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Taxation

Craig D. Bell

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TAXATION

*Craig D. Bell **

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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 (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, 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 Code of Virginia, 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 its long-standing practice, the General Assembly amended Code of Virginia 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, 2020 to December 31, 2021.¹ Although advancing the date of conformity, Senate Bill 94 and House Bill 971 did not change the previously adopted exceptions to the rule of conformity that are codified at section 58.1-301(B)(1)–(9).²

The General Assembly’s conformity legislation permits Virginia to conform its Code to several tax-related provisions in the

1. 2022 Va. Acts chs. 3 & 19 (codified as amended at VA. CODE ANN. § 58.1-301 (2022)).

2. S.B. 94, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 19); H.B. 971, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 3); VA. CODE ANN. § 58.1-301(B)(1)–(9) (2022).

American Rescue Plan Act of 2021 (“ARPA”) that the federal government signed into law on March 11, 2021, which provide emergency economic assistance to businesses and individuals affected by COVID-19.³ These provisions include enabling Virginia individuals to take advantage of the enhanced Child and Dependent Child Tax Credit for 2021, which benefits Virginia taxpayers who claim the Virginia Child and Dependent Care Deduction; increasing the amount taxpayers can contribute to Child and Dependent Care Flexible Spending Accounts for 2021; expanding eligibility for the Earned Income Tax Credit; excluding student loan forgiveness from gross income for taxable years 2021 through 2025; and allowing certain business taxpayers to receive tax-free assistance under the federal grant programs for restaurants while also deducting business expenses with such tax-free funds.⁴

The legislation also provided a Virginia-specific deduction of up to \$100,000 for business expenses funded by forgiven Paycheck Protection Program (“PPP”) loan proceeds that were paid or incurred during taxable year 2020 and provided a Virginia-specific deduction of up to \$100,000 for Rebuild Virginia grant recipients.⁵ This legislation was enacted as emergency legislation, making it effective on February 23, 2022.⁶

b. Virginia Adopts an Elective Pass-Through Entity Tax

The General Assembly amended Code of Virginia sections 58.1-322, 58.1-390.1, and 58.1-390.2, and added a new section as 58.1-390.3, which cumulatively allow a qualifying pass-through entity (“PTE”) to make an annual election for taxable years 2021 through 2025 to pay an income tax at a rate of 5.75% at the entity level.⁷ The legislation then provides a corresponding refundable income

3. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

4. See VA. CODE ANN. § 58.1-301(B)(10) (2022); Va. Dep’t of Taxation, Pub. Doc. 22-34 (Feb. 23, 2022), <https://www.tax.virginia.gov/laws-rules-decisions/tax-bulletins/22-1> [<https://perma.cc/TKF3-KG28>].

5. VA. CODE ANN. § 58.1-301(B)(10) (2022) (amending Code of Virginia sections 58.1-322.02(30), -322.03(17), -402(C)(28), -402(H) relating to the deductions for PPP forgiven loan proceeds and the Rebuild Virginia grant recipients).

6. 2022 Va. Acts ch. 3, cl. 2 (“Be it enacted by the General Assembly of Virginia . . . [t]hat an emergency exists and this act is in force from its passage.”).

7. 2022 Va. Acts chs. 689 & 690 (codified as amended at VA. CODE ANN. §§ 58.1-332, -390.1, -390.2 & codified at VA. CODE ANN. § 58.1-390.3 (2022)).

tax credit for taxable years 2021 through 2025 for any amount of income tax paid by a qualifying PTE to its individual owners.⁸

Several states have enacted similar PTE tax statutes with refundable tax credits to the PTE partners, shareholders, or members. The statutes provide a work-around to the limitation on the itemized deduction for state and local taxes paid that Congress enacted as part of the federal Tax Cuts and Jobs Act (which amended IRC section 164(b)(6)).⁹ For example, the State of Maryland enacted a similar state and local tax deduction workaround for individual owners of PTEs.¹⁰ The issue arose as to whether a Virginia resident who is an owner in a Maryland PTE could claim the credit for tax paid to Maryland by the PTE that has elected to use Maryland's PTE State and Local Tax work-around statute.¹¹ Prior to this new Virginia PTE work-around legislation, the Virginia Tax Commissioner, in an advisory ruling, stated that the Virginia resident is not entitled to the credit for income tax paid to another state pursuant to Code of Virginia section 58.1-332 because the credit is only available for the tax paid by the Virginia resident, as opposed to the Maryland PTE which paid the Maryland income tax.¹² This legislation eliminated the problem by allowing taxpayers to claim a credit on their individual income tax return for certain taxes paid by a PTE under another state's substantially similar PTE tax structure for taxable years 2021 through 2025, in proportion to their ownership in such PTE.¹³

The legislation defines a PTE as

a limited partnership, a limited liability partnership, a general partnership, a limited liability company, a professional limited liability company, a business trust, or a Subchapter S corporation, that is recognized as a separate entity for federal income tax purposes, in which the partners, members, or shareholders report their share of the income, gains, losses, deductions, and credits from the entity on their

8. VA. CODE ANN. § 58.1-322(C)(2) (2022).

9. See Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (amending I.R.C. § 164(b)(6)).

10. Va. Dep't of Taxation, Pub. Doc. 21-156 (Dec. 29, 2021), <https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/21-156> [<https://perma.cc/EDN7-H2V4>].

11. *Id.*

12. *Id.*

13. VA. CODE ANN. § 58.1-332(C)(2) (2022).

federal income tax returns or make the election and pay the tax levied pursuant to Code of Virginia section 58.1-390.3.¹⁴

“[Qualifying PTE]” means a PTE “that is 100 percent owned by natural persons or other persons eligible to be shareholders in an S corporation.”¹⁵

The election is to be made by the qualifying PTE in accordance with requirements and procedures to be established by the Department of Taxation, and the tax levied at the entity level for the taxable year must be paid.¹⁶ The tax will be at the rate of 5.75%.¹⁷ The legislation provides that an owner of a qualifying PTE that makes the election to be taxed at the entity level is entitled to a credit against the tax imposed, provided that taxable income has been adjusted to add back any deduction for state and local income taxes paid by the qualifying PTE. The credit shall be in an amount equal to such person’s pro rata share of the tax paid of which a person is an owner.¹⁸ If the amount of the credit allowed exceeds such person’s tax liability, such excess shall be treated as an overpayment and is refundable pursuant to Code of Virginia section 58.1-499.¹⁹

c. Corporate Income Tax Returns of Affiliated Corporations Filing Rules Revised

The General Assembly made several changes to the rules governing the filing of the “Virginia Corporation Income Tax Return” for an affiliated group of corporations. For federal income tax purposes, an affiliated group of corporations has the option of filing a consolidated return in lieu of separate returns for each corporation.²⁰ If a consolidated return is filed, the affiliated group members are treated as one entity and their revenues and expenses are combined for purposes of computing their federal income tax liability.²¹ To be treated as a corporate affiliate, a corporation must pos-

14. *Id.* § 58.1-390.1 (2022).

15. *Id.*

16. *Id.* § 58.1-390.3(A)(1)–(2) (2022).

17. *Id.* § 58.1-390.3(B) (2022).

18. *Id.* § 58.1-390.3(D) (2022).

19. *Id.*

20. I.R.C. §§ 1501–1502.

21. § 1503.

sess at least eighty percent of the total voting power and at least eighty percent of the total value of a corporation's stock.²²

Virginia is a separate return state.²³ Accordingly, Virginia allows each corporation with a nexus to the state to elect to file a separate Virginia tax return.²⁴ However, Virginia also allows corporations that are members of an affiliated group of corporations with a nexus to Virginia the ability to elect to file on a consolidated or Virginia combined basis.²⁵

Once the filing status for Virginia corporations is elected, each member of the group is required to file in the same manner in subsequent years unless the group applies to the Virginia Tax Commissioner for permission to change the basis of the type of return filed (i.e., combined to consolidated, consolidated to combined, combined to separate, consolidated to separate, etc.).²⁶ Once the Virginia corporations have filed the same way for at least twenty consecutive years, permission to change their filing status will generally be granted provided certain statutory requirements are met.²⁷

The General Assembly amended Code of Virginia section 58.1-442(C) to reduce the twenty preceding years filing rule to twelve preceding years.²⁸ The Virginia legislature also amended Code section 58.1-442 to provide that an affiliated group of corporations may elect to change the basis of the type of return from combined to consolidated if (a) the affiliated group has filed on the basis for at least the preceding twenty years, and (b) at least one member of the affiliated group, on or before January 1, 2022, is an entity related to a state or national bank that is exempt from filing a "Virginia Corporation Income Tax Return" because it is subject to the Virginia Bank Franchise Tax.²⁹

Under the new statutory rules, any eligible affiliated group that elects to change the basis of the type of return it files is required to compute its Virginia income tax liability under both the new filing

22. § 1504.

23. VA. CODE ANN. § 58.1-441 (2022).

24. *Id.*

25. *Id.* § 58.1-442 (2022).

26. *Id.* § 58.1-442(B)-(C) (2022).

27. *Id.* § 58.1-442(C) (2022).

28. 2022 Va. Acts ch. 274 (codified as amended at VA. CODE ANN. § 58.1-442(C) (2022)).

29. 2022 Va. Acts chs. 416 & 417 (codified as amended at VA. CODE ANN. § 58.1-442 (2022)).

method and the former filing method and pay the greater of the two amounts for both the taxable year in which the new election is effective and the immediately succeeding taxable year.³⁰

d. Deduction for Business Interest Expanded

The General Assembly amended Code of Virginia sections 58.1-322.03(15) and 58.1-402(G) to increase the Virginia individual and corporate income tax deduction for business interest from twenty to thirty percent of the business interest disallowed as a deduction under the business interest limitation imposed by IRC Section 163(j).³¹

2. Tax Credits

a. Worker Training Tax Credit Sunsetting to 2025

The General Assembly extended the sunset date of the Worker Training Tax Credit from July 1, 2022, to July 1, 2025.³² This legislation also extended the sunset date of the portion of the Worker Training Tax Credit that is for a business primarily engaged in manufacturing from January 1, 2022, to January 1, 2025.³³ The Worker Training Tax Credit allows businesses to claim a credit against the individual income tax, estate and trust income tax, corporate income tax, bank franchise tax, insurance premiums license tax, and license tax on telegraph, telephone, water, heat, light, power, and pipeline companies in an amount equal to thirty-five percent of expenses incurred by the business during the taxable year for eligible worker training.³⁴ The credit is limited to not exceed \$500 per qualified employee annually for a highly-compensated employee and shall not exceed \$1,000 per non-highly-compensated employee.³⁵ The statute provides definitions as to what qualifies as “eligible worker training,” a “qualified employee,” and a “non-highly compensated worker.”³⁶

30. VA. CODE ANN. § 58.1-442(D) (2022).

31. 2022 Va. Acts ch. 648 (codified as amended at VA. CODE ANN. §§ 58.1-322.03, -402 (2022)).

32. 2022 Va. Acts ch. 431 (codified as amended at VA. CODE ANN. § 58.1-439.6:1 (2022)).

33. VA. CODE ANN. § 58.1-439.6:1 (2022).

34. *Id.* § 58.1-439.6:1(B) (2022).

35. *Id.*

36. *Id.* § 58.1-439.6:1(A) (2022).

b. Sunset Date Extended for Major Business Facility Job Tax Credit

The General Assembly amended Code of Virginia section 58.1-439(A) to extend the sunset date of the Major Business Facility Job Tax Credit so that it would be effective for taxable years beginning before July 1, 2025.³⁷

c. Local Tax Credits for Approved Local Volunteer Activities

The General Assembly enacted new Code of Virginia section 58.1-3019 to provide a credit against taxes and fees imposed by a locality to an individual who provides approved volunteer services in the locality.³⁸ The locality may allow the credit to be used against the individual's liability for any taxes, fees, or other charges imposed pursuant to Code of Virginia section 58.1-3000, *et seq.*, with the exception that the credits shall not be applied against any property taxes or payments in lieu of property taxes.³⁹ "The locality, in its discretion, shall determine which taxes, fees, or other charges shall be allowable uses of the credit, and such information shall be stated in the ordinance for that locality."⁴⁰

New Code of Virginia section 58.1-3019(A) defines "approved volunteer services" to mean "volunteer firefighting and fire prevention services, emergency medical and ambulance services, auxiliary police services, and emergency rescue services that operate exclusively for the benefit of the general public on behalf of non-profit organizations or the locality."⁴¹ "Approved volunteer services" is defined to include "all training and training-related activities required by law to perform such approved volunteer services."⁴² Approved volunteer services includes only services performed by a bona fide volunteer.⁴³

37. 2022 Va. Acts chs. 11 & 203 (codified as amended at VA. CODE ANN. § 58.1-439(A) (2022)).

38. 2022 Va. Acts ch. 773 (codified at VA. CODE ANN. § 58.1-3019 (2022)).

39. VA. CODE ANN. § 58.1-3019(B) (2022).

40. *Id.*

41. *Id.* § 58.1-3019(A) (2022).

42. *Id.*

43. *Id.*

The statute goes on to define “bona fide volunteer” as:

[A]n individual who performs approved volunteer services and whose only compensation for such performance is (i) reimbursement, or a reasonable allowance for reasonable expenses incurred in the performance of such approved volunteer services or (ii) reasonable benefits, including length of service awards, and fees for such approved services customarily paid by employers in connection with the performance of approved volunteer services by bona fide volunteers.⁴⁴

3. Sales and Use Taxation

a. Gold, Silver and Platinum Bullion Enhanced and Sunset Date Extended

Before the new legislation, the exemption for sales of gold, silver, and platinum bullion and legal tender coins was available only for purchases in excess of \$1,000 and was set to expire on June 30, 2022.⁴⁵ The General Assembly extended the sunset date to June 30, 2025 and removed the \$1,000 purchase price threshold so that all gold, silver and platinum bullion and legal tender coins qualified for the sales tax exemption.⁴⁶

b. Exemption from Sales and Use Tax Expanded to Cover Medicines and Drugs Prescribed by Veterinarians

The General Assembly amended Code of Virginia subsection 58.1-609.10.9 and added new subsection 58.1-609.10.22 to broaden the prescription medicines and drugs exemption to include prescription medicines and drugs purchased by veterinarians and administered or dispensed to patients within a veterinarian-client-patient relationship as defined in Code of Virginia section 54.1-3303.⁴⁷ The legislation also repealed the provisions in the pre-amended statute which provided that a veterinarian dispensing or selling medicines or drugs on prescription is deemed to be the user

44. *Id.*

45. *Id.* § 58.1-609.1.19 (2022).

46. 2022 Va. Acts chs. 12 & 634 (codified as amended at VA. CODE ANN. § 58.1-609.1 (2022)) (extending sunset date to June 30, 2025); 2022 Va. Acts ch. 643 (codified as amended at VA. CODE ANN. § 58.1-609.1 (2022)) (removing the \$1,000 purchase price threshold so that the exemption applies to all gold, silver and platinum bullion and legal tender coin purchases).

47. 2022 Va. Acts chs. 551 & 552 (codified as amended at VA. CODE ANN. § 58.1-609.10 (2022)).

or consumer of all such medicines and drugs.⁴⁸ The legislation has a sunset date of July 1, 2025.⁴⁹

c. Media-Related Exemption Expanded

Prior to the 2022 General Assembly beginning its legislative session, Code of Virginia section 58.1-609.6 provided a sales and use tax exemption for broadcasting equipment and parts and accessories thereto and towers used or to be used by (a) commercial radio and television companies, (b) wired and land-based wireless cable television systems, (c) common carriers or video programmers using an open video system or other video platform provided by telephone common carriers, or (d) concerns which are under the regulation and supervision of the Federal Communications Commission.⁵⁰ The exemption also applied to amplification transmission and distribution equipment used or to be used by (a) wired or land-based wireless cable television systems, (b) open video systems, or (c) other video systems provided by telephone common carriers.⁵¹

The General Assembly expanded the section 58.1-609.6 exemption to include “network equipment” within the definition of “amplification, transmission, and distribution equipment” in Code of Virginia section 58.1-602.⁵² The expanded definition of “network” now includes “modems, fiber optic cables, coaxial cables, radio equipment, routing equipment, switching equipment, a cable modem termination system, associated software, transmitters, power equipment, storage devices, servers, multiplexers, and antennas, which the network uses to provide internet service.”⁵³ The legislation also amends the definition of “internet” to include the requirement that such network employ the Transmission Control Protocol/Internet Protocol to communicate by wire or radio.⁵⁴

48. VA. CODE ANN. § 58.1-609.10(9) (2022).

49. *Id.* § 58.1-609.10(22) (2022).

50. *Id.* § 58.1-609.6(2) (2021).

51. *Id.*

52. 2022 Va. Acts chs. 434 & 435 (codified as amended at VA. CODE ANN. §§ 58.1-602, -609.6 (2022)).

53. VA. CODE ANN. § 58.1-602 (2022).

54. *Id.*

d. Aircraft Component Exemption Revised and Sunset Date Extended

The General Assembly amended Code of Virginia section 58.1-609.10(20) to extend the exemption for aircraft “parts, engines, and supplies used for maintaining, repairing, or reconditioning aircraft or any aircraft’s avionics system, engine, or component parts” until July 1, 2025.⁵⁵ This legislation also clarifies that for manned systems, the term “aircraft” will include only aircraft with a “maximum takeoff weight of at least 2,400 pounds.”⁵⁶

e. Sales Tax Definition for Transient Accommodations Clarified

The legislature clarified the Code of Virginia section 58.1-602 definition for “accommodations” to ensure it “does not include rooms or space offered by a person in the business of providing conference rooms, meeting space, or event space if the person does not also offer rooms available for overnight sleeping.”⁵⁷ The legislation provides further that “nothing in the definitions of ‘retail sale’ and ‘sale at retail’ . . . require or have required, in any year prior to the effective date” of the legislation, the collection of any sales tax “for the offering of rooms or space by a person in the business of providing conference rooms, meeting space, or event space if the person does not also offer rooms available for overnight sleeping.”⁵⁸ The legislation is given retroactive effect to September 1, 2021.⁵⁹

The purpose of this legislation is to ensure the Virginia Department of Taxation does not assess convention centers or other meeting hall facilities with sales tax on its room charges or rental fees when the convention center or meeting hall does not have, and therefore cannot provide, overnight sleeping accommodations.

Effectively, these forms of businesses are distinguished from convention or conference halls or centers owned or operated by hotels—which are subject to sales tax on their rental of conference rooms, meeting space, or event space—because they can also provide overnight sleeping accommodations.

55. 2022 Va. Acts chs. 8 & 228 (codified as amended at VA. CODE ANN. § 58.1-609.10 (2022)).

56. *Id.*

57. 2022 Va. Acts ch. 154 (codified as amended at VA. CODE ANN. § 58.1-602 (2022)).

58. *Id.*

59. *Id.* at cl. 3.

f. Sales and Transient Occupancy Tax Collection Process
Changed When Accommodation Intermediaries Used

The General Assembly made substantial changes to the process by which sales and transient occupancy taxes are collected from accommodations sales involving accommodations intermediaries. The new process will require accommodations intermediaries, a defined term discussed below, to collect sales and occupancy taxes and remit them to the Department of Taxation (sales tax), or a locality (transient occupancy tax), as applicable.⁶⁰

It is important to understand some of the nomenclature and definitions in this legislation, so the new sales and transient occupancy tax collection processes make sense. An “[a]ccommodations fee” means the room charge less the discount room charge, if any, provided that the accommodations fee shall not be less than \$0.⁶¹ An “accommodations intermediary” means any person other than an accommodations provider (the provider of any room or rooms) that (a) facilitates the sale of an accommodation and (b) either (i) charges a room charge to the customer and charges an accommodations fee to the customer, which fee it retains as compensation for facilitating the sale; (ii) collects a room charge from the customer; or (iii) charges a fee, other than an accommodation fee, to the customer, which fee it retains as compensation for facilitating the sale.⁶² Facilitating the sale includes “brokering, coordinating, or in any other way arranging for the purchase of the right to use accommodations via a transaction directly” or indirectly “between a customer and an accommodations provider.”⁶³

The legislation also provides that in a transaction involving multiple parties that may be considered accommodations intermediaries, such parties may agree that one party shall be responsible for collecting and remitting the taxes.⁶⁴ In such an event, the party agreeing to collect and remit such taxes would be the sale party liable for the tax.⁶⁵

60. 2022 Va. Acts chs. 7 & 640 (codified as amended at VA. CODE ANN. §§ 58.1-602, -612.2, -3826 (2022)).

61. VA. CODE ANN. § 58.1-602 (2022).

62. *Id.*

63. *Id.*

64. *Id.* §§ 58.1-612.2(C), -3826(C)–(D) (2022).

65. *Id.*

B. *Significant Judicial Decisions*

1. Supreme Court of Virginia Affirms Trial Court's Exclusion of Stored Leaf Tobacco in Virginia from Apportionment Property Factor for Corporate Income Tax Purposes

The Supreme Court of Virginia affirmed a decision of the Danville City Circuit Court, finding that the value of R.J. Reynolds Tobacco Company's—the taxpayer and successor of Lorillard Tobacco Company (“Lorillard”)—stored leaf tobacco in Virginia should not be included in the property factor for corporate income tax purposes.⁶⁶ Lorillard stores leaf tobacco in its Danville warehouse for the sole purpose of allowing the tobacco to age, which generally takes thirteen to twenty-three months, depending on the type and grade of the leaf tobacco.⁶⁷ “The aging is a natural process that occurs without human intervention or specialized equipment.”⁶⁸ “Once Lorillard’s production and manufacturing team in North Carolina determines that the leaf tobacco has reached the target drying age, it instructs the Danville Facilities to ship the leaf tobacco to North Carolina for processing and manufacturing into cigarettes.”⁶⁹

Lorillard is a multistate corporation that earns income from business activities taxable within and without Virginia.⁷⁰ The Virginia tax code establishes apportionment rules for multistate businesses to apportion their income to determine the amount of their income that is taxable in Virginia. Specifically, the apportionment involves multiplying the multistate corporation’s total income by a fraction, “the numerator of which is the property factor plus the payroll factor, plus twice the sales factor, and the denominator of which is four.”⁷¹

The key issues in this case were the property factor and what the term “used” means under Code of Virginia section 58.1-409 (the “property factor”). The property factor is a fraction: the numerator is the average value of a corporation’s real and tangible property

66. Va. Dep’t of Tax’n v. R.J. Reynolds Tobacco Co., 300 Va. 446, 449 n.2, 456–57, 868 S.E.2d 429, 430 n.2, 434 (2022).

67. *Id.* at 449, 868 S.E.2d at 430.

68. *Id.*

69. *Id.*

70. *Id.*

71. VA. CODE ANN. § 58.1-408(A) (2022).

owned and used in Virginia during the tax year, and the denominator is the average value of the corporation's real and tangible personal property owned and used everywhere during the tax year.⁷²

For the tax years at issue in this case, Lorillard included the value of the leaf tobacco stored in its Danville warehouse in its property factor it used to apportion income to Virginia.⁷³ Lorillard then sought to amend its property apportionment to remove the value of its stored tobacco leaf from the property factor because it believed including the value of the stored leaf tobacco in its property factor resulted in apportionments that overstated Lorillard's business in Virginia.⁷⁴ The Department of Taxation denied Lorillard's request, its subsequent request for reconsideration, and refused Lorillard's amended tax returns, which excluded the stored leaf tobacco from its property factor.⁷⁵

At trial, and again on appeal, the Department of Taxation argued that the term "used" in Code of Virginia section 58.1-409 and the income tax regulation relating to section 58.1-409 includes leaf tobacco stored in Virginia prior to its use in the manufacture of cigarettes.⁷⁶ Lorillard argued that the storage of leaf tobacco in Virginia is not necessary for the aging process as the leaf tobacco will age regardless of where it is kept. Lorillard did not perform any positive act over the stored leaf tobacco.⁷⁷

The Supreme Court of Virginia agreed with both parties that there is no ambiguity in section 58.1-409 and its employment of the term "used."⁷⁸ The supreme court reasoned that:

"When a statute, as written, is clear on its face, [we] will look no further than the plain meaning of the statute's words." As such, "[w]hen the language of a statute is unambiguous, we are bound by the plain meaning of that language," unless "applying the plain language would lead to an absurd result."⁷⁹

72. *See id.* § 58.1-409 (2017).

73. *R.J. Reynolds Tobacco Co.*, 300 Va. at 450, 868 S.E.2d at 430.

74. *Id.*

75. *Id.* at 450, 868 S.E.2d at 430–31.

76. *Id.* at 453–54, 868 S.E.2d 432–33.

77. *Id.* at 454, 868 S.E.2d at 433.

78. *Id.* at 455, 868 S.E.2d at 433.

79. *Id.* (citations omitted) (first quoting *Va. Elec. & Power Co. v. State Corp. Comm'n*, 300 Va. 153, 161, 861 S.E.2d 47 (2021); and then quoting *JSR Mech., Inc. v. Aireco Supply, Inc.*, 291 Va. 377, 383, 786 S.E.2d 144 (2016)).

The supreme court additionally stated that:

Allowing raw materials to sit does not constitute processing because processing requires that these materials undergo treatment that will result in a product that is more marketable or useful. Lorillard does not introduce any treatment to the leaf tobacco, nor does it perform any affirmative act or activity to prompt or aid the aging process.⁸⁰

The court held that the leaf tobacco stored in the Danville facilities was not “used” within the intendment of section 58.1-409 simply because it was aging while it was in storage.⁸¹ The court found no error in the trial court’s holding that the Department of Taxation’s corporate income tax assessments for the tax years at issue were erroneous and ordered the Department to refund Lorillard the amount of its overpayments.⁸²

2. Trial Court Permits Manufacturing Company to Elect Alternative Apportionment Under Code of Virginia Section 58.1-422 by Means of an Amended Corporate Income Tax Return

In *1887 Holdings, Inc. v. Virginia Department of Taxation*, the Richmond City Circuit Court held that 1887 Holdings was permitted to make an election to use the manufacturer’s apportionment method provided in Code of Virginia section 58.1-422 on either an original “Virginia Corporation Income Tax Return” or a timely filed amended “Virginia Corporation Income Tax Return.”⁸³

The C.F. Sauer Company (“C.F. Sauer”), a manufacturer of spices, sauces, and similar food products, attempted to file amended Virginia corporation income tax returns for tax years 2014 and 2015 during an audit by the Department of Taxation. C.F. Sauer had reported its income to Virginia using the three-factor apportionment scheme. During the audit, C.F. Sauer sought to amend its 2014 and 2015 corporation income tax returns to elect to use the alternative apportionment method for manufactures

80. *Id.* at 456, 868 S.E.2d at 434 (citation omitted).

81. *Id.* at 457, 868 S.E.2d at 434.

82. *Id.*

83. Order Granting 1887 Holdings, Inc.’s Motion for Summary Judgment at 3, 1887 Holdings, Inc. v. Va. Dep’t of Tax’n, No. CL21001314-00 (Va. Cir. Ct. Mar. 2022) (City of Richmond). During the tax years at issue in the case, 1887 Holdings’ legal name was “The C.F. Sauer Company.” Stipulated Facts ¶ 3, 1887 Holdings, Inc. v. Va. Dep’t of Tax’n, No. CL21001314-00 (Va. Cir. Ct. Jan. 18, 2022) (City of Richmond).

provided by section 58.1-422.⁸⁴ The auditors refused to consider the issue, stating the election can only be made on the original corporate income tax returns filed by the taxpayer.⁸⁵ The Virginia Tax Commissioner upheld this position on an administrative appeal by C.F. Sauer.⁸⁶

Because the case involved uncontested facts, notwithstanding a disagreement as to whether the alternative apportionment method for manufacturers can be made on a timely filed amended corporate income tax return, the parties filed cross-motions for summary judgment on fully stipulated facts.⁸⁷

The Richmond City Circuit Court held that C.F. Sauer satisfied all of the statutory requirements of section 58.1-422 needed to elect the manufacturer's apportionment method.⁸⁸ Section 58.1-422 was silent on the timing issue as to when the election may be made, and the Department of Taxation issued no regulations on the manufacturer's apportionment method election.⁸⁹ Additionally, the Tax Department's *Single Sales Factor Election for Manufacturers Guidelines* are silent on the issue and have no legal precedence.⁹⁰ The trial court noted that "section 58.1-422 only prevents a taxpayer from revoking its election within three years once affirmatively made."⁹¹ The circuit court stated that making the election on an amended tax return still meets the purposes set forth by the General Assembly for the manufacturer's election—bolstering the public fiscal health of the Commonwealth through job creation and a higher wage base.⁹² The court abated the two tax assessments, which totaled approximately \$800,000 in tax and accrued interest.⁹³

The Department of Taxation has filed a Notice of Appeal to the Court of Appeals of Virginia. The appeal is fully briefed by the parties. Oral arguments of the Department of Taxation's appeal has

84. Stipulated Facts, *supra* note 83, ¶¶ 3, 11, 23, 25.

85. *Id.* ¶¶ 27–28.

86. *Id.* ¶ 60.

87. Order Granting 1887 Holdings, Inc.'s Motion for Summary Judgment, *supra* note 83, at 1.

88. *Id.* at 2.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2–3.

93. *Id.* at 3; Stipulated Facts, *supra* note 83, ¶ 57.

not yet been set by the Court of Appeals, but it is expected to be some time in the first quarter of calendar year 2023. This case is expected to be one of the first tax cases heard by the appellate court as a result of its expanded jurisdiction to hear appeals as a matter of right in all civil cases, which went into effect on January 1, 2022.

II. TAXES ADMINISTERED BY LOCALITIES

A. *Significant Legislative Activity*

1. Real Property Tax Exemption for Single Member LLC of Tax-Exempt Organization by Classification

The General Assembly amended Code of Virginia section 58.1-3609(A), which applies to post-1971 property exempt from taxation by classification, to include real and personal property of an organization classified in Code of Virginia sections 58.1-3610 through 58.1-3621 and used by such organization for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes as set forth in Article X, section 6(a)(6) of the Constitution of Virginia to include the real and personal property of a single member limited liability company whose sole member is an organization classified in sections 58.1-3610 through 58.1-3621, and property exempt by section 58.1-3622 of a single member limited liability company whose sole member is an organization classified in section 58.1-3622.⁹⁴ This legislation is designed to clarify that the property of certain organizations that is tax exempt by classification includes the property of a single member limited liability company whose sole member is such an exempt organization.⁹⁵

2. Certain Fixtures of Data Centers Taxed as Real Property to be Valued Based on Depreciated Reproduction or Replacement Cost

Real property is traditionally valued for tax assessment purposes using three methods: (1) the sales comparison method, (2) the replacement cost less depreciation method, and (3) the capitalization of income method. A “fixture” composed of tangible personal

94. 2022 Va. Acts ch. 167 (codified as amended at VA. CODE ANN. § 58.1-3609 (2022)).

95. VA. CODE ANN. § 58.1-3609(A) (2022).

property that is considered a part of the real estate for purposes of taxation is valued using the same three methods. However, the General Assembly adopted a specific rule to value fixtures of data centers. If fixtures are installed at a data center and taxed as real property, such fixtures shall be assessed using the cost approach.⁹⁶

For purposes of assessing fixtures of data centers, “fixtures” is defined to mean all fixtures and equipment used in a data center except for computer equipment and peripherals, equipment used for external surveillance and security, and fire and burglar alarms.⁹⁷ Fixtures include generators, radiators, exhaust fans and fuel tanks; electrical substations, power distribution equipment, cogeneration equipment, and batteries; chillers, computer room air conditioners, and cool towers; heating, ventilating, and air conditioning systems; water storage tanks, water pump and piping; monitoring systems; and transmission and distribution equipment.⁹⁸

The data center fixture legislation also amended Code of Virginia section 58.1-3500 by removing fixtures that are taxed in accordance with section 58.1-3295.3, as it applies to data centers, from the definition of tangible personal property.⁹⁹

3. Certified Pollution Control Equipment Used by a Political Subdivision May Be Certified by the Political Subdivision Itself

The legislature amended Code of Virginia sections 58.1-609.3(9) of the Virginia Retail Sales and Use Tax and 58.1-3660(B) of the local property tax exemption for pollution control equipment—used as part of a political subdivision’s water, wastewater, stormwater, or solid waste management facilities or systems—to permit such equipment to be certified by the political subdivision itself instead of by a state certifying authority.¹⁰⁰ A “subdivision certifying authority” is defined as “the body of a political subdivision responsible for administering the political subdivision’s water, waste-

96. 2022 Va. Acts chs. 671 & 672 (codified as amended at VA. CODE ANN. § 58.1-3500 & codified at VA. CODE ANN. § 58.1-3295.3 (2022)).

97. VA. CODE ANN. § 58.1-3295.3(A) (2022).

98. *Id.*

99. 2022 Va. Acts chs. 671 & 672; VA. CODE ANN. § 58.1-3500 (2022).

100. 2022 Va. Acts chs. 14 & 501 (codified as amended at VA. CODE ANN. §§ 58.1-609.3, -3660 (2022)).

water, stormwater, or solid waste management facilities or systems.”¹⁰¹

4. New Solar Facility Property Tax Exemption Created

The General Assembly enacted Code of Virginia section 58.1-3661(A) to create a separate class of property for local taxation for any solar facility “with a nameplate rated electrical generating capacity measured in direct current kilowatts of not more than [twenty-five] kilowatts” installed on the roof of a residential, commercial, industrial, institutional, or mixed-use building or buildings to serve the electricity or thermal needs of such building or property, provided the installation follows all applicable local zoning rules.¹⁰² Such facilities would be exempt from local property taxation.¹⁰³ The legislation will become effective January 1, 2023.¹⁰⁴

5. Bank Director Fees Not Subject to BPOL Tax

The General Assembly amended Code of Virginia section 58.1-3703(C)(12) to prohibit a locality from imposing the Business, Professional, and Occupational License Tax (“BPOL”) on any bank or trust company director provided the bank or trust company is subject to the bank franchise tax.¹⁰⁵

6. Procedure for Judicial Challenges of Local Tax Assessments Made

The General Assembly made a number of technical amendments to Code of Virginia section 58.1-3984 which apply to any application to a circuit court to correct erroneous assessments of local taxes and levies.¹⁰⁶ The first amendment to section 58.1-3984(A) clarifies that the necessary parties in circuit court litigation are the taxpayer and the locality. The amended statute requires the taxpayer filing the judicial application to name the locality “in the

101. VA. CODE ANN. § 58.1-3660(B) (2022).

102. 2022 Va. Acts ch. 496 (codified as amended at VA. CODE ANN. § 58.1-3661 (2022)).

103. VA. CODE ANN. § 58.1-3661(A) (2022).

104. 2022 Va. Acts ch. 496, cl. 2.

105. 2022 Va. Acts chs. 659 & 660 (codified as amended at VA. CODE ANN. § 58.1-3703(C)(12) (2022)).

106. 2022 Va. Acts ch. 358 (codified as amended at VA. CODE ANN. § 58.1-3984 (2022)).

application as the ‘City of _____,’ ‘Town of _____,’ or ‘_____ County,’ as applicable.”¹⁰⁷ The legislation also provides that when rebutting the presumption of correctness accorded the locality’s real property assessment, the taxpayer may “show by a preponderance of the evidence that the property in question was assessed at more or less than its fair market value.”¹⁰⁸ The taxpayer must still show by a preponderance of the evidence that the property in question is valued at more “than its fair market value or that the assessment is not uniform in its application, and that it was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations . . . and applicable Virginia law.”¹⁰⁹

B. *Significant Opinions of the Virginia Attorney General*

1. Payment of Interest on Local Tax Refunds

The Commissioner of the Revenue and the Treasurer for York County requested an opinion on whether interest should be paid by a locality for (1) “[t]he filing of a corrected return by a taxpayer to re-classify property originally reported by the taxpayer as business personal property to real property, when such corrected return is ultimately accepted by the Commissioner of Revenue on appeal”; (2) “[t]he filing of a business license return and payment of tax to the wrong locality, or a tax payment directed to the incorrect account”; and, (3) “[a] ‘statutory assessment’ issued as a result of the taxpayer’s failure to file a business tax return, which assessment is subsequently corrected upon either audit by the Commissioner of Revenue or the taxpayer’s late filing of a return.”¹¹⁰ The Attorney General opined that per Code of Virginia section 58.1-3916 interest should be paid on all erroneous assessments.

As an aside, to achieve the result desired by York County, words would have to be read into the statute. The Attorney General said that the rules of statutory construction prohibit this.¹¹¹ In 2013

107. VA. CODE ANN. § 58.1-3984(A) (2022).

108. *Id.* § 58.1-3984(B) (2022).

109. *Id.*

110. Va. Att’y Gen., Opinion Letter No. 21-052, at 1 (July 16, 2021), <https://www.oag.state.va.us/files/Opinions/2021/20-052-Thomas-Kelly-issued.pdf> [<https://perma.cc/G7F9-TPAT>].

111. *Id.* at 2.

there were no fewer than five bills (House Bill 1329, House Bill 1534, House Bill 1578, Senate Bill 710, and Senate Bill 937) introduced in the General Assembly with the purpose of limiting the payment of interest to errors by the locality.¹¹² After some consolidation, not one of these bills received an affirmative vote.¹¹³ The opinion request seems to be a rekindling of this issue by York County and that could lead to more introduced legislation in the 2023 General Assembly. First, what is interest? It is compensation for the time value of money. It is not a penalty or revenue raiser. Unfortunately, many localities have set their rate of interest at ten percent, which is well above the current interest rates.¹¹⁴ So, for these localities, having a high rate of interest is a revenue raiser. What better way to further raise revenue than by limiting the interest that must be paid on a tax refund? Second, most local taxes (business, professional, and occupational license tax, tangible personal property tax, meals tax, etc.) are based on taxpayer-filed returns. A desirable interpretation would effectively mean that local governments would only pay interest on erroneous assessments of real property taxes. Now that the Attorney General has made it clear that the statutory language must provide for this limitation, tax advisors need to beware of a possible reawakening of the interest limitation proposals similar to those introduced during the 2013 General Assembly.¹¹⁵

2. Admissions Tax: Classes of Events

The Loudoun County Attorney asked if a county elects to levy an admissions tax under Code of Virginia section 58.1-3818, may that county define the class of events to which an admissions tax will be imposed pursuant to section 58.1-3817(6).¹¹⁶ The Virginia Attorney General opined that a county may define the class of events to which an admissions tax will be imposed pursuant to section 58.1-3817(6). This opinion is based on the text of section 58.1-3817(6),

112. H.B. 1329, Va. Gen. Assembly (Reg. Sess. 2013); H.B. 1534, Va. Gen. Assembly (Reg. Sess. 2013); H.B. 1578, Va. Gen. Assembly (Reg. Sess. 2013); S.B. 710, Va. Gen. Assembly (Reg. Sess. 2013); S.B. 937, Va. Gen. Assembly (Reg. Sess. 2013).

113. H.B. 1329; H.B. 1534; H.B. 1578; S.B. 710; S.B. 937.

114. Va. Att'y Gen., *supra* note 110, at 2–3.

115. Author's Commentary.

116. Va. Att'y Gen., Opinion Letter No. 21-012, at 1 (Oct. 1, 2021), <https://www.oag.state.va.us/files/Opinions/2021/21-012-Rogers-issued.pdf> [<https://perma.cc/G9J3-KWBE>].

which, after defining specific classes of admissions, creates a catch-all class for “[a]ll other admissions.”¹¹⁷

C. *Significant Judicial Decisions*

1. Supreme Court of Virginia Reduces Real Property Tax Assessment Based on Locality’s Expert Appraiser Testimony

In an unpublished opinion, the Supreme Court of Virginia found that Arlington County’s evidence presented at trial established that the real property’s assessed value was greater than its fair market value for the 2017 and 2018 tax years.¹¹⁸ This finding rebutted the presumption of correctness afforded to the County’s assessments, even though the taxpayer’s expert testimony for the value of the property was determined to be flawed and disregarded by the trial court.¹¹⁹

In 1988, CSHV Lincoln Place (“CSHV”) leased two office buildings to the Government Services Administration (“GSA”).¹²⁰ The GSA used the space for the Drug Enforcement Agency (“DEA”).¹²¹ The GSA renewed the lease for ten years in 2008.¹²² In 2015, the GSA announced it was taking competitive bids for DEA’s next office space lease.¹²³ As part of the bid process, GSA required at least \$55 million in tenant improvement contributions and \$16 million in capital improvement contributions from the winning bidder.¹²⁴

Arlington County appraised CSHV’s property at \$287,715,300 for tax year 2017 and at \$263,874,500 for tax year 2018.¹²⁵ CSHV initiated litigation claiming the two tax assessments were erroneous.¹²⁶ The landowner’s real estate appraisal expert testified that the property was considered unstable given that a significant amount of the leased space was scheduled to expire in the near future and that significant renovations were required to retain its

117. *Id.* at 1–2.

118. *CSHV Lincoln Place, LLC v. Cnty. Bd. of Arlington*, No. 201301, 2021 Va. Unpub. LEXIS 30, at *6 (Oct. 28, 2021).

119. *Id.*

120. *Id.* at *1.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at *1–2.

126. *Id.* at *1.

tenants.¹²⁷ He valued the property at \$150 million for 2017 and \$156 million for 2018.¹²⁸ The landowner's appraiser testified that even if the property was stabilized, it would have a fair market value of \$217 million.¹²⁹

Arlington County's expert real estate appraiser testified that the fair market value of the property for 2017 was \$236,700,000 and \$243,700,000 for tax year 2018.¹³⁰ The County's expert agreed that the need for tenant improvement contributions should be taken into account in determining the fair market value of the property.¹³¹

In a letter opinion, the circuit court explained that CSHV failed to rebut the presumption of correctness of the two tax assessments and denied the landowner's application for relief.¹³² The circuit court pointed out errors and exaggerations made by taxpayer's expert.¹³³ CHSV moved for reconsideration, arguing that the court must reduce the tax assessments based on the County expert's valuations that were below the assessed values, but the trial court disagreed.¹³⁴

On appeal, CSHV argued that the evidence provided by both parties proved the property had been assessed at more than its fair market value.¹³⁵ At a minimum, CSHV contends that the circuit court was required to adopt the County appraiser's valuation of the property.¹³⁶ The Supreme Court of Virginia recognized that a taxing authority is bound by credible evidence of fair market value that it presents at trial.¹³⁷

Arlington County's expert opinions of value were \$51 million below the County's 2017 assessment of value and \$20.17 million below the 2018 assessment of value.¹³⁸ The court held this evidence

127. *Id.*

128. *Id.* at *2.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at *3.

133. *Id.*

134. *Id.* at *3–4.

135. *Id.* at *4.

136. *Id.*

137. *Id.* at *5 (citing *Fray v. Culpeper County*, 212 Va. 148, 148–49, 183 S.E.2d 175, 176 (1971)).

138. *Id.* at *6.

rebutted the presumption that the tax assessments were correct, holding the circuit court erred in denying CSHV's application for relief.¹³⁹ The Supreme Court of Virginia agreed with the circuit court's finding that the landowner's expert appraiser used a flawed methodology, but that the County expert's valuations were credible. Thus, the supreme court agreed with this finding by the circuit court and ordered the County to decrease the 2017 and 2018 tax assessments to the values its expert established at trial for each of these two tax years.¹⁴⁰

2. Supreme Court of Virginia Revives and Remands a Bill of Review on a Tax Assessment

The Supreme Court of Virginia held a circuit court erred in dismissing a bill of review filed by Emmanuel Worship Center in the City of Petersburg.¹⁴¹ In August 2018, the City of Petersburg brought a complaint against the Emmanuel Worship Center and its trustees (collectively, "EWC") for delinquent property taxes, seeking a sale of the property to pay the tax assessment of approximately \$29,300 for unpaid real estate taxes through June 30, 2015.¹⁴² The trial court also held that EWC could not challenge the tax delinquency because the three-year statutory period to challenge an erroneous tax assessment pursuant to Code of Virginia section 58.1-3984 had expired.¹⁴³ The circuit court issued a decree of sale of the property.¹⁴⁴

EWC did not appeal the circuit court's ruling. Instead, EWC paid a little over \$114,000, under protest, in real estate taxes, penalties, and accrued interest.¹⁴⁵ Additionally, within six months of entry of the decree of sale, EWC filed a bill of review in the circuit court, pursuant to Code of Virginia section 8.01-623. EWC asked the circuit court to review the earlier decree of sale and reverse, modify, or nullify it, and award it the amounts paid to the City to redeem its property.¹⁴⁶

139. *Id.*

140. *Id.* at *4, *7-8.

141. *Emmanuel Worship Ctr. v. City of Petersburg*, 300 Va. 393, 397, 405, 867 S.E.2d 291, 292, 296 (2022).

142. *Id.* at 396-97, 867 S.E.2d at 292.

143. *Id.* at 397, 867 S.E.2d at 292.

144. *Id.*

145. *Id.*

146. *Id.*

EWC argued it was exempt from paying real estate taxes under Article X, Section 6(a)(2) of the Constitution of Virginia because the property at issue was owned and used exclusively for religious purposes.¹⁴⁷ EWC asserted that this tax exemption was self-executing, and because the City did not have an ordinance in place to monitor exempted property, it was not required to take any further action.¹⁴⁸ EWC also argued the three-year statute of limitations contained in section 58.1-3984 was not applicable to a bill of review proceeding.¹⁴⁹

The City filed a motion to dismiss the bill of review and asserted it was not a valid pleading in this case because the mechanism is a procedure used to reopen suits in equity, and the City argued this case involved an action at law.¹⁵⁰ The City asserted a taxpayer must use section 58.1-3984 to challenge the tax assessment.¹⁵¹ EWC responded by asserting it had presented a proper case for a bill of review because the error of law was apparent from the record so leave of the court was not required.¹⁵² EWC asserted the property was exempt from real estate taxation pursuant to a self-executing exemption.¹⁵³ The circuit court denied the bill of review and held the bill of review was not properly before it because the underlying action was an action at law and a bill of review is utilized to review suits in equity.¹⁵⁴

The supreme court held EWC had presented a proper bill of review per the delinquent tax sale statute, Code of Virginia section 58.1-3960, located in Chapter 39, Article 4, titled “Bill in Equity for Sale of Delinquent Tax Lands.”¹⁵⁵ Code of Virginia section 58.1-3967 states these proceedings for delinquent property taxes “shall be by bill in equity.”¹⁵⁶ The court held the trial court erred in holding that the underlying action was a matter at law and that the

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 398, 867 S.E.2d at 292.

153. *Id.* at 398, 867 S.E.2d at 292–93.

154. *Id.* at 398, 867 S.E.2d at 293.

155. *Id.* at 399, 867 S.E.2d at 293.

156. *Id.*

bill of review was inappropriate.¹⁵⁷ The supreme court reversed the trial court on this issue.¹⁵⁸

The supreme court then turned its attention to the tax exemption issue. The court agreed with EWC that the religious property exemption for churches or religious bodies is self-executing.¹⁵⁹ The court notes that Code of Virginia section 58.1-3604 requires localities to maintain an inventory of a tax-exempt property and keep a record of such information, along with the fair market value of such property.¹⁶⁰ Further, the court referred to section 58.1-3605 that authorizes localities to require by local ordinance any entity, exclusive of federal or state agencies or political subdivision, that any tax-exempt entity which owns real and personal property exempt from property tax to file triennially an application with the appropriate assessing office as a requirement for retention of the exempt status of the property.¹⁶¹ The supreme court pointed out that the City of Petersburg had no such ordinance.¹⁶² Additionally, the supreme court held the three-year statute of limitations in section 58.1-3984 did not apply to a bill of review which is governed by section 58.1-3965 for delinquent taxes.¹⁶³ The supreme court explained that a court must first determine whether the taxes were even owed in the first place.¹⁶⁴ If the locality was never entitled to tax the property, there would be no delinquent taxes.¹⁶⁵ The circuit court had refused to consider EWC's defense.¹⁶⁶

The Supreme Court of Virginia first concluded the circuit court erred when it held the underlying action was an action at law.¹⁶⁷ Second, the circuit court erred when it held the taxes were beyond review and EWC could not raise any defenses to the assessments.¹⁶⁸ The supreme court reversed and remanded the case to the circuit court to make a determination as to whether EWC's property was used for religious worship as defined in section 58.1-

157. *Id.* at 399, 867 S.E.2d at 294.

158. *Id.*

159. *Id.* at 401, 867 S.E.2d at 294.

160. *Id.* at 402, 867 S.E.2d at 295.

161. *Id.*

162. *Id.*

163. *Id.* at 404-05, 867 S.E.2d at 296.

164. *Id.* at 404, 867 S.E.2d at 296.

165. *Id.*

166. *Id.* at 403, 867 S.E.2d at 295.

167. *Id.* at 405, 867 S.E.2d at 296.

168. *Id.*

3606 and whether EWC owed any delinquent taxes.¹⁶⁹ The supreme court noted that Code of Virginia section 58.1-3606 contains an expansive definition of religious worship that, in addition to worship and housing, includes property used for outdoor worship activities, and property used for ancillary and accessory purposes that support or augment the principal religious worship use of the property.¹⁷⁰

3. BPOL Tax Does Not Apply to an Author Under its City Ordinance

The Supreme Court of Virginia held that the City of Charlottesville BPOL tax ordinance does not apply to freelance writers.¹⁷¹ The supreme court also reversed the trial court on the narrow issue of what costs are proper to include in an award of costs.¹⁷²

Regulus Books, LLC (“Regulus Books”) is owned by Corban Addison Klug (“Klug”).¹⁷³ Klug, a graduate of the University of Virginia School of Law, has written several internationally received legal fiction novels that focus on international human rights.¹⁷⁴ He also works on other unpublished fiction and nonfiction projects.¹⁷⁵ Regulus Books contracts with publishers to produce, publish, distribute, and sell Klug’s written works.¹⁷⁶ Klug is the sole member of Regulus Books.¹⁷⁷

In 2018, Klug filed a Virginia income tax return with an attached Schedule C of business income earned in Charlottesville.¹⁷⁸ The City of Charlottesville reviewed its BPOL license records and did not locate a license for either Klug or Regulus Books.¹⁷⁹ The City wrote Klug to inform him of its BPOL tax ordinance for those engaged in a business, trade, profession, occupation, or calling in the City.¹⁸⁰ Klug responded to the City that he was not covered by

169. *Id.*

170. *Id.*

171. *City of Charlottesville v. Regulus Books, LLC*, __ Va. __, __, 873 S.E.2d 81, 82 (2022).

172. *Id.* at __, 873 S.E.2d at 86.

173. *Id.* at __, 873 S.E.2d at 82.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at __, 873 S.E.2d at 82–83.

the BPOL license ordinance because he does not offer goods or services, has no storefronts or employees, and does not advertise.¹⁸¹ He also argued that freelance authors are not listed as covered by the ordinance and noted the “book publisher” classification did not apply to him because he is an author, not a publisher.¹⁸²

The City assessed \$2,177 in BPOL tax for tax years 2015 through 2018, and Regulus Books paid the tax liability, plus penalties and interest, totaling \$2,461, under protest.¹⁸³ When the City issued another BPOL tax assessment for 2019, Regulus Books refused to pay it and initiated the underlying lawsuit against the City.¹⁸⁴ In its application for relief from the assessment, Regulus Books asserts that the City’s ordinance is unconstitutionally vague.¹⁸⁵ The trial court overruled the City’s demurrer, and each of the parties filed a motion for summary judgment.¹⁸⁶

Regulus Books argued that the City’s BPOL tax ordinance “is unconstitutionally vague because it contains a catchall provision covering repair services, business services, and personal services, but it does not define those terms and its definition for the separate terms of ‘business’ and ‘service’ do not assist reasonable persons in determining whether they will be taxed.”¹⁸⁷ The City asserted that the subclassification catch all provision in its Charlottesville City Code section 14-19(i)(12) taxes “[a]ny other repair, personal or business service not specifically included in any other subclassification’ at a rate of \$0.36 per \$100.”¹⁸⁸ The City argued that Regulus Books’ services “clearly fall into the catchall category.”¹⁸⁹

The trial court issued a letter opinion granting summary judgment to Regulus Books on its challenge that the ordinance is unconstitutionally vague.¹⁹⁰ The court stated the City’s ordinance does not provide persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so they may act accordingly,

181. *Id.* at __, 873 S.E.2d at 83.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at __, 873 S.E.2d at 83–84.

187. *Id.* at __, 873 S.E.2d at 83.

188. *Id.* at __, 873 S.E.2d at 84 (quoting CHARLOTTESVILLE, VA., CODE § 14-19(i)(12) (2022)).

189. *Id.*

190. *Id.*

and that it provided no explicit standards to those in charge of applying the ordinance. The court also stated that Regulus Books' business is not covered by the City's ordinance because the ordinance does not include authors and holders of their works from its listing of eight classes of businesses and specific indication of over 130 professions.¹⁹¹ The circuit court concluded that placing Regulus Books' activity under the license tax ordinance's catchall provision was forced, strained, or contrary to reason; it put the imposition of the BPOL license tax on any unnamed business solely in the hands of the Commissioner of Revenue.¹⁹² The trial court ordered the 2018 tax, penalties, and interest to be refunded, abated the 2019 tax assessment, and awarded \$762 for the payment of costs to Regulus Books.¹⁹³

On the City's appeal of the circuit court decision to the Supreme Court of Virginia, the supreme court upheld the circuit court's decision awarding a refund to Regulus Books, but did not reach the question of whether the ordinance is unconstitutionally vague, as it found that Klug's business neither provides a service under the ordinance, nor falls under the ordinance's catchall provision for repair, personal or business service.¹⁹⁴

The supreme court wrote:

Regulus's commercial activity cannot constitute a 'business service' because it does not fall under the more general term of 'service,' as defined by the Ordinance or in accordance with the word's ordinary meaning. . . . Writing a literary work then licensing that work to a publisher as Klug does through Regulus is not performing a service.¹⁹⁵

Because the circuit court ruled in favor of Regulus, and under Virginia precedent a decision can be sustained when the result is correct but for a different reason, the supreme court affirmed the decision.¹⁹⁶ However, the supreme court determined that the lower court erred in granting Regulus certain litigation costs because "Regulus's transcript fees, transcript shipping fees, pro hac vice admission fees, and fees for case file copy requests were not

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at ___, 873 S.E.2d at 85.

195. *Id.*

196. *Id.*

essential for the prosecution of the suit. Therefore, Regulus may not recover these fees.”¹⁹⁷

CONCLUSION

The 2022 Session and Special Session of the Virginia General Assembly enacted fewer bills involving state and local taxation. The vast majority of the tax bills that did pass addressed mostly targeted and technical changes in the tax laws, with several notable exceptions. First, the new statute providing for an elective pass-through entity tax, coupled with a refundable tax credit to offset the entity’s tax, represents Virginia’s foray into the state and local tax cap work-around that several states have recently adopted. Second, tightening up sales and use tax and transient occupancy tax for booking overnight accommodations through the use of third-party accommodation intermediaries provides clarity on who is to be responsible for collecting and remitting both the sales tax and the transient occupancy tax. This legislation is most welcome and should improve compliance with the tax collection and remittance processes. On the local tax side, establishing the valuation approach to data center fixtures is very important. As Virginia actively seeks to expand its growth market of data centers, setting forth the designated valuation methodology now should reduce subsequent compliance issues and potential litigation resulting from those issues.

On the litigation front, we see the prior years of acceleration in real estate property tax litigation stabilizing and possibly subsiding. BPOL tax still generates a sizeable amount of litigation. There has also been an increase in corporate income and tax credit litigation over the past year. I am uncertain if this is a new trend or simply a temporary episodic uptick in court cases involving income tax. If I were to characterize the 2021–2022 year for taxation, I would call it steady with perhaps a bit of COVID-19 overhang.

197. *Id.* at ___, 873 S.E.2d at 85–86.