing on, Verizon asserted that “failure to raise an argument in the administrative phase is as fatal to a litigant as the failure to raise a trial issue in the Circuit Court prior to appeal to the Supreme Court.”¹⁴⁴ Verizon further asserted that Horbal’s response to Verizon’s administrative appeal to the State Tax Commissioner contained no challenge to the Tax Commissioner’s jurisdiction to resolve the parties’ dispute and contained no mention of any jurisdictional concern.¹⁴⁵

138. *Id.* at 186, 796 S.E.2d at 414.

139. *Id.* at 185–86, 796 S.E.2d at 414.

140. *See id.* at 186, 796 S.E.2d at 414.

141. *Id.* at 186, 796 S.E.2d at 414.

142. *See id.* at 186–87, 796 S.E.2d at 414–15.

143. *See* Brief for Appellant at 13, *Verizon Online LLC v. Horbal*, 293 Va. 176, 796 S.E.2d 409 (2017) (No. 15-1955); *see also Verizon Online LLC*, 293 Va. at 186, 796 S.E.2d at 414.

144. Brief for Appellant at 10, *Verizon Online LLC v. Horbal*, 293 Va. 176, 796 S.E.2d 409 (2017) (No. 15-1955).

145. *Id.* at 12.

Commissioner Horbal argued that “the time period for filing a local appeal provided for in Code § 58.1-3983.1(B) is a matter of subject matter jurisdiction that may be raised at any time.”¹⁴⁶ The Supreme Court of Virginia disagreed.¹⁴⁷ The court concluded that “the time period for filing a local appeal provided for in code § 58.1-3983.1(B) is ‘an other [sic] jurisdictional element subject to waiver if not properly raised.’”¹⁴⁸ Accordingly, the issue regarding the timelines of Verizon’s local appeal under code section 58.1-3983.1(B) was not preserved for review by the circuit court and the circuit court erred in ruling that Verizon was not entitled to refunds of the taxes paid for tax years 2008 and 2009.¹⁴⁹ The court held and affirmed the circuit court’s determination of the State Tax Commissioner and ruled that Verizon’s set top boxes were not subject to local taxation.¹⁵⁰ The court reversed the part of the circuit court’s judgment that reversed the determination of the State Tax Commissioner and ruled that Verizon was not entitled to refunds of taxes paid for 2008 and 2009, and entered judgment in favor of Verizon on that issue.¹⁵¹

The *Verizon Online LLC* decision as to the issue on how courts should review the unique administrative appeal process contained in Virginia Code section 58.1-3983.1 comes as a surprise to most Virginia tax practitioners. Under Code section 58.1-3983.1(G), which provides for judicial review of the State Tax Commissioner’s determination by the circuit court, the party challenging the determination must show that the ruling of the State Tax Commissioner is “erroneous with respect to the part challenged.”¹⁵² After referencing this statute, the Supreme Court of Virginia went on to state, “in such proceedings, the circuit court acts in the role of an appellate court.”¹⁵³ The Supreme Court of Virginia cites two non-tax cases as support for this proposition, but from analogous situations, which lend support to the statement.¹⁵⁴ The two cases involved a review of agency actions or decisions, both of which involved agencies whose decisions were

146. *Verizon Online LLC*, 293 Va. at 188, 796 S.E.2d at 415.

147. *Id.* at 188, 796 S.E.2d at 415.

148. *Id.* at 188, 796 S.E.2d at 415.

149. *Id.* at 189, 796 S.E.2d at 415–16.

150. *Id.* at 189, 796 S.E.2d at 416.

151. *Id.* at 189, 796 S.E.2d at 416.

152. VA. CODE ANN. § 58.1-3983.1(G) (Repl. Vol. 2017).

153. *Verizon Online LLC*, 293 Va. at 186, 796 S.E.2d at 414.

154. *See id.* at 186, 796 S.E.2d at 414.

subject to the Virginia Administrative Procedures Act (“VAPA”).¹⁵⁵ The Court also looked at the roles of Supreme Court Rules 5:25 and 5A:18 in connection to appeals from agency decisions under the VAPA and principles of procedural default.¹⁵⁶ Rules 5:25 and 5A:18 require preservation of issues for appellate review by the Supreme Court of Virginia and the Court of Appeals of Virginia, respectively.¹⁵⁷ The supreme court seems to suggest that such principles similar to these rules apply to determinations of the State Tax Commissioner when judicially challenged under code section 58.1-3983.1(G) before the trial court. Neither of the two cases cited in support of the court’s position involve the administrative appeal rules set out in Virginia Code section 58.1-3983.1 applicable to appeals of local tax final determinations or of any other State Tax Department agency decisions, for that matter. Yet the court, under the introductory signal “*Cf.*,” cited two Court of Appeals of Virginia decisions where the appellate court in each case reviewed agency decisions that were subject to the VAPA.¹⁵⁸

A number of stakeholders participated in developing the local business tax appeal statute during the late 1990s which led to the General Assembly adopting the new administrative appeals and rulings provisions contained in Virginia Code section 58.1-3983.1.¹⁵⁹ At no time during the development of the local tax appeal statute was it contemplated that determinations made by the State Tax Commissioner on appeals of final determinations by local taxing jurisdictions would be either subject to the VAPA or have administrative appeals treated in a similar manner as agency decisions on claims which are subject to the VAPA. Historically, with the exception of occasionally promulgating tax regulations from time to time, no decision or ruling of the Virginia

155. *Id.* at 186–87, 796 S.E.2d at 414 (citing *French v. Va. Marine Res. Comm’n*, 64 Va. App. 226, 236, 767 S.E.2d 245, 251 (2015); *Pence Holdings, Inc. v. Auto Ctr., Inc.*, 19 Va. App. 703, 707–08, 454 S.E.2d 732, 734–35 (1995)).

156. *Id.* at 187, 796 S.E.2d at 414–15; see VA. SUP. CT. R. 5:25, 5A:18 (Repl. Vol. 2017).

157. R. 5:25, 5A:18 (Repl. Vol. 2017).

158. See *Verizon Online LLC*, 293 Va. at 186–87, 796 S.E.2d at 414 (citing *French*, 64 Va. App. 226, 236, 767 S.E.2d 245, 251; *Pence Holdings, Inc.*, 19 Va. App. 703, 707–08, 454 S.E.2d 732, 734–35).

159. The author was a participant in the advisory group that drafted and proposed to the General Assembly a bill establishing the new local business tax rules contained within Virginia Code section 58.1-3983.1. The remainder of this section consists of the authors’ comments.

Department of Taxation is subject to the VAPA.¹⁶⁰ Accordingly, comparing the administrative tax appeal procedures to court challenges to agency decisions that are subject to the VAPA purports to create similarities where none exist.

Taxpayer appeals of final determinations by local tax jurisdictions to the State Tax Commissioner are designed to give the taxpayer a cost efficient review of a local tax assessment without the need to initiate a judicial challenge to the tax assessment. However, in an administrative appeal of a local business tax to the State Tax Department, the taxpayer does not receive many of the rights that would be available if the VAPA applied to an administrative appeal. In administrative tax appeals, the taxpayer has no right to an actual face-to-face due process hearing, to call witnesses, or to subpoena local tax officials and question them on their final tax determination.¹⁶¹ In fact, the entire administrative “proceeding” is handled by submitting a written appeal, followed by the written submission by the local taxing jurisdiction to address any points made by the taxpayer in its written appeal.¹⁶² Nothing further is contemplated in the administrative appeal process. The entire administrative appeal program is designed to be informal and provide an opportunity to the taxpayer to avoid the cost of litigation.

However, if the circuit court is called upon to review an administrative decision by the State Tax Commissioner as if it is an appellate court, then the rules of the game have changed. For example, if the issue in a business professional and occupational license (“BPOL”) tax assessment involves whether the taxpayer has a definite place of business in the locality, may the taxpayer then raise any factual or legal argument it wants in circuit court in support of the position taken in the administrative appeal to the State Tax Department that it had no definite place of business in the locality? What if the taxpayer, a manufacturer, argues in the administrative appeal that it is not taxable because it has no definite place of business in the locality? If the taxpayer loses, may it then argue in the circuit court that if it is taxable at all, it is because it is a wholesale merchant, to which an exclusion from tax applies, and not a retail merchant subject to the BPOL tax?

160. See VA. CODE ANN. § 58.1-203(B)–(C) (Repl. Vol. 2017).

161. See VA. CODE ANN. §§ 58.1-3703.1(A)(6), -3983.1(D) (Repl. Vol. 2017).

162. See VA. CODE ANN. §§ 58.1-3703.1(A)(6), -3983.1(D) (Repl. Vol. 2017); cf. VA. ADMIN. CODE § 10-20-170 (2008) (repealed 2009).

Is the taxpayer bound to the administrative record when seeking to challenge the local tax assessment following an administrative appeal? For example, using the same example of a taxpayer who is a manufacturer, if the State Tax Commissioner rules that the taxpayer is a manufacturer, but is not selling at wholesale at the place of manufacture, is the only issue you need to prove at trial that you are selling at wholesale if the locality does not cross appeal?

Virginia tax practitioners and the State Tax Department have always operated under the presumption that the Tax Department's actions, except for promulgating regulations, are not covered by the VAPA. Under Virginia Code section 2.2-4018(1), "[t]he assessment of taxes or penalties and other rulings in individual cases in connection with the administration of the tax laws" are specifically exempt from the article governing case decisions in the VAPA.¹⁶³ This statutory provision includes both informal fact finding proceedings, as well as formal proceedings for the taking of evidence and testimony.¹⁶⁴ The Supreme Court of Virginia's choice to compare a local tax appeal to a matter specifically governed by the VAPA and apply VAPA principles governing case decisions, as it did in the *Verizon Online LLC* decision, is most troubling in light of the statutory exemption afforded by Virginia Code section 2.2-4018(1) and creates uncertainty where none should exist with regard to administrative local tax appeals.

b. *Dulles Duty Free, LLC v. County of Loudoun*

This case is about whether the County of Loudoun violates the United States Constitution when it taxes the gross receipts realized by Dulles Duty Free, LLC ("Duty Free") on its export sales.¹⁶⁵ Duty Free is a duty-free retailer.¹⁶⁶ "Duty Free sells alcohol, tobacco, luxury gifts, fragrances and other goods in their stores."¹⁶⁷ During tax years 2009 to 2011, Duty Free operated five stores

163. VA. CODE ANN. § 2.2-4018(1) (Repl. Vol. 2017).

164. *See id.*

165. *Dulles Duty Free, LLC v. County of Loudoun*, Civil No. 90613, letter op. at 1 (Va. Cir. Ct. Apr. 26, 2016) (Loudoun County) (unpublished decision) (on file with the authors).

166. *Id.*

167. *Id.* at 2.

at the Dulles International Airport in Loudoun County.¹⁶⁸ A sixth store was opened in 2012, and it operated for the years 2012 and 2013.¹⁶⁹ The specific facts were as follows:

Duty Free assembles imported and domestic goods in bonded warehouses in Florida and Texas. Bonded carriers transport the goods to a bonded warehouse at Dulles Airport where they are eventually delivered to the retail stores within the airport. This process is highly regulated, scrutinized and controlled. For example, a bonded carrier arriving at the airport warehouse is unable to unload his sealed container until a customs official is present to verify the delivery, and to break the customs seal and cut the bolts sealing the container. Once in the warehouse, items are first delivered to a staging area where they must again be inspected before they can be warehoused. The process of delivery to the retail stores is also highly controlled.

Once in the retail stores the goods are available for sale in the “sterile” area of the airport. This is the area where only passengers who have boarding passes and have gone through security may enter. Both domestic and international passengers may make purchases at Duty Free’s stores. The evidence showed that Duty Free is able to identify whether a sale is for import or export. If a domestic passenger purchases an item, a Virginia sales tax is charged and the customer is able to take possession of the item. If the sale involves a bonded imported item, an import duty is paid by the domestic passenger.

International sales are handled differently. An international traveler must show his or her passport and boarding pass, which is verified by Duty Free’s cashier. The international traveler purchases the goods for export. No Virginia sales tax is collected nor is any duty collected. The merchandise is not delivered to the traveler at the point of sale. The traveler obtains a receipt and a duty free cartman meets the traveler at the jet way just prior to boarding the plane, where the traveler surrenders his receipt to the cartman in exchange for the goods. In this way, Duty Free ensures that items are in fact for export. These procedures are to ensure actual export. . . . Duty Free is able to demonstrate through record keeping the percentage of sales attributable to domestic travelers and international travelers. . . . Duty Free does not challenge the BPOL taxes attributable to its domestic sales.¹⁷⁰

However, Duty Free argued that the BPOL tax which arose from gross receipts attributable to their international sales (de-

168. *Id.* at 1.

169. *Id.* at 1–2.

170. *Id.*

pending on the tax year the amount of export sales varies between ninety-two and ninety-nine percent of its total sales) violated the United States Constitution.¹⁷¹

At trial, Duty Free argued that, as applied to its export sales, the Loudoun County BPOL tax based on gross receipts violates the Import-Export Clause of the United States Constitution.¹⁷² The Import-Export Clause states, “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s [sic] inspection Laws”¹⁷³ Duty Free argued that under the Import-Export Clause, Loudoun County’s “BPOL tax based on gross receipts is imposed on sales of exports, and therefore qualifies as a ‘direct’ tax on the goods sold.”¹⁷⁴ The BPOL tax is measured by the amount of sales.¹⁷⁵ Further, “Duty Free maintain[ed] that the export goods being sold and delivered to those preparing imminently to go abroad [were] ‘in export transit’ and cannot be taxed.”¹⁷⁶

Loudoun County countered by arguing that its “BPOL tax is not a sales, property, or income tax.”¹⁷⁷ In fact, the BPOL tax is not on a particular transaction, but only uses sales as the measure of business activity upon which to base its tax.¹⁷⁸ Accordingly, the BPOL tax is only “an ‘indirect’ tax for the privilege to engage in a business in Loudoun County.”¹⁷⁹ The trial court held that Duty Free met its burden of proof and established its export sales were in transit for export.¹⁸⁰

However, under the Import-Export Clause, Duty Free still had to prove that the Loudoun County BPOL tax was a direct tax on exports. Duty Free relied principally on the Supreme Court of the United States decision in *Richfield Oil Corp. v. State Board of*

171. *Id.* See Transcript of Record at 10, 255–58, 271–87, 457, *Dulles Duty Free, LLC v. County of Loudoun*, Civil No. 90613, letter op. at 1 (Va. Cir. Ct. Apr. 26, 2016) (Loudoun County) (unpublished decision) (on file with the authors).

172. *Id.* at 3.

173. U.S. CONST. art. I, § 10, cl. 2.

174. *Dulles Duty Free, LLC*, letter op. at 3.

175. *See id.* at 3–4.

176. *Id.* at 3.

177. *Id.*

178. *See id.* at 3–4.

179. *Id.* at 3.

180. *See id.* at 12.

Equalization.¹⁸¹ In *Richfield Oil Corp.*, the Supreme Court of the United States held that, as applied to Richfield, a California privilege tax measured by the "gross receipts" from all of Richfield's oil sales to New Zealand violated the Import-Export Clause.¹⁸² The Supreme Court held the California tax assessments based on the value or sale price of the goods, for federal protected constitutional rights purposes, is a tax on the goods themselves.¹⁸³ Duty Free argued that the County's BPOL tax, also for the privilege to engage in business and measured by gross receipts, is structured in the same manner as the California tax struck down by the Supreme Court of the United States in *Richfield*.¹⁸⁴

Loudoun County argued the *Richfield Oil Corp.* decision was no longer good law, even though the Supreme Court of the United States had not reversed *Richfield*.¹⁸⁵ Rather, the County argued two more recent decisions by the Supreme Court that involved the Import-Export Clause, provided a policy oriented test, and that this test represented the current state of instructive law.¹⁸⁶ The two more recent decisions, *Michelin Tire Corp. v. Wages*¹⁸⁷ and *Department of Revenue of Washington v. Association of Washington Stevedoring Companies*,¹⁸⁸ adopted a three-part, policy oriented test to determine if a state or local tax impermissibly violated the Import-Export Clause.¹⁸⁹ Following a lengthy discussion of the *Michelin Tire Corp.* and *Washington Stevedoring* opinions, the trial court was persuaded that Loudoun County's BPOL tax was neither an impost nor a duty upon exports, but rather an "indirect tax" that did not "fall" upon the export.¹⁹⁰ Accordingly, the trial court denied Duty Free's application for a refund of BPOL taxes paid on its export sales.¹⁹¹

Duty Free filed a Petition for Appeal with the Supreme Court of Virginia, which was granted by the court on December 14,

181. *Id.* at 6 (citing *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946)).

182. *See Richfield Oil Corp.*, 329 U.S. at 71, 83, 86.

183. *See id.* at 71-72, 84-86.

184. *Dulles Duty Free, LLC*, letter op. at 7.

185. *See id.* at 9.

186. *See id.* at 7-8.

187. 423 U.S. 276 (1976). This case did not involve an export in transit. *See id.* at 302.

188. 435 U.S. 734 (1978). This case did not present a tax on a good in transit but rather a tax on ancillary labor services to move a good in transit. *See id.* at 736-38.

189. *Michelin Tire Corp.*, 423 U.S. at 285-86; *Washington Stevedoring*, 435 U.S. at 762.

190. *Dulles Duty Free, LLC*, letter op. at 13.

191. *See id.*

2016.¹⁹² Briefing to the court on the appeal was completed on February 24, 2017, and oral argument was presented in June of 2017.¹⁹³ A decision by the Supreme Court of Virginia is expected in the fall of 2017.

3. Machinery and Tools Tax

a. *Western Refining Yorktown, Inc. v. County of York*

A divided Supreme Court of Virginia upheld machinery and tools tax assessments by the County of York Commissioner of the Revenue for tax years 2010 and 2011.¹⁹⁴ Western Refining Yorktown, Inc. (“Western Refining”) challenged the County of York’s tax assessments of its machinery and tools (“M&T”) for the 2010 and 2011 tax years and asserted that the York County Commissioner of the Revenue ignored the appraisal report prepared by its expert that opined on the value of its M&T.¹⁹⁵

The refinery at issue in the case was completed in 1956.¹⁹⁶ Western Refining acquired the facility in 2006.¹⁹⁷ The refinery occupied approximately 658 acres.¹⁹⁸ Upon acquisition, Western Refining invested heavily to upgrade the facility, making purchases of approximately \$213,500,000 in equipment to comply with environmental mandates, but also to improve the refinery’s profitability.¹⁹⁹ By 2010, Western Refining’s York County facility was operating at a loss.²⁰⁰ In September 2010, Western Refining shutdown the facility, idled the M&T, and laid off almost its entire workforce.²⁰¹ In March 2011, Western Refining “filed a 10-K statement with the Securities & Exchange Commission [“SEC”] indicating to investors that its refining assets were worth \$472,000,000, and

192. *Dulles Duty Free, LLC v. County of Loudoun*, Record No. 160939, SUPREME COURT OF VA.: APPELLATE CASE MGMT. SYS., <https://eapps.courts.state.va.us/acms-public/caseInquiry/showCasePublicInquiry>.

193. *Id.*; *June 2017 Argument Docket*, VA.’S JUD. SYS., <http://www.courts.state.va.us/courts/scv/docket.html>.

194. *See* *W. Refining Yorktown, Inc. v. County of York*, 292 Va. 804, 808, 810, 793 S.E.2d 777, 777–79 (2016).

195. *See id.* at 808, 810, 793 S.E.2d at 778–79.

196. *Id.* at 809, 793 S.E.2d at 779.

197. *Id.* at 809, 793 S.E.2d at 779.

198. *Id.* at 809, 793 S.E.2d at 779.

199. *Id.* at 809, 793 S.E.2d at 779.

200. *Id.* at 809, 793 S.E.2d at 779.

201. *See id.* at 809, 793 S.E.2d at 779.

that it planned to let the facility sit idle to wait out the poor economy.”²⁰² The SEC filing also stated that Western Refining planned to restart the refinery no later than mid-2013; however, the refinery was never restarted.²⁰³ In fact, Western Refining sold its York County facility to Plains Marketing LP on December 29, 2011, for \$180,000,000.²⁰⁴ Plains Marketing was not a refiner, but rather a reseller of equipment, machinery, and tools.²⁰⁵

York County assessed Western Refining’s M&T at twenty-five percent of its original cost.²⁰⁶ The York County Commissioner of the Revenue uses the same methodology, twenty-five percent of original cost, on M&T assessments regardless of the age of the M&T.²⁰⁷ Western Refining sought to lower its M&T assessments by providing the Commissioner with an appraisal of its M&T located at the York County facility.²⁰⁸ Western Refining’s initial appraisal report valued the M&T at \$25,000,000 for 2010 and \$16,000,000 for 2011.²⁰⁹ To reach these values for the M&T, Western Refining’s appraiser looked at the three methods of appraising property: sales comparison, income, and cost.²¹⁰ The Western Refining appraiser valued the total plant site, including the land.²¹¹ The appraiser “then deducted the value of component parts, such as real estate and its improvements, tankage, pollution control assets, and what remained, [the expert] concluded, was the value of the [M&T].”²¹²

The Commissioner of the Revenue considered the Western Refining’s expert appraisal report and also its supporting schedules.²¹³ The Commissioner also “found that the site was subject to credit line deeds of trust in the amounts of \$800 million and \$1.7 billion.”²¹⁴ The Commissioner sought information as to whether any of the M&T was pledged as collateral, but received no re-

202. *Id.* at 809, 793 S.E.2d at 779.

203. *Id.* at 809, 793 S.E.2d at 779.

204. *Id.* at 809, 793 S.E.2d at 779.

205. *See id.* at 809, 793 S.E.2d at 779.

206. *Id.* at 810, 793 S.E.2d at 779–80.

207. *Id.* at 810, 793 S.E.2d at 779–80.

208. *See id.* at 813, 793 S.E.2d at 781.

209. *Id.* at 813, 793 S.E.2d at 781.

210. *Id.* at 813, 793 S.E.2d at 781.

211. *See id.* at 813, 793 S.E.2d at 781.

212. *Id.* at 813, 793 S.E.2d at 781.

213. *See id.* at 812, 793 S.E.2d at 780.

214. *Id.* at 812, 793 S.E.2d at 780.

sponse to her inquiry.²¹⁵ The Commissioner refused to change her M&T tax assessments and Western Refining initiated M&T litigation pursuant to Virginia Code section 58.1-3984 to correct the tax assessments.²¹⁶

At trial, York County presented an expert to opine on the value of the M&T, which he concluded to be approximately \$215,400,000 for 2010 and \$198,000,000 for 2011.²¹⁷ York County's expert also challenged the methodology used by Western Refining's expert.²¹⁸ The trial court found the commissioner's assessments to be prima facie correct and rejected the testimony of Western Refining's expert.²¹⁹ Ultimately, the trial court held Western Refining failed to meet its burden of proof to show the M&T was valued in excess of its fair market value.²²⁰

On appeal, the same basic arguments were made by the parties. Additionally, Western Refining argued that assessing all M&T at twenty-five percent of its original cost is not a valid method, as it "is not reasonably expected to determine fair market value."²²¹ The Supreme Court of Virginia disagreed. The court noted that Virginia Code sections 58.1-3503(B) and 58.1-3507(B) require the commissioner to take into account the condition of the property, and "must also consider 'upon written request of the taxpayer . . . any bona fide, independent appraisal presented by the taxpayer.'"²²² The court looked at the SEC filings made by Western Refining, the sale of property in late 2011, as well as the two appraisals.²²³ The court stated the Commissioner of the Revenue did not ignore Western Refining's appraisal, but considered it along with other information she developed.²²⁴ The Supreme Court of Virginia also rejected Western Refining's contention that the county assumed inconsistent positions in a related litigation matter involving the real estate assessments.²²⁵ The result of its

215. *Id.* at 812, 793 S.E.2d at 780.

216. *See id.* at 812-13, 793 S.E.2d at 780-81.

217. *Id.* at 813, 793 S.E.2d at 781.

218. *See id.* at 814, 793 S.E.2d at 782.

219. *Id.* at 815, 793 S.E.2d at 782.

220. *Id.* at 815, 793 S.E.2d at 782.

221. *Id.* at 816, 793 S.E.2d at 783.

222. *Id.* at 817, 793 S.E.2d at 783 (citing VA. CODE ANN. §§ 58.1-3503(B), -3507(B) (Repl. Vol. 2013)) (emphasis in original).

223. *Id.* at 820, 793 S.E.2d at 785.

224. *See id.* at 821, 793 S.E.2d at 786.

225. *See id.* at 829, 793 S.E.2d at 790.

analysis led four members of the court to uphold the trial court's decision, including three judges on the primary opinion and one judge concurring on the judgment reached in the primary opinion.²²⁶

Three judges dissented on the basis that using twenty-five percent of original cost of the M&T, without conducting any studies or receipt of advice by consultants, was arbitrary.²²⁷ The dissenters opined that the Commissioner exceeded her statutory authority under Virginia Code section 58.1-3503 by imposing arbitrary assessments and that they would have reversed and remanded the case back to the trial court.²²⁸

b. *International Paper Company v. Isle of Wight County*

Just two months after the Supreme Court of Virginia issued its decision in *Western Refining*, the trial court in *International Paper Company v. County of Isle of Wight* presided over an M&T tax case involving a local government's use of a percentage of original cost to arrive at what Isle of Wight County considered to represent the fair market value of M&T. Unlike the twenty-five percent of original cost used in York County that barely survived the Supreme Court of Virginia's review in *Western Refining*, Isle of Wight County taxed M&T at 100% of original cost.²²⁹ Following a six-day trial, the circuit court for the County of Isle of Wight ruled that the County's methodology for taxing International Paper Company's ("IP") M&T at their original total capitalized cost, without allowance for depreciation, was clearly erroneous.²³⁰ The trial court ordered substantial M&T tax refunds and interest for tax years 2012–2014 that exceeded \$4,000,000.²³¹

Perhaps most interesting in this trial was a procedural issue raised by the County. Isle of Wight County asserted that IP willfully refused to provide the County with accurate records and filings that prevented the County from providing accurate M&T tax

226. *See id.* at 829, 793 S.E.2d at 790.

227. *Id.* at 830, 793 S.E.2d at 790 (McClanahan, J., dissenting).

228. *Id.* at 830, 833, 793 S.E.2d at 790, 792.

229. *Int'l Paper Co. v. County of Isle of Wight*, No. CL 14001026-00, slip op. at 1 (Va. Cir. Ct. Mar. 15, 2017) (Isle of Wight County).

230. *Id.*

231. *See id.* at 2–4.

assessments.²³² Specifically, the County asserted that IP admitted, by virtue of filing amended M&T tax returns with the County, that it erroneously had reported some M&T on its original M&T tax return that were either idled or were double-reported.²³³ The amended returns sought to eliminate the double reporting of the M&T, along with eliminating the idled property that was reported on the original M&T tax returns as in use.²³⁴ The County also argued IP's reporting of its electric power plant to the State Corporation Commission for assessment, as had been done in prior years, was a willful attempt to refuse to furnish a local assessing official with information,²³⁵ even though the actual tax imposed and to be remitted to the County would be the same.²³⁶ Accordingly, the County argued that, under Virginia Code section 58.1-3987, IP's actions should prevent the taxpayer from receiving any refund of tax despite the success of IP's claims on the rest of the refund claim.²³⁷

IP responded by pointing out that the County offered no allegation as to how such actions support the claim of a willful failure to provide all requisite and requested information.²³⁸ In fact, if anything, IP's actions caused it to pay more M&T tax than required, by virtue of its reporting some idled equipment and double reporting several items of M&T, cumulatively estimated at only several percent of the total tax refund claims for these two tax years.²³⁹ Under Virginia Code sections 58.1-3984 and 58.1-3987, IP argued that "the mere failure to provide a perfect return by the due date will not bar recovery, as the use of the qualifier 'willful'

232. *Id.* at 2; County of Isle of Wight's Demurrer and Plea in Bar ¶¶ 19–20, Int'l Paper Co. v. County of Isle of Wight, No. CL 14001026-00 (Va. Cir. Ct. Mar. 15, 2017) (Isle of Wight County) [hereinafter County's Demurrer].

233. County's Demurrer, *supra* note 232, ¶ 21.

234. Int'l Paper Co.'s Opposition to County's Demurrer and Plea in Bar at 5, International Paper Co. v. County of Isle of Wight, No. CL 14001026-00 (Va. Cir. Ct. Mar. 15, 2017) (Isle of Wight County) [hereinafter IP's Opposition to Demurrer].

235. County's Demurrer, *supra* note 232, ¶¶ 24–25.

236. *See id.* ¶ 18–19 (stating that a willful refusal of the applicant to furnish necessary information would result in the County keeping the erroneously paid taxes).

237. *Id.* ¶¶ 19–20.

238. IP's Opposition to Demurrer, *supra* note 234, at 5.

239. *Id.* at 3.

‘imports something more than the mere exercise of the will in doing the act. It imports a wrongful intention.’²⁴⁰

The trial court did rule that Virginia Code section 58.1-3987 “places the burden of proof on the County to establish that any particular erroneous assessment was caused by the wilful [sic] failure or refusal of IP to furnish the [County] Commissioner of the Revenue with the necessary information, as required by law.”²⁴¹ At the conclusion of the trial, the court held

[t]hat the County failed, as a matter of law, to carry its burden to show that its erroneous assessments of IP’s [M&T] for tax years 2012, 2013, and 2014 were caused by IP’s failure or refusal to furnish the County any necessary information, or any information required by law.²⁴²

The court also held “the County failed, as a matter of law, to carry its burden to show that any failure to promptly provide the County complete and accurate information during tax years [2012–2014] was willful.”²⁴³

240. *Id.* at 14–15 (quoting *King v. Empire Collieries Co.*, 148 Va. 585, 590, 139 S.E. 478, 479 (1927)).

241. Order Regarding Burden of Proof Under Code § 58.1-3987 at 1, *Int’l Paper Co. v. County of Isle of Wight*, No. CL 14001026-00 (Va. Cir. Ct. Mar. 15, 2017) (Isle of Wight County).

242. *Int’l Paper Co.*, slip op. at 2.

243. *Id.*
