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Taxation

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TAXATION

Craig D. Bell *

Michael H. Brady **

INTRODUCTION

This Article reviews significant recent developments in the laws affecting Virginia state and local taxation. Its Parts cover legislative activity, judicial decisions, and selected opinions and other pronouncements from the Virginia Department of Taxation (the “Tax Department” or “Department of Taxation”) and the Attorney General of Virginia over the past year.

Part I of this Article addresses state taxes. Part II covers local taxes, including real and tangible personal property taxes, license taxes, recordation taxes, 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 are most likely to impact their

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clients. However, it does not address many of the numerous minor, locality-specific, or technical legislative changes to Title 58.1 of the Virginia Code, which covers taxation.

I. TAXES ADMINISTERED BY THE TAX DEPARTMENT

A. *Significant Legislative Activity*

1. Income Taxation

a. Conformity to the Internal Revenue Code

Consistent with long-standing practice, the General Assembly in 2020 amended section 58.1-301 of the Virginia Code of 1950 (the “Virginia Code”), which mandates conformity with the Internal Revenue Code (“I.R.C.”) as of a certain date, and moved the date from December 31, 2018 to December 31, 2019.¹ Although advancing the date of conformity, Senate Bill 582 and House Bill 1413 left unchanged the previously adopted exceptions from the rule of conformity that are codified at section 58.1-301(B)(1)–(5).²

The General Assembly also deconformed from another I.R.C. provision, adopted in 2019, that was “related to the reduction in the medical expense deduction floor.”³ A congressional appropriations act adopted on December 20, 2019 reduced the percentage of adjusted gross income that had to be spent on qualifying medical expenses to obtain a deduction, from 10% to 7.5%, a reduction applicable to tax years 2019 and 2020.⁴ The Department of Taxation projected that this decision to deconform would “preserve revenues of \$39.7 million in Fiscal Year 2020 and \$14.0 million in Fiscal Year 2021.”⁵

1. Acts of Feb. 17 & Mar. 10, 2020, chs. 1 & 255, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 58.1-301 (Cum. Supp. 2020)).

2. *Id.* at __, __.

3. *Id.* at __, __.

4. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, § 103, 133 Stat. 2534, 3228 (2019).

5. DEP’T OF TAXATION, 2020 FISCAL IMPACT STATEMENT, S.B. 582, at 2, <https://lis.virginia.gov/cgi-bin/legp604.exe?201+oth+SB582FER161+PDF> [<http://perma.cc/N6R5-HAL6>].

Senate Bill 582 became effective immediately, on February 17, 2020,⁶ and applies to tax years 2018 and beyond.⁷ In total, the Tax Department projected that advancement of conformity would reduce Virginia tax revenues by approximately \$17.5 million in fiscal year 2020, and \$4.7 million in fiscal year 2021, but increase revenues thereafter.⁸

b. Updated Procedures for Reporting Federal Adjustments to Partnership Taxable Income

On November 2, 2015, Congress passed the Bipartisan Budget Act of 2015 (“BBA”), which adopted a new federally authorized partnership audit regime for most partnerships and became effective for taxable years beginning after December 31, 2017.⁹ Under the BBA, partnerships are subject to either partner-level audits (if the partnership is able to elect out of the BBA procedures and makes an affirmative decision to do so) or the BBA procedures.¹⁰ The BBA procedures generally apply beginning with 2018 returns.

The BBA procedures fundamentally change the manner in which the Internal Revenue Service (“IRS”) will determine, assess, and collect partnership adjustments. Pursuant to these new procedures, the IRS generally will make adjustments, determine an imputed tax (the “imputed underpayment”), and assess and collect tax (including penalties and interest) at the partnership entity level.¹¹ There are limited options to elect out of the BBA procedures (election out)¹² or elect to have the reviewed year partners assessed instead of the partnership (the “push-out” election).¹³

6. Ch. 1, 2020 Va. Acts at __.

7. *Id.* at __.

8. See DEPT OF TAXATION, *supra* note 5, at 2.

9. Pub. L. No. 114-74, 129 Stat. 584 (2015) (codified as amended at 26 U.S.C. §§ 6221–6235 (2015)). Note that the 2016 Consolidated Appropriations Act made several corrections and clarifications to the 2015 BBA, effective as if originally included in the BBA. Pub. L. No. 114-113, 129 Stat. 2242 (2015). Additionally, on March 23, 2018, the Tax Technical Corrections Act of 2018 made a number of significant and retroactive amendments to the BBA, including clarification of its scope, determination and modification of imputed underpayments, rules pertaining to tiered partnerships, and consequences for a partnership’s failure to pay an imputed underpayment. Pub. L. No. 115-141, 132 Stat. 348.

10. 26 U.S.C. §§ 6221–6235 (U.S.C. Title 26 is the Internal Revenue Code of 1986, as amended).

11. *Id.* § 6221(a).

12. *Id.* § 6221(b).

13. *Id.* § 6226(a).

Under the BBA and subject to certain exceptions, the IRS will audit partnership items at the partnership level and issue a proposed adjustment to the partnership for the reviewed year.¹⁴ For 270 days, the reviewed year partners may file amended returns and pay their share of the tax (the “pay-up” method), and/or the partnership may submit modifications to the imputed underpayment.¹⁵ After that period, the IRS issues a notice of final partnership audit adjustment. The partnership then has forty-five days to elect whether the partnership will use a push-out or partnership pays method.¹⁶ Under the push-out method, the partnership allocates the adjustments to the reviewed year partners to pay the tax on their current year (adjustment year) returns.¹⁷ Under the partnership pays method, the partnership pays the tax on its adjustment year return, causing the current year partners to effectively bear the liability.¹⁸ These practices create complexity at the state level because partners and apportionment data may be different in the reviewed year and the adjustment year.

All of the foregoing led most states to ponder next steps. The 2020 General Assembly responded by amending Virginia Code sections 58.1-311, -499, and -1823 and enacting new section 58.1-311.2 and new sections 58.1-396 through -399.7. Cumulatively, these provisions establish the procedures for reporting federal adjustments to taxable income.¹⁹ The General Assembly adopted the following key provisions for the reporting and payment of tax on final adjustments to the federal taxable income of partnerships and their partners.

Virginia Partnership Representative. The federal partnership representative will serve as the Virginia partnership representative unless the partnership designates another person as its state partnership representative.²⁰ Such designation must be in writing.²¹ The legislation requires the Department of Taxation to establish reasonable qualifications and procedures for designating a

14. *Id.* §§ 6225, 6231(b).

15. *Id.* § 6225(c).

16. *Id.* § 6226(a).

17. *Id.* § 6226(b).

18. *Id.* § 6227.

19. Act of Apr. 10, 2020, ch. 1030, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-311, -311.2, -396, -397, -398, -399, -399.1, -399.2, -399.3, -399.4, -399.5, -399.6, -399.7, -499, -1823 (Cum. Supp. 2020)).

20. VA. CODE ANN. § 58.1-398(B) (Cum. Supp. 2020).

21. *Id.*

person, other than a federal partnership representative, to be the Virginia partnership representative.²²

Final Determination Date. The partnership's final determination shall occur when all adjustments made by the IRS to the federal taxable income of a partnership have become final and all appeal rights under the I.R.C. are exhausted or have been waived for the partnership's taxable year.²³ If the taxpayer was a member of a combined or consolidated group, the final determination triggering these reporting obligations shall be the first day on which no adjustments remain to be finally determined for the entire group.²⁴

Reporting and Payment Requirements for a Partnership Subject to a Final Federal Adjustment. The Virginia partnership representative shall be provided at least ninety days from the partnership's final determination date to (1) file a completed federal adjustments report with the Department of Taxation; (2) notify its direct partners of their distributive share of the adjustments; and (3) file amended composite and/or withholding returns for direct nonresident partners as required by state law, and pay any additional Virginia tax, interest, and penalties for such nonresident partners.²⁵ Direct partners shall, no later than one year after the final determination date, file a federal adjustments report that identifies the distributive share of adjustments reported to such direct partner, and pay any additional amount of tax, penalty, and interest due.²⁶

Partnership Pays Election. Virginia Code section 58.1-399.1 provides that an audited partnership may make an elective payment through its state partnership representative to pay the tax, interest, and penalties in lieu of such amounts its direct and indirect partners owe (the "partnership pays election").²⁷ Partnerships making the election have up to ninety days from the partnership's final determination date to (1) notify the Department of Taxation it is making the election and (2) file a federal adjustments report with the Department of Taxation.²⁸ The partnership will then have up to one year from the partnership's final determination date to

22. *Id.* § 58.1-398(C) (Cum. Supp. 2020).

23. *Id.* § 58.1-311.2(1) (Cum. Supp. 2020).

24. *Id.* § 58.1-311.2(2) (Cum. Supp. 2020).

25. *Id.* § 58.1-399(B) (Cum. Supp. 2020).

26. *Id.* § 58.1-399(C) (Cum. Supp. 2020).

27. *Id.* § 58.1-399.1 (Cum. Supp. 2020).

28. *Id.* § 58.1-399.1(A)(1)–(2) (Cum. Supp. 2020).

make the payment in lieu of amounts owed by its direct and indirect partners.²⁹ The partnership pays election shall be the amount of the federal adjustments, subject to the following modifications.

(1) *Direct Exempt Partners.* The distributive share of adjustments attributable to direct exempt partners not subject to tax on such income shall be excluded from the calculation.³⁰

(2) *Direct Corporate Partners and Direct Exempt Partners.* The distributive share of adjustments attributable to direct corporate partners and direct exempt partners subject to tax on such income (e.g., unrelated business income) shall be apportioned or allocated to Virginia using Virginia's existing apportionment factors pursuant to sections 58.1-405 through -423 of the Virginia Code and shall be subject to tax at the tax rate specified in Virginia Code section 58.1-400.³¹

(3) *Nonresident Direct Partners.* The distributive share of adjustments attributable to nonresident direct partners subject to tax as individuals or trusts shall be sourced to Virginia using Virginia's nonresident partner sourcing laws and regulations and shall be subject to tax at the tax rate specified in Virginia Code section 58.1-320.³²

(4) *Tiered Partners.* The distributive share of adjustments attributable to tiered partners (partners that are pass-through entities themselves) shall be subject to tax according to the type of underlying income.

Income that would be sourced to Virginia if ultimately attributable to nonresident partners (e.g., business income) shall be sourced to Virginia using the sourcing rules attributable to such income.³³

Income that would be sourced to Virginia if attributable to nonresident partners (e.g., investment income) shall be sourced to Virginia and shall be subject to tax at the highest rate applicable to individuals and trusts, except to the extent the partnership can

29. *Id.* § 58.1-399.1(A)(3) (Cum. Supp. 2020).

30. *Id.* § 58.1-399.1(B)(1) (Cum. Supp. 2020).

31. *Id.* § 58.1-399.1(B)(2) (Cum. Supp. 2020).

32. *Id.* § 58.1-399.1(B)(3) (Cum. Supp. 2020).

33. *Id.* § 58.1-399.1(B)(4) (Cum. Supp. 2020).

demonstrate the adjustment is attributable to nonresident indirect partners or partners not subject to tax on such income.³⁴

The partnership pays election shall be irrevocable unless the Virginia Department of Taxation determines otherwise. Direct and indirect partners cannot claim deductions, credits, or refunds of amounts paid by the partnership to Virginia; however, resident direct partners may claim a credit for amounts paid by the partnership or tiered partner on the resident partner's behalf to another state.³⁵

Tiered Partners. Tiered partners are subject to the above reporting and payment requirements and may use the default reporting method or the partnership pays election at each tier. Tiered partners and their partners must make all reports and payments within ninety days following the time for filing and furnishing statements to tiered partners under I.R.C. section 6226. The Department of Taxation may promulgate regulations to establish procedures and deadlines for reports and payments required by tiered partners and their partners.³⁶

Modified Reporting and Payment. The Department of Taxation and tiered partners may enter into agreements to use alternative reporting and payment methods if the partnership or tiered partner can demonstrate the requested method will reasonably provide for the reporting and payment of taxes, penalties, and interest due.³⁷

De Minimis Exceptions. Virginia may establish a de minimis amount upon which taxpayers shall not be required to comply with the new aforementioned reporting and payment obligations.³⁸

If a partnership or partner makes a partnership pays election or alternative reporting and payment method pursuant to Virginia Code sections 58.1-399.1 or -399.3, respectively, such election is not revocable by such partnership or partner. However, the Depart-

34. *Id.*

35. *Id.* § 58.1-399.4(B) (Cum. Supp. 2020).

36. *Id.* § 58.1-399.2(A)–(B) (Cum. Supp. 2020).

37. *Id.* § 58.1-399.3 (Cum. Supp. 2020).

38. *Id.* § 58.1-399.6 (Cum. Supp. 2020).

ment of Taxation may make a discretionary determination that allows such election to be revoked.³⁹ These new procedures for reporting federal adjustments to partnership taxable income took effect on July 1, 2020.

c. Tax Deduction and Subtraction for Employer-Paid Commuting Expenses

Under federal tax law, employers can provide their employees tax-free cash reimbursements if they are “qualified transportation fringe” benefits.⁴⁰ The cost of transit passes, carpooling arrangements, and qualified parking may be reimbursed up to a certain amount, which is determined annually by IRS regulations.⁴¹ However, the 2017 Tax Act disallowed the employers’ deduction against corporate taxable income for providing those same qualified transportation fringe benefits.⁴² Having conformed to the 2017 Tax Act in 2019, the Commonwealth presently gives this expenditure the same income tax treatment as the federal government.⁴³

In 2020, the General Assembly directed the Virginia Department of Rail and Public Transportation to “study the utilization and impacts of commuter tax benefit tax deductions for businesses in Virginia and report . . . by December 2020” on the results of that study.⁴⁴ This direction is the prelude to the potential effectiveness of an individual income tax deduction, and of a corporate income tax subtraction, of the amount of “commuter benefits provided by an employer . . . to an employee.”⁴⁵ Note that chapter 1033 of the 2020 Virginia Acts of Assembly expressly provides that “the provisions of this act shall not become effective unless reenacted by the 2021 Session of the Virginia General Assembly.”⁴⁶

39. *Id.* § 58.1-399.4(A) (Cum. Supp. 2020).

40. *See* 26 U.S.C. § 132(a)(5).

41. *See id.* § 132(f).

42. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13304, 131 Stat. 2054, 2125 (codified as amended at 26 U.S.C. § 274(a)(4)).

43. Act of Feb. 15, 2019, ch. 18, 2019 Va. Acts 31, 31 (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2019)).

44. Act of Apr. 10, 2020, ch. 1033, 2020 Va. Acts __, __.

45. *Id.* at __ (codified as amended at VA. CODE ANN. §§ 58.1-322.03(17), -402(C)(28) (Cum. Supp. 2020)).

46. *Id.* at __.

If the provisions of chapter 1033 are reenacted in 2021, “commuter benefits” will be defined as “expenses paid for public transportation, as defined in § 33.2-100, and ridesharing arrangements, as defined in § 46.2-1400, for the purposes of commuting to and from the employer.”⁴⁷ In the case of reenactment, the amount of commuter benefits that may be deducted by an employee’s individual Virginia adjusted gross income, and that may be paid and claimed as a deduction by the employer from its Virginia taxable income, will be limited to \$265 per employee.⁴⁸

d. Grants Available from Virginia Outdoors Foundation for Transfers of Fee Simple Interests in Land for Conservation Purposes

Current law authorizes individuals and corporations to receive credits against individual and corporate income tax liability for qualified donations of interests in land to “a public or private conservation agency eligible to hold such land and interests therein for conservation or preservation purposes,” including the Virginia Outdoors Foundation (“VOF”).⁴⁹ These qualified donations may take the form of a fee simple interest in the land or, more commonly, a conservation easement.⁵⁰

Besides receiving donations of interests in land, the VOF has also been empowered to administer the Open-Space Lands Preservation Trust Fund and, since 1997, to give grants “to persons conveying conservation easements” to the VOF in accordance with the Open-Space Land Act and Virginia Conservation Easement Act.⁵¹

House Bill 1622 amended Virginia Code section 10.1-1801 to expand the interests of land for which grants may be given to include

47. *Id.* at __ (codified as amended at VA. CODE ANN. §§ 58.1-322.03(17), -402(C)(28) (Cum. Supp. 2020)).

48. *Id.* at __ (codified as amended at VA. CODE ANN. § 58.1-322.03 (Cum. Supp. 2020)).

49. VA. CODE ANN. § 58.1-512(A)(1) (Repl. Vol. 2017); *see, e.g.*, Woolford v. Va. Dep’t of Taxation, 294 Va. 377, 382, 806 S.E.2d 398, 400 (2017). The Virginia Outdoors Foundation was established in 1966 “to promote the [preservation of open-space lands] and to encourage private gifts of money, securities, land, or other property of whatever character for the purpose of preserving the natural, scenic, historic, scientific, and recreational areas of the State.” Act of Apr. 5, 1966, ch. 525, 1966 Va. Acts 703, 704 (codified at VA. CODE ANN. §§ 10.1-1800 to -1804 (Repl. Vol. 2018)).

50. *See* VA. CODE ANN. § 58.1-512(C)(2) (Repl. Vol. 2017).

51. Act of Mar. 13, 1997, ch. 338, 1997 Va. Acts 482, 483 (codified at VA. CODE ANN. § 10.1-1801.1(A) (Repl. Vol. 2018)).

“fee simple title or other rights, interests, or privileges in property.”⁵² This expansion of grant-making authority applies whether the grant is going to a locality who is acquiring the interest or to a person conveying the interest to the VOF.⁵³ As before, however, “[t]o be eligible for a grant award, the property interest shall be compliant with the Open-Space Land Act.”⁵⁴

e. Student Loan Debt Cancellation/Discharge Excluded from Adjusted Gross Income

The 2017 Tax Act provided that gross income does not include the post-2017 discharge of a student loan or private education “on account of the death or total and permanent disability of the student.”⁵⁵ By conforming to the I.R.C. as amended through 2018 (with certain limited exceptions),⁵⁶ Virginia already excluded such discharges on account of total and permanent disability from Virginia gross income.

Perhaps for the avoidance of doubt, in 2020 the General Assembly expressly provided that such discharges in favor of “a veteran who has been rated by the U.S. Department of Veterans Affairs, or its successor agency pursuant to federal law, to have a 100 percent service-connected, permanent, and total disability” would not count as Virginia adjusted gross income for said “eligible veteran.”⁵⁷ This provision applies to tax years 2020 through 2025,⁵⁸ paralleling the provisions of the 2017 Tax Act.⁵⁹

52. Act of Mar. 31, 2020, ch. 567, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 10.1-1801.1(A) (Cum. Supp. 2020)).

53. *Id.* at __.

54. *Id.* at __ (codified as amended at VA. CODE ANN. § 10.1-1801.1(D) (Cum. Supp. 2020)); *see* VA. CODE ANN. §§ 10.1-1700 to -1705 (Repl. Vol. 2018).

55. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11031, 131 Stat. 2054, 2081 (codified as amended at 26 U.S.C. § 108(f)(5)(A)–(B)).

56. Act of Feb. 15, 2019, ch. 18, 2019 Va. Acts 31, 31 (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2019)).

57. Act of Apr. 2, 2020, ch. 606, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-321(C) (Cum. Supp. 2020)).

58. *Id.* at __.

59. Tax Cuts and Jobs Act § 11031, 131 Stat. at 2081.

2. Sales and Use Taxation

Unlike the session in 2019, which saw sweeping changes to the sales and use tax regime of the Commonwealth,⁶⁰ the 2020 sessions of the General Assembly brought about very few alterations.

a. Sales and Use Tax Exemption for Gun Safes

In keeping with the new legislative majority's interest in gun legislation, the General Assembly passed a new exemption from imposition of either state or local sales and use taxation on the purchase of certain gun safes.⁶¹ To enjoy the exemption provided by chapters 191 and 507 of the 2020 Virginia Acts of Assembly, the gun safe must (1) have a "selling price of \$1,500 or less"; (2) be a safe or vault that is "(i) commercially available, (ii) secured with a digital or dial combination locking mechanism or biometric locking mechanism, and (iii) designed for the storage of a firearm or of ammunition for use in a firearm"; and (3) not be a "glass-faced cabinet."⁶² Although the bills cut taxes and addressed gun ownership, two highly contentious issues in the 2020 Session, the final agreed legislation passed with only token opposition.⁶³

b. Sales and Use Exemption for Film Production and Distribution Extended

Virginia Code section 58.1-609.6 provides a partial media-related exemption from sales and use taxation for the "lease, rental, license, sale, other transfer, or use" of audiovisual work by one acquiring the work to exhibit it to others or otherwise interact with it artistically.⁶⁴ In essence, this is an exemption from sales and use tax for intellectual property rights in audiovisual media.

60. See Craig D. Bell & Michael H. Brady, *Annual Survey of Virginia Law: Taxation*, 54 U. RICH. L. REV. 133, 134–41 (2019).

61. See Acts of Mar. 6 & 27, 2020, chs. 191 & 507, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 58.1-609.10(21) (Cum. Supp. 2020)).

62. *Id.* at __, __.

63. See *SB 268 Retail Sales and Use Tax; Exemption for Certain Gun Sales*, VA.'S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB268> [<https://perma.cc/2MXQ-YN9F>]; *HB 888 Retail Sales and Use Tax; Exemption for Certain Gun Sales*, VA.'S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB888&201+sum+HB888> [<https://perma.cc/9HBZ-XD8B>].

64. VA. CODE ANN. § 58.1-609.6(6)(a)(i)–(iii) (Cum. Supp. 2020).

The exemption is partial because certain tangible personal property transferred with the intellectual property remains subject to tax “to the extent of the value of their tangible components prior to their use in the production of any audiovisual work and prior to their enhancement by any production service.”⁶⁵

This exemption was set to expire on July 1, 2022.⁶⁶ In adopting House Bill 1318, this partial exemption was extended through July 1, 2027.⁶⁷

3. Tax Credits and Exemptions

a. Green Job Creation Tax Credit Extended

Existing Virginia law provides an individual and corporate income tax credit “for each new green job created within the Commonwealth by the taxpayer.”⁶⁸ This tax credit, in the amount of \$500 “for each new green job” whose “annual salary . . . is \$50,000 or more,” was set to expire at the end of 2020.⁶⁹ In passing House Bill 408, the General Assembly extended the sunset date of this tax credit through the 2024 tax year.⁷⁰

b. Motion Picture Production Tax Credit Extended

A host of subsidies and incentives are provided for filming movies in the Commonwealth.⁷¹ Among these are a refundable credit against individual and corporate income tax liability, which is available to “any motion picture production company with qualifying expenses of at least \$250,000 with respect to a motion picture production filmed in Virginia.”⁷² The amount of the refundable

65. *Id.* § 58.1-609.6(6)(a) (Cum. Supp. 2020).

66. *Id.* § 58.1-609.6(6) (Cum. Supp. 2018).

67. Act of Apr. 9, 2020, ch. 966, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-609.6(6) (Cum. Supp. 2020)).

68. VA. CODE ANN. § 58.1-439.12:05(A) (Cum. Supp. 2020).

69. *Id.* § 58.1-439.12:05(A) (Cum. Supp. 2019).

70. Act of Mar. 23, 2020, ch. 429, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-439.12:05 (Cum. Supp. 2020)).

71. *See, e.g.*, VA. CODE ANN. § 2.2-2320 (Repl. Vol. 2017) (establishing the “Governor’s Motion Picture Opportunity Fund (the Fund) to be used, in the sole discretion of the Governor, to support the film and video industries in Virginia by providing the means for attracting production companies and producers who make their projects in the Commonwealth using Virginia employees, goods and services”).

72. *Id.* § 58.1-439.12:03(A) (Cum. Supp. 2020).

credit is limited to “15 percent of the production company’s qualifying expenses or 20 percent of such expenses if the production is filmed in an economically distressed area of the Commonwealth.”⁷³ Additional refundable credit amounts may be claimed, in certain circumstances, for employing Virginia residents in connection with a production.⁷⁴ Under the previous law, these refundable credits could apply to expenditures through 2021,⁷⁵ and were administered by the Virginia Film Office and the Tax Department.⁷⁶

In adopting House Bill 1318 and its twin in the Senate, Senate Bill 923, the General Assembly in 2020 extended the availability of these refundable credits through 2026.⁷⁷ It also transferred the responsibilities of the Virginia Film Office to the Virginia Tourism Authority⁷⁸ and revised certain aspects of the credits’ administration.⁷⁹ Among these changes was permitting the Tax Department to issue tax credits that could be claimed in future years, albeit without interest.⁸⁰

c. Certification of Pollution Control Equipment Used by Political Subdivisions

As permitted by article X, section 6(d) of the Virginia Constitution, “[c]ertified pollution control equipment and facilities” are exempt from state and local taxation.⁸¹ To enjoy this exemption, “the state certifying authority having jurisdiction with respect to such property” was required to “certif[y] to the Department of Taxation” that the equipment or facilities *were* “constructed, reconstructed, erected, or acquired in conformity with the state program or requirements for abatement or control of water or atmospheric pollution or contamination.”⁸² Note the past tense.

73. *Id.*; *see id.* § 58.1-439.12:03(A)(1)–(2) (Cum. Supp. 2020) (defining qualifying expenses).

74. *Id.* § 58.1-439.12:03(B)(1)–(2) (Cum. Supp. 2020).

75. *Id.* § 58.1-439.12:03(A) (Repl. Vol. 2017).

76. *Id.* § 58.1-439.12:03(D)(1)–(3), (E), (H) (Repl. Vol. 2017).

77. Acts of Apr. 9, 2020, chs. 966 & 967, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 58.1-439.12:03(A) (Cum. Supp. 2020)).

78. *Id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-439.12:03(D)(1)–(4), (E), (H) (Cum. Supp. 2020)).

79. *Id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-439.12:03(D)(3), (5) (Cum. Supp. 2020)).

80. *Id.* at __, __.

81. VA. CODE ANN. § 58.1-3660(A) (Cum. Supp. 2020).

82. *Id.* § 58.1-3660(B) (Cum. Supp. 2020). Which Virginia (or interstate) agency serves

The General Assembly, in adopting Senate Bill 685 and House Bill 1173, provided that “the state certifying authority having jurisdiction” may make a prospective certification, that is, one prior to construction, reconstruction, erection, or acquisition.⁸³ However, this power, and the certainty it affords, may be exercised only as to “equipment, facilities, devices, or other property” that is “intended for use by any political subdivision in conjunction with the operation of its water, wastewater, stormwater, or solid waste management facilities or systems.”⁸⁴

4. Tax Enforcement

a. Tax Department Deputized to Investigate “Misclassification” of Employees

Among the most divisive legislation that passed the General Assembly in 2020 was House Bill 1407, which adopted the rule that when “an individual performs services for an employer for remuneration, that individual shall be considered an employee of the party that pays that remuneration unless such individual or his employer demonstrates that such individual is an independent contractor.”⁸⁵

An employer who “fails to properly classify an individual as an employee” and who “fails to pay taxes, benefits, or other contributions required to be paid with respect to an employee” may be subject to a civil penalty,⁸⁶ and debarred from contracting with public bodies and “covered institutions.”⁸⁷

The legislation merits mention here because the General Assembly charged the Tax Department with the duty of enforcing this legislation. “The Department shall determine whether an individual is an independent contractor by applying Internal Revenue Service guidelines,” enforce the civil penalties, notify of debarment,

as the certifying authority depends upon the nature of the pollution being controlled. *See id.*

83. Acts of Mar. 2 & 10, 2020, chs. 65 & 252, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 58.1-3660(B) (Cum. Supp. 2020)).

84. *Id.* at __, __.

85. Act of Apr. 6, 2020, ch. 681, 2020 Va. Acts __, __ (codified at VA. CODE ANN. § 58.1-1900 (Cum. Supp. 2020)).

86. *Id.* at __ (codified at VA. CODE ANN. § 58.1-1901 (Cum. Supp. 2020)).

87. *Id.* at __ (codified at VA. CODE ANN. § 58.1-1902(B) (Cum. Supp. 2020)). Covered institutions are defined as certain “public institution[s] of higher education.” VA. CODE ANN. § 2.2-4321(B) (Cum. Supp. 2020).

and “report annually on its enforcement of this chapter to the Governor and the General Assembly regarding compliance with and enforcement of” new chapter 19 of Title 58.1.⁸⁸ Various Virginia agencies are authorized to assist the Tax Department in enforcing this legislation, including by sharing confidential taxpayer information “[n]otwithstanding the provisions of § 58.1-3.”⁸⁹ The Tax Department is also obligated to develop guidelines implementing House Bill 1407.⁹⁰

The legislation expressly revised sections 58.1-1821 and -1825 to provide that the Tax Department’s enforcement of the debarment provisions may be administratively appealed,⁹¹ or subject to judicial review.⁹² No specific provision was adopted with respect to any civil penalties imposed.

Governor Northam proposed, and the General Assembly agreed, to delay the effect of chapter 681 until January 1, 2021.⁹³ The cost of this legislation on the Tax Department alone is expected to exceed \$600,000 for fiscal year 2021, and \$800,000 in fiscal year 2022, with a positive revenue impact of \$1.7 million in fiscal year 2021 and \$2.6 million in fiscal year 2022.⁹⁴

B. *Significant Judicial Decision*

1. Virginia Court Dismisses Massachusetts Online Sales Tax Case—*Crutchfield Corp. v. Harding*

In this case, the Albemarle County Circuit Court dismissed a case brought by a Virginia taxpayer challenging the applicability of Massachusetts’ 2017 remote seller nexus standards for sales and use tax purposes.⁹⁵ The judge found a lack of jurisdiction based on the absence of sufficient contact by Massachusetts.⁹⁶

88. Ch. 681, 2020 Va. Acts at __ (codified at VA. CODE ANN. §§ 58.1-1900 to -1902, -1905 (Cum. Supp. 2020)).

89. *Id.* at __ (codified at VA. CODE ANN. § 58.1-3.4 (Cum. Supp. 2020)).

90. *Id.* at __.

91. *Id.* at __ (codified as amended at VA. CODE ANN. § 58.1-1821 (Cum. Supp. 2020)).

92. *Id.* at __ (codified as amended at VA. CODE ANN. § 58.1-1825(A) (Cum. Supp. 2020)).

93. *Id.* at __.

94. DEP’T OF TAXATION, 2020 FISCAL IMPACT STATEMENT, H.B. 1407, at 2, <https://lis.virginia.gov/cgi-bin/legp604.exe?201+oth+HB1407FER161+PDF> [<https://perma.cc/RX7Q-MJE8>].

95. *Crutchfield Corp. v. Harding*, 103 Va. Cir. 211 (2019) (Albemarle County).

96. *Id.*

On April 3, 2017, the Massachusetts Department of Revenue (“MDOR”) issued a directive advising taxpayers that it had adopted an administrative bright-line rule that would require out-of-state internet vendors to collect sales or use tax if they met certain sales and transaction thresholds.⁹⁷ Under the rule, which was to become effective July 1, 2017, an internet vendor with a principal place of business located outside of Massachusetts was required to register, collect and remit sales or use tax on its Massachusetts sales if, during the preceding year, it had over \$500,000 in Massachusetts sales for delivery into Massachusetts in at least 100 transactions.⁹⁸ On June 2, 2017, MDOR sent an informational letter to Crutchfield Corp. (“Crutchfield”) advising the company of the new directive.⁹⁹

On June 28, 2017, MDOR issued a second directive, Directive 17-2, that revoked Directive 17-1 while giving notice of its intent to propose regulations similar to the contents of Directive 17-1 on internet vendor sales and use tax nexus issues.¹⁰⁰ About three months later, MDOR adopted a regulation that required out-of-state internet vendors to collect sales or use tax if they meet certain sales and transaction thresholds that mirrored those contained in the recently revoked Directive 17-1.¹⁰¹

Between June 2, 2017 and October 20, 2017, MDOR sent three letters to Crutchfield first advising it of the initial Directive 17-1, a second letter advising Crutchfield of the new regulation, and finally a third letter advising Crutchfield to review its Massachusetts sales as it may have a duty to collect and remit Massachusetts sales and use tax.¹⁰² Upon receipt of the third letter, Crutchfield initiated this litigation seeking a declaratory judgment that the Massachusetts law imposing sales and use tax collections on remote sellers such as Crutchfield was invalid under the Commerce

97. MASS. DEP'T OF REVENUE, DIRECTIVE 2017-1 (2017) (revoked and superseded by MASS. DEP'T OF REVENUE, DIRECTIVE 2017-2 (2017)), <https://www.mass.gov/directive/directive-17-1-requirement-that-out-of-state-internet-vendors-with-significant> [<https://perma.cc/5KA7-K4MM>].

98. *Id.*

99. Affidavit of Dale Morrow at 2–3, Exhibit A to Massachusetts Commissioner of Revenue’s Memorandum of Points and Authorities in Support of His Motion to Dismiss for Lack of Personal Jurisdiction, *Harding*, 103 Va. Cir. 211 (No. CL17001145-00).

100. MASS. DEP'T OF REVENUE, Directive 2017-2 (2017), <https://www.mass.gov/directive/directive-17-2-revocation-of-directive-17-1-in-anticipation-of-a-proposed-regulation> [<https://perma.cc/UJ4S-6HM4>].

101. 830 MASS. CODE REGS. 64 H.1.7 (2017).

102. *Harding*, 103 Va. Cir. at 211.

Clause, violated the Internet Tax Freedom Act (“ITFA”), and that it could bring the action in Virginia pursuant to Virginia Code section 8.01-184.1(A) and (C)—declaratory judgment to adjudicate constitutional nexus.¹⁰³ MDOR responded with a motion to dismiss the Crutchfield complaint because the Virginia court lacked jurisdiction.¹⁰⁴

In support of its motion to dismiss, MDOR asserted that the only contacts it had with Virginia related to Crutchfield were the three informational letters MDOR sent to Crutchfield and other vendors.¹⁰⁵ MDOR stated that its Commissioner was “simply trying to carry out his own State’s laws” and, in doing so, had sent informational communications to entities located in other states making sales to residents of Massachusetts.¹⁰⁶ MDOR asserted these letters did not constitute or satisfy Virginia’s jurisdiction requirements because, as applied to Massachusetts in this case, personal jurisdiction was lacking under the Constitution of the United States due to the lack of minimum contacts with Virginia.¹⁰⁷

Crutchfield contended that MDOR was active in its pursuit of business non-filers located in Virginia. Specifically, Crutchfield argued that in over four and a half months between June 2017 to late October 2017, MDOR sent seventeen separate demand letters to Virginia businesses (three letters to each of five different companies, including Crutchfield, and two letters to a sixth company).¹⁰⁸ Crutchfield also asserted that MDOR conducted sixty-seven audits in Virginia, spending hundreds of days and more than 4000 hours in Virginia between 2010 and the beginning of 2017.¹⁰⁹ During this time period, MDOR issued over 400 business non-filer notices that generated hundreds of tax assessments and thirty-one notices of intent to assess tax on Virginia taxpayers.¹¹⁰

103. Complaint for Declaratory Judgment at 1–2, *Harding*, 103 Va. Cir. 211 (No. CL17001145-00).

104. Massachusetts Commissioner of Revenue’s Memorandum of Points and Authorities in Support of His Motion to Dismiss for Lack of Personal Jurisdiction at 1, *Harding*, 103 Va. Cir. 211 (No. CL17001145-00).

105. *Id.* at 8.

106. *Id.* at 9.

107. *Id.* at 8–13.

108. Crutchfield Corp.’s Opposition to the Commissioner’s Motion to Dismiss for Lack of Personal Jurisdiction at 5, *Harding*, 103 Va. Cir. 211 (No. CL17001145-00).

109. *Id.* at 6.

110. *Id.* at 6–7.

MDOR responded that its contacts with Virginia unrelated to the internet vendor regulation were irrelevant to the jurisdiction analysis because it did not generate general jurisdiction over the MDOR Commissioner.¹¹¹ There were only three letters sent by MDOR to Crutchfield and these three letters did not provide sufficient “minimum contact” of MDOR with Virginia to constitutionally support a finding of personal jurisdiction.¹¹²

In a brief letter opinion, the Albemarle County Circuit Court held that under the limits imposed by the Due Process Clause, and in examining the quality and nature of MDOR’s activity in Virginia, the three letters sent to Crutchfield were insufficient to confer jurisdiction over MDOR’s objection.¹¹³ The court granted MDOR’s request to dismiss the case.¹¹⁴

2. ITFA Preempts Virginia’s Business, Professional, and Occupational License Tax

The Fairfax County Circuit Court granted partial summary judgment to Coxcom (d/b/a Cox Communications Northern Virginia) (“Cox”) holding that the ITFA preempts Fairfax County’s Business, Professional, and Occupational License (“BPOL”) tax to prevent imposition of the BPOL tax on Cox’s gross receipts from internet access services for the 2013–2015 tax years.¹¹⁵ The circuit court denied the county’s summary judgment motion and the court shifted the burden of proof to Fairfax County to determine if the county fell within the protection of the grandfather clause, which would enable the county to assess its BPOL tax on Cox because it

111. Massachusetts Commissioner of Revenue’s Reply Memorandum of Points and Authorities in Further Support of His Motion to Dismiss at 2–3, *Harding*, 103 Va. Cir. 211 (No. CL17001145-00).

112. *See id.* at 3.

113. *Crutchfield Corp. v. Harding*, 103 Va. Cir. 211, 211 (2019) (Albermarle County).

114. *Id.* In 2019, MDOR adopted new nexus standards for remote sellers. 830 MASS. CODE REGS. 64 H.1.9 (2019). Following the U.S. Supreme Court’s five-to-four decision in *South Dakota v. Wayfair, Inc.*, which clarified that physical presence is not necessary to assert nexus, and implicitly endorsed the \$100,000 threshold adopted by South Dakota, Massachusetts along with many other states enacted new nexus laws governing sales tax nexus for internet-based business activity. 138 S. Ct. 2080, 2099–2100 (2018); *see* Jennifer Dunn, *Sales Tax by State: Economic Nexus Laws*, TAX JAR (Jun. 5, 2020), <https://blog.taxjar.com/economic-nexus-laws/> [<https://perma.cc/3AEX-A63K>] (collecting various state economic nexus laws).

115. *Bd. of Supervisors v. Coxcom, L.L.C.*, 104 Va. Cir. 248, 248–49 (2020) (Fairfax County).

was imposed before ITFA was enacted by Congress on October 1, 1998.¹¹⁶

In 2016, Cox sought a refund of BPOL taxes paid to Fairfax County in tax years 2013, 2014, and 2015 on gross receipts from internet access fees.¹¹⁷ Fairfax County issued a final determination by the county's tax commissioner that stated ITFA did not preempt the BPOL tax and, even if it did, Fairfax County could keep collecting the tax under ITFA's grandfather clause.¹¹⁸ Cox appealed the county's final determination to the state tax commissioner. The state tax commissioner held that the county's BPOL tax was preempted by ITFA and remanded the dispute back to the county to determine if it qualified for an exemption under ITFA's grandfather provisions.¹¹⁹ Both parties then initiated this case to set aside the state tax commissioner's decision.¹²⁰

On the cross summary judgment motions, Cox argued that the BPOL tax is a "tax" as defined by ITFA.¹²¹ ITFA defines a tax as "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes and . . . not a fee imposed by a specific privilege, service, or benefit conferred."¹²² Specifically, ITFA provides that "any charge imposed by any governmental entity" is unambiguous and the charge does not fall within "a fee imposed for a specific privilege, service, or benefit conferred."¹²³ ITFA bars state and local governments from imposing "[t]axes on Internet access."¹²⁴ Congress enacted ITFA in 1998 as a temporary moratorium on state and local taxation of internet access. Congress extended that moratorium numerous times, including the 2013, 2014, and 2015 tax years at issue in this case.¹²⁵ Cox contended that Fairfax's BPOL tax "violates ITFA because it is a

116. *Id.* at 248, 252.

117. *Id.* at 249.

118. *Id.* at 248–49.

119. *Id.* at 249.

120. *Id.*

121. *Id.*

122. 47 U.S.C. § 151 note (Moratorium on Internet Taxes).

123. *Id.*

124. *Id.*

125. *Coxcom*, 104 Va. Cir. at 249. In February 2016, the moratorium became permanent. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 922, 130 Stat. 122, 281 (2016).

tax on gross receipts, including those receipts derived from internet access.”¹²⁶ Thus, Cox request[ed the] return of any taxes collected from its internet access receipts, . . . unless the [c]ounty could prove that the tax was enforced and therefore grandfathered-in prior to the October 1, 1998[] enactment of ITFA.”¹²⁷

“[Fairfax] County argue[d] that the BPOL tax is excluded as it falls under ITFA’s ‘fees for specific privilege’ exception.”¹²⁸ Specifically, the county argued that it is a fee imposed on a business for the privilege of operating a business in a locality in Virginia.¹²⁹ The county also disagreed with Cox on the impact of the recent Supreme Court of Virginia decision in *Dulles Duty Free, L.L.C. v. County of Loudoun*, which held that the BPOL tax is a direct tax on the export of goods in transit.¹³⁰ The court noted that

the Fairfax County Board of Supervisors, a legislative body, imposes the charge on every business operating in the county. The taxes go into the general fund and are used for general purposes. Thus, the BPOL tax is just that, a tax. Whereas a fee, which is excluded from ITFA, is used for a specific and narrow purpose. Therefore, despite the [countv’s] contention that BPOL tax is used for a specific privilege, it is still a tax.¹³¹

Cox then argued “that the definition of a ‘tax on internet access’ is defined as any tax that burdens internet access irrespective of who the tax is imposed on and regardless of the terminology used to describe the tax.”¹³² The court stated that “Congress unequivocally drafted ITFA, which prohibits taxes on internet access in any form except those listed by the exceptions. Thus, a tax on gross receipts, including those receipts providing internet access, are in violation of ITFA.”¹³³ The circuit court concluded Cox was entitled to a judgment as a matter of law.¹³⁴ “Accordingly, . . . the burden now shifts to the County to prove that it falls within the protection

126. *Coxcom*, 104 Va. Cir. at 249.

127. *Id.*

128. *Id.* at 250.

129. *Id.*

130. *See id.* (quoting *Dulles Duty Free, L.L.C. v. County of Loudoun*, 294 Va. 9, 23, 803 S.E.2d 54, 62 (2017)). For a discussion of the *Dulles Duty Free* Supreme Court of Virginia decision, see Craig D. Bell & Michael H. Brady, *Annual Survey of Virginia Law: Taxation*, 53 U. RICH. L. REV. 135, 170–75 (2018).

131. *Coxcom*, 104 Va. Cir. at 251.

132. *Id.* at 252 (citing 47 U.S.C. § 151 note (Moratorium on Internet Taxes)).

133. *Id.*

134. *Id.*

of the grandfather clause.”¹³⁵ As the county’s motion for summary judgment was denied and Cox’s motion for partial summary judgment was granted, the case continues on for further proceedings.¹³⁶

C. Attorney General of Virginia Advises a Locality that the State Cannot Charge It Interest on Sales Tax Revenues Wrongly Paid and Required to be Returned

The Commissioner of the Revenue for the City of Manassas sought advice concerning “whether the Commonwealth of Virginia, through its Department of Taxation, has the authority to require a locality to pay interest on local sales tax revenues erroneously forwarded to the locality by the Commonwealth, when repaid by the locality upon notification of the error.”¹³⁷ The erroneous local sales tax payments the City of Manassas received were due to a coding error made by a local business who “used the wrong Federal Information Processing Standards . . . code when remitting sales tax revenues to the [State] Tax Commissioner.”¹³⁸ The “error resulted in the Commonwealth crediting and paying the one percent local share of the retail sales tax to the City of Manassas, rather than to Prince William County where the sales were made.”¹³⁹

Upon correcting the error, the Virginia Tax Department maintained that under Virginia Code section 58.1-1833, Manassas must pay interest on these payments.¹⁴⁰ The Manassas Commissioner of the Revenue questioned whether section 58.1-1833 authorizes or requires the assessment of interest on the sales tax erroneously distributed to the City.¹⁴¹

The Attorney General of Virginia noted that Virginia Code section 58.1-605(F) speaks to the issue of incorrect distributions of local sales tax revenues from the Commonwealth to the locality by providing that “[i]f errors are made in any such payment, or adjustments are otherwise necessary . . . the errors shall be corrected and adjustments made in the payments for the next two months

135. *Id.*

136. *Id.*

137. 2019 Op. Va. Att’y Gen. 56.

138. *Id.*

139. *Id.*

140. *Id.* at 56–57.

141. *Id.*

. . .”¹⁴² “Notably, this [statutory provision] does not mention interest, but refers only to correcting a payment error by adjusting such future payments.”¹⁴³ Looking at Virginia Code section 58.1-1833(A), which “provides general authority for the addition of interest on tax refunds that are ‘permitted or required . . . on monies improperly collected from the taxpayer,’” there is no mention in the statute as to payments by a locality, only a taxpayer.¹⁴⁴ “By its plain language, [Virginia Code section] 58.1-1833(A) requires interest to be paid by the Commonwealth to the taxpayer on refunds resulting from correction of a tax assessment by the Tax Commissioner or by a court of law.”¹⁴⁵ The Attorney General opined that section 58.1-1833(A) “does not apply to a locality’s refund to the state of erroneously distributed [local] sales tax revenues.”¹⁴⁶ Instead, section 58.1-605(F) provides the statutory requirement to correct erroneously distributed local sales tax through adjustments over the next two succeeding months.¹⁴⁷ This statute does not require payment of interest on the amount of local sales tax refunded to the Commonwealth.¹⁴⁸ The Attorney General concluded no such interest may be assessed or collected by the Tax Department.¹⁴⁹

II. TAXES ADMINISTERED BY LOCALITIES

A. *Significant Legislative Activity*

1. Real Estate Taxation

2020 saw the passage of a number of bills designed to address blighted, derelict, and tax delinquent properties.

142. *Id.* at 57 (alteration in original).

143. *Id.*

144. *Id.* at 57–58.

145. *Id.* at 58.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

a. Blighted Properties and Derelict Buildings in Certain Localities Made Separate Class that May be Subjected to Increased Taxation or Judicial Sale

Under the Virginia Constitution, the lodestar for real property taxation is uniformity in the measure of assessment and the rate of taxation imposed.¹⁵⁰ The Virginia Constitution also provides for certain exceptions from the rule of uniformity for real property taxation.¹⁵¹ Blighted properties and derelict buildings are not addressed specifically. Yet the General Assembly retains the authority to “define and classify taxable subjects,”¹⁵² and it elected to exercise that authority in 2020 with respect to “blighted properties” and “derelict buildings” in “qualifying localit[ies].”¹⁵³

Using definitions for these terms found elsewhere in the Virginia Code,¹⁵⁴ the General Assembly declared both blighted properties and derelict buildings “along with the land such properties are located on, . . . to be separate class[es] of property [that] constitute separate classification[s] for local taxation of real property” if located in a qualifying locality.¹⁵⁵

150. *See* Bd. of Supervisors v. Telecomms. Indus., Inc., 246 Va. 472, 477, 436 S.E.2d 442, 445 (1993) (“[W]hen it is impossible to achieve both fair market value and uniformity, the preferred standard is uniformity.”).

151. *See, e.g.*, VA. CONST. art. X, § 1 (permitting the General Assembly to authorize “differences in the rate of taxation to be imposed upon real estate by a city or town within all or parts of areas added to its territorial limits, or by a new unit of general government, within its area, created by or encompassing two or more, or parts of two or more, existing units of general government”); *id.* (permitting the General Assembly to authorize localities “to provide for differences in the rate of taxation imposed upon tangible personal property owned by persons not less than sixty-five years of age or persons permanently and totally disabled”); *id.* § 2 (“The General Assembly may define and classify real estate devoted to agricultural, horticultural, forest, or open space uses, and may by general law authorize any county, city, town, or regional government to allow deferral of, or relief from, portions of taxes otherwise payable on such real estate if it were not so classified. . . .”); *id.* §§ 6, 6-A, 6-B (expressly authorizing various exemptions from taxation).

152. VA. CONST. art. X, § 1; *see, e.g.*, VA. CODE ANN. §§ 58.1-3221.1 to -3221.5 (Repl. Vol. 2017 & Cum. Supp. 2020).

153. Act of Apr. 22, 2020, ch. 1213, 2020 Va. Acts __, __ (codified at VA. CODE ANN. § 58.1-3221.6 (Cum. Supp. 2020), and codified as amended at VA. CODE ANN. § 58.1-3965 (Cum. Supp. 2020)).

154. *See* VA. CODE ANN. § 58.1-3221.6(A) (Cum. Supp. 2020).

155. *Id.* § 58.1-3221.6(B)–(C) (Cum. Supp. 2020).

The “real estate assessor of the locality” will determine whether real estate “constitutes either a blighted property or derelict structure,” and whether that condition has been abated.¹⁵⁶ The assessor’s determination is subject to judicial review as an “erroneous assessment.”¹⁵⁷

If determined to be a blighted property, the real estate may be subjected to an increased rate of taxation, up to five percent greater than “the rate applicable to the general classes of real property.”¹⁵⁸ Similarly, if determined to host a derelict building, it may be subjected to an increased rate of taxation, up to ten percent greater than “the rate applicable to the general class of real property.”¹⁵⁹

The General Assembly also revised the statute addressing judicial sales to collect delinquent taxes, permitting qualifying localities to accelerate the judicial sale process with respect to a blighted property or a derelict building. Under general law, “[w]hen any taxes on any real estate in a locality are delinquent on December 31 following the second anniversary of the date on which such taxes have become due, . . . such real estate may be sold for the purpose of collecting all delinquent taxes on such property.”¹⁶⁰ The period of required delinquency prior to sale is only one year for real property on which is situated a condemned structure, a nuisance, a derelict building, or any property that has been declared to be blighted.¹⁶¹

House Bill 755 created a third class, applicable where “abatement costs” are incurred to address any of the foregoing conditions.¹⁶² In those cases, a qualifying locality may proceed to judicial sale to collect all delinquent taxes and abatement costs following the passage of six months, rather than one year, from both “the date on which such taxes became due” and “the date on which the abatement costs were first incurred.”¹⁶³

156. *Id.* § 58.1-3221.6(F) (Cum. Supp. 2020).

157. *Id.* §§ 58.1-3980 to -3995 (Repl. Vol. 2017 & Cum. Supp. 2020).

158. *Id.* § 58.1-3221.6(D) (Cum. Supp. 2020).

159. *Id.* § 58.1-3221.6(E) (Cum. Supp. 2020).

160. *Id.* § 58.1-3965(A) (Cum. Supp. 2020).

161. *Id.*

162. Act of Apr. 22, 2020, ch. 1213, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3965(A) (Cum. Supp. 2020)).

163. *Id.* at __.

b. Non-Judicial Sale of Delinquent Lands Expanded

Prior to the recent amendment,

[a] treasurer or other officer responsible for collecting taxes may sell, at public auction, any unimproved parcel of real property that is assessed at less than \$5,000, provided that the taxes on such parcel are delinquent on December 31 following the third anniversary of the date on which such taxes have become due, [without judicial involvement.]¹⁶⁴

Note that the parcel had to be “unimproved” and the assessed value less than \$5000. The treasurer or other tax collector could also sell, without judicial oversight, real property assessed at \$5000 or more, but less than \$20,000, to satisfy such delinquent taxes provided that the property “is not subject to a recorded mortgage or deed of trust lien” and meets any one of six other conditions listed under the same statutory provision.¹⁶⁵ These include properties that have been condemned, declared a nuisance, found to host “a derelict building,” or “declared by the locality to be blighted.”¹⁶⁶

In keeping with the program of facilitating collection of delinquent real estate taxes, the General Assembly also adopted House Bill 1582, legislation that garnered no opposing votes.¹⁶⁷ That legislation increased the assessed value at which a non-judicial sale could occur to satisfy delinquent taxes even if the property was subject to a recorded mortgage or deed of trust lien and none of the six conditions obtained, from less than \$5000 to up to \$10,000, and removed the limitation on sales of improved parcels.¹⁶⁸ With respect to properties that were long delinquent, not subject to a recorded mortgage or deed of trust lien and that were subject to one of the six conditions, the legislation also increased the assessed value range, from between \$5000 and \$20,000 to between \$10,001 to \$25,000.¹⁶⁹ Finally, House Bill 1582 expanded one of the six conditions, which previously had required that the unimproved parcel

164. VA. CODE ANN. § 58.1-3975(A) (Repl. Vol. 2017).

165. *Id.* § 58.1-3975(B)(1)–(6) (Repl. Vol. 2017).

166. *Id.* § 58.1-3975(B)(3)–(6) (Repl. Vol. 2017).

167. *H.B. 1582 Delinquent Tax Lands; Threshold for Nonjudicial Sale*, VA.’S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB1582> [<https://perma.cc/QY5J-W2B8>].

168. Act of Mar. 10, 2020, ch. 257, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3975(A) (Cum. Supp. 2020)).

169. *Id.* at __ (codified as amended at VA. CODE ANN. § 58.1-3975(B) (Cum. Supp. 2020)).

be less than a tenth of an acre, to embrace unimproved properties that are up to an acre in size.¹⁷⁰

c. Non-Profit Organization's Sale of Delinquent Lands Obtained by Order of Special Commissioner

Virginia law provides localities with a range of mechanisms for recovering delinquent real estate taxes or other charges, which operate as a lien on real estate, including judicial sale of the delinquent lands by public auction.¹⁷¹ Under certain defined circumstances, a locality may bypass the process of a public auction of the property that is subject to a tax or other lien, and petition a circuit court for appointment of a special commissioner to transfer title to the delinquent land to the locality.¹⁷²

For parcels in the Cities of Norfolk, Richmond, Hopewell, Martinsville, Newport News, Petersburg, and Fredericksburg, the locality may petition the circuit court to appoint a special commissioner to execute the necessary deed or deeds to convey the real estate to the locality in lieu of the sale at public auction if

- (i) each parcel has delinquent real estate taxes or the locality has a lien against the parcel for removal, repair or securing of a building or structure; removal of trash, garbage, refuse, litter; or the cutting of grass, weeds or other foreign growth, (ii) each parcel has an assessed value of \$75,000 or less, and (iii) such taxes and liens, together, including penalty and accumulated interest, exceed thirty-five percent of the assessed value of the parcel or such taxes alone exceed fifteen percent of the assessed value of the parcel or parcels.¹⁷³

These localities may follow the same procedure if the delinquent land has an assessed value of \$150,000 or less; is not an occupied dwelling; and “such taxes and liens, together, including penalty and accumulated interest, exceed twenty percent of the assessed value of the parcel or such taxes alone exceed ten percent of the assessed value of the parcel or parcels.”¹⁷⁴ In that case, however, the locality must then “enter[] into an agreement for sale of the parcel to a nonprofit organization to renovate or construct a single-

170. *Id.* at __ (codified as amended at VA. CODE ANN. § 58.1-3975(B)(1) (Cum. Supp. 2020)).

171. VA. CODE ANN. § 58.1-3965(A) (Cum. Supp. 2020).

172. *Id.* § 58.1-3970.1(A) (Cum. Supp. 2020).

173. *Id.* § 58.1-3970.1(A)–(B) (Cum. Supp. 2020).

174. *Id.*

family dwelling on the parcel for sale to a person or persons to reside in the dwelling whose income is below the area median income.”¹⁷⁵

House Bill 535 imposed some restrictions on the nonprofit organization’s alienation of such delinquent lands.¹⁷⁶ The nonprofit may sell “(i) both the land and the structural improvements on a property or (ii) only the structural improvements of a property and not the land the structural improvements are located on.”¹⁷⁷ If only the structural improvements are sold, and not the land, then the land must be “subject to a ground lease with a community land trust” that “has a term of at least 90 years,” and the community land trust must “retain[] a preemptive option to purchase such structural improvements at a price determined by a formula that is designed to ensure that the improvements remain affordable in perpetuity to low-income and moderate-income families earning less than 120 percent of the area median income, adjusted for family size.”¹⁷⁸

d. Richmond Allowed to Tax Improvements at Lesser Rate than Land

Prior to the recent amendment, Virginia Code section 58.1-3221.1 declared improvements to real property in only three cities—Fairfax, Poquoson, and Roanoke—to be “a separate class of property” than the land on which it sits for purposes of real estate taxation.¹⁷⁹ Having surmounted the uniformity hurdle,¹⁸⁰ the section authorized two of those cities—Fairfax and Roanoke—to levy any lesser rate on the improvements that is higher than zero, as zero would function as an exemption.¹⁸¹ The same section, conversely, authorized Poquoson simply to levy on improvements “at a different rate” higher than zero, and so potentially to impose a

175. *Id.* § 58.1-3970.1(B) (Cum. Supp. 2020).

176. Act of Mar. 10, 2020, ch. 244, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3970.1(C) (Cum. Supp. 2020)).

177. *Id.* at __.

178. *Id.* at __.

179. VA. CODE ANN. § 58.1-3221.1(A) (Repl. Vol. 2017).

180. *See* VA. CONST. art. X, § 1.

181. VA. CODE ANN. § 58.1-3221.1(B) (Repl. Vol. 2017).

greater or lesser rate on improvements than on land.¹⁸² None of the localities could “alter in any way its valuation of real property.”¹⁸³

In 2020, the General Assembly amended Virginia Code section 58.1-3221.1 to declare the same separate class of property in the City of Richmond and to delegate to Richmond the same taxing power previously delegated to the Cities of Fairfax and Roanoke, subject to the same restrictions.¹⁸⁴

2. Exemptions

a. Reduction of Local Ad Valorem Tax Exemptions for Solar Energy Projects

Historically, certain solar energy projects enjoyed a total exemption from local taxation.¹⁸⁵ Other solar energy projects enjoyed an exemption from ad valorem taxation for eighty percent of a project’s assessed value.¹⁸⁶ In all cases, this exemption did not extend to “the land on which such equipment or facilities are located,” and was available for projects greater than twenty megawatts only if construction began by January 1, 2024.¹⁸⁷

In 2020, the General Assembly, in adopting House Bill 1434 and Senate Bill 763, expanded the class of solar energy projects subject to the time limitation and substantially extended the time in which the exemption could be claimed.¹⁸⁸ Now, solar energy projects greater than *five megawatts* are subject to the time limitation, but the exemption may be claimed so long as “an application has been filed with the locality for . . . project[s] before July 1, 2030.”¹⁸⁹

182. *Id.* § 58.1-3221.1(D) (Repl. Vol. 2017).

183. *Id.* § 58.1-3221.1(C) (Repl. Vol. 2017).

184. Act of Apr. 7, 2020, ch. 790, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3221.1 (Cum. Supp. 2020)).

185. VA. CODE ANN. § 58.1-3660 (Cum. Supp. 2019).

186. *Id.* § 58.1-3660(B) (Cum. Supp. 2019).

187. *Id.*

188. Acts of Apr. 10, 2020, chs. 1028 & 1029, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 58.1-3660(D) (Cum. Supp. 2020)).

189. *Id.* at __, __. This application requirement is satisfied if

[the] applicant has filed an application for a zoning confirmation from the locality for a by-right use or an application for land use approval under the locality’s zoning ordinance to include an application for a conditional use permit, special use permit, special exception, or other application as set out in the locality’s zoning ordinance.

Id. at __, __.

This legislation also adopted a stepped-down exemption for the solar energy projects entitled to an eighty percent exemption under the previous law and “for which an initial interconnection request form has been filed with an electric utility or a regional transmission organization on or after January 1, 2019.”¹⁹⁰ Now, those solar energy projects are entitled to an eighty percent exemption only “in the first five years in service after commencement of commercial operation,” at which point the exemption is reduced to “70 percent of the assessed value” for “the second five years in service,” and, after then, further reduced to an exemption of “60 percent of the assessed value for all remaining years in service.”¹⁹¹

b. Localities May Impose Revenue Sharing on Certain Solar Energy Projects, Thereby Increasing Exemption

Building on prior legislation on solar energy projects, the General Assembly enacted House Bill 1131 and Senate Bill 762, which authorized localities to “assess a revenue share of up to \$1,400 per megawatt” on certain solar energy projects.¹⁹² The solar energy projects are limited to solar energy projects greater than five megawatts or, in the case of solar energy projects for which “an initial interconnection request form has been filed with an electric utility or a regional transmission organization on or before December 31, 2018,” twenty megawatts or less, but cannot “include any project that is . . . described in § 56-594, 56-594.01, or 56-594.2 or [c]hapters 358 and 382 of the Acts of Assembly of 2013, as amended.”¹⁹³

If a revenue share is assessed pursuant to this legislation on a solar energy project of more than five megawatts, “as measured in alternating current (AC) generation capacity,” and “an application has been filed with the locality for the project before July 1, 2030,” a 100 percent exemption applies.¹⁹⁴ Otherwise, the stepped down

190. *Id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-3660(F) (Cum. Supp. 2020)).

191. *Id.* at __, __.

192. Acts of Apr. 22, 2020, chs. 1224 & 1270, 2020 Va. Acts __, __ & __, __ (codified at VA. CODE ANN. § 58.1-2636(A) (Cum. Supp. 2020)). Megawatt capacity is “measured in alternating current (AC) generation capacity of the nameplate capacity of the facility based on submissions by the facility owner to the interconnecting utility.” *Id.* at __, __.

193. *Id.* at __, __ (codified at VA. CODE ANN. § 58.1-2636(B) (Cum. Supp. 2020)).

194. *Id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-3660(D) (Cum. Supp. 2020)).

exemption provided by House Bill 1434 and Senate Bill 763, and reviewed above, applies.¹⁹⁵

No revenue share may be applied “retroactively . . . to any solar photovoltaic (electric energy) project for which an application was filed with the locality on or before July 1, 2020” unless the taxpayer and locality agree.¹⁹⁶

c. Exemption for Solar Energy and Recycling Equipment Made Retroactive to Date of Installation

Before July 1, 2020, “[c]ertified solar energy equipment, facilities, or devices and certified recycling equipment, facilities, or devices” were a separate class of property that localities could exempt or partially exempt from local taxation.¹⁹⁷ Such an exemption is permitted by Article X, section 6(d) of the Virginia Constitution.

For recycling equipment, facilities, or devices to enjoy this exemption, they must be, among other things,

certified by the Department of Environmental Quality as integral to the recycling process and for use primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth, and used in manufacturing facilities or plant units which manufacture, process, compound, or produce for sale recyclable items of tangible personal property at fixed locations in the Commonwealth.¹⁹⁸

For “solar energy equipment, facilities, or devices” to enjoy this exemption, they must be, among other things, “certified by the local certifying authority to be designed and used primarily for the purpose of collecting, generating, transferring, or storing thermal or electric energy.”¹⁹⁹

Before July 1, 2020, however, the “exemption [was] effective beginning in the next succeeding tax year” or, in the case of real estate taxation, “when such real estate [was] first assessed, but not prior to the date of such application for exemption.”²⁰⁰

195. *See id.* at __, __; Acts of Apr. 10, 2020, chs. 1028 & 1029, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 58.1-3660(F) (Cum. Supp. 2020)).

196. Chs. 1224 & 1270, 2020 Va. Acts at __, __.

197. VA. CODE ANN. § 58.1-3661(A) (Repl. Vol. 2017).

198. *Id.* § 58.1-3661(B) (Repl. Vol. 2017).

199. *Id.*

200. *Id.* § 58.1-3661(D) (Repl. Vol. 2017).

Senate Bill 1039 allows localities to revise the foregoing rule regarding the timing of the exemption for “equipment, facilities, or devices.”²⁰¹ Under this legislation, a locality may provide by ordinance that “if the taxpayer installs equipment, facilities, or devices and obtains certification for such equipment, facilities, or devices within one year of installation, . . . the exemption shall be effective as of the date of installation, and” to further reimburse the taxpayer “if the taxpayer has paid any taxes on such equipment, facilities, or devices” in the meantime.²⁰²

d. Duration of Partial Exemption for Construction or Improvement in Redevelopment, Conservation, or Rehabilitation District May Be Extended

Localities are permitted under Virginia law to create a “redevelopment or conservation area or a rehabilitation district”²⁰³ and may provide by ordinance a “partial exemption from taxation of (i) new structures located in a redevelopment or conservation area or rehabilitation district or (ii) other improvements to real estate located in a redevelopment or conservation area or rehabilitation district.”²⁰⁴ The ordinance provides “[t]he partial exemption . . . shall be either (i) an amount equal to the increase in assessed value or a percentage of such increase resulting from the construction of the new structure or other improvement . . . , or (ii) an amount up to 50 percent of the cost of such construction or improvement”²⁰⁵

This partial exemption “may commence upon completion of the new construction or improvement or on January 1 of the year following completion of the new construction or improvement and shall run with the real estate”²⁰⁶ Significantly, for purposes of this article, the prior law was that it could last for “a period of no longer than 15 years.”²⁰⁷

That period may now be lengthened. Senate Bill 727 and House Bill 537 doubled the maximum duration of the partial exemption,

201. Act of Apr. 2, 2020, ch. 633, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3661(D) (Cum. Supp. 2020)).

202. *Id.* at __.

203. VA. CODE ANN. § 58.1-3219.4(A) (Cum. Supp. 2020).

204. *Id.*

205. *Id.* § 58.1-3219.4(B) (Cum. Supp. 2020).

206. *Id.*

207. *Id.* § 58.1-3219.4(B) (Repl. Vol. 2017).

to thirty years, presumably to incentivize more substantial investments in such districts.²⁰⁸ Of course, it remains the case that the locality's ordinance "may place a shorter time limitation on the length of such exemption."²⁰⁹

3. Tangible Personal Property Taxation

a. Farm Machinery and Implements Used for Growing and Harvesting Trees May Be Exempted or Taxed at a Lower Rate than Other Tangible Personal Property

Under current law, tangible personal property is divided into numerous separate classes for purposes of valuation. Virginia Code section 58.1-3505(A) specifically defines various farm-related tangible personal property and puts them into different classes. "Farm machinery" is classified as either "[f]arm machinery designed solely for the planting, production or harvesting of a single product or commodity"²¹⁰ and all other "farm machinery . . . and farm implements," among which expressly include machinery and equipment used by wineries, by nurseries, and any "farm tractor."²¹¹ Localities may exempt, in whole or in part, or provide a different rate of taxation than is generally applicable to tangible personal property for "farm machinery" and other personal property within these classes (or within the other classes set forth in section 58.1-3505(A)).²¹²

The General Assembly, through House Bill 1021, created in Virginia Code section 58.1-3505(A)(14) a new class of farm-related tangible personal property that localities may exempt.²¹³ This new class consists of "farm machinery and farm implements" other than those identified previously, and expressly includes "equipment and machinery used for forest harvesting and silvicultural activities."²¹⁴ House Bill 1021 also made various revisions to section

208. Acts of Mar. 2 & 10, 2020, chs. 66 & 246, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 58.1-3219.4(B) (Cum. Supp. 2020)).

209. VA. CODE ANN. § 58.1-3219.4(B) (Cum. Supp. 2020).

210. *Id.* § 58.1-3505(A)(10) (Cum. Supp. 2020).

211. *Id.* § 58.1-3505(A)(8) (Cum. Supp. 2020).

212. *Id.* § 58.1-3505(A)-(B) (Cum. Supp. 2020).

213. Act of Mar. 10, 2020, ch. 251, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3505(A)(14) (Cum. Supp. 2020)).

214. *Id.* at __.

58.1-3506, addressing the taxation of “forest harvesting and silvicultural activity equipment” to reflect this potential exemption.²¹⁵

b. Classification for Property Used in Satellite Industry
Extended

Returning to Virginia Code section 58.1-3506, we find a separate tax classification for “tangible personal property that is used in manufacturing, testing, or operating satellites within a Multi-county Transportation Improvement District, provided that such business personal property is put into service within the District on or after July 1, 1999.”²¹⁶ However, this classification expired by its terms on June 30, 2019.²¹⁷

Senate Bill 273 and House Bill 724 “revived” the classification, pushing the date-based expiration back to June 30, 2029.²¹⁸ And the General Assembly made this change effective for tax years beginning on or after January 1, 2019, meaning that there was no tax year in which this classification did not apply.²¹⁹

4. BPOL Taxation/Merchants’ Capital Tax—Merchants’ Capital
Class for Retailers with Large Storage Facilities Created

Article 3 of chapter 35 of Title 58.1 defines from the mass of tangible personal property “[t]he capital of merchants” and segregates it for permissive local taxation.²²⁰ Since 1997, the Virginia Code has had only one separate class from the general class of merchants’ capital—that “reported as inventory of pharmaceutical wholesalers.”²²¹ In 2018, another separate class of merchants’ capital was created—that “of any wholesaler reported as inventory

215. *Id.* at __ (codified as amended at VA. CODE ANN. § 58.1-3506(A)(8), (33) (Cum. Supp. 2020)).

216. VA. CODE ANN. § 58.1-3506(A)(21) (Cum. Supp. 2020).

217. *Id.* § 58.1-3506(A)(21) (Repl. Vol. 2017).

218. Acts of Mar. 2 & 10, 2020, chs. 64 & 247, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 58.1-3506(A)(21) (Cum. Supp. 2020)). The classification may expire before this date if “a special improvements tax is no longer levied under § 15.2-4607 on property within a Multicounty Transportation Improvement District created pursuant to Chapter 46 (§ 15.2-4600 et seq.) of Title 15.2.” VA. CODE ANN. § 58.1-3506(A)(21) (Cum. Supp. 2020).

219. Chs. 64 & 247, 2020 Va. Acts at __, __.

220. VA. CODE ANN. § 58.1-3509 (Repl. Vol. 2017); *see id.* § 58.1-3510(A) (Repl. Vol. 2017) (defining “[m]erchants’ capital”).

221. *Id.* § 58.1-3510.01 (Repl. Vol. 2017).

that is located, and is normally located, in a structure that contains at least 100,000 square feet, with at least 100,000 square feet used solely to store such inventory.”²²² For both of these separate classifications, localities “may levy a tax . . . at different rates from the tax levied on other merchants’ capital[,]” but may not adopt a “rate of tax” or “of assessment” that “exceed[s] that applicable generally to merchants’ capital.”²²³

House Bill 1575 revised the separate classification for wholesalers found in section 58.1-3510.02 to include retailers with at least twice as much storage.²²⁴ Now, merchants’ capital of “any retailer reported as inventory that is located, and is normally located, in a structure that contains at least 200,000 square feet, with at least 200,000 square feet used solely to store such inventory” is part of the separate class in section 58.1-3510.02.²²⁵ As a result, it too may also be subjected to “different rates” of tax than “other merchants’ capital” provided they do not “exceed that applicable generally to merchants’ capital.”²²⁶

5. Miscellaneous Local Taxation

a. Authorization of Counties to Impose Additional Admissions, Transient and Occupancy and Cigarette Taxes

Virginia localities enjoy widely varying powers with respect to the imposition of taxes depending on, among other factors, their status as a county, city or town. Additionally, some localities of the same type may impose certain miscellaneous taxes that others may not.²²⁷

House Bill 785 and Senate Bill 588, as part of a drive for greater uniformity between the various classes of localities, largely harmonized localities’ taxing authority with respect to admissions, transient occupancy, food and beverage/meals, cigarette, and travel

222. Act of Feb. 26, 2018, ch. 23, 2018 Va. Acts 59, 59 (codified at VA. CODE ANN. § 58.1-3510.02 (Cum. Supp. 2018)).

223. VA. CODE ANN. § 58.1-3510.01 (Repl. Vol. 2017); *id.* § 58.1-3510.02 (Cum. Supp. 2020).

224. Act of Mar. 31, 2020, ch. 541, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3510.02 (Cum. Supp. 2020)).

225. *Id.* at __.

226. *Id.* at __.

227. *See, e.g.*, VA. CODE ANN. § 58.1-3818(A)–(C) (Cum. Supp. 2020).

campground taxes.²²⁸ This was done by amending section 58.1-3840, which previously authorized these types of miscellaneous taxation by cities and towns, to make the authorization similarly applicable to counties.²²⁹

With respect to admissions taxes, which are governed by article five of chapter 38 of Title 58.1, the General Assembly amended section 58.1-3818 to create a uniform rule for localities regarding the levying of “a tax on admissions charged for attendance at any event.”²³⁰ In doing so, it prohibited counties that imposed “a state sales and use tax, in addition to the taxes authorized pursuant to §§ 58.1-603 and 58.1-604, . . . at a rate of at least one percent, a portion of which is dedicated to the promotion of tourism” to also impose an admissions tax.²³¹ Consistent with the changes to Virginia Code section 58.1-3818, sections that had provided unique admissions tax rules for specific localities were repealed.²³²

Turning to transient occupancy taxes, which are governed by article six of chapter 38 of Title 58.1, the General Assembly amended section 58.1-3819 to remove the prohibition against charging more than two percent of the amount of charge for the occupancy (or more than five percent for certain, less populous counties).²³³ Rather than generally prohibit taxation at these levels, amended section 58.1-3819 directs that all funding in excess of that provided by a two percent rate, but less than that resulting from a rate in excess of five percent, be used for the same purposes as it was before this amendment or, if not applicable, “solely for tourism and travel, marketing of tourism or initiatives that . . . attract travelers to the locality, increase occupancy at lodging properties, and generate tourism revenues in the locality.”²³⁴ Unlike with admissions taxes, most of the authorizations relating to application of additional

228. Acts of Apr. 22, 2020, chs. 1214 & 1263, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 58.1-3840 (Cum. Supp. 2020)).

229. *Id.* at __, __.

230. *Id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-3818(A)–(B) (Cum. Supp. 2020)).

231. *Id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-3818(C) (Cum. Supp. 2020)).

232. VA. CODE ANN. §§ 58.1-3818.01, -3818.03, -3818.04 (Cum. Supp. 2020), *repealed by* Acts of Apr. 22, 2020, chs. 1214 & 1263, 2020 Va. Acts __, __ & __, __.

233. Chs. 1214 & 1263, 2020 Va. Acts at __, __ (codified as amended at VA. CODE ANN. § 58.1-3819(A)(1) (Cum. Supp. 2020)).

234. *Id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-3819(A)(2) (Cum. Supp. 2020)).

transient and occupancy taxation were left intact.²³⁵ These amendments are effective May 1, 2021.²³⁶

House Bill 785 and Senate Bill 588 extended the power of counties to tax food and beverage by, first, permitting adoption of such taxation without a referendum or unanimous vote of the governing body.²³⁷ Second, House Bill 785 and Senate Bill 588 increased the cap on food and beverage taxation, from four to six percent “of the amount charged for such food and beverages.”²³⁸

Virginia Code section 58.1-3830 was amended to affirm the power of every county, city, and town, not merely the counties of Arlington and Fairfax²³⁹ and those municipalities with general taxing powers by charter, to tax the sale or use of cigarettes.²⁴⁰ However, this power was circumscribed.²⁴¹ The maximum rate that may be imposed by counties, as well as those cities and towns “that, on January 1, 2020, had in effect a rate not exceeding two cents (\$0.02) per cigarette sold,” will be “two cents (\$0.02) per cigarette sold.”²⁴² For those cities and towns “that, on January 1, 2020, had in effect a rate exceeding two cents (\$0.02) per cigarette sold, then the maximum rate” that may be charged will “be the rate in effect on January 1, 2020.”²⁴³ Note the *will*—these amendments will not be effective until July 1, 2021.²⁴⁴

235. See *id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-3823, -3825.3 (Cum. Supp. 2020)); *but cf.* VA. CODE ANN. §§ 58.1-3820 to -3821 (Cum. Supp. 2020), *repealed by* Chs. 1214 & 1263, 2020 Va. Acts at __, __.

236. Chs. 1214 & 1263, 2020 Va. Acts at __, __.

237. *Id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-3833 (Cum. Supp. 2020)). In those counties where a referendum was defeated prior to July 1, 2020, no food and beverage tax may be imposed “until six years after the date of such referendum, unless a successful referendum was held after the defeated referendum and before July 1, 2020.” *Id.* at __, __. Note that the voting requirements on imposing taxes found in VA. CONST. art. VII, § 7 and VA. CODE ANN. § 15.2-1428 (Repl. Vol. 2018) remain.

238. Chs. 1214 & 1263, 2020 Va. Acts at __, __ (codified as amended at VA. CODE ANN. § 58.1-3833(A)(1) (Cum. Supp. 2020)).

239. See VA. CODE ANN. § 58.1-3831 (Repl. Vol. 2017), *repealed by* Chs. 1214 & 1263, 2020 Va. Acts at __, __.

240. Chs. 1214 & 1263, 2020 Va. Acts at __, __ (codified as amended at VA. CODE ANN. § 58.1-3830(A) (Cum. Supp. 2020)).

241. *Id.* at __, __.

242. *Id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-3830(C)(1) (Cum. Supp. 2020)).

243. *Id.* at __, __ (codified as amended at VA. CODE ANN. § 58.1-3830(C)(2) (Cum. Supp. 2020)).

244. *Id.* at __, __.

b. Exemption for De Minimis Farmer’s Market and Roadside Sales from Meals Tax and Food and Beverage Taxation

As referenced above, Virginia cities and towns may impose a meals tax and counties may impose a food and beverage tax.²⁴⁵ Both of these taxes are in addition to sales and use taxes and are subject to various statutory exceptions.²⁴⁶

House Bill 342 added a similar exemption to both food and beverage and meals taxes.²⁴⁷ The county food and beverage tax now may “not be levied on food and beverages sold . . . by . . . sellers at local farmers markets and roadside stands, when such sellers’ annual income from such sales does not exceed \$2,500” in all localities.²⁴⁸ Similarly, “[n]o such taxes on meals may be imposed on when sold or provided by . . . sellers at local farmers markets and roadside stands, when such sellers’ annual income from such sales does not exceed \$2,500” in all localities.²⁴⁹

6. Tax Enforcement

a. Urban Counties May Agree to Collect Town Taxes

In 2018, Loudoun County was authorized to “enter into an agreement with any town located partially or wholly within Loudoun County for the county treasurer to collect and enforce delinquent or non-delinquent real or personal property taxes owed to such town.”²⁵⁰

Building on this legislation, House Bill 1534 and Senate Bill 649 amended the provision governing tax collection under the urban county executive form of government, Virginia Code section 15.2-826, to authorize broadly these sorts of arrangements.²⁵¹ Under

245. See VA. CODE ANN. § 58.1-3833(A)(1) (Cum. Supp. 2019) (county food and beverage tax); *id.* § 58.1-3840 (Repl. Vol. 2017) (excise taxes on, among other things, “meals”).

246. *Id.* § 58.1-3833(A)(1) (Cum. Supp. 2020); *id.* § 58.1-3840 (Repl. Vol. 2017).

247. See Act of Mar. 10, 2020, ch. 241, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-3833, -3840 (Cum. Supp. 2020)).

248. VA. CODE ANN. § 58.1-3833(A) (Cum. Supp. 2020).

249. *Id.* § 58.1-3840(A) (Cum. Supp. 2020).

250. Acts of Mar. 2 & 19, 2018, chs. 74 & 342, 2020 Va. Acts 158, 158 & 607, 607 (codified as amended at VA. CODE ANN. § 58.1-3910.1 (Cum. Supp. 2019)).

251. Acts of Mar. 27, 2020, chs. 504 & 505, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. § 15.2-826 (Cum. Supp. 2020)).

this legislation, the relevant board of supervisors for all such localities

may enter into an agreement, similar to such agreements as are authorized under § 58.1-3910.1, with any town located partially or wholly within the county for the official responsible for the assessment or collection of taxes to collect and enforce delinquent or non-delinquent real or personal property taxes owed to such town.²⁵²

B. *Significant Judicial Decisions*

1. Supreme Court of Virginia Rules Real Property Tax Assessments Were Not Entitled to Presumption of Correctness—Message to Local Tax Authorities?

In reversing a decision of the Augusta County Circuit Court, the Supreme Court of Virginia held that the trial court erred in upholding the county's tax assessments against McKee Foods Corporation ("McKee") for tax years 2011–2014 because the appraisers for the county improperly applied valuation methodologies, making the resulting assessments ineligible for a presumption of correctness.²⁵³ McKee owns an 828,619 square foot industrial building where it manufactures "Little Debbie" snack foods and other products.²⁵⁴ In 2011, 2012, and 2013, Augusta County assessed McKee's property at \$28,525,300, and for 2014, the County raised the assessment to \$31,745,800.²⁵⁵ McKee challenged all four assessments contending the actual fair market value was in the range of \$16,000,000 to \$17,660,000 over the four tax years.²⁵⁶

For tax years 2011 through 2013, Augusta County's assessments were performed by Blue Ridge Mass Appraisal Company, L.L.C. ("Blue Ridge").²⁵⁷ David Hickey ("Hickey") was the Blue Ridge employee who conducted the assessment of McKee's property for that time period.²⁵⁸ Hickey testified he used a cost method to appraise McKee's property, and then he "referred to a list of 52 industrial sales he had previously accumulated to see if he was in the correct

252. *Id.* at __, __.

253. *McKee Foods Corp. v. County of Augusta*, 297 Va. 482, 830 S.E.2d 25 (2019).

254. *Id.* at 485, 830 S.E.2d at 27.

255. *Id.* at 485–86, 830 S.E.2d at 27.

256. *Id.* at 485–86, 830 S.E.2d at 27.

257. *Id.* at 485–86, 830 S.E.2d at 27.

258. *Id.* at 486, 830 S.E.2d at 27.

range of price per square foot.”²⁵⁹ The properties on Hickey’s list “ranged in size from 28,360 square feet to 714,278 square feet, and all but two of the buildings on his list were less than half the square footage” of the McKee property.²⁶⁰ Hickey admitted that he assessed the property using an average of the sale price divided by the square footage for each of the fifty-two properties on the list.²⁶¹ Hickey also added that the database management system utilized by Blue Ridge was based on an old system dating back to the 1970s and was not really a cost approach.²⁶² Hickey “made no adjustments to the sale prices of the properties on the list to account for the size of the properties, the location of the properties, or when in the ten-year period the sales occurred.”²⁶³ Hickey also did not attempt to investigate “the nature of the sales (i.e., whether they were arm’s length transactions) when he compiled his list.”²⁶⁴ His assessment of McKee’s property simply used “an average of the sale price divided by the square footage for each of the 52 properties on the list.”²⁶⁵

The 2014 assessment was prepared by another appraiser named Donald Thomas (“Thomas”), who was employed by Wingate Appraisal Service.²⁶⁶ At the time Thomas assessed the McKee property, he was only a licensed residential real estate appraiser.²⁶⁷ The person from Wingate Appraisal who was supposed to appraise the property, and was a certified general real estate appraiser, did not do the appraisal or supervise Thomas’ work on the McKee property appraisal.²⁶⁸

Thomas testified he “classified [McKee’s] [p]roperty as a special use property solely because it was originally designed and constructed to be used for food processing.”²⁶⁹ “He admitted, however, that the main building on the property was a rectangular-shaped industrial building” that could have been converted to a different

259. *Id.* at 487, 830 S.E.2d at 27–28.

260. *Id.* at 487–88, 830 S.E.2d at 27–28.

261. *Id.* at 487–88, 830 S.E.2d at 27–28.

262. *Id.* at 487, 830 S.E.2d at 28.

263. *Id.* at 488, 830 S.E.2d at 28.

264. *Id.* at 488, 830 S.E.2d at 28.

265. *Id.* at 488, 830 S.E.2d at 28.

266. *Id.* at 488, 830 S.E.2d at 28.

267. *Id.* at 488, 830 S.E.2d at 28.

268. *Id.* at 488, 830 S.E.2d at 28.

269. *Id.* at 488, 830 S.E.2d at 28.

use.²⁷⁰ Thomas testified that he appraised the property at the price he figured McKee could sell it for to a buyer who also intended to use the property as a food processing plant.²⁷¹ He also said he did not use the sales comparison method to value the property because he could not find any comparable sales for special purpose food processing plants.²⁷² Thomas also “rejected the income approach due to a lack of rental market data because the property was owner-occupied.”²⁷³ He said the market for McKee’s property was national in scope, but he admitted he did not search for rental data outside Augusta County.²⁷⁴ He also did not search for comparable sales outside of the eastern region of the United States.²⁷⁵

The Supreme Court of Virginia stated the statutory and judicial standards or legal principles called upon when reviewing real property tax assessments for correctness.²⁷⁶ First, “[a]ssessments by taxing authorities are afforded a presumption of correctness, and the burden is on the taxpayer to rebut the presumption.”²⁷⁷ “Generally, a taxing authority’s assessment of a property’s fair market value is presumed valid and a circuit court will reject and correct a tax authority’s assessment only if the taxpayer demonstrates that the taxing authority committed manifest error or disregarded controlling evidence in making the assessment.”²⁷⁸

“Taxing authorities commonly use one or more of three valuation approaches: the cost approach, income approach, and sales approach.”²⁷⁹ “Ideally, an appraisal should, if possible, derive its final determination of a property’s value using all three approaches in order to maximize the likelihood that the valuation accurately reflects the property’s fair market value.”²⁸⁰ “In cases where a taxing authority bases an assessment of fair market value solely on one

270. *Id.* at 488, 830 S.E.2d at 28.

271. *Id.* at 488–89, 830 S.E.2d at 28.

272. *Id.* at 489, 830 S.E.2d at 28.

273. *Id.* at 489, 830 S.E.2d at 28.

274. *Id.* at 489, 830 S.E.2d at 28–29.

275. *Id.* at 489, 830 S.E.2d at 29.

276. *Id.* at 495–96, 830 S.E.2d at 28–29.

277. *Id.* at 496, 830 S.E.2d at 32 (quoting *Tidewater Psychiatric Inst., Inc. v. City of Virginia Beach*, 256 Va. 136, 140–41, 501 S.E.2d 761, 763 (1998)).

278. *Id.* at 496, 830 S.E.2d at 32 (quoting *Keswick Club, L.P. v. County of Albemarle*, 273 Va. 128, 136–37, 639 S.E.2d 243, 247 (2007)).

279. *Id.* at 496, 830 S.E.2d at 32 (quoting *Keswick Club*, 273 Va. at 137, 639 S.E.2d at 248).

280. *Id.* at 496, 830 S.E.2d at 32 (quoting *Keswick Club*, 273 Va. at 137, 639 S.E.2d at 248).

approach, the resulting assessment is still entitled to the presumption of validity so long as the taxing authority considered and properly rejected the other valuation methods.”²⁸¹

The Supreme Court of Virginia was able to point to numerous places in the record where it is evident the locality’s assessments were not compliant with generally accepted appraisal practices and Virginia law.²⁸² By Hickey’s own testimony, he “did not properly use any of the three generally accepted approaches to valuation.”²⁸³ “First, Hickey did not perform an income approach valuation at all.”²⁸⁴ “Second, to the extent he considered comparable sales, Hickey’s methodology was so improper it did not meet the definition of the sales approach.”²⁸⁵ The court noted “Hickey identified 52 properties and simply used the average price per square foot of these properties as the price per square foot for the McKee property, without any adjustments for the size or location of the other properties.”²⁸⁶ “[A]lthough the sales approach involves the averages of properties, first,” the court stated, “an assessor must find similar properties and make necessary adjustments, which Hickey completely failed to do.”²⁸⁷

“Hickey also failed to properly utilize the cost approach. . . . Instead of estimating depreciation based upon the [McKee] [p]roperty’s actual characteristics, Hickey used the average price per square foot to guide his depreciation.”²⁸⁸ “Even though Hickey failed to properly utilize any of the three accepted valuation methods, the circuit court still applied the presumption of validity” to the 2011 assessment.²⁸⁹ The supreme court held this was in error.²⁹⁰

For the 2014 assessment, the Supreme Court of Virginia stated, “Thomas’ assessment was based upon a single valuation approach, the cost approach.”²⁹¹ “Because Thomas’ assessment of fair market

281. *Id.* at 496–97, 830 S.E.2d at 32–33 (citing *Keswick Club*, 273 Va. at 137, 639 S.E.2d at 248).

282. *Id.* at 496–97, 830 S.E.2d at 32–33.

283. *Id.* at 497, 830 S.E.2d at 33.

284. *Id.* at 497, 830 S.E.2d at 33.

285. *Id.* at 497, 830 S.E.2d at 33.

286. *Id.* at 497, 830 S.E.2d at 33.

287. *Id.* at 497–98, 830 S.E.2d at 33.

288. *Id.* at 498, 830 S.E.2d at 33.

289. *Id.* at 498–500, 830 S.E.2d at 33–34.

290. *Id.* at 498–500, 830 S.E.2d at 33–34.

291. *Id.* at 500, 830 S.E.2d at 35.

value [was] based solely on the cost approach, the resulting assessment [was] only entitled to the presumption of correctness if the taxing authority considered and properly rejected the other valuation methods.”²⁹² The evidence at trial demonstrates that Thomas applied the cost approach without sufficiently attempting to gather the data necessary to utilize the income or sales approach.²⁹³ The supreme court held the circuit court also erred when it applied the presumption of correctness to the 2014 assessments; thus all of the assessments in the case were erroneous and not entitled to a presumption of correctness.²⁹⁴ The court reversed and remanded the decision of the trial court for further proceedings consistent with the court’s holdings.²⁹⁵

2. The Supreme Court of Virginia Concludes Trial Court Wrongly Excluded Taxpayer’s Appraiser’s Testimony in Property Tax Refund Dispute

The Supreme Court of Virginia held that for Virginia property tax purposes, the trial court abused its discretion when it excluded testimony from Virginia International Gateway, Inc.’s (“VIG”) appraiser because a real estate appraiser is not required to have an active Virginia license to testify as an expert in a tax assessment dispute.²⁹⁶ In *Virginia International Gateway, Inc. v. City of Portsmouth*, VIG, the landowner of a large marine container terminal in the City of Portsmouth, believed that the City’s property tax assessments of \$361 million in real property and \$30 million in personal property in the 2015–2016 tax year were excessively above fair market value.²⁹⁷ VIG’s terminal consists of 610 acres, fronting on the Elizabeth River, “including a wharf, buildings, eight ‘ship-to-shore’ (‘STS’) cranes,” thirty rail mounted gantry cranes, and four rubber-tire gantry cranes.²⁹⁸ The rail-mounted and the rubber-tire gantry cranes were considered personal property.²⁹⁹ The STS cranes were considered fixtures.³⁰⁰

292. *Id.* at 501, 830 S.E.2d at 35 (citing *Keswick Club*, 273 Va. at 137, 639 S.E.2d at 248).

293. *Id.* at 501, 830 S.E.2d at 35.

294. *Id.* at 501–02, 830 S.E.2d at 34–35.

295. *Id.* at 502, 830 S.E.2d at 35–36.

296. *Va. Int’l Gateway, Inc. v. City of Portsmouth*, 298 Va. 43, 834 S.E.2d 234 (2019).

297. *Id.* at 47, 834 S.E.2d at 236.

298. *Id.* at 46–47, 834 S.E.2d at 235–36.

299. *Id.* at 47, 834 S.E.2d at 236.

300. *Id.* at 47, 834 S.E.2d at 236.

“At trial, VIG offered expert testimony to support its position that the actual fair market value of the real property was \$197,217,000.”³⁰¹ VIG’s expert witness testimony was provided by Glen Fandl, a tax consultant and real estate appraiser with experience evaluating complex industrial properties, to establish the value of the land, buildings, improvements, and wharf. For every aspect of the real property, except the STS cranes, “Fandl held an active New York real estate appraisal license”³⁰² When it became apparent that litigation was inevitable, Fandl obtained a temporary Virginia real estate appraisal license, effective January 28, 2016 to January 27, 2017, then prepared a formal appraisal report of the property’s value, which was based on his 2015 informal valuation.³⁰³ His final valuation report was completed in October 2016.³⁰⁴

At the time of trial, Fandl’s temporary appraisal license lapsed.³⁰⁵ The City of Portsmouth objected to Fandl’s expert testimony because he lacked Virginia licensure at the time of trial.³⁰⁶ Initially, the trial court permitted Fandl to testify because the court recognized Fandl as an expert.³⁰⁷ Fandl testified as to the real property and its improvements, ultimately reaching his opinion that the fair market value of the real property and improvements was \$163,017,000.³⁰⁸

VIG called Maarten Verheijen, “a broker specializing in buying and selling container-handling equipment used by marine ports, to testify regarding the value of the STS cranes and other port equipment.”³⁰⁹ Mr. Verheijen was recognized by the trial court as “an expert in the field of valuing specialized marine terminal equipment, including STS cranes, rail-mounted gantries, and rubber-tire gantries.”³¹⁰ Verheijen’s valuation methodologies “considered a variety of factors in assessing the value of the STS cranes, including market trends,” the impact of different country currencies, “the cranes’ size and age, the cost of a new crane, modification

301. *Id.* at 48, 834 S.E.2d at 236.

302. *Id.* at 48, 834 S.E.2d at 236.

303. *Id.* at 48, 834 S.E.2d at 236.

304. *Id.* at 48, 834 S.E.2d at 236.

305. *See id.* at 48, 834 S.E.2d at 236.

306. *Id.* at 48, 834 S.E.2d at 236.

307. *Id.* at 48, 834 S.E.2d at 236.

308. *Id.* at 48–49, 834 S.E.2d at 236–37.

309. *Id.* at 49, 834 S.E.2d at 237.

310. *Id.* at 49, 834 S.E.2d at 237.

costs, and warranty costs.”³¹¹ Ultimately, Mr. Verheijen opined that “the primary market for the STS cranes would be overseas.”³¹² “Consequently, the valuation would have to account for transportation costs and electrical conversion costs because North America uses an electrical system incompatible with any other location in the world.” He valued the STS cranes at \$34,200,000.³¹³

The testimony of both experts presented by VIG for all of the property was “\$197,217,000—a figure \$163,867,820 lower than the City’s assessment.”³¹⁴ Verheijen valued the other personal property at issue (the two types of gantry cranes) at a fair market value of \$19,500,000 for 2015 and \$16,500,000 for 2016.³¹⁵

“The trial court dismissed VIG’s real estate case because it reversed its prior decision to qualify Fandl as an expert.”³¹⁶ While again stating Fandl was “eminently qualified to testify” as an expert, the trial court found it was an abuse of its power to recognize Mr. Fandl as an expert in Virginia real estate values—his appraisal work was unlicensed and he gave his testimony when he was unlicensed in Virginia.³¹⁷ The trial court concluded that crediting Fandl’s testimony would in effect be facilitating the commission of a criminal act, since developing an opinion of value of Virginia real estate without holding a license would constitute illegal conduct and put the trial court in the position of condoning and allowing unlawful activity.³¹⁸

The Portsmouth City Circuit Court also rejected VIG’s personal property tax case, primarily because Mr. Verheijen’s appraisals included transportation-related costs.³¹⁹ “[C]osts of removal are not part of Virginia’s definition of fair market value and their inclusion rendered Verheijen’s testimony ‘flawed.’”³²⁰ The transportation costs were “too speculative to be considered a special factor in valuing’ the gantries.”³²¹ The trial court determined “VIG failed to

311. *Id.* at 50, 834 S.E.2d at 237.

312. *Id.* at 50, 834 S.E.2d at 237.

313. *Id.* at 50, 834 S.E.2d at 237.

314. *Id.* at 50, 834 S.E.2d at 237.

315. *Id.* at 50–51, 834 S.E.2d at 238.

316. *Id.* at 51–52, 834 S.E.2d at 238.

317. *Id.* at 51–52, 834 S.E.2d at 238.

318. *Id.* at 52, 834 S.E.2d at 238.

319. *Id.* at 52, 834 S.E.2d at 238.

320. *Id.* at 52, 834 S.E.2d at 239.

321. *Id.* at 52, 834 S.E.2d at 238–39.

carry its burden of establishing that the City overvalued the personal property.”³²²

VIG appealed both the holding that an appraiser of real property must have an active Virginia appraisal license to testify as an expert, and that VIG failed to rebut the presumption that the City’s assessments were correct.³²³

a. Licensure and Qualification of Real Estate Appraisal Expert

Virginia Code section 54.1-2011(A) provides that it is “unlawful to engage in the appraisal of real estate or real property for compensation or valuable consideration in [Virginia] without first obtaining a real estate appraiser’s license.”³²⁴ The Supreme Court of Virginia went at length through the development of the state’s statutory scheme and precedents relating to unlicensed appraisal testimony.³²⁵ The court noted that the Virginia General Assembly in 1995 amended Virginia Code section 54.1-2010(B) to provide that “[n]othing contained herein shall proscribe the powers of a judge to determine who may qualify as an expert witness to testify in any legal proceeding. This provision is declarative of existing law.”³²⁶

However, the case of *Lee Gardens Arlington Ltd. Partnership v. Arlington County Board*, decided several months after the July 1, 1995 effective date of the amendment to section 54.1-2010(B), overlooked the amendment, leading to the misstatement of Virginia’s statutory law at the time it was decided.³²⁷

The Supreme Court of Virginia, in *Virginia International Gateway, Inc.*, noted that licensure status is not irrelevant, “remain[ing] an important consideration in assessing a prospective expert’s qualifications.”³²⁸ However, the Virginia Code stands for the proposition that “a trial court cannot refuse to qualify an otherwise appropriate expert solely for the lack of an active Virginia

322. *Id.* at 52, 834 S.E.2d at 238–39.

323. *Id.* at 52, 834 S.E.2d at 239.

324. *Id.* at 53, 834 S.E.2d at 239.

325. *Id.* at 53–56, 834 S.E.2d at 239–41.

326. *Id.* at 54, 834 S.E.2d at 239–40.

327. *Id.* at 54–55, 834 S.E.2d at 240 (citing *Lee Gardens Arlington Ltd. P’ship v. Arlington Cty. Bd.*, 250 Va. 534, 463 S.E.2d 646 (1995)).

328. *Id.* at 57, 834 S.E.2d at 241.

license at trial.”³²⁹ The supreme court found the trial court’s exclusion of Mr. Fandl’s testimony was an abuse of discretion, reversing and remanding the real property tax case.³³⁰ However, the court affirmed the trial court’s decision on the personal property case, holding it did not err in ruling that VIG failed to overcome the presumption of the personal property assessment’s correctness.³³¹

3. Another Taxpayer is Unable to Overcome Presumption of Correctness in Challenge to Its Real Property Tax Assessments—*Portsmouth 2175 Elmhurst, L.L.C. v. City of Portsmouth*

In this case, the Supreme Court of Virginia held that the trial court did not err in upholding the City of Portsmouth’s tax assessments because the taxpayer did not overcome the presumption of correctness attached to the mass appraisal and failed to show that the City’s mass appraisal, or the subsequent 2015 revised assessment, violated professional appraisal procedures and standards.³³² In *Portsmouth 2175 Elmhurst, L.L.C. v. City of Portsmouth*, the taxpayer (“Portsmouth 2175 Elmhurst”), purchased a former Smithfield Foods property consisting of approximately 12.5 acres and a 141,229 square foot building located in the City of Portsmouth for \$875,000 in 2013.³³³ Two years later, Portsmouth 2175 Elmhurst sold the property for \$575,000.³³⁴ The building had been vacant since 2012 when Smithfield Foods ceased operations in the plant.³³⁵ For two of the three tax years at issue, the City assessed the property at \$6,132,520 per year.³³⁶ However, following an administrative challenge before the City’s Board of Equalization, the 2015 tax assessment was reduced to \$3,768,160.³³⁷ Portsmouth 2175 Elmhurst paid a total of \$233,540.31 in taxes, storm water fees, penalties, interest, and attorney’s fees of \$36,477.34.³³⁸

329. *Id.* at 57, 834 S.E.2d at 241.

330. *Id.* at 58, 62, 834 S.E.2d at 242, 244.

331. *Id.* at 62, 834 S.E.2d at 244.

332. *Portsmouth 2175 Elmhurst, L.L.C. v. City of Portsmouth*, 298 Va. 310, 320–25, 333, 837 S.E.2d 504, 508–11, 514–15 (2020).

333. *Id.* at 316, 837 S.E.2d at 506.

334. *Id.* at 316, 837 S.E.2d at 506.

335. *Id.* at 316, 837 S.E.2d at 506.

336. *Id.* at 316, 837 S.E.2d at 506.

337. *Id.* at 316–18, 837 S.E.2d at 506–07.

338. *Id.* at 316, 837 S.E.2d at 506.

At trial, Portsmouth 2175 Elmhurst presented a prima facie case that the real property and former meat packing plant was valued in excess of fair market value in determining whether mass appraisal for real estate tax assessment conformed to generally accepted appraisal practices, procedures, rules, and standards or applicable Virginia law relating to valuation of property.³³⁹ Portsmouth 2175 Elmhurst presented testimony of a highly qualified expert to that effect, an exhaustive appraisal report, and evidence that the property had sold recently on two occasions, each time well below the City's assessed value.³⁴⁰ Additional evidence at trial showed the most recent purchaser demolished the building on the property, which the court noted was compelling evidence that "the building had outlived its useful life" ³⁴¹

The trial court issued a detailed memorandum opinion that upheld the City's assessments.³⁴² The court concluded that the property was assessed using proper techniques of mass appraisal based on the cost method approach to valuation.³⁴³ The trial court wrote that while the taxpayer's testimony and experts' opinions were in conflict with those of the City, at no point did the City violate any generally accepted appraisal practices, standards, rules, or Virginia laws.³⁴⁴

On appeal, the Supreme Court of Virginia stated that Virginia Code section 58.1-3984(B) establishes the method for challenging real property assessments.³⁴⁵ This provision establishes a presumption of correctness in favor of the locality.³⁴⁶ While establishing that the fair market value of the property is in excess of the assessment is one-half of the statutory showing required, a taxpayer still has the burden to establish the second element of section 58.1-3984(B), that the assessment "was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards . . . and applicable Virginia law relating to valuation of property."³⁴⁷ The supreme court noted that none of the

339. *Id.* at 324–25, 837 S.E.2d at 510–11.

340. *Id.* at 316, 324–25, 837 S.E.2d at 506, 510–11.

341. *Id.* at 316, 325, 837 S.E.2d at 506, 511.

342. *Id.* at 320, 837 S.E.2d at 508.

343. *Id.* at 320, 837 S.E.2d at 508.

344. *Id.* at 320, 837 S.E.2d at 508.

345. *Id.* at 320, 837 S.E.2d at 508.

346. *Id.* at 320, 837 S.E.2d at 508 (first citing VA. CODE ANN. § 58.1-3833(A)(1) (Cum. Supp. 2019); and then citing *id.* § 58.1-3840 (Repl. Vol. 2017)).

347. *Id.* at 320–21, 837 S.E.2d at 508 (quoting VA. CODE ANN. § 58.1-3984(B) (Repl. Vol.

live testimony presented at trial explained how the mass appraisal “was not arrived at in accordance with generally accepted appraisal practices.”³⁴⁸ While criticisms were made by the taxpayer’s appraisers regarding alleged specific violations of the Uniform Standards of Professional Appraisal Practice, none of these criticisms addressed what they believed to be flawed mass appraisal method violations.³⁴⁹ Accordingly, the supreme court affirmed the trial court’s decision and held it did not err in holding that Portsmouth 2175 Elmhurst did not meet its burden of overcoming the presumption of correctness attached to the mass appraisal.³⁵⁰

4. City of Richmond Misinterpreted Tax Amnesty Ordinance to Wrongfully Deny Property Owner Tax Exemption Credit

The Supreme Court of Virginia reversed two decisions by the Richmond City Circuit Court to grant the City of Richmond’s (the “City”) “motions to dismiss [the landowner’s] application for correction of erroneous assessment and complaint for declaratory judgment,” both dismissals relating to an interpretation of the City’s tax amnesty ordinance.³⁵¹ HRIP Miller & Rhoads Acquisition, L.L.C. (“HRIP”) owns a building located in the City.³⁵² “The City levies taxes on real estate annually on January 1.”³⁵³ Richmond City Code section 26-361(a) allows taxpayers to divide their real estate taxes into two installments, with the first payment due by January 14 and the second payment due by June 14.³⁵⁴

In 2017, HRIP was entitled to a tax exemption of “\$524,584.43 under the City’s Tax Abatement for Rehabilitated Real Estate Program.”³⁵⁵ “HRIP applied half of the tax exemption to the amount of real estate taxes it owed and timely paid the January 14th installment.”³⁵⁶ “The remaining installment, due on or before June 14th,

2017)).

348. *Id.* at 328, 837 S.E.2d at 512 (quoting VA. CODE ANN. § 58.1-3984(B) (Repl. Vol. 2017)).

349. *Id.* at 328–31, 837 S.E.2d at 512–14.

350. *Id.* at 330–31, 837 S.E.2d at 514.

351. HRIP Miller & Rhoads Acquisition L.L.C. v. City of Richmond, No. 190316, 2020 Va. LEXIS 6, at *1, *4 (Apr. 9, 2020) (Richmond City).

352. *Id.* at *1.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* at *1–2.

was \$72,580.50. HRIP failed to timely pay its second installment.”³⁵⁷ The City claimed that “HRIP’s failure to timely pay its June 14th installment forfeited the entire 2017 tax exemption credit of \$524,584.43, including the portion already applied to the January 14th installment.”³⁵⁸ HRIP then paid under protest all taxes, penalties, and interest it owed to the City.³⁵⁹

HRIP applied for relief under Richmond’s tax amnesty ordinance, City Code section 26-29, which was adopted in April 2017.³⁶⁰ The City found that “HRIP did not qualify for amnesty because the June 14th installment payment was not due prior to February 1st and was, therefore, not delinquent as of February 1st as required by the tax amnesty ordinance.”³⁶¹ HRIP initiated two “companion cases in the circuit court for an application for correction of erroneous assessments and a complaint for declaratory judgment. . . . The circuit court consolidated the cases”³⁶²

The circuit court held that “(1) HRIP forfeited the entire exemption for the 2017 tax year by failing to pay its real estate taxes by June 30” as required under City Code section 26-405(c); (2) the City’s tax amnesty program under City Code section 26-29 “did not provide tax amnesty for the untimely June installment;” and “(3) that the City appropriately limited the application of the Tax Amnesty Program”³⁶³

The Supreme Court of Virginia noted on HRIP’s appeal that City Code section 26-361(a) states that “[t]axes levied on real estate shall be due and payable on the first day of the tax year.”³⁶⁴ The court also pointed out that City Code section 26-29(b) establishes the amnesty program dates “for delinquent local taxes . . . owed as of February 1, 2017.”³⁶⁵ On appeal, the City argued there was no error by the court below because “the words ‘delinquent’ and ‘owed’ are both modified by ‘as of February 1, 2017.’”³⁶⁶ HRIP, however, contended that “‘as of February 1, 2017’ only modifies the word

357. *Id.* at *2.

358. *Id.* at *3.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at *3–4.

363. *Id.* at *4.

364. *Id.* at *4–5 (quoting RICHMOND CITY, VA., CODE § 20-361(a) (2020)).

365. *Id.* at *5 (quoting RICHMOND CITY, VA., CODE § 26-29(b) (2020)).

366. *Id.*

‘owed’” and that the circuit court’s “construction of the statute contravenes the rule of the last antecedent.”³⁶⁷ The Supreme Court of Virginia stated, “[u]nder [the] rule, referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.”³⁶⁸

The supreme court noted it could find “no evidence of a ‘contrary intention’ in the wording of the [tax amnesty] ordinance that would make this rule inapplicable.”³⁶⁹ “Because the phrase ‘as of February 1, 2017’ does not modify ‘delinquent,’ real estate taxes need not be delinquent as of that date to be eligible for tax amnesty under City Code [section] 26-29(b).”³⁷⁰ In this case, “HRIP’s June 14th installment was owed as of February 1st as taxes are levied and ‘due and payable’ on January 1st” under City Code section 26-361(a). “However, the installment was not delinquent until June 15, 2017.”³⁷¹ The supreme court held the “circuit court erred in finding that the 2017 tax amnesty program under City Code § 26-29(b) only applied to real estate taxes that were both ‘owed’ and ‘delinquent’ as of February 1, 2017.”³⁷² The court reversed the circuit court’s decisions to grant the two motions to dismiss and remanded the cases for further proceedings.³⁷³

C. *Significant Attorney General Opinion—An Institution of Higher Learning Exempt from Property Tax by Classification Loses Its Tax Exemption When Its Property Is Conveyed to a Single Member Limited Liability Company*

The Attorney General of Virginia was asked to render a formal opinion to the Commissioner of the Revenue of Virginia Beach on the issue of whether property owned by a single member limited liability company (“SMLLC”) is eligible for tax exemption by classification pursuant to Virginia Code section 58.1-3606(A)(4) “if the sole owner of the SMLLC is a non-profit corporation that operates

367. *Id.* (citing Va. Educ. Ass’n v. Davison, 294 Va. 109, 120, 803 S.E.2d 320, 325 (2017)).

368. *Id.* at *5–6 (quoting Butler v. Fairfax Cty. Sch. Bd., 291 Va. 32, 37, 780 S.E.2d 277, 280 (2015)).

369. *Id.* at *6.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at *6–7.

as an institution of learning.”³⁷⁴ The Virginia Beach Commissioner of the Revenue also asked whether “the receipts of the same SMLLC could be excluded from business, professional, and occupational license (BPOL) taxes pursuant to [Virginia Code section] 58.1-3703(C)(18).”³⁷⁵

Pursuant to Virginia Code section 58.1-3606, “property owned by ‘incorporated colleges or other institutions of learning not conducted for profit’ and used primarily for ‘literary, scientific or educational purposes or purposes incidental thereto’ generally is exempt from state and local taxation.”³⁷⁶ “Under Virginia law, a limited liability company (LLC) is a legal entity separate and distinct from its members.”³⁷⁷ The LLC “has the power to own property, and title to any property acquired in the name of the LLC vests in the LLC.”³⁷⁸ “This separate legal status exists even if there is only a single member of the LLC.”³⁷⁹ Accordingly, “title to property vested in an SMLLC is not owned by its member.”³⁸⁰ The Attorney General of Virginia opined

that property that is owned by an SMLLC that does not independently qualify as an “institution of learning not conducted for profit” is not eligible for the tax exemption by classification under [Virginia Code] section 58.1-3606(A)(4), notwithstanding that the sole owner of the SMLLC is a non-profit corporation operating as an institution of learning.³⁸¹

The second issue raised by the Virginia Beach Commissioner of the Revenue involved application of the BPOL exclusion from tax provided to certain nonprofit organizations by Virginia Code section 58.1-3703(C)(18).³⁸² The Attorney General of Virginia stated that

[u]nless the SMLLC itself qualifies as one of the types of “nonprofit organizations” [set out in Virginia Code section 58.1-3703(C)(18)], a

374. 2019 Op. Va. Att’y Gen. 67.

375. *Id.*

376. *Id.* (citing VA. CODE ANN. § 58.1-3606(A)(4) (Repl. Vol. 2017)).

377. *Id.* at 67–68 (citing *Hagan v. Adams Prop. Assocs.*, 253 Va. 217, 220, 482 S.E.2d 805, 807 (1997); *Jordan v. Commonwealth*, 36 Va. App. 270, 274, 549 S.E.2d 621, 622–23 (2001)).

378. *Id.* at 68 (citing VA. CODE ANN §§ 13.1-1009, -1021 (Repl. Vol. 2016)).

379. *Id.* (citing *Jeb Stuart Auction Servs., L.L.C. v. W. Am. Ins. Co.*, 122 F. Supp. 3d 479, 484 (W.D. Va. 2015)).

380. *Id.*

381. *Id.*

382. *Id.*

determination must be made as to whether all or a portion of its receipts, including gifts and contributions, are excluded from BPOL taxation by virtue of its relationship to its member.³⁸³

“Under federal and Virginia income tax laws, the income of a domestic SMLLC may be considered the same as the income of [the] owner.”³⁸⁴ “By default, domestic SMLLCs are characterized as ‘disregarded entities’ for federal income tax purposes.”³⁸⁵ The IRS notes such contributions made to a domestic SMLLC “will be treated as charitable contributions to the charitable organization.”³⁸⁶ The Attorney General stated that “[a]pplying a similar rationale to the BPOL tax exclusions, the receipts of a disregarded SMLLC should be treated as the receipts of its sole member and are excluded from BPOL tax to the extent permitted by [Virginia Code section] 58.1-3703(C)(18).”³⁸⁷

The Attorney General concluded by stating that whether and to what extent the receipts of a member organization qualify for exclusion from BPOL taxation under Virginia Code section 58.1-3703(C)(18) are determinations to be made by the Virginia Beach Commissioner of the Revenue.³⁸⁸

CONCLUSION

The 2020 session of the Virginia General Assembly reverted back to its recent trend of addressing mostly targeted and technical changes in the tax laws, with several important exceptions. First, the new statutes providing procedures for reporting federal adjustments to partnership taxable income is very important to implement Virginia’s legislative response to an entirely new federal statutory scheme to audit and assess taxes, penalties, and interest at the federal level. Without the Virginia General Assembly’s adoption of new rules, the Department of Taxation would be significantly handicapped in its ability to identify, quantify, assess, and

383. *Id.* at 69.

384. *Id.* (citing *Nahigian v. Juno-Loudoun, L.L.C.*, 677 F.3d 579, 591 n.8 (4th Cir. 2012)).

385. *Id.* (citing 26 C.F.R. § 301.7701-2, -3 (2019)).

386. *Id.* at 69–70.

387. *Id.* at 70. Note the Attorney General of Virginia stated, “[t]his would not be the case if the SMLLC elects to be classified as a corporation for federal income tax purposes or if the SMLLC does not meet the requirements set out in Internal Revenue Service Notice 2012-52, 2012-35 I.R.B. 317.” *Id.* at 70 n.14.

388. *Id.* at 71.

collect income tax due following federal income tax audit adjustments to income tax returns of partnerships. Also important are the number of new local tax provisions and credits to encourage investment and expansion of renewable energy sources from solar energy projects, as well as encouraging compliance with pollution control property tax exemptions.

The more dramatic taxation impacts, however, are from the continued and increased volume of judicial cases involving Virginia local taxes. Real property tax continues to be an area of dispute between landowners and local taxing jurisdictions. The 2012 amendments to Virginia Code section 58.1-3984(B) are finally receiving some consistent treatment by the courts as the Supreme Court of Virginia continues to weigh in and provide much needed guidance on what burdens a taxpayer must overcome to put forward a credible case when challenging a real property tax assessment. The *McKee*, *Virginia International Gateway*, and *Portsmouth 2175 Elmhurst* decisions of the supreme court provide significant and useful guidance that counsel for taxpayers need to understand before initiating a judicial challenge to a real property tax assessment. The taxpayer's counsel needs to conduct a fair amount of due diligence, fact finding, and analysis before filing his or her application to correct an erroneous tax assessment with the courts. The days of simply asserting that an assessment exceeds a property's fair market value to be successful in litigation are over. We believe that we will see more real property tax cases filed, as well as an increase in attention to business tangible personal property, and machinery and tools tax cases.