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Taxation

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TAXATION

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INTRODUCTION

This Article reviews significant recent developments in the laws affecting Virginia state and local taxation. Its Parts cover legislative activity, judicial decisions, and selected opinions and other pronouncements from the Virginia Department of Taxation ("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, and discrete local taxes.

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 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.

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I. TAXES ADMINISTERED BY THE TAX DEPARTMENT

A. *Significant Legislative Activity*

1. Judicial Appeals of State and Local Tax Cases

As a component of a significant expansion of the jurisdiction of the Court of Appeals of Virginia, the General Assembly provides that state and local tax cases that are litigated in Virginia Circuit Court may be appealed, by right, to the Court of Appeals of Virginia.[1] Under prior law, state and local tax cases litigated in Virginia Circuit Court can be appealed only to the Supreme Court of Virginia, where certiorari is required to be granted before an appeal will be considered. The current petition for appeal process continues to apply to any case for which a notice of appeal to the Supreme Court is filed prior to January 1, 2022,[2] and such appeal will not be affected by the provisions of this legislation.[3]

2. Waiver of Accrual of Interest During Emergency Enacted

The Virginia Legislature enacted a new subsection C to the Virginia Code section 58.1-112 that authorizes the Tax Commissioner to waive interest for any class of taxpayers when the Commissioner finds that imposing interest has caused, or would cause, undue hardship to such class of taxpayers because of a natural disaster or other reason.[4] The Tax Commissioner's authority to waive interest is limited to situations in which the Governor declares a state of emergency in the Commonwealth pursuant to subdivision (7) of Virginia Code section 44-146.17 with respect to such natural disaster or other reasons.[5] The legislation was enacted as emergency legislation, making it effective on April 7, 2021.[6]

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1. Act of Mar. 31, 2021, ch. 489, 2021 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-527, -1828, -2282, 58-3147, -3992 (Cum. Supp. 2021)).
2. *Id.* at __.
3. *Id.* at __.
4. Act of Apr. 7, 2021, ch. 536, 2021 Va. Acts __, __ (codified as amended at § 58.1-112(C) (Cum. Supp. 2021)).
5. *Id.* at __.
6. Act of Apr. 7, 2021, ch. 536, 2021 Va. Acts __, __ ("Be it enacted by the General Assembly of Virginia . . . [t]hat an emergency exists and this act is in force from its passage.").

3. Income Taxation

a. Conformity to the Internal Revenue Code

Consistent with its long-standing practice, the General Assembly amended Virginia Code section 58.1-301, which mandates conformity with the Internal Revenue Code ("IRC") as of a certain date, and moved the date from December 31, 2019 to December 31, 2020.[7] Although advancing the date of conformity, House Bill 1935 and Senate Bill 1146 left unchanged the previously adopted exceptions from the rule of conformity that are codified at section 58.1-301(B)(1)–(5).[8]

The General Assembly specifically deconformed from the provisions of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act and the Consolidated Appropriations Act, 2021 ("CAA").[9] The legislation specifically decouples from the CARES Act provisions temporarily changing the limitations applicable to excess business losses, the next operating loss deduction, and the business interest deduction.[10] The legislation also decouples from the CAA provision that permanently reduces the medical expense deduction threshold from 10% of adjusted gross income ("AGI") to 7.5% of AGI.[11]

What the amended conformity provisions do conform to is the federal tax exemption for Paycheck Protection Program ("PPP") loan forgiveness and Economic Injury Disaster Loan ("EIDL") program funding, but they deconform from the provisions of the CAA allowing deductions for business expenses funded by forgiven PPP loan and EIDL funding proceeds.[12] The effect of this decoupling provision is to permit taxpayers to claim the federal exemption from income for certain funding received under the EIDL program, but it does not permit a federal deduction for business expenses funded by the forgiven EIDL funding proceeds.

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7. Acts of Mar. 15, 2021, chs. 117 & 118, 2021 Va. Acts __, __ & __, __ (codified as amended at § 58.1-301 (Cum. Supp. 2021)).

8. H.B. 1935 & S.B. 1146 Va. Gen. Assembly (Spec. Sess. I 2021) (enacted as chs. 117 & 118, 2021 Va. Acts at __); § 58.1-301(B)(1)–(5) (Cum. Supp. 2021).

9. § 58.1-301 (Cum. Supp. 2021); CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020); CAA, Pub. L. No. 116-260, 134 Stat. __ (Dec. 27, 2020).

10. § 58.1-301(B)(7)(9) (Cum. Supp. 2021).

11. *Id.* § 58.1-301(B)(6) (Cum. Supp. 2021).

12. *See id.* § 58.1-301(B)(10) (Cum. Supp. 2021); Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, 134 Stat. 641; RISE After Disaster Act of 2015, Pub. L. No. 114-88, 129 Stat. 686.

Lastly, the new conformity legislation provides an individual and corporate income tax subtraction for taxable year 2020 for "up to $100,000 of all grant funds received by the taxpayer under the Rebuild Virginia program."[13] The conformity legislation was passed with an emergency clause that permits the legislation to become effective on March 15, 2021, the date of enactment of the law.[14]

b. Feasibility Study of Adopting Unitary Combined Reporting

The General Assembly passed House Joint Resolution Number 563 that directs the Division of Legislative Services, in conjunction with the Department of Taxation, to establish a work group to assess the feasibility of transitioning to a unitary combined reporting system for corporate income tax purposes.[15] House Joint Resolution 563 noted that twenty-nine out of the forty-four states that have a corporate income tax have adopted unitary combined reporting to treat multistate members and operations of a unitary business enterprise as if they were a single company in the determination of the amount of corporate tax liability under that state's corporate income tax.[16] Thirteen of these twenty-nine states changed to unitary combined reporting in the last fifteen years.[17] Virginia is one of the twenty states that treat each corporation as a separate taxpayer in the determination of corporate tax liability.[18] The resolution also stated that changing to a unitary combined tax filing will affect corporations differently.[19]

Given the wide variances that exist among different industries when determining state corporate tax liability and filing options, the Joint Resolution directs the working group to assess the following areas with respect to Virginia potentially adopting unitary combined reporting:

1. administration feasibility;
2. impact on major classifications of corporations operating in Virginia;

13. §§ 58.1-322.02 (30), -322.03(17), -402(H) (Cum. Supp. 2021).
14. Act of Mar. 15, 2021, ch. 118, 2021 Va. Acts __, __ (codified as amended at § 58.1-301 (Cum. Supp. 2021)).
15. H.J. Res. 563, Va. Gen. Assembly (Spec. Sess. I 2021).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

3. impact on corporate expansion within and into Virginia; and
4. projected impact on Virginia's tax revenue.[20]

The work group is directed to submit a summary of its findings, recommendations, and a draft of any recommended legislation to the Chairmen of the House Committee on Finance and the Senate Committee on Finance and Appropriations no later than November 1, 2021.[21]

c. Study to Increase the Progressivity of Virginia's Individual Income Tax System

The Virginia Legislature also approved House Joint Resolution 567 that requires the Joint Legislative Audit and Review Commission ("JLARC") to study increasing the progressivity of Virginia's individual income tax system.[22] The resolution directs JLARC to evaluate the fiscal impact of amendments to tax brackets, tax rates, credits, deductions, and exemptions, as well as any other factors it deems relevant to making Virginia's individual income tax system more progressive and fair in response to economic dynamics.[23] The resolution requires JLARC to recommend whether the General Assembly should amend the Virginia Code or administrative regulations of the Department of Taxation and to make any other appropriate recommendations by November 30, 2022.[24]

4. Tax Credits

a. Research and Development Credits Expanded to Bank Franchise Tax

The General Assembly adopted legislation to permit taxpayers subject to the bank franchise tax to claim the Research and Development Expenses Tax Credit and the Major Research and

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20. *Id.*

21. *Id.* To support the study required by H.J. Resolution 563, Section 3-5.23 of the 2021 Appropriates Act, Acts of Apr. 7, 2021, ch. 552, 2021 Va. Acts __, __ requires corporations that are members of a unitary business to file a corporate income tax report for the unitary combined group containing the unitary combined net income of such group. The report is to be based on Taxable Year 2019 computations and must include, at a minimum, the difference in tax owed as a result of filing a unitary combined report compared to the tax owed under the corporation's current filing results. *Id.* This "pro forma" return is required to be submitted to the Tax Department on or before July 1, 2021. *Id.*

22. H.J. Res. 567, Va. Gen. Assembly (Spec. Sess. I. 2021).

23. *Id.*

24. *Id.*

Development Expenses Tax Credit.[25] Prior to the adoption of this legislation, these two tax credits could be claimed only against the individual and corporate income tax.[26]

b. Virginia Coal Tax Credits Sunsetted

The General Assembly enacted a January 1, 2022, sunset date for the coal employment and production incentive tax credit and the coalfield employment enhancement tax credit.[27] This legislation repealed the Coalfield Employment Tax Credit, the Virginia Coal Employment and Production Incentive Tax Credit that may be claimed against the corporate income tax,[28] and the Virginia Coal Employment and Production Incentive Tax Credit that may be claimed against the public service corporation's license tax.[29]

Taxpayers that earned Virginia Coal Employment and Production Incentive Tax Credits that may be claimed against the corporate income tax prior to the repeal are permitted to claim such credits pursuant to the applicable carryover period.[30] This legislation limits the amount of such credits that a taxpayer may claim per taxable year pursuant to the applicable carryover or carryforward periods, in the aggregate, to one million dollars.[31] No taxpayer is permitted to amend a tax return for a taxable year prior to January 1, 2022, to claim more of such credits than the taxpayer claimed on their return before such amendment.[32]

c. Enhanced Credit for Agricultural Best Management Practices

The Legislature amended the Virginia Agricultural Best Management Practices Tax Credit to increase the amount that may be claimed and to provide an enhanced Agricultural Best Management Practices Tax Credit for certain taxpayers with an approved

25. Acts of Mar. 11, 2021, chs. 47 & 48, 2021 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. §§ 58.1-439.12:08(B)(1)–(B)(2), -439.12.11(B)(1)–(B)(2) (Cum. Supp. 2021)).

26. §§ 58.1-439.12:08, -439.12:11 (Cum. Supp. 2020).

27. Acts of Apr. 15, 2021, chs. 553 & 554, 2021 Va. Acts __, __ & 2021 Va. Acts __, __ (codified as amended at §§ 58.1-433.1, -439.2, -2626.1 (Cum. Supp. 2021)).

28. §§ 58.1-433.1, -439.2 (Cum. Supp. 2021).

29. *Id.* § 58.1-2626.1 (Cum. Supp. 2021).

30. *Id.* §§ 58.1-433.1(C), -439.2(B) (Cum. Supp. 2021).

31. *Id.* § 58.1-433.1(C) (Cum. Supp. 2021).

32. *Id.*

resource management plan.[33] Virginia has two main agricultural best management practice programs, both of which are designed to improve or maintain water quality in the state's streams, lakes, and bays. These two programs are the Agricultural Best Management Practices Cost-Share[34] and the Agricultural Best Management Practices Tax Credit.[35]

Prior to the new legislation, the agricultural best management tax credit was a refundable tax credit in an amount equal to 25% of the first $70,000 expended for agricultural best management practices to reduce nonpoint source pollutants by an individual who has in place a soil conservation plan approved by the local Soil and Water Conservation District ("SWCD").[36] The new legislation amends this tax credit to increase it to 50% of the first $100,000 expended for agricultural best management practices.[37]

A similar enhanced credit under the new legislation is available to a corporation engaged in agricultural production for market, or that has equines that create needs for agricultural best management practices to reduce nonpoint source pollutants, and has in place a resource management plan approved by the local SWCD is now allowed a refundable credit in an amount equal to 50% of the first $100,000 expended for agricultural best management practices implemented by a corporation on the acreage included in the resource management plan.[38]

The new legislation has a sunset date of January 1, 2025, which applies both to the existing Agricultural Best Management Practices Tax Credit and to the enhanced Agricultural Best Management Practices Tax Credit.[39] The legislation also imposes an annual credit cap of two million dollars per fiscal year.[40]

33. Act of Mar. 11, 2021, ch. 40, 2021 Va. Acts __, __ (codified as amended at § 58.1-339.3 (Cum. Supp. 2021)).
34. § 58.1-339.3 (Cum. Supp. 2021).
35. *Id.* § 58.1-439.5 (Cum. Supp. 2021).
36. *Id.* § 58.1-339.3 (Cum. Supp. 2021).
37. *Id.* § 58.1-339.3(A) (Cum. Supp. 2021).
38. *Id.* § 58.1-439.5(A) (Cum. Supp. 2021).
39. *Id.* §§ 58.1-339.3(A)(3), -439.5(A)(3) (Cum. Supp. 2021).
40. *Id.* § 58.1-439.5(C)(1) (Cum. Supp. 2021).

d. Refundable Credit Enacted for Conservation Tillage and Precision Agricultural Equipment

The General Assembly enacted Virginia Code sections 58.1-337 and 58.1-436, creating a new refundable individual and corporate income tax credit for 25% of expenditures for the purchase of conservation tillage and precision agriculture equipment certified by the Virginia Soil and Water Conservation Board as reducing soil compaction or improving the precision of pesticide and fertilizer application or injection.[41] The legislation lists, as an example of equipment that reduces soil compaction, a "no-till" planter, drill, or other equipment, or equipment that provides more precise pesticide and fertilizer application or injection.[42] The maximum amount of the credit is $17,500 per taxable year.[43] There is no annual cap on the amount of credit available each taxable year.[44] This new credit is available for taxable years 2021 through 2025.[45] The former agricultural equipment nonrefundable tax credit expires for taxable years after taxable year 2020.[46]

5. Sales and Use Taxation

a. Temporary Sales and Use Tax Exemption Enacted for Personal Protective Equipment

The Legislature enacted Virginia Code section 58.1-609.14 to create an exemption from Virginia's Retail Sales and Use Tax Act for the purchase of personal protective equipment ("PPE").[47]

The exemption is available to any business that has in place a COVID-19 safety protocol that complies with the Emergency Temporary Standard promulgated by the Virginia Department of Labor and Industry and that meets the following criteria:

> 1. Reasonably prevent the spread of COVID-19;
> 2. Comply with all applicable federal, state, and local laws;
> 3. Are consistent with best practices for infection prevention and workplace hygiene;

41. Act of Mar. 18, 2021, ch. 272, 2021 Va. Acts __, __ (codified as amended at §§ 58.1-337, 58.1-436 (Cum. Supp. 2021)).

42. §§ 58.1-337(A)(1), -436(A)(1) (Cum. Supp. 2021).

43. *Id.* §§ 58.1-337(A)(3), -436(A)(3) (Cum. Supp. 2021).

44. *Id.*

45. *Id.* §§ 58.1-337(A)(1), -436(A)(1) (Cum. Supp. 2021).

46. *Id.* §§ 58.1-337(B)(1), -436(B)(1) (Cum. Supp. 2021).

47. Acts of Mar. 11, 2021, chs. 55 & 56, __, __ & __, __ (codified as § 58.1-609.14 (Cum. Supp. 2021)).

4. Promote remote work to the fullest extent possible, including increasing the number of telework-eligible employees; and

5. Implement enhanced cleaning, screening, testing, and contact tracing procedures and any additional infection-control measures that are reasonable in light of the work performed at the worksite and the rate of infection in the surrounding community.[48]

For purposes of the exemption, "'personal protective equipment'" means only the following:

1. Disinfecting products approved for use against SARS-CoV-2 and COVID-19;

2. Coveralls, full body suits, gowns, and vests;

3. Engineering controls such as substitution, isolation, ventilation, and equipment modification to reduce exposure to SARS-CoV-2 and COVID-19 disease-related workplace hazards and job tasks; engineering controls also include UVC sanitation equipment, indoor air quality equipment such as ionization, HEPA filtration, and physical barriers;

4. Face coverings, face shields, and filtering facepiece respirators;

5. Gloves;

6. Hand sanitizer;

7. Hand-washing facilities;

8. HVAC, testing, and physical modifications to comply with the American National Standards Institute (ANSI)/American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standards 62.1 and 62.2 (ASHRAE 2019a, 2019b);

9. Medical and nonmedical masks;

10. Physical barriers and electronic sensors or systems designed to maintain or monitor physical distancing of employees from other employees, other persons, and the general public, including acrylic sneeze guards, permanent or temporary walls, electronic employee monitors, and proximity sensors in employee badges;

11. Respiratory protection equipment;

12. Safety glasses;

13. Signs related to COVID-19;

48. § 58.1-609.14(A) (Cum. Supp. 2021).

14. Temperature-checking devices and monitors, and
15. Testing and related equipment related to COVID-19.[49]

"No exemption [is] allowed . . . for a purchase by a qualifying business for other than business use."[50]

> "Other than business use" means, with respect to the purchased item or service, that . . . the business uses the purchased item or service more than 50% of the time for nonbusiness purposes, or . . . the business transfers a purchased item to a person other than the business or transfers the use of a purchased service to a person other than the business.[51]

If the Department of Taxation receives information that a business has made a tax-exempt purchase for PPE and used the purchase for other than business use, the Tax Department must notify the business, and the business would be required to remit the tax due on the purchase, plus a penalty of 10% of the tax due and interest accruing from the date of purchase.[52] The Tax Department must also notify the business that its qualification for the exemption is revoked if it receives information that a business is not following its COVID-19 safety protocols.[53] The PPE exemption expires on the first day following the expiration of the last executive order issued by Virginia's Governor related to the COVID-19 pandemic and the termination of the COVID-19 Emergency Temporary Standard and any permanent COVID-19 regulations adopted by the Virginia Safety and Health Codes Board.[54] The legislation included an emergency clause making the temporary exemption effective as of March 11, 2021.[55]

b. Sales and Use Tax Exemption for Data Centers Amended

The Virginia Legislature made a number of changes to the sales and use tax exemption for data centers.[56] The legislation reduces the new job creation requirement for any data center located in a distressed locality from twenty-five jobs to ten jobs in order to

49. *Id.*
50. *Id.* § 58.1-609.14(B) (Cum. Supp. 2021).
51. *Id.* § 58.1-609.14(A) (Cum. Supp. 2021).
52. *Id.* § 58.1-609.14(C)(1) (Cum. Supp. 2021).
53. *Id.* § 58.1-609.14(C)(2) (Cum. Supp. 2021).
54. *Id.* § 58.1-609.14(D)(4) (Cum. Supp. 2021).
55. *Id.* § 58.1-609.14(D)(5) (Cum. Supp. 2021).
56. Acts of Mar. 25, 2021, chs. 367, 368, 2021 Va. Acts __, __ & __, __ (codified as amended at § 58.1-609.3(18)(a), (b), (c) (Cum. Supp. 2021)).

qualify for the sales and use exemption for data centers.[57] The amended exemption also reduced the requirement of a $150 million capital investment to $70 million for data centers that qualify for the reduced jobs requirement.[58]

The legislation modifies the definition of "distressed locality" to include:

1. From July 1, 2021, until July 1, 2023, any locality that had (i) an annual unemployment rate for calendar year 2019 that was greater than the final statewide average unemployment rate for that calendar year and (ii) a poverty rate for calendar year 2019 that exceeded the statewide average poverty rate for that year;[59] and
2. From and after July 1, 2023, any locality that has (i) an annual unemployment rate for the most recent calendar year for which such data is available that is greater than the final statewide average unemployment rate for that calendar year and (ii) a poverty rate for the most recent calendar year for which such data is available that exceeds the statewide average poverty rate for that year.[60]

The distressed locality must meet both of the criteria at the time of the execution of the memorandum of understanding signed with the Virginia Economic Development Partnership ("VEDP").[61] The legislation also clarifies that the exemption includes any data center facilities located in the same locality as the data center that are under common ownership or affiliation of the data center operator.[62]

c. Sales and Use Taxes and Transient Occupancy Taxes on Accommodations to be on Total Charges Where the Intermediary Facilitates Accommodations

Beginning September 1, 2021, the retail sales and use tax and transient occupancy taxes on accommodations must be computed upon the basis of the total charges or the total price paid for use or

57. § 58.1-609.3(18)(a) (Cum. Supp. 2021).
58. *Id.*
59. *Id.* § 58.1-609.3(18)(b)(1) (Cum. Supp. 2021).
60. *Id.* § 58.1-609.3(18)(b)(2) (Cum. Supp. 2021).
61. *Id.* § 58.1-609.3(18)(a) (Cum. Supp. 2021).
62. *Id.*

possession of the room.[63] Where an accommodations provider contracts with an intermediary to facilitate the sale of accommodations and the intermediary charges the customer for the room and also an accommodations fee, the intermediary is deemed the dealer for the transaction and is required to separately state the taxes on the bill or invoice and to collect the taxes on the entire amount paid for the use or possession of the room.[64]

When the accommodations are at a hotel, the accommodations intermediary must remit the taxes collected on the accommodations fee to the Department of Taxation or locality, as applicable, and any remaining tax to the hotel, which the hotel would then be required to remit to the Tax Department or locality, as applicable.[65] If the accommodations are not a hotel, the accommodations intermediary must remit the sales tax collected on the entire amount of the transaction to the Tax Department and the occupancy tax collected to the locality.[66]

The legislation defines an "accommodations intermediary" to include "any person other than an accommodations provider that facilitates the sales of an accommodation, charges a room charge to the customer," and retains such fee as compensation for facilitating the sale.[67] An accommodation intermediary does not include a person (1) where the intermediary owns the trademark or tradename under which the accommodations provider is operating, or (2) where the price paid by the customer to such person is equal to the price paid by the facilitator to the accommodation received by the facilitator is a commission to the facilitator from the accommodations provider.[68]

63. Act of Mar. 25, 2021, ch. 383, 2021 Va. Acts __, __ (codified as amended at §§ 58.1-602, -603, -612.2, -3818.8, -3819, -3819.1, -3823, -3824, -3825, -3825.2, -3825.3, -3826, -3842, -3843) (Cum. Supp. 2021)).

64. § 58.1-612.2(A), (E) (Cum. Supp. 2021).

65. *Id.* § 58.1-612.2(B) (Cum. Supp. 2021).

66. *Id.*

67. *Id.* § 58.1-602 (Cum. Supp. 2021).

68. *Id.*

B. *Significant Attorney General Opinion—Authority of Department of Taxation to Adopt a Pro-Rata Methodology for Calculating the Amount of a Retirement Plan Distribution that Represents a Taxpayer's Contributions for Purposes of Virginia Code Section 58.1-322.02(11) Subtraction*

The Attorney General of Virginia was asked to render a formal opinion to State Senator R. Creigh Deeds on the authority under state law of the Department of Taxation to adopt a pro-rata methodology for calculating the amount of a retirement plan distribution that represents the taxpayer's contributions to the retirement plan for purposes of the subtraction from Virginia taxable income as provided in Virginia Code section 58.1-322.02(11).[69]

If a taxpayer's federal adjusted gross income includes certain retirement plan distributions, Virginia Code section 58.1-322.02(11) authorizes a subtraction to compute Virginia taxable income for the contributions to which were deductible from the taxpayer's federal gross income, but only to the extent the contributions to the retirement plan or program were subject to taxation under the income tax in another state.[70] "Section 58.1-322.02(11) does not [provide] the specific methodology to be used to calculate which portion of a plan distribution represents a taxpayer's contribution to the plan (which may be subtracted), and which portion represents income generated by those contributions (which may not be subtracted)."[71]

The Attorney General noted that the Tax Department adopted a pro-rata approach to determine which portion of a retirement plan distribution represents contributions to the plan, and which portions represent taxable earnings.[72] The Tax Department's approach follows the methodology prescribed by IRC section 72 to determine what portion of an annuity represents a taxpayer's nontaxable recovery of their investment in such annuity contract, and what portion of the payment represents taxable income.[73]

Although section 58.1-322.02(11) does not specify the methodology to be used by the Tax Department, the Attorney General noted that the State Tax Commissioner and the Department of Taxation

69. 19-058 Op. Va. Att'y Gen. 1 (2020).
70. *Id.* at 1–2 (citing § 58.1-322.02(11) (Cum. Supp. 2020)).
71. *Id.* at 2.
72. *Id.*
73. *Id.* (citing 26 U.S.C. § 72).

supervise administration of Virginia's tax laws.[74] The Virginia Attorney General held that absent a statutory directive requiring or prohibiting the use of a specific methodology, the Department of Taxation is vested with discretion to determine how to calculate the subtraction authorized by section 58.1-322.02(11) of the Virginia Code.[75] The Attorney General concluded that the Tax Department has the discretion under Virginia law to adopt a pro-rata methodology to calculate the amount of a retirement plan distribution that may be subtracted from Virginia taxable income pursuant to section 58.1-322.02(11).[76]

II. TAXES ADMINISTERED BY LOCALITIES

A. *Significant Legislative Activity*

1. State and Local Property Tax Exemption Enacted and Revenue Shares for Energy Storage Systems

The General Assembly enacted legislation to provide that energy storage systems are exempt from state and local property tax because they are not included in the definition of certified pollution control equipment and facilities.[77] For purposes of the exemption, "energy storage system" is defined as equipment, facilities, or devices that are capable of absorbing energy, storing it for a period of time, and redelivering that energy after it has been stored.[78] The exemption only applies to certain projects with alternating current ("AC") storage capacity of more than 5 megawatts and less than 150 megawatts.[79] The exemption will not apply unless an application has been filed with the locality for the project before July 1, 2030, regardless of whether a locality assesses a revenue share on such project.[80] If the locality adopts an energy revenue share, the exemption for energy storage systems greater than five megawatts is 100% of the assessed value.[81] If the locality does not adopt an energy revenue share, the exemption for energy storage systems

74. *Id.* (citing VA. CODE ANN. § 58.1-202(1) (Cum. Supp. 2020)).
75. *Id.*
76. *Id.* at 3.
77. Acts of Mar. 11, 2021, chs. 49 & 50, 2021 Va. Acts __, __ & __, __ (codified as amended at §§ 58.1-2600, -2628, -2636 & -3660) (Cum. Supp. 2021)).
78. § 58.1-3660(B) (Cum. Supp. 2021).
79. *Id.* § 58.1-3660(D), (G) (Cum. Supp. 2021).
80. *Id.*
81. *Id.* § 58.1-3660(H) (Cum. Supp. 2021).

greater than five megawatts is as follows: 80% of the assessed value in the first five years of service, 70% of the assessed value in the second five years of service, and 60% of the assessed value in the remaining years in service.[82]

Lastly, this legislation permits a locality to assess a revenue share of up to $1400 per megawatt of AC storage capacity on energy storage systems and increase the revenue share by 10% on solar and energy storage systems beginning on July 1, 2026, and every five years thereafter for projects approved by the locality on or after January 1, 2021.[83]

2. Sunset Date Extended for Certain Local Gas Severance Taxes

The General Assembly extended the sunset date from January 1, 2022, to January 1, 2024, for the local gas severance tax that is dedicated to (a) the local Coal and Gas Road Improvement Fund; (b) the Virginia Coalfield Economic Development Fund; and (c) water, sewer, and natural gas systems and lines.[84] Prior to this legislation, the local gas severance tax may not be imposed on or after January 1, 2022.[85]

B. *Significant Advisory Opinion by the State Tax Commissioner on PPP Loans and the BPOL Tax*

The U.S. Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act on March 27, 2020.[86] One of the components of the CARES Act is the creation of a loan program commonly known as the Paycheck Protection Program ("PPP") which is administered by the federal Small Business Administration ("SBA"). Under certain circumstances, borrowers of PPP loans may apply for and qualify for full or partial loan forgiveness under the CARES Act. A representative of a Virginia city asked the State Tax Commissioner for an advisory opinion on whether the portion of any PPP loan that is forgiven by the SBA should be included in a

82. *Id.* § 58.1-3660(G) (Cum. Supp. 2021).

83. *Id.* § 58.1-2636(A) (Cum. Supp. 2021).

84. Act of Mar. 30, 2021, ch. 430, 2021 Va. Acts __, __ (codified as amended at § 58.1-3713 (Cum. Supp. 2021)).

85. § 58.1-3713 (Cum. Supp. 2020).

86. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

taxpayer's gross receipts for purposes of the business, professional, and occupational license ("BPOL") tax.[87]

The Tax Commissioner stated in this advisory opinion that loan proceeds are not considered to be income for federal income tax purposes because they have to be paid back. However, income from the discharge of indebtedness is considered gross income for federal income tax purposes.[88] The CARES Act created an exclusion from gross income for loans forgiven under the PPP. The Tax Commissioner also stated that you must look at the applicable BPOL statutes and regulations because the BPOL tax is a separate and distinct tax from income tax.[89]

Virginia Code section 58.1-3732(A)(4) excludes receipts which are the proceeds of a loan transaction in which the licensee is the obligator.[90] While this statute does not cover scenarios in which some part of a loan may be forgiven, the Tax Commissioner advised that a forgiven loan does not change the character of the funds as proceeds of a loan transaction. Additionally, there is an exclusion for loan proceeds that are not derived from the exercise of the licensed privilege to engage in a business or profession in the ordinary course of business.[91]

Accordingly, the State Tax Commissioner opined that loan proceeds paid out under the Paycheck Protection Program are not gross receipts for purposes of the BPOL tax, regardless of whether some part or all of such loans are forgivable or not.[92]

C. *Significant Judicial Decisions*

1. Supreme Court of Virginia Rules Transient Occupancy Tax Applies to Home Rentals

For Virginia Transient Occupancy Tax ("TOT") purposes, the Supreme Court of Virginia upheld the Fairfax County Circuit Court decision that dismissed a case brought by a group of homeowners who use online platforms to make short-term rentals of their

87. VA. DEP'T OF TAX'N, PUB. DOC. 21-12 (2021), https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/21-12 [https://perma.cc/RD8C-5TKD].

88. *Id*.

89. *Id.*

90. *Id.*

91. *Id.* (citing VA. CODE ANN. § 58.1-3732(A)(4) (Repl. Vol. 2017)).

92. *Id.*

homes and challenged the county's assessments of the TOT to their rental income.[93] In this proceeding, a group of taxpayers owned and possessed homes in Fairfax County, and through various online marketplace platforms the taxpayers rented out their individual homes for short periods of time.[94] In March 2018, the Board of Supervisors adopted a resolution that short-term lodging uses typically referred to as the rental or occupancy of a dwelling portion or portion of a dwelling for transient occupancy of fewer than thirty days.[95] In addition to other changes, the Board of Supervisors made amendments to its ordinances that imposed requirements on short-term lodging providers to pay fees, obtain permits, keep guest records, allow reasonable inspections and comply with building costs. The County also imposed a transient occupancy tax of 2% on the cost of the short-term lodging.[96]

While a good portion of the case focused on zoning matters, the taxpayers also argued the imposition of the TOT was not authorized by the Virginia Code.[97] The trial court rejected the taxpayers' argument that the board of supervisors did not have the authority to impose the TOT.[98] Specifically, the taxpayers' argument attempted to differentiate between hotels, motels, and boarding houses and their short-term renting. The taxpayers argued that since their properties did not qualify as a hotel, motel, or boarding house, the board was not authorized to impose the TOT tax on its properties.[99]

The Supreme Court of Virginia looked at the Virginia Code section 58.1-3819(A), in particular that portion of the statute authorizing any county, by duly adopted ordinance, to levy a transient occupancy tax on hotels, motels, boarding houses, travel campgrounds, and other facilities offering guest rooms rented for continuous occupancy for fewer than thirty consecutive days. The Court notes that this language does not describe a type of property (i.e., commercial vs. residential). Rather, it describes the manner in which the property is used.[100] The Court states it is undisputed

93. Norton v. Bd. of Supervisors of Fairfax Cnty., __ Va. __, __, 858 S.E.2d 170, 171, 176 (2021).
94. *Id.* at __, 858 S.E.2d at 172.
95. *Id.* at __, 858 S.E.2d at 172.
96. *Id.* at __, 858 S.E.2d at 172.
97. *Id.* at __, 858 S.E.2d at 172–73.
98. *Id.* at __, 858 S.E.2d at 173.
99. *Id.* at __, 858 S.E.2d at 174–75.
100. *Id.* at __, 858 S.E.2d at 176.

that the taxpayers use their properties in the same manner as hotels, motels, etc., albeit to a lesser degree. The Court highlighted the trial court's express finding on this subject stating:

> While the level of ancillary services provided such as maid service, food service and other amenities varies greatly between these types of accommodations, they all provide a place for people to stay where they can live and sleep. The [taxpayers'] residences likewise are offered as an accommodation to people requiring a place to conduct those same activities of daily living, and thus the term "other facilities" is property construed to include them.[101]

The Court stated that while the properties are clearly distinguishable from hotels, motels, boarding houses and travel campgrounds in many respects, those distinctions are irrelevant in determining whether Virginia Code section 58.1-3819(A) allows a locality to levy a transient occupancy tax on those properties.[102] The Court concluded the trial court did not err in dismissing the taxpayers' challenge to the TOT ordinance amendment, affirming the judgment.[103]

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

The Norfolk City Circuit Court held that the Internet Tax Freedom Act ("ITFA") proscribes the City of Norfolk's BPOL tax as applied to the gross receipts associated with Cox Communications Hampton Roads, L.L.C. ("Cox") internet access services, unless the BPOL tax falls within the ITFA's grandfather clause or is otherwise grandfathered by the ITFA.[104] The circuit court did not address in this opinion which party had the burden of proving whether Norfolk's BPOL tax has been grandfathered by the ITFA as the court addressed the substantive tax issues on cross motions for partial summary judgment.[105]

Cox has a Norfolk business license and provides a number of services, including internet access services, to its Norfolk customers.[106] Norfolk imposed the BPOL gross receipts tax, and Cox paid

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101. *Id.* at __, 858 S.E.2d at 176.
102. *Id.* at __, 858 S.E.2d at 176.
103. *Id.* at __, 858 S.E.2d at 176.
104. Cox Commc'ns Hampton Rds., L.L.C. v. Poston, 105 Va. Cir. 450, 450 (2020) (Norfolk County).
105. *Id.* at 450–51.
106. *Id.* at 451.

the BPOL tax on its total gross receipts in 2013, 2014, and 2015.[107] Cox subsequently filed a refund claim with the Norfolk Commissioner of the Revenue with respect to the receipts Cox received that were applicable to its charges for internet access, a refund amount that totaled $325,683.[108] The Commissioner of the Revenue denied the refund claim filed by Cox.[109] When the 2016 BPOL tax year arrived, Cox did not pay the BPOL tax associated with its internet access fees, claiming again that the ITFA prohibits the BPOL tax on its internet access services.[110] The Commissioner of the Revenue responded with an additional assessment for $128,374, plus penalties and interest.[111]

Cox administratively appealed the Commissioner of the Revenue's two rulings to the State Tax Commissioner, who agreed with Cox that the ITFA applies to, and therefore prohibits, the BPOL tax on gross receipts from internet access services.[112] The State Tax Commissioner also concluded that the burden rests with Norfolk to prove it qualified for exemption under the ITFA's grandfather provisions.[113] The State Tax Commissioner was not able to reach a resolution on the burden shifting caused by the ITFA, which he found to be incompatible with Virginia's administrative appeals process for state and local taxes.[114] As a result, the State Tax Commissioner did not issue a correction allowing Norfolk's tax assessments to stand.[115]

Both Cox and Norfolk filed petitions with the Norfolk Circuit Court which consolidated the cases into a single action.[116]

Both parties argued what weight, if any, the State Tax Commissioner's determination should be given.[117] Cox argued the State Tax Commissioner's ruling regarding application of the ITFA to the BPOL tax should be given weight, but also acknowledged the trial court is not bound by the State Tax Commissioner's ruling.[118]

107. *Id.* at 451.
108. *Id.* at 451.
109. *Id.* at 451.
110. *Id.* at 451.
111. *Id.* at 451.
112. *Id.* at 451–52.
113. *Id.* at 452.
114. *Id.* at 452.
115. *Id.* at 452.
116. *Id.* at 452.
117. *Id.* at 452, 455.
118. *Id.* at 455.

The City argued the court should not give any weight or deference to the ruling.[119] The court noted that the State Tax Commissioner's interpretation of an ambiguous tax statute should receive great weight. However, if the tax statute is not ambiguous, the trial court concluded it shall afford no weight to the State Tax Commissioner's interpretation.[120]

On the substantive tax issues, Cox argued that the BPOL tax is a "tax" as defined by the ITFA.[121] The ITFA defines a tax as "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes and . . . not [for] a fee imposed for a specific privilege, service, or benefit conferred."[122] The City conceded that the BPOL tax is a charge that Norfolk imposes to generate revenue for governmental purposes.[123] Norfolk argued that its BPOL tax is also a fee imposed for a specific privilege and, therefore, is more akin to classification as a fee under the federal statute.[124] A fee imposed on a business is a charge imposed for a specific privilege, service, or benefit conferred.[125] The trial court concluded that the BPOL tax is a tax under the ITFA, and not a fee.[126] Following the analysis of the Supreme Court of Virginia in *Dulles Duty Free, L.L.C. v. County of Loudoun*,[127] the court concluded that the BPOL tax is based on a percentage of gross receipts, so it is a tax on the goods themselves and not a tax placed on the privilege to engage in business activity.[128] The BPOL tax, by measuring business activity via gross receipts, acts as a tax directly on the services that generate those receipts. Cox is an internet access provider, and the City applied its BPOL Tax to the gross receipts related to Cox's provision of internet services.[129]

The circuit court, however, would not address the issue of which party bears the burden of proof on the application of whether Norfolk is grandfathered under the ITFA, so it can still impose its

119. *Id.* at 455.
120. *Id.* (citing Nielsen Co. v. Cnty. Bd. of Arlington Cnty., 289 Va. 79, 88, 767 S.E.2d 1, 4–5 (2015)).
121. *Id.* at 456.
122. *Id.* (citing 47 U.S.C. § 151 note § 1105(8)(A)(i) (Moratorium on Internet Taxes)).
123. *Id.* at 456.
124. *Id.* at 456–57.
125. *Id.* at 457.
126. *Id.* at 457.
127. *Id.* (citing Dulles Duty Free, L.L.C. v. Cnty. of Loudoun, 294 Va. 9, 11–12, 803 S.E.2d 54, 55 (2017)).
128. *Id.* at 461.
129. *Id.* at 463.

BPOL tax on Cox. The circuit court granted Cox partial summary judgment on the BPOL tax as an impermissible tax under ITFA, but it left the issue of whether the BPOL tax is grandfathered for another hearing.[130]

Following the circuit court's opinion on the issue of whether the BPOL tax is barred by the ITFA, the court was asked to address Cox's motion on the burden of proof at trial.[131] The circuit court ruled that Cox had the burden of proof to show that Norfolk's BPOL tax did not fall within the ITFA grandfather clause.[132] The circuit court stated that under Virginia Code section 58.1-3703.1, Cox, as the party challenging the State Tax Commissioner's ruling, had the burden of proving that the determination was erroneous which can be done by proving the original assessment was "otherwise invalid or illegal."[133] In reaching this result, the Norfolk Circuit Court looked at two other recent trial court decisions on this or "the same" issue, both of which concluded that the applicability of the ITFA's grandfather provision to a BPOL tax rested with the locality assessing the BPOL tax.[134]

The Norfolk Circuit Court wrestled with competing burdens of proof. The circuit court noted that a Virginia locality seeking to impose its BPOL tax on the gross receipts of a business has the burden to prove it qualified for exemption under the ITFA's grandfather provisions. However, under Virginia's BPOL tax administrative appeals to a locality, the locality's assessment was deemed prima facie correct, and the taxpayer has the burden to prove it is erroneous.[135]

The circuit court stated that under Virginia Code section 58.1-3703.1, Cox, as the party challenging the State Tax Commissioner's determination, has the burden of proving that the determination was erroneous.[136] The court elaborated that because the Commissioner of the Revenue determined that the assessment against Cox was valid and that the BPOL tax would be

130. *Id.* at 464.

131. Cox Commc'ns Hampton Rds., L.L.C. v. Poston, CL19-4764, 2021, Va. Cir. LEXIS 60, at *1 (Apr. 7, 2021) (Norfolk County).

132. *Id.* at *2.

133. *Id.* at *13–*14.

134. *Id.* at *19–*23 (citing Mugler v. Cellco P'ship, No. 18-1409, 2020 Va. Cir. LEXIS 663, at *12–*14 (July 13, 2020); Bd. of Supervisors v. Coxcom, L.L.C., 104 Va. Cir. 248, 252 (2020)). Craig D. Bell & Michael H. Brady, *Annual Survey of Virginia Law: Taxation*, 55 U. RICH. L. REV. 151, 168–71 (2020).

135. *Id.* at *25.

136. *Id.* at *14–*15 (citing VA. CODE ANN. § 58.1-3703.1(A)(7)(a)) (Cum. Supp. 2020)).

grandfathered if the ITFA applied to the BPOL tax—and the State Tax Commissioner affirmed that determination—proving that the original assessment was "otherwise invalid" involves disproving the Commissioner of the Revenue's determination. The circuit court concluded that this means Cox bears the burden of proving that the BPOL tax was not grandfathered.[137]

3. Supreme Court of Virginia Holds Isle of Wight County's 2017 Machinery & Tools Tax Assessment is Nonuniform, Invalid, and Illegal

The Supreme Court of Virginia ruled, for Virginia property tax purposes, the County of Isle of Wight Circuit Court erred in granting the County's motion to strike International Paper Company's ("IP") application for correction of a 2017 machinery and tools ("M&T") tax assessment that IP claimed was nonuniform because the M&T tax plan created disparity tax rates among taxpayers.[138] This case had its genesis from an earlier court case where IP sued Isle of Wight County seeking relief from M&T tax assessments for machinery and tools located at its Franklin Mill location in the County for tax years 2012 through 2014. After holding a trial, the circuit court entered a final order in IP's favor which held that the County's methodology of taxing IP's machinery and tools at their original total capitalized cost, without allowance for depreciation, was clearly erroneous. The resulting M&T tax assessments were held to be far in excess of the machinery and tools' fair market value for the 2012, 2013, and 2014 tax years.[139] The M&T tax refund ordered by the court for tax years 2012 through 2014 was approximately $2.4 million plus accrued interest at 10% from the

137. *Id.* at *31–*32. In another Virginia locality, Cox Communications Hampton Roads, L.L.C. brought the same challenge to its City of Chesapeake BPOL tax assessments on its gross receipts received on providing internet to its customers. *See* Cox Commc'ns, L.L.C. v. King, 105 Va. Cir. 481, 481 (2020). The Chesapeake Circuit Court bifurcated the case into two phases, of which this opinion addressed the phase that involved the issue of whether the ITFA applies to the BPOL tax. This case involved similar arguments by Cox and the City of Chesapeake on the cross motions for summary judgment. The Chesapeake Circuit Court granted a partial summary judgment to Cox, ruling that the ITFA prevents the City of Chesapeake from assessing its BPOL tax on Cox, unless its BPOL Tax is grandfathered under the exemptions provided by the ITFA. The latter question was not before the circuit court at this stage of the case.

138. Int'l Paper Co. v. Cnty. of Isle of Wight, 299 Va. 150, 847 S.E.2d 507 (2020); *see* Final Order at 1, Int'l Paper Co. v. Cnty. of Isle of Wight, No. CL14001026-00 (Va. Cir. Ct. Feb. 21, 2017) (County of Isle of Wight).

139. *Int'l Paper Co.*, 299 Va. at 158, 847 S.E.2d at 512.

dates IP made their first and second half M&T tax payments for 2012 through 2014 (the "First Refund Action").[140]

During the pendency of the First Refund Action, the County's retained expert concluded that the County's assessment of M&T property at 100% of its originally capitalized cost resulted in valuations of M&T property in excess of fair market value. Isle of Wight Commissioner of the Revenue Gerald Gwaltney, after public notice, changed the valuation methodology of M&T in the County from 100% to 40% of original capitalized cost for M&T tax year 2016.[141] Gwaltney recommended that the County's Board of Supervisors adopt an amended M&T tax rate of $1.75 per $100 of assessed value for M&T tax year 2016, in order to make the change to the 2016 M&T property valuations revenue neutral.[142]

The County's Board of Supervisors passed an ordinance on October 20, 2016, increasing the M&T tax rate from $0.70 per $100 of assessed value to $1.75 per $100 of assessed value, for M&T tax year 2016. The ordinance noted that the change was revenue neutral for the 2016 for the County and the M&T taxpayers.[143] The only real net effect was to make the 2016 M&T tax ordinance essentially unassailable should it be added by IP to the First Refund Action then currently pending in circuit court.

In December 2016, Commissioner Gwaltney sent letters to M&T taxpayers in the County, conceding that their M&T property valuations for tax years 2013 through 2015 had been above fair market value. He also informed them that the valuations for those tax years would be retroactively reduced and tax refunds voluntarily issued because of the overpayments the County had received from the M&T taxpayers as a result of the improper valuations.[144] The County issued refunds, based on a revised assessment of the M&T property values at 60% of the original capitalized cost, rather than the 100% of capitalized cost at which it was previously assessed and taxed, for the 2013, 2014, and 2015 M&T tax years.[145] The County issued a total of $5.6 million in refunds.[146]

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140. *Id.* at 158–59, 847 S.E.2d at 512.

141. *Id.* at 158–59, 847 S.E.2d at 512.

142. *Id.* at 159, 847 S.E.2d at 512.

143. *Id.* at 159, 847 S.E.2d at 512.

144. *Id.* at 159, 847 S.E.2d at 512. No refunds were made by the County for the 2012 M&T tax year because the statute of limitations expired for 2012, thereby precluding a refund for tax year 2012.

145. *Id.* at 159, 847 S.E.2d at 512.

146. *Id.* at 159, 847 S.E.2d at 512. The $5.6 million includes the circuit court ordered

Along with their refund checks, M&T taxpayers also received a letter from the County Administrator dated January 6, 2017, in which the administrator stated:

> The amount of the refunds was not anticipated in this year's Operating Budget and will create a potential deficit that the board is now taking steps to address. One of the anticipated steps is an increase in the M&T tax rate for the County's fiscal year 2017–18 budget. The adjustment will only be for tax year 2017.
>
> We have estimated that any tax increase over the current tax amount will be very close to the amount of the refund you have just received.[147]

At a County Board of Supervisors meeting on January 5, 2017, Gwaltney briefed the Board on the approximately $5.6 million M&T tax refunds he needed to issue.[148] At that same meeting, Mr. Gwaltney presented his plan to replenish the County's budget.[149] He recommended a one-year M&T tax rate increase from $1.75 per $100 of assessed value to $4.24 per $100 of assessed value.[150] Gwaltney also told the Board that this tax rate increase would also be sufficient to permit some type of payment program for M&T taxpayers to offset any net increase in M&T tax assessments above the amount of the M&T tax refund the M&T taxpayer had received.[151]

The Board subsequently approved the 2017 M&T tax rate increase on May 11, 2017, and on July 17, 2017, it approved a resolution appropriating the amount of $1,164,274 to fund Mr. Gwaltney's grant program, named Economic Development Retention Grants, from the 2017–2018 General Fund that would receive the increased 2017 M&T tax collections.[152] The Board funded the Economic Development Retention Grants with $32,125 in appropriations and approximately $1.1 million which would be raised from the increased 2017 M&T tax.[153]

As expressed by the Board, any business "negatively impacted by the adjustment" received an M&T Tax Relief Program "grant," which prevented those negatively impacted from being burdened

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refund to IP as a result of the First Refund Action.

147. *Id.* at 159–60, 847 S.E.2d at 512.

148. *Id.* at 159–60, 847 S.E.2d at 512–13.

149. *Id.* at 160, 847 S.E.2d at 513.

150. *Id.* at 160, 847 S.E.2d at 513.

151. *Id.* at 160, 847 S.E.2d at 513.

152. *Id.* at 161, 847 S.E.2d at 513.

153. *Id.* at 160, 847 S.E.2d at 513.

by the tax increase.[154] The payment by an M&T taxpayer, up to the amount of the M&T tax refund the taxpayer received from the County, was not considered by the County to negatively impact that taxpayer.[155]

For tax year 2017, IP's M&T property was assessed at a value of $139,386,552.[156] Application of the tax rate of $4.24 per $100 of assessed value and application of the M&T Tax Relief Program formula resulted in IP receiving an M&T tax bill from the County which stated that it owed the County $5,485,481.82 in M&T taxes for tax year 2017.[157] IP timely paid the amount it was billed for its 2017 M&T taxes, and subsequently filed an application to correct its assessment.[158]

> On May 24, 2018, IP filed an application, pursuant to Code [section] 58.1-3984, for a correction of the County's "nonuniform, invalid & illegal" assessment of IP's M&T taxes for tax year 2017 (the Second Refund Action) in the Circuit Court of Isle of Wight County. The Second Refund Action had five counts, which asserted violations of: IP's vested right in the judgment it obtained in the First Refund Action (Count 1), separation of powers (Count 2), the County's statutory grant of legislative authority (Count 3), tax uniformity required by Va. Const. art. X, [section] 1 (Count 4), and the established classes of taxable property subject to uniformity pursuant to Va. Const. art. X, [section] 1 and Code [section] 58.1-3507(A) (Count 5). In its prayer for relief, International Paper requested that the circuit court find its 2017 M&T tax assessment to be *ultra vires*, erroneous, not uniform in its application, invalid, and illegal, and that the 2017 M&T taxes paid by International Paper be ordered refunded.
>
> On November 19, 2018, International Paper filed a pretrial memorandum. International Paper argued that the County's 2017 M&T tax plan (the increased M&T tax rate and the M&T Tax Relief Program—which International Paper referred to as a "Refund Clawback Ordinance"—violated International Paper's vested right to its judgment in the First Refund Action. It further contended that the County's actions violated separation of powers because the County cannot indirectly nullify a court judgment. It also argued that the County's 2017 M&T tax plan resulted in the County "clawing back the precise amount" of tax refunds that International Paper received from the County pursuant to the judgment in the First Refund Action for tax years 2013–14 and the County's administrative refund for tax year 2015. Finally, International Paper contended that the 2017 M&T tax

154. *Id.* at 161, 847 S.E.2d at 513.
155. *Id.* at 162, 847 S.E.2d at 513.
156. *Id.* at 162, 847 S.E.2d at 513–14.
157. *Id.* at 162, 847 S.E.2d at 514.
158. *Id.* at 162, 847 S.E.2d at 514.

> plan resulted in varying "effective rates" among M&T taxpayers, which violated uniformity.
>
> The County submitted a pretrial memorandum on the same date. It argued that it had authority to tax M&T property and to raise the M&T tax rate. [The County] also contended that the uniformity requirement does not apply to the outcome of a tax bill and that every M&T taxpayer was subject to the same valuation method and tax rate. It argued that M&T Tax Relief Program payments should not be considered in determining an "effective tax rate" because the grants from such a program are not part of the tax process and not relevant to the challenge of an "assessment" pursuant to Code [section] 58.1-3984. Further, the County asserted that, even if the net amount owed for M&T taxes after application of M&T Tax Relief Program payments is within the meaning of "assessment," the M&T Tax Relief Program was uniformly applied.[159]

IP presented, over three days, thousands of pages of documents and hours of testimony to prove what it had pled. At the conclusion of IP's case in chief, the circuit court granted the County's motion to strike from the bench.[160]

> Regarding vested rights, the circuit court explained that the 2017 M&T tax rate was a "new tax" and that "new taxes are required to be paid" and do not violate a taxpayer's vested rights to a prior judgment regarding a different tax. Regarding separation of powers, the circuit court noted that the Board is concerning the 2017 M&T tax plan and thus, there was no violation of the separation of powers.
>
> Regarding uniformity, the court held that an "effective tax rate" is not relevant because any tax deduction can result in an "effective tax rate" differential. [The court] therefore concluded that the 2017 M&T tax rate and tax assessments were uniform notwithstanding the M&T Tax Relief Program. The court also found that the "purpose and effect" of the 2017 M&T tax plan was to cover the County's budget deficit created by the County's tax refunds for prior tax years and to ensure that no M&T taxpayers paid more than their entitled refund toward closing that budget deficit. Accordingly, the circuit court dismissed the Second Refund Action, with prejudice.[161]

On IP's appeal, the supreme court concluded that IP had proven its nonuniform case, citing at length both the admitted exhibits[162]

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159. *Id.* at 162–63, 847 S.E.2d at 514 (emphasis added).

160. *Id.* at 168, 847 S.E.2d at 517.

161. *Id.* at 168, 847 S.E.2d at 517.

162. *See, e.g.*, *id.* at 162–63, 847 S.E.2d at 514 (reviewing the "Second Refund Action"); *id.* at 163–64, 847 S.E.2d at 514 ("[IP] offered into evidence documentation supporting the facts as stated above" pertinent to the Second Refund Action); *id.* at 164, 847 S.E.2d at 514–515 ("Additionally, [IP] offered two spreadsheets that showed the County's assessed values of M&T property, M&T Tax Relief Program payment amounts, and 2017 M&T tax bills for all M&T taxpayers."); Joint Appendix at 3405–5392, 299 Va. 150, 847 S.E.2d 507 (No. 190542).

and testimony.[163] Taken together, the supreme court held that this evidence demonstrated "that the M&T Tax Relief Program operated effectively as a partial tax exemption that was part of the 2017 M&T taxation process, and that [IP]'s 2017 M&T tax assessment was non-uniform, invalid, and illegal."[164] Put in terms of elements, IP had shown, first, that "the M&T Tax Relief Program was effectively integrated into the M&T taxation process" and, second, that this legislative "act produces a non-uniform effect among a constitutionally protected class of taxpayers."[165] Put in its procedural context, the Court held that IP "provided prima facie evidence sufficient to show" these elements.[166] Absent "contradictory evidence," "prima facie evidence" "will . . . sustain a judgment" for IP.[167] The evidence admitted at trial provided more than an adequate factual basis for a rational factfinder to be persuaded that a nonuniform assessment had been imposed.

D. *M&T Tax Relief Program Shown to Be Part of M&T Taxation Process*

"Whether the Relief Program was effectively part of the 2017 M&T taxation process"—the first element of IP's uniformity claim—turns on the evidence of "the factual aspects of [that] legislative act, such as its intended purpose, its structure and administration, and its factual correlations to the tax it allegedly affects."[168] As the Court explained, these "particular factual aspects" include "whether a grant or tax credit provided to a taxpayer is for a stated purpose directly related to the tax, or whether it is structured and administered to directly reduce a specific tax obligation."[169] Others "include whether the legislative act was enacted at substantially the same time as the tax act, whether the legislative

163. *Int'l Paper*, 299 Va. at 164–67, 847 S.E.2d at 515–16 (reviewing the testimony of Messrs. Popovich, Gwaltney, Elder and Davis); Joint Appendix at 2818:20–2998:20, *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542) (Mr. Popovich); Joint Appendix at 3011:3–3139:22, *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542) (Mr. Gwaltney); Joint Appendix at 3142:19–3168:13, *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542) (Mr. Elder); Joint Appendix at 3218:4–3339:7, *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542) (Mr. Davis).

164. *Int'l Paper*, 299 Va. at 190, 847 S.E.2d at 529.

165. *Id.* at 186, 847 S.E.2d at 527.

166. *Id.* at 187, 847 S.E.2d at 527.

167. *Evidence*, BLACK'S LAW DICTIONARY 701 (11th ed. 2019) (defining "prima facie evidence").

168. *Int'l Paper*, 299 Va. at 186, 847 S.E.2d at 527.

169. *Id.* at 185, 847 S.E.2d at 526.

relief act lasts for the same duration as the tax, or whether the legislation's funding is linked to the tax."[170]

The Supreme Court of Virginia catalogued an array of facts from the trial establishing the first element, that M&T Tax "Relief Program was effectively part of the 2017 M&T taxation process."[171] These were that (1) the "stated purpose of the M&T Tax Relief Program was to relieve liability from the 2017 M&T tax rate increase," and was "tethered exclusively to 2017 M&T tax assessments";[172] (2) the "County structured and administered the M&T Tax Relief Program to directly exempt M&T tax liability";[173] (3) "the payments from the M&T Tax Relief Program directly offset M&T tax liability";[174] (4) "the M&T Tax Relief Program factually correlated with the 2017 M&T tax rate increase to $4.24 per $100 of assessed value," being "enacted at substantially the same time" and applied "for the same time period—the 2017 tax year";[175] and (5) "the M&T Tax Relief Program was funded predominantly by the 2017 M&T tax rate increase."[176]

The Court found "[m]ost telling" that "the Relief Program computationally correlated with the M&T taxation process"—i.e., "[t]he payments from the M&T Tax Relief Program were calculated exclusively with M&T taxation figures."[177] The Court noted that Mr. Mark Popovich, then-County Attorney and designated corporate representative of Isle of Wight, testified via video deposition to this fact and to the calculation process.[178]

170. *Id.* at 186, 847 S.E.2d at 526.

171. *Id.* at 186, 190, 847 S.E.2d at 527, 529.

172. *Id.* at 187, 847 S.E.2d at 527; *see, e.g.*, Joint Appendix at 4534–35, 4673, 4680, 4915–16, 5192–99, 5200, *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542).

173. *Int'l Paper,* 299 Va. at 187, 847 S.E.2d at 527; *see, e.g.*, Joint Appendix at 3405–08, 3414–16, 4915, 5367–69, *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542).

174. *Int'l Paper*, 299 Va. at 188, 847 S.E.2d at 528; *see, e.g.*, Joint Appendix at 4673–75, 5201, *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542).

175. *Int'l Paper*, 299 Va. at 188, 847 S.E.2d at 528; *see, e.g.*, Joint Appendix at 4342–43, 4680, 4915–16, 5200, 5370–71, 5367–69, *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542).

176. *Int'l Paper*, 299 Va. at 188, 847 S.E.2d at 528; *see, e.g.*, Joint Appendix at 4680, 4870–71, 4915–16, 5200, 5201, 5321, 5327–29, *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542).

177. *Int'l Paper*, 299 Va. at 188–89; *see, e.g.*, Joint Appendix at 3405–08, 3414–16, 5201, 5158, *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542).

178. *Int'l Paper*, 299 Va. at 164–165, 847 S.E.2d at 515; *see* Joint Appendix at 2841:23–2858:1, 2869:15–2870:18, 2873:23–2874:23, 2875:3–2883:11, 2886:8–2890:25, 2892:1–2893:1, 2911:19–2931:11, 2947:2–2961:16, 2971:9–2973:21, 2976:5–2990:22, 4917–20 (plaintiff's exhibit 43), 4923–65 (plaintiff's exhibit 46), 4966–69 (plaintiff's exhibit 47), 5158–60, 5192–99 (plaintiff's exhibit 50), 5319–5326 (plaintiff's exhibit 53), 5327–29 (plaintiff's

Summing up, the Court held that IP had "produced evidence" "that the County intended, structured, funded, administered, and calculated the M&T Tax Relief Program payments almost entirely within the closed circuit of the M&T taxation process, and that the M&T tax rate increase and the M&T Tax Relief program were both part of an interwoven 2017 M&T tax strategy."[179] In short, "the M&T Tax Relief Program was part of the 2017 M&T taxation process."[180]

E. *M&T Tax Relief Program Shown to Result in Non-Uniform M&T Assessments*

Virginia's constitutional requirement of uniform property taxation is categorical and unequivocal. "Any act that 'has the effect' of allowing one taxpayer to pay 'less than another [taxpayer] similarly situated might be required to pay' offends uniformity, no matter how the different treatment is effected."[181] As the Supreme Court of Virginia explained at great length, "[i]n determining whether application of a tax plan resulted in a non-uniform assessment," courts "must consider the effect of the tax plan upon those subject to it, rather than the government's stated label for its actions."[182] Bringing these principles to bear on this case, the Court on appeal reviewed the evidence to determine whether "the 2017 M&T tax plan resulted in 2017 M&T tax assessments that were not uniform."[183] Under the evidence already adduced, it was equally clear that the "2017 M&T tax assessments," including IP's assessment for $5,909,989.80, "were not uniform."[184]

The Court held that IP's case-in-chief constituted "prima facie evidence sufficient to show that the M&T Tax Relief Program payments . . . had the same effect as partial tax exemptions."[185] To reach this conclusion, the Court reviewed the detailed testimony

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exhibit 54), *Int'l Paper*, 299 Va. 150, 847 S.E.2d 507 (No. 190542).

179. *Int'l Paper*, 847 S.E.2d at 528, 299 Va. at 189; *id.* at 187, 847 S.E.2d at 527 (explaining that this amounted to "prima facie evidence sufficient to show that the M&T Tax Relief Program payments were integrated into the M&T taxation process . . . ."); *see id.* at 189, 847 S.E.2d at 528 ("Thus, [IP] provided sufficient evidence to prove that the M&T Tax Relief Program was part of the 2017 M&T taxation process.").

180. *Id.* at 189, 847 S.E.2d at 528.

181. *Int'l Paper*, 299 Va. at 182 (quoting Indus. Dev. Auth. of Chesapeake v. Suthers, 208 Va. 51, 61–62, 155 S.E.2d 326 (1967)).

182. *Id.* at 186, 847 S.E.2d at 527.

183. *Id.* at 186, 847 S.E.2d at 527.

184. *Id.* at 186–87, 847 S.E.2d at 527.

185. *Id.* at 187, 847 S.E.2d at 527.

from Mark Popovich, former County attorney and designated corporate representative of Isle of Wight, as to how the County "determine[d] the amount each [M&T taxpayer] owed the County for 2017 M&T taxes."[186] The Court explained:

> the relief formula treated the M&T taxpayers differently based upon whether the County had lawfully owed that taxpayer a refund on M&T taxes overpaid in prior years. This created a sub-class of M&T taxpayers. . . . Only those M&T taxpayers who had received a refund owed to them by the County were required to pay the 2017 M&T tax increase" to $4.24 per $100 of assessed value.[187]

F. *The Supreme Court of Virginia Affirmed the Effects Analysis for IP's Uniformity Claim and Determined the Two Component Pieces Were Part of an Interwoven Strategy*

"Any act that 'has the effect' of allowing one taxpayer to pay 'less than another [taxpayer] similarly situated might be required to pay' offends uniformity, no matter how the different treatment is effected."[188] "In summary, uniformity requires equality in every respect of the taxation process."[189] "Uniformity is thus the promise of equality of treatment among members of a tax class during the taxation process," a fact on which IP has offered prima facie evidence.[190]

More specifically, the supreme court held that IP "provided prima facie evidence sufficient to show that (1) the M&T Tax Relief Program payments were integrated into the M&T taxation process and that (2) the M&T Tax Relief Program payments had the same effect as partial tax exemptions."[191] The Court stated the following uncontroverted acts as support for its findings.

1. The stated purpose of the M&T Tax Relief Program was to relieve liability from the 2017 M&T tax rate increase.[192]

2. The Board of Supervisor's resolution implementing the M&T Tax Relief Program specifically noted that the payments were for

186. *Id.* at 164–66, 847 S.E.2d at 516–17.

187. *Id.* at 189–90, 847 S.E.2d at 528–29; *see id.* at 161–62, 847 S.E.2d at 513 ("This resulted in only the taxpayers who received refunds having to pay the substantially increased M&T tax rate, with the increased amount owed by them being limited to the amount of the M&T tax refund they had received from the county.").

188. 299 Va. at 182, 847 S.E.2d at 524.

189. *Id.* at 186, 847 S.E.2d at 526.

190. *Id.* at 178, 847 S.E.2d at 522.

191. *Id.* at 187, 847, S.E.2d at 527.

192. *Id.* at 187, 847 S.E.2d at 527.

businesses negatively impacted by the adjustment to the M&T tax. The phrase "the adjustment of the M&T tax" refers to the 2017 M&T tax increase to a rate of $4.24 per $100 of assessed value. The stated goal of the M&T Tax Relief Program was therefore tethered exclusively to 2017 M&T tax assessments.[193]

3. Although (the County's corporate representative and County Attorney) Popovich and Commissioner Gwaltney testified that the M&T Relief Program was intended to keep M&T businesses from leaving the County, the M&T Tax Relief Program's incentive for keeping these businesses was to effectively discharge some members of the M&T taxpayer class from M&T tax liability.[194]

4. The M&T Tax Relief Program had a purpose, at least in part, to relieve liability from the 2017 M&T tax for a sub-class of M&T taxpayers, deemed by the County to be "harmed" by the M&T tax rate increase.[195]

5. The County structured and administered the M&T Tax Relief Program to directly exempt M&T tax liability. Elder testified that the County's economic development office was not involved in the creation or implementation of the M&T Tax Relief Program, despite that office having the same stated purpose expressed regarding the M&T Tax Relief Program—to promote and retain businesses in the County.[196]

6. The payments from the M&T Tax Relief Program directly offset M&T tax liability. The County automatically subtracted the relief payment amounts from each taxpayer's 2017 M&T tax bill, without any taxpayer applying for such payment. The payments also did not apply to any taxpayer outside the class of taxpayers who owned M&T tax property.[197]

7. The M&T Tax Relief Program factually correlated with the 2017 M&T tax rate increase to $4.24 per $100 of assessed value. Both the 2017 M&T tax rate and the M&T Tax Relief Program were enacted at substantially the same time: in May and June 2017, respectively. They both applied for the same time period: the 2017 tax year. As Popovich testified, the M&T Tax Relief Program

193. *Id.* at 187, 847 S.E.2d at 527.
194. *Id.* at 187, 847 S.E.2d at 527.
195. *Id.* at 187, 847 S.E.2d at 527.
196. *Id.* at 188, 847 S.E.2d at 528.
197. *Id.* at 188, 847 S.E.2d at 527.

was a one-time, "unique" legislative act contemplated to coincide with the 2017 M&T tax rate increase.[198]

8. The M&T Tax Relief Program was funded predominantly by the 2017 M&T tax rate increase. The Board authorized $32,125 in spending for the M&T Tax Relief Program, but it distributed nearly $1.2 million in relief payments. That additional revenue came from the anticipated 2017 M&T tax revenue produced by the increased tax rate, which was forgiven by way of the relief payments. Although the revenue from that tax was assigned to the general fund, the Board explicitly noted, in its July 2017 resolution, that $1,164,274 raised by the 2017 M&T tax would be dedicated to the M&T Tax Relief Program.[199]

9. The Relief Program computationally correlated with the M&T taxation process. The County determined the amount of the M&T Tax Relief Program payments by subtracting each taxpayer's hypothetical 2016 M&T tax calculation from the initial 2017 M&T tax calculation, which produced the next tax increase. The County then subtracted the M&T tax refund amount each taxpayer received for tax years 2013 through 2015 from the next tax increase to determine the amount of the M&T Tax Relief Program payment the taxpayer would have received as a credit. If the resulting amount was a negative number for a taxpayer, the County did not award any relief to that taxpayer. The County thus awarded relief payments only to M&T taxpayers who experienced a net tax increase that was greater than the amount of the tax refund they had received for tax years 2013 through 2015, exempting the sub-class of M&T taxpayers from the burden of the 2017 M&T tax rate increase.[200]

10. The payments from the M&T Tax Relief Program were calculated exclusively with M&T taxation figures. The County calculated the payments based on (1) the value of each taxpayer's M&T property in tax year 2017, (2) the tax rates for tax years 2016 and 2017, and (3) the amount the taxpayer received as a tax refund, which was based on the change in valuation of M&T property and tax rates in past years. Thus, the M&T Tax Relief Program formula only used factors that related to an aspect of the M&T taxation

198. *Id.* at 188, 847 S.E.2d at 527.
199. *Id.* at 188, 847 S.E.2d at 528.
200. *Id.* at 188–89, 847 S.E.2d at 528.

process in determining the amount of tax relief a taxpayer was entitled to receive.[201]

11. In short, IP produced evidence to support its contention that the County intended, structured, funded, administered, and calculated the M&T Tax Relief Program payments almost entirely within the closed circuit of the M&T taxation process, and that the M&T tax rate increase and the M&T Tax Relief Program were both part of an interwoven 2017 M&T tax strategy. Thus, IP provided sufficient evidence to prove that the M&T Tax Relief Program was part of the 2017 M&T taxation process.[202]

12. By design, the relief formula treated the M&T taxpayers differently based upon whether the County had lawfully owed that taxpayer a refund on M&T taxes overpaid in prior years. This created a sub-class of M&T taxpayers. The amount of refund a taxpayer had been owed by the County and the amount of the relief payment the taxpayer received under the Relief Program were negatively correlated: the larger the refund an M&T taxpayer received, the smaller the relief payment. Only those M&T taxpayers who had received a refund owed to them by the County were required to pay the 2017 M&T tax increase.[203]

13. IP also produced evidence that the "effective tax rates," the net tax rate paid by M&T taxpayers given the payments made to some M&T taxpayers by the Relief Program, considering payments granted to some taxpayers by the M&T tax plan, were not uniform. Although the varying "effective tax rates" among M&T taxpayers are not the cause of the nonuniformity, they were provided as indicia of the nonuniformity in the assessments levied under the 2017 M&T tax plan. Guy Davis (IP's expert) opined at trial that, in tax year 2017, thirty-nine M&T taxpayer accounts paid according to the $4.24 rate, twenty-eight accounts paid according to a $1.75 rate, and thirty-three accounts paid somewhere in between those two rates. IP was assessed at an effective rate of $3.94 per $100 of assessed value. The Supreme Court of Virginia agreed with IP that these varying effective tax rates further exemplify the non-uniform assessments produced by the 2017 M&T tax plan and support IP's claim.[204]

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201. *Id.* at 189, 847 S.E.2d at 528.
202. *Id.* at 189, 847 S.E.2d at 528.
203. *Id.* at 189, 847 S.E.2d at 529.
204. *Id.* at 190, 847 S.E.2d at 529.

Put simply, this unequal distribution of burdens on M&T was the direct result of Isle of Wight giving "relief payments only to M&T taxpayers who experienced a net tax increase [in 2017] that was greater than the amount of the tax refund they had received for tax years 2013 through 2015."[205] By awarding such "relief payments," Isle of Wight was effectively "exempting that sub-class of M&T taxpayers from the burden of the 2017 M&T tax rate increase."[206]

The Court, thus, reversed the trial court's order striking Counts 4 and 5 and held that IP had "provided prima facie evidence sufficient to show that the M&T Tax Relief Program operated effectively as a partial tax exemption that was part of the 2017 M&T taxation process."[207] Importantly, the Court's holding made explicit the conclusion that implicitly follows: "that International Paper's 2017 M&T tax assessment was non-uniform, invalid, and illegal."[208]

The Supreme Court of Virginia upheld the circuit court's striking of the first three counts of its application to correct an erroneous 2017 M&T tax assessment.[209] In Counts 1 through 3 of its complaint, IP claimed that the 2017 M&T tax plan adopted by the County was "'invalid or illegal' because it violated IP's vested rights, the separation of powers doctrine, and was executed without statutory authority."[210] IP argued that the circuit court erred in striking Counts 1, 2, and 3 because "its evidence established that the County's 2017 M&T tax plan' had the operation, effect, and so purpose, of clawing back legally required refunds, impairing vested rights, breaching the separation of powers, and exceeding the statutory power to tax M&T.'"[211]

The supreme court stated that "[a]lthough the 2017 M&T tax plan may have 'clawed back' the money the County paid [IP] pursuant to the First Refund Action, the tax increase and relief program did not interfere with [IP's] vested rights to its judgment."[212] It "ha[d] been paid the money it had a vested right to receive."[213]

205. *Id.* at 189, 847 S.E.2d at 528.
206. *Id.* at 189, 847 S.E.2d at 528.
207. *Id.* at 190, 847 S.E.2d at 529.
208. *Id.* at 190, 847 S.E.2d at 529.
209. *Id.* at 847, 507 S.E.2d at 529.
210. *Id*. at 170, 847 S.E.2d at 518.
211. *Id.* at 170, 847 S.E.2d at 518.
212. *Id.* at 171, 847 S.E.2d at 519.
213. *Id.* at 171, 847 S.E.2d at 519.

The Court held the trial court did not err in sustaining the motion to strike as to Count 1.[214]

As to Count 2 claiming a violation of the separations of power, the Court stated "the 2017 M&T tax rate increase did not invade the judicial branch's authority because the rate increase did not void the First Refund Action final order, nor change the M&T tax rates applicable in tax years 2012 through 2014, which were the bases for the First Refund Action judgment."[215] "In short," the Court stated that "the County was not acting judicially, but was executing its legislative authority when it increased the M&T tax rate for the 2017 M&T tax year."[216] The Court concluded that trial court did not err in striking Count 2 of the complaint.[217]

Count 3 claimed the County's 2017 M&T tax plan was ultra vires because it indirectly and retroactively revised IP's M&T valuations and tax rates for 2013–2015.[218] The Court disagreed with IP's claim.[219] The Court held that "[t]the circuit court did not err in concluding that under [Virginia] Code section 58.1-3507(A) and Article X, section 4 of the Constitution of Virginia, the County had the statutory and constitutional authority to impose taxes on M&T property and that the County also had [] authority to execute the M&T Tax Relief Program, pursuant to [Virginia] Code sections 15.2-940 and 15.2-950."[220]

The Supreme Court of Virginia reversed the circuit court's striking of IP's Counts 4 and 5, and affirmed its striking Counts 1, 2, and 3.[221] Having reversed the final judgment, the Court "remand[d] the case to the Isle of Wight County circuit court for further trial proceedings in accordance with [it's] opinion."[222]

G. *Remand Proceeding*

The Remand trial was held on June 24, 2021, at Isle of Wight Circuit Court. Upon the conclusion of taking evidence on the County's case in chief, the court heard a full half day of closing

214. *Id.* at 171, 847 S.E.2d at 519.
215. *Id.* at 173, 847 S.E.2d at 520.
216. *Id.* at 173, 847 S.E.2d at 520.
217. *Id.* at 173, 847 S.E.2d at 520.
218. *Id.* at 173, 847 S.E.2d at 520.
219. *Id.* at 174–75, 847 S.E.2d at 520–21.
220. *Id.* at 174–75, 847 S.E.2d at 520–21.
221. *Id.* at 190, 847 S.E.2d at 529.
222. *Id.* at 190, 847 S.E.2d at 529.

arguments. At the conclusion of arguments, the circuit court held that, under the preponderance of evidence standard, IP established that the 2017 M&T Tax Rate and the Economic Development Retention Grants were part of an interwoven tax plan and that the 2017 M&T tax assessments were not uniform as the M&T Tax Relief Program payments had the same effect as partial tax exemptions. The result, the court held, is a nonuniform, invalid, and illegal tax assessment levied on IP.[223] Under the provisions of Virginia Code section 58.1-3987, the circuit court ordered the County to refund $5,485,481.81 the full amount of IP's 2017 M&T taxes paid to the County together with accrued interest at an annual rate of 10% according to the County's ordinance.[224]

CONCLUSION

The 2021 session of the General Assembly produced fewer bills enacted involving state and local taxation. However, several items of legislation will have a large impact on Virginia's judicial dispute process on Virginia taxation. Appellate jurisdiction in Virginia is split between the Supreme Court of Virginia and the Court of Appeals of Virginia. Currently, the court of appeals has jurisdiction over criminal matters and only very limited civil cases. On January 1, 2022, that will change. The court of appeals will become the intermediate appellate court for all criminal and civil cases, including all tax cases. Importantly, these cases will become appeals of right. This is a huge change for civil litigation in state courts. Currently, parties who are dissatisfied with a circuit court decision can petition the Supreme Court of Virginia for the right to appeal, but allowing an appeal is a matter of the court's discretion, and most tax cases are denied. Once the new law is in force, all civil and criminal tax litigants of the circuit courts will be entitled to an appeal before the court of appeals. If a party is not satisfied with the decision of the court of appeals, it will then have the right to petition the supreme court for the right to appeal further.

Additionally, House Joint Resolution 563 asked to study the possibility of moving Virginia's corporate income tax reporting from a separate return to a unitary combined reporting. The result of the study may suggest change is in the air given the trend in many

223. *Id.* at 190, 847 S.E.2d at 529.

224. Final Order at 2, Int'l Paper v. Cnty. of Isle of Wight, No. 190542 (Va. Cir. Aug. 4, 2021).

other states to adopt a unitary combined reporting system for corporate income tax purposes.

On the litigation front, the Supreme Court of Virginia, in a comprehensive decision, issued an opinion on Virginia's constitutional requirement of uniformity among taxpayers within the same class of real or tangible personal property ad velorem taxation. *International Paper Company v. County of Isle of Wight* is easily the most important decision on Virginia's constitutional uniformity requirement in the last one hundred years. As a matter of all Virginia tax jurisprudence, the Court's decision is probably one of the most important opinions issued in the past several decades. Local tax cases continue to represent the most active area of litigated tax disputes. I believe this trend will continue.