Recent Developments in Virginia Taxation

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RECENT DEVELOPMENTS IN VIRGINIA TAXATION


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I. CORPORATE INCOME TAX

A. 2017 Legislation

1. Conformity with the Internal Revenue Code. Senate Bill 977 (Chapter 2) and House Bill 1521 (Chapter 1) amend § 58.1-301 to advance Virginia’s date of conformity to the Internal Revenue Code from December 31, 2015 to December 31, 2016. As a result of this legislation, Virginia conforms to the United States Appreciation for Olympians and Paralympians Act of 2016. This legislation was effective on February 3, 2017.

2. Subtraction for Virginia venture capital account income. House Bill 2074 (Chapter 762) amends § 58.1-402 to create a subtraction from the corporate income tax for certain income attributable to an investment in a Virginia venture capital account made on or after January 1, 2018, but before December 31, 2023.

"Virginia venture capital account" means an investment fund certified by the tax department as a Virginia venture capital account. In order to be certified, the operator of the investment fund must register the investment fund with the Tax Department prior to December 31, 2023, (i) indicating its intent to invest at least 50 percent of the capital committed to its fund in qualified portfolio companies and (ii) providing documentation that it employs at least one investor who has at least four years of professional experience in venture capital investment or substantially equivalent experience. "Substantially equivalent experience" includes an undergraduate degree from an accredited college or university in economics, finance, or a similar field of study.

This legislation requires the Tax Department to promulgate REGULATIONS, prior to December 31, 2017, in accordance with the Administrative Process Act, establishing procedures regarding the (i) registration of an investment fund as a Virginia venture capital account; (ii) documentation requirements regarding an investor's training, education, or experience as deemed necessary by the tax department to meet the requirements of this act; and (iii) certification process of an investment fund as a Virginia venture capital account by the tax department. This legislation will be effective for taxable years beginning on and after January 1, 2018.

3. Minimum Tax on Home Service Contract Providers. House Bill 1542 (Chapter 727) amends §§ 38.2-100, 38.2-2600, 38.2-2601, 38.2-2602, 38.2-2604, 38.2-2605, 38.2-2613, 38.2-2615, 59.1-200, and 59.1-436 and adds §§ 58.1-400.4 and 59.1-434.1 through 59.1-434.8 to change the regulation of home service contract providers and create a minimum tax on home service contract providers. This tax is intended to be a replacement for a premiums tax that the home service contract providers are currently subject to. The minimum tax is equal to 2.25% of the provider’s collected fees annually.
4. **Enterprise Zone Credits for Real Property Expenditures.** Senate Bill 1328 (Chapter 451) amends §§ 59.1-280.1 and 59.1-548 to allow otherwise qualifying expenditures to qualify for Enterprise Zone Real Property Investment Grants and Enterprise Zone Real Property Investment Tax Credits regardless of whether such expenditures are considered properly chargeable to a capital account or deductible as business expenses under federal Treasury regulations. This legislation became effective on July 1, 2017.

5. **Worker Retraining and Telework Expenses Tax Credit.** Senate Bill 1576 (Chapter 454) and House Bill 1814 (Chapter 177) amend §§ 58.1-439.6 and 58.1-439.12:07 to 1) extend the sunset date for the Worker Retraining Tax Credit from taxable years beginning before January 1, 2018 to taxable years beginning before January 1, 2022; 2) extend the sunset date for the Telework Expenses Tax Credit from taxable years beginning before January 1, 2017 to taxable years beginning before January 1, 2022; and 3) extend the date before which an employer must enter into a telework agreement with a participating employee to January 1, 2022.

6. **Extension of Motion Picture Tax Credit.** Senate Bill 982 (Chapter 982) and House Bill 1665 (Chapter 108) amend § 58.1-439.12:03 to extend the expiration date of the Motion Picture Production Tax Credit from January 1, 2019 to January 1, 2022.

### B. Recent Court Decisions


Kohl’s, which operates retail stores in Virginia and elsewhere, paid royalties to its affiliate, “Kohl’s Illinois,” for the use of intellectual property owned by Kohl’s Illinois. Kohl’s Illinois also operates retail stores, but none in Virginia. Kohl’s deducted the royalties paid to Kohl’s Illinois on its federal income tax return as ordinary and necessary business expenses. The issue for the Court was whether Kohl’s had to “add back” to its Virginia taxable income some or all of those royalties payments under Va. Code § 58.1-402(B)(8)(a) (the “add-back statute”). The royalty expenses would not be required to be added-back to Kohl’s Virginia income if that income “received by the related member is subject to a tax based on or measured by net income or capital imposed by...another state.” Va. Code § 58.1-402(B)(8)(a)(1). While the royalty income was included in Kohl’s Illinois’ income, Kohl’s Illinois did not pay state taxes on all of that income because in each state in which Kohl’s Illinois filed a return, it was only taxed on an apportionable share of its taxable income. Justice Mims, writing the majority opinion and joined by Justices Powell and McCullough, as well as Senior Justice Russell, opined that the exception to the add-back statute applies only to the royalty income where Kohl’s Illinois did, in fact, pay tax in other states. They found that the statutory scheme was ambiguous and of “doubtful import” so it could, notwithstanding Va. Code § 58.1-205 (“judicial notice” given to Department of Taxation published guidance), give “due weight” to the Rulings of the Tax Commissioner and the Fiscal Impact statement prepared by the Tax Commissioner when the General Assembly enacted the add-back statute. The Court held that the exception to the add-back statute applies only to the extent the royalty payments were actually taxed by another state (e.g., on a post-apportionment basis). The tax could, however, be paid by any member of Kohl’s affiliated group

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1 All statutory citations herein are to Title 58.1 (Taxation) of the Code of Virginia unless otherwise provided.
(for example, in certain combined return states, Kohl’s Illinois’ income was also included in Kohl’s taxable income calculations).

The dissenting opinion, written by Justice McClanahan and joined by Chief Justice Lemons and Justice Kelsey, did not find any ambiguity in the exception to the add-back statute. In its view, the exception to the add-back statute does not contain an apportionment qualifier. The subsequent attempts to amend the add-back statute by the General Assembly would have inserted apportionment language. Those attempts failed or, with respect to two budget bills that appeared to enact retroactive tax legislation, were not at issue in the case. Even if the add-back statute was ambiguous, the dissent would have resolved the ambiguity in favor of the taxpayer (and in favor of finding that the exception to the add-back statute applies on a “pre-apportionment” basis) because general tax statutes are construed most strongly against the Commonwealth and in favor of the taxpayer. Finally, in the dissent’s view, the legislative history of the add-back statute was to close loopholes relating to holding companies for which income is not subject to tax in any state. By contrast, the income of Kohl’s Illinois is subject to tax in many states.


The court denied the request by Corporate Executive Board (“CEB”) to use a destination-based sourcing apportionment method in lieu of the statutory prescribed cost of performance method (the “statutory method”). CEB develops information (best practices research, executive education, etc), which customers purchase for a fixed-fee subscription and can access online. Nearly all of CEB’s costs of performance were incurred at its Arlington headquarters but fewer than 6% of its customers had a Virginia billing address. Under the statutory method, CEB reported approximately 90% of its sales in Virginia, while other states with destination-based sourcing rules required CEB to pay income tax on 30-35% of its sales. The court determined that the statutory method was not unconstitutional because there was sufficient connection between its activities generating the income and Virginia and the income attributed to Virginia was rationally related to values connected with Virginia. It also found that CEB’s proposed method would produce arbitrary results because a customer may access or use CEB’s information in a state different than its billing address. Any double taxation incurred by CEB as a result of the statutory method was attributable to unique sourcing methods used by other states; as such, the statutory method did not produce inequitable or arbitrary results in this case.

C. Rulings of the Tax Commissioner

1. Foreign Source Income. P.D. 17-3 (January 19, 2017). The Taxpayer filed an amended return on which a refund of corporate income tax was claimed pursuant to the claim of a subtraction for foreign source income. The income was from the sale of stock in a corporation. The Department denied the refund and subtraction as the corporation was a U.S. corporation, not a foreign corporation, and the proceeds were not “technical fees.” However because the Taxpayer was not eligible for the subtraction, Virginia law allows the proceeds to be included in its apportionment factor.
2. **Fixed Date Conformity Bulletin.** P.D. 17-7 (February 6, 2017). The Department issued Tax Bulletin 17-1 implementing the advancement of the fixed date conformity to December 31, 2016 as provided for by Senate Bill 977 (Chapter 2) and House Bill 1521 (Chapter 1).

3. **Federal Settlements: Statute of Limitations.** P.D. 17-51 (April 6, 2017). The Taxpayer and the IRS entered into settlement agreements regarding changes to the Taxpayer's federal income tax liability for the taxable years ended September 30, 2001, and 2007 on January 27, 2015, and December 19, 2014, respectively. The Taxpayer filed amended Virginia corporate income tax returns to claim refunds resulting from the changes on February 29, 2016 and February 8, 2016, respectively. The Tax Department refused to issue the refunds because the returns were filed after more than a year from settlement.

4. **Combined Return.** P.D. 17-121 (June 29, 2017). After filing separate returns, a parent and its subsidiaries began filing a combined return upon the acquisition of a new subsidiary. The Tax Department issued assessments which were upheld on appeal as permission was not requested for the change in filing method.

5. **Coalfield Employment Enhancement Tax Credit.** P.D. 17-123 (June 29, 2017). A taxpayer requested a ruling regarding the coalfield employment enhancement tax credit and how it should be claimed by its subsidiaries under several scenarios. The Tax Commissioner opined on each scenario.

6. **Filing Extension Tax Bulletin.** P.D. 17-129 (July 28, 2017). The Tax Department issued Tax Bulletin 17-9 regarding corporate income tax extensions. Because the period for federal income tax extensions was increased from five to six months, the extension due date for Virginia corporate income tax returns is extended from six to seven months.

**D. Guidelines**


II. INDIVIDUAL INCOME TAX

A. 2017 Legislation

1. Subtraction for Virginia Venture Capital Account Income. House Bill 2074 (Chapter 762) amends § 58.1-322 to create a subtraction from the individual income tax for certain income attributable to an investment in a Virginia venture capital account made on or after January 1, 2018, but before December 31, 2023.

"Virginia venture capital account" would mean an investment fund that has been certified by the tax department as a Virginia venture capital account. In order to be certified as a Virginia venture capital account, the operator of the investment fund would be required to register the investment fund with the tax department prior to December 31, 2023, (i) indicating that it intends to invest at least 50 percent of the capital committed to its fund in qualified portfolio companies and (ii) providing documentation that it employs at least one investor who has at least four years of professional experience in venture capital investment or substantially equivalent experience. "Substantially equivalent experience" would include, but would not be limited to, an undergraduate degree from an accredited college or university in economics, finance, or a similar field of study.

This legislation requires the tax department to promulgate REGULATIONS, prior to December 31, 2017, in accordance with the Administrative Process Act, establishing procedures regarding the (i) registration of an investment fund as a Virginia venture capital account; (ii) provision of documentation regarding an investor's training, education, or experience as deemed necessary by the tax department to meet the requirements of this act; and (iii) certification of an investment fund as a Virginia venture capital account by the tax department. This legislation will be effective for taxable years beginning on and after January 1, 2018.

2. Historic Rehabilitation Tax Credit Limit. Senate Bill 1034 (Chapter 721) and House Bill 2460 (Chapter 717) amend § 58.1-339.2 to prohibit a taxpayer from claiming more than $5 million in Historic Rehabilitation Tax Credits for a taxable year. A taxpayer may carry forward the excess and claim the credit in future taxable years within the credit’s current ten-year carryover period or until the full credit is used, whichever occurs first. This legislation is effective for taxable years beginning on or after January 1, 2017 but before January 1, 2019.

3. Land Preservation Tax Credit Annual Limitation. Senate Bill 963 (Chapter 424) amends § 58.1-512 to extend the $20,000 limitation on the amount of Land Preservation Tax Credits that a taxpayer may claim per taxable year to apply to taxable year 2017. Such limitation would then increase to $50,000 for taxable year 2018 and thereafter. This legislation became effective on July 1, 2017.

4. Land Preservation Tax Credit Transfer Fee Exemption. Senate Bill 1286 (Chapter 725) amends § 58.1-513 to create an exemption from the two percent Land Preservation Tax Credit transfer fee for the distribution of credits to a nonresident owner of a pass-through entity when such credits are applied by the pass-through entity to the pass-through entity withholding tax. Credits distributed to resident owners and nonresident owners who are not
subject to the pass-through entity withholding requirement would continue to be subject to the transfer fee. This legislation became effective on July 1, 2017.

5. **Neighborhood Assistance Act Tax Credits.** Senate Bill 1165 (Chapter 723) amends § 58.1-439.20 to require that the Department of Education and Department of Social Services consider, in allocating Neighborhood Assistance Act Tax Credits, the past performance of neighborhood organizations that have received allocations of credits, including review of performance metrics, success in reaching targeted goals, or other measures of accountability that may be established by regulations or guidelines. This legislation became effective on July 1, 2017.

6. **Neighborhood Assistance Act Tax Credits.** Senate Bill 1168 (Chapter 724) amends § 58.1-439.20 and adds §§ 58.1-439.20:1 and 58.1-439.20:2 to reorganize the tax credit structure by mainly adding new requirements for education proposals. Also an expiration date of July 1, 2028 is added for all neighborhood assistance act tax credits. This legislation became effective on July 1, 2017.

7. **Neighborhood Assistance Act Tax Credits.** House Bill 1838 (Chapter 317) does not amend the Code of Virginia but requires that any neighborhood organization submitting a proposal to the Superintendent of Public Instruction for tax credits to include a list of all localities in Virginia in which the organization provides services beginning July 1, 2016. This legislation became effective on July 1, 2017.

8. **Neighborhood Assistance Act Tax Credits.** House Bill 1433 (Chapter 147) amends § 58.1-439.20 to modify the Neighborhood Assistance Act Tax Credit by eliminating the requirement that 10 percent of all available tax credits each year must be set aside for neighborhood organizations that did not receive an allocation of tax credits in the previous year. In its place, a requirement is imposed that, in any year in which the available amount of tax credits exceeds the previous year's available amount, 10 percent of all tax credits created by the increase in available tax credits must be set aside for neighborhood organizations that did not receive an allocation of tax credits in the previous year. This change allows a set aside of tax credits for new organizations only in years during which there is an increase in funding for the Neighborhood Assistance Act Tax Credit program. This legislation became effective on February 23, 2017.


**B. Recent Court Decisions**

No recent court decisions.
C. Rulings of the Tax Commissioner

1. **Virginia Residents.** The following rulings all deal with who is a domiciliary or resident of Virginia: P.D. 17-5 (February 2, 2017); P.D. 17-20 (March 15, 2017); P.D. 17-21 (March 15, 2017); P.D. 17-24 (March 17, 2017); P.D. 17-26 (March 17, 2017); P.D. 17-44 (April 3, 2017); P.D. 17-49 (April 6, 2017); P.D. 17-72 (May 23, 2017); P.D. 17-73 (May 23, 2017); P.D. 17-86 (June 2, 2017); P.D. 17-118 (June 29, 2017); P.D. 17-122 (June 29, 2017); P.D. 17-127 (June 29, 2017); P.D. 17-133 (July 19, 2017); P.D. 17-147 (August 23, 2017).

2. **Virginia Residents/Insufficient Information.** The Department was unable to determine the resident status of the Taxpayer. It gave the Taxpayer additional time to provide requested documentation before upholding the assessment. P.D. 17-92 (June 9, 2017); P.D. 17-111 (June 21, 2017).

3. **Domicile: Military.** The following rulings all deal with whether a member of the military is required to file an income tax return with Virginia: P.D. 17-89 (June 8, 2017); P.D. 17-97 (June 12, 2017); P.D. 17-126 (June 29, 2017); P.D. 17-150 (August 24, 2017).

4. **Instructions and Virginia Taxpayer Bill of Rights.** P.D. 17-6 (February 2, 2017). The Taxpayer challenged an assessment in which the Department denied the long term capital gain subtraction claimed by the Taxpayer. The appeal was based upon the instructions that the Taxpayer claimed to be unclear and incomplete (not erroneous though) and oral advice given to the Taxpayer's local Commissioner or the Revenue's office that was subsequently written and provided to the Taxpayer. The Department upheld the assessment and noted that the instructions are just general guidance and cannot be relied upon ahead of statutes, rulings, regulations, court cases, the Internal Revenue Code, and other sources. Regarding the advice, the Department noted that it does not qualify under the Virginia Taxpayer Bill of Rights as it was not provided in writing or pursuant to a written request from the Taxpayer.

5. **Statute of Limitations.** P.D. 17-9 (February 17, 2017). In October 2016, a taxpayer filed a 2012 tax return requesting a refund. The refund request was denied as it was filed outside of three years from the original due date.

6. **Statute of Limitations.** P.D. 17-18 (March 13, 2017). In May 2016, a taxpayer filed 2011 and 2012 tax returns requesting a refund. The refund requests were denied as they were filed outside of three years from the original due date.

7. **No Withholding.** P.D. 17-22 (March 15, 2017). The Taxpayer filed a Virginia individual income tax return for the 2015 taxable year, claiming a credit for income tax withheld. Under review, the Tax Department denied the credit as to income tax withheld by one of the Taxpayer's employers because the Department was unable to verify that the employer withheld and remitted the amount claimed. The Taxpayer appealed, contending he paid the tax when it was withheld from his wages. As the taxpayer did not provide any evidence, the appeal was denied but the Taxpayer was given a second opportunity to provide evidence.

8. **Failure to Withhold.** P.D. 17-23 (March 15, 2017). A Taxpayer appealed an assessment alleging that the assessment was not correct because his employer failed to
withhold tax. The Tax Department upheld the assessment as the Taxpayer still had the responsibility to pay the tax.

9. **Subtraction for Federal Employee Salary.** P.D. 17-25 (March 17, 2017). The Taxpayers, a husband and wife, were both federal employees during the 2015 taxable year. The husband's total salary was more than $15,000 and the wife's total salary was less than $15,000 during 2015. The Taxpayers claimed a subtraction for the amount of the wife's salary income pursuant to Virginia Code § 58.1-322(C)(24). The Tax Department disallowed the subtraction because the Taxpayers' combined salaries were more than $15,000. The Taxpayers appeal contending the wife's salary met the requirements for the subtraction. The Tax Commissioner abated the assessment because the statute does not require the combination of spouses' income.

10. **Subtraction for Long Term Capital Gain.** P.D. 17-37 (March 28, 2017). A Taxpayer claimed a subtraction for a long term capital gain which was denied because the Tax Department determined that the investment was not in a qualified business. The investment was in stock purchased before January 1, 2010. Even though the stock did not vest until after that date, the Tax Commissioner upheld the assessment as the stock must have been purchased after January 1, 2010.

11. **Land Preservation Tax Credit.** P.D. 17-46 (April 3, 2017). The Taxpayer and a partner formed an LLC in 2005. The LLC purchased two parcels of land and placed a conservation easement on the properties. A limited partnership provided capital to the LLC in exchange for a membership interest. A Virginia land preservation tax credit (the “Credit”) was issued to the LP and the Taxpayer. On audit, the IRS treated the LP's contribution of capital as a “disguised sale” of the Credit resulting in an increase in federal adjusted gross income and a decrease in the amount of the Taxpayer's deductible charitable contributions for 2005, resulting in the reduction of charitable contribution available to carryover for 2006. As such, additional Virginia income tax and interest was assessed for the 2006 taxable year. The Taxpayer paid the assessment and filed amended Virginia income tax returns for both the 2005 and 2006 taxable years requesting a refund of Virginia income tax paid for the 2005 taxable year asserting that the transfer of the Credit should not have created gain for Virginia income tax purposes. The Tax Commissioner approved the refunds as Va. Code § 58.1-513(e) provides that the transfer of a Credit will not create a gain. **Comment:** Why was this appeal needed? The statute is directly on point.

12. **Out of State Tax Credit.** P.D. 17-50 (April 6, 2017). The Taxpayer, a domiciliary resident of Virginia, moved to State A in June 2015. Prior to her move, she spent significant time in State A working for her employer. The Taxpayer filed a part-year Virginia resident income tax return and a State A nonresident/part-year resident income tax return for the 2015 taxable year. On her Virginia return, she claimed a credit for income tax paid to State A. The Tax Department denied the credit and issued an assessment. The Taxpayer appealed arguing that she was permitted to claim a credit for income tax paid to State A, at least with respect to the non-Virginia source income she earned prior to June 2015 that was taxed by both Virginia and State A. The Tax Commissioner agreed and allowed the credit. The Taxpayer was claiming a credit for earned income from State A that was earned while she was a Virginia resident.
13. **Subtraction for State Employee Salary.** P.D. 17-58 (April 26, 2017). The Taxpayer claimed a subtraction for state employee salary of under $15,000. The Tax Department denied and ultimately upheld the denial as the income was negated on the Taxpayer’s federal return as he claimed expenses of greater than his salary. The Tax Department also deemed school board members to not be state employees for purposes of the subtraction under § 58.1-322(C)(24).

14. **Out of State Tax Credits.** P.D. 17-64 (May 10, 2017). The Taxpayer filed a return claiming an out of state tax credit. The credit was denied but on appeal the Taxpayer provided a statement, conforming to the requirements of P.D. 07-207, that listed his pro rata portion of taxable income from a Partnership that was attributable to another state and the amount of tax that was paid to the other state on his behalf. The Tax Commissioner revised the assessment based on this statement.

15. **Reconsideration.** P.D. 17-65 (May 10, 2017). The Taxpayer requested a reconsideration of a previous domicile appeal and proved that one taxable IRA distribution was received prior to the domicile change.

16. **Federal Adjustment.** P.D. 17-66 (May 10, 2017). The Taxpayers received an assessment issued pursuant to an adjustment to its FAGI as reported on their federal return. The Taxpayers appealed contending they did not know why they received an assessment and the assessment was issued outside of the statute of limitations period. The Tax Commissioner upheld the assessment as a letter was sent to the Taxpayers prior to the issuance of the assessment and § 58.1-312(A)(3) permits the Tax Department to issue the assessment at any time as the result of a federal change. *See Also:* P.D. 17-143 (August 23, 2017).

17. **New Jersey Pension Income.** P.D. 17-67 (May 10, 2017). The Taxpayers received an assessment issued pursuant to the denial of a subtraction for contributions returned to the Taxpayers via pension distributions. The Taxpayers appealed and the Tax Department agreed that the assessments should be adjusted. This ruling contains a lengthy discussion of how this subtraction should be calculated and the treatment of pension payments in New Jersey. *See also for a discussion of the methodology:* P.D. 17-91 (June 9, 2017); P.D. 17-124 (June 29, 2017); P.D. 17-134 (July 19, 2017); P.D. 17-149 (August 24, 2017).

18. **Federal Information.** P.D. 17-75 (May 23, 2017). The Tax Commissioner adjusted a return based upon information filed by the Taxpayers on its federal return.

19. **Federal Adjustment.** P.D. 17-78 (May 23, 2017). Based upon a federal audit, the Tax Department issued an assessment for a federal adjustment. The Taxpayers claimed that the federal audit was still under review. The Tax Commissioner disagreed and upheld the assessment. *See also:* P.D. 17-120 (June 29, 2017); P.D. 17-125 (June 29, 2017).

20. **Combat Duty Extension.** P.D. 17-96 (June 9, 2017). A taxpayer requested a refund that was denied as being beyond three years. On appeal, the taxpayer showed that he was eligible for a combat duty extension. The Tax Commissioner determined that the request was timely and granted the refunds.
21. **Converted Assessment.** P.D. 17-101 (June 20, 2017). A taxpayer appealed a converted assessment of corporate income taxes claiming the failure to pay was not willful. The Tax Commissioner upheld the assessment upon discovering that other expenses were paid in lieu of the corporation’s taxes.

22. **Disability Subtraction.** P.D. 17-107 (June 21, 2017). The Taxpayers were issued an assessment after an audit reduced the subtraction for disability payments. Upon review, the Tax Commissioner determined that the husband was eligible for the subtraction even though his payments were reported on a W-2.

23. **Subtraction for Long Term Capital Gain for Qualified Investments.** P.D. 17-108 (June 21, 2017). A taxpayer was denied the subtraction for long term capital gain for qualified investments. He appealed, but did not respond to requests to show that the investment met the required statutory definition.

24. **Death Benefit Subtraction.** P.D. 17-109 (June 21, 2017). Upon audit, the Taxpayers were denied a subtraction for death benefit payment as they were not the result of an annuity. On appeal, the Taxpayer showed that the insurance payments were the result of an annuity. The Tax Commissioner abated the assessment.

25. **Deduction for Retirement Income.** P.D. 17-110 (June 21, 2017). A taxpayer was denied the deduction for retirement income. He appealed, but did not respond to requests for additional information.

26. **Credit For Income Tax Paid on Retirement Income Earned in a Foreign Country.** P.D. 17-130 (July 19, 2017). The Taxpayers claimed the credit for income tax paid on retirement income earned in a foreign country which was disallowed under audit. The Taxpayers appealed, but the assessment was upheld as the Taxpayers could not provide a copy of the necessary tax return.

27. **Foreign Earned Income Exclusion.** P.D. 17-131 (July 19, 2017). Upon not receiving a response to an information request, the Tax Department issued an assessment to the Taxpayers who had not filed a Virginia return. The Taxpayers appealed contending that their income was excluded a foreign earned income under IRC § 911(a)(1) and that their remaining income was below the filing threshold. The Taxpayers provided documentation showing the husband was employed by a government contractor based in the United States and allowed to take advantage of the foreign earned income exclusion as provided by IRC § 911(a)(1).

28. **Joint Return.** P.D. 17-132 (July 19, 2017). Upon a federal adjustment, the Tax Department issued an assessment against a divorced couple for the period in which they filed a joint return. The husband appealed contending that his ex-wife should pay this assessment as he paid the federal tax assessment. The appeal was denied.

29. **Credit for Taxes Paid to Other States.** P.D. 17-135 (July 19, 2017). The taxpayers claimed a credit for taxes paid to Pennsylvania. The credit was denied as Virginia has a reciprocity agreement with Pennsylvania such that a tax return would not likely be required to
be filed with Pennsylvania. The Taxpayers appealed but did not respond to requests for additional information.

30. **Credit for Taxes Paid to Other States.** P.D. 17-136 (July 19, 2017). The taxpayers claimed a credit for taxes paid to Maryland based upon Maryland income tax withholding. The credit was denied as Virginia has a reciprocity agreement with Maryland such that income tax would not be due to Maryland. The Taxpayers appealed but the assessment was upheld as the taxpayers had no Maryland tax liability.

31. **Federal Adjustment.** P.D. 17-144 (August 23, 2017). The Taxpayers received an assessment issued pursuant to an adjustment to its FAGI as reported on their federal return. The Taxpayers appealed questioning the adjustment. The Tax Commissioner upheld the assessment as federal adjustments are considered to be correct. *See also:* P.D. 17-146 (August 23, 2017); P.D. 17-153 (August 24, 2017).

32. **Protective Claim.** P.D. 17-145 (August 23, 2017). The Tax Department issued an assessment to the Taxpayer on March 19, 2014, after she failed to file a Virginia individual income tax return for the 2010 taxable year. By December 2014, the assessment had been paid in full. In December 2016, the Taxpayer filed a return for the 2010 taxable year, reporting an overpayment of income tax and requesting a refund. The Tax Department denied the refund because the return was filed beyond the refund period allowed by the statute of limitations. By letter postmarked March 13, 2017, the Taxpayer appealed the Tax Department's denial, contending she should be able to receive her refund because she has now filed her 2010 federal and Virginia income tax returns. Because § 58.1-1821 appeals can be treated as a protective claims under § 58.1-1824 as the tax has been paid, the protective claim was timely filed. The Tax Commissioner determined that the return will be reviewed and processed and a refund issued as warranted.

33. **Credit for Taxes Paid to Other States.** P.D. 17-148 (August 23, 2017). The Taxpayer was issued an assessment after the credit for taxes paid to other states was reduced. The Taxpayer appealed and provided information showing that the credit was allowable.

34. **Reconsideration.** P.D. 17-154 (August 25, 2017). A Taxpayer's reconsideration request was denied as the Taxpayer did not present any new information.

35. **Hurricane Harvey.** P.D. 17-166 (September 14, 2017). The Tax Department issued Tax Bulletin 17-10 providing for extensions and penalty waivers for victims of Hurricane Harvey.

D. Guidelines


III. RETAIL SALES AND USE TAXES

A. 2017 Legislation

1. Nexus. Senate Bill 962 (Chapter 808) and House Bill 2058 (Chapter 51) amend § 58.1-612 to clarify that the storage of inventory in Virginia gives rise to nexus sufficient to require an out-of-state seller to register as a dealer for the collection of sales and use tax on sales to customers within Virginia. This legislation became effective on July 1, 2017.

2. Consuming Contractors. Senate Bill 1308 (Chapter 449) and House Bill 1890 (Chapter 436) amend § 58.1-610 to repeal the provision requiring dealers that both make retail sales and also install fences, venetian blinds, window shades, awnings, storm windows and doors, locks and locking devices, floor coverings, cabinets, countertops, kitchen equipment, window air conditioning units or other like or comparable items to collect the tax from their customers on such non-retail sales. In the same manner as other real property contractors, these retailers would be required to pay the tax on their purchase or use of these items. This legislation became effective on July 1, 2017.

3. Exemption for Aviation Parts. House Bill 1738 (Chapter 714) amends §§ 58.1-609.3 and 58.1-609.10 to provide an exemption from the sales and use tax for parts, engines, and supplies used for maintaining, repairing, or reconditioning aircraft or any aircraft’s avionics system, engine, or component parts. The exemption will apply to both manned and unmanned systems, but will not cover tools or equipment. The exemption will not restrict the sales tax exemption available to scheduled common carriers under current law. This legislation will be effective on July 1, 2018 and expire on July 1, 2022.

4. Automotive Repair Supplies. House Bill 1518 (Chapter 104) amends § 58.1-602 to require that the sales and use tax be collected by automobile repair businesses on separately stated charges to their customers for supplies used during the repairs, whether or not title or possession of the supplies passes to the customer. Automobile repairers may purchase such supplies exempt from the tax as sales for resale. This legislation became effective on July 1, 2017.

5. Disclosure of Registration Information. House Bill 1810 (Chapter 49) adds § 58.1-623.01 to require the Department of Taxation to provide online access by registered dealers to the names and certificate of registration numbers of dealers who are currently registered for the retail sales and use tax. The Department of Taxation has already been authorized to disclose this information, but apparently, the Department of Taxation would only disclose this information by telephone. This legislation became effective on July 1, 2017.
6. **Advertising Exemption Extension.** Senate Bill 804 (Chapter 441) amends § 58.1-609.6 to extend the sunset date for the exemption allowed for the purchase of printing materials by advertising businesses when the printed material is distributed outside the Commonwealth. The exemption was scheduled to expire July 1, 2017, and is now extended to July 1, 2022.

7. **Exemption for Legal Tender Coins.** Senate Bill 934 (Chapter 445) and House Bill 1668 (Chapter 48) amend § 58.1-609.1 to exempt sales of legal tender coins where the sales price for the transaction exceeds $1,000. This legislation will be effective on January 1, 2018 and expire on June 30, 2022.

8. **Extension of Sales Tax Holiday Sunset Date.** Senate Bill 1018 (Chapter 446) and House Bill 1529 (Chapter 26) amend § 58.1-611.2 to extend the sunset date from July 1, 2017 to July 1, 2022 for the combined sales tax holidays for school supplies and clothing, Energy Star and WaterSense products, and hurricane preparedness products.

9. **Extension of Exemption for Audiovisual Productions and Equipment.** House Bill 1543 (Chapter 412) amends § 58.1-609.6 to extend the July 1, 2019 expiration date for the Retail Sales and Use Tax exemption for audio and video works to July 1, 2022.

10. **Extension of Exemption of Certain Textbooks and other Educational Materials.** House Bill 2377 (Chapter 54) amends § 58.1-609.6 to extend the sunset date for the exemption for textbooks and other educational materials withdrawn from inventory at book-publishing distribution facilities to July 1, 2022. The exemption applies when such materials are withdrawn for free distribution to professors and other individuals with an educational focus.

**B. Recent Court Decisions**

No recent court decisions.

**C. Rulings of the Tax Commissioner**

1. **Audio/Visual Systems.** P.D. 17-2 (Jan. 19, 2017). Taxpayer engineers and installs audio/visual systems for its customers. It claimed that in the prior audit, the auditor told it that all charges for labor are exempt and that it has since relied on that advice. Because there was nothing in the audit file to confirm that advice, the Department upheld assessments on labor charges that were not separately stated installation labor. Further, the Department refused to remove charges where the Taxpayer (i) had only an email (and no other proof) that its customer accrued and paid sales tax to the Department and (ii) accepted a governmental resale certificate when its contract was with a contractor, not a governmental entity.

2. **NAICS Code.** P.D. 17-4 (Feb. 2, 2017). Taxpayer sells ready-to-cook meal delivery service to customers in Virginia. The Taxpayer’s product consists of the raw ingredients needed to prepare a complete meal in the home. When registering, it selected the NAICS code for caterers. The Department initially advised that, based on this code, it needed to collect the full retail sales tax on its sales. With this ruling, the Department changed its position, finding that the Taxpayer’s products are not intended for immediate consumption and are sales of tangible
personal property, not services. The sales are thus eligible for the reduced rate of tax on food for home consumption (currently 1.5% state; 1% local).

3. **Party Packages.** P.D. 17-12 (March 3, 2017). A laser tag amusement business failed to collect sales tax on sales of its party packages, which included the provision of pizza, drinks, a private room and games of laser tag for party attendees. The Taxpayer paid sales tax to the vendors of the pizza and drinks that were provided with the party packages. The Department held that the party packages were taxable because they included the sale of taxable food and beverage. Furthermore, the Taxpayer was not given credit in the assessment for sales tax paid to the pizza vendor. Refunds of erroneous sales taxes paid need to be collected from the vendor so as to prevent misallocations of the 1.0% local sales tax and distortions of the dealer discount.

4. **Consulting Services.** P.D. 17-28 (March 23, 2017). The Department determined that the sale of consulting services, which consisted of instructions for modifying pre-written software that the Taxpayer also sold, was separate and distinct from its sale of pre-written software. Thus, the services were not subject to sales tax. The consulting services were optional, could be purchased simultaneously with or after the purchase of pre-written software, and did not include the exchange of tangible personal property. NB. The ruling does not mention whether the consulting services could be purchased by customers who purchased the prewritten software from another vendor.

5. **Statute of Limitations/Failure to File.** P.D. 17-29 (March 23, 2017). When the auditor determined that the Taxpayer had failed to file use tax returns during the 3 year audit period, he correctly increased the audit period to 6 years under Va. Code § 58.1-634.

6. **Mulching Equipment/Exemption.** P.D. 17-35 (March 28, 2017). The Taxpayer purchased equipment to clear wooded land and simultaneously grind such wood, which remains on the owner’s property as a bed of natural mulch. The Department denied a sales tax exemption on the purchase of the equipment because the forest product (wood mulch) was not held for sale or use. Instead, the taxpayer was providing a service.

7. **Textbooks/Exemption.** P.D. 17-36 (March 28, 2017). The Department clarified that textbooks sold to students attending non-profit and for-profit colleges were exempt from sales tax. The Taxpayer, an out-of-state, online retailer, needed only to prove that the books purchased were certified as required by a department or instructor. It currently met this burden because it obtained lists of all required textbooks for all colleges prior to applying the exemption.

8. **Horse Boarding/Agricultural Exemption.** P.D. 17-43 (April 3, 2017). The Department disagreed with the Taxpayer’s position that, as a horse boarding facility, it could make purchases of grain, hay and supplies exempt from tax. The agricultural exemption in Va. Code § 58.1-609.2.1 applies only to sales to people in the business of producing agricultural products for markets. The Taxpayer provides a service, and similar to dog kennels, it is considered the taxable user of all tangible personal property purchased in connection with providing that service. The Department was permitted to extend the statute of limitations from 3 to 6 years because the Taxpayer failed to file use tax returns on purchases where the vendor did not collect sales tax.
9. **Durable Medical Equipment.** P.D. 17-48 (April 6, 2017). The Department reaffirmed its position in P.D. 16-81 (May 16, 2016) that the Taxpayer’s 100% natural latex mattresses were not exempt durable medical equipment because latex mattress are useful in instances when illness or injury is not present. Customers must have a prescription to purchase the mattress because they do not meet federal flammability standards. *See also* P.D. 17-55 (April 19, 2017) (same taxpayer, but different location).

10. **Substantiation/Statute of Limitations.** P.D. 17-47 (April 6, 2017). Taxpayer did not keep adequate purchase records for the auditor; consequently, she reviewed the general ledger to identify purchases. Because Taxpayer could not prove that it paid sales tax on many of these purchases, it was assessed use tax. Auditor extended audit period to 6 years because Taxpayer had not filed use tax returns during the 3 year audit period. Department rejected Taxpayer’s position that it remove all purchases from one vendor if Taxpayer established that it paid sales tax on at least one of those purchases from that vendor.

11. **Advertising Purchases.** P.D. 17-54 (April 19, 2017). The Department upheld an assessment against a graphics design firm for failing to pay tax on purchases of printing, office and computer supplies. The taxpayer provides professional services and is thus the user and consumer of all property purchased for use in its business. It makes no difference that it was providing these services to a nonprofit; the taxpayer could not rely on the nonprofit’s exemption certificate to make these purchases exempt from tax.

12. **Substantiation.** P.D. 17-56 (April 26, 2017). Taxpayer was unable to convince the Department that cash withdrawals from his fencing business were for personal use rather than expensed purchases, for which use tax should have been paid. The notations in the general ledger of the business show that the checks written for cash were expensed to the small tools and material expense general ledger account. Thus, the Taxpayer should have paid use tax on those expenses.

13. **Nexus and Storage of Inventory.** Tax Bulletin 17-3 (May 3, 2017). Effective July 1, 2017, Va. Code § 58.1-612(C)(9) was amended to provide that the ownership by a dealer of tangible personal property for sale located in Virginia is sufficient activity to require that dealer to register for the collection of Virginia sales and use tax. Prior to June 1, 2017, some dealers who stored inventory in a Virginia facility owned by third parties were not required to collect Virginia sales tax on sales of that property to Virginia residents because ownership of tangible personal property for sale located in Virginia was not sufficient activity to cause the dealer to have nexus. The Guidelines offer examples of when an out of state dealer must now register and collect sales tax on sales to Virginia residents.

14. **Exemption Certificates/Good Faith.** P.D. 17-62 (May 10, 2017). The Department agreed with the Taxpayer that it accepted resale certificates in good faith. Citing *International Paper Comp. v. Va Dept of Taxation*, CL -2009-360, Cir. Ct. of Fairfax Cnty, July 29, 2010, the Taxpayer satisfied the good faith and reasonable care standards because, upon a facial examination of the certificate, the Taxpayer could have reasonably concluded that its customers could be reselling the items purchased.

15. **Nexus.** P.D. 17-71 (May 23, 2017). The Taxpayer, located outside of Virginia, operates an online business and sells tangible personal property to customers in
Virginia and elsewhere. It does not make deliveries in Virginia, has no employees in Virginia and does not own any property in Virginia. It stores inventory at a fulfillment center in Virginia. When it receives an online order from a customer, it forwards it to the Virginia fulfillment center where it is packaged and shipped. The Department ruled that, effective July 1, 2017 with the amendment to Va. Code § 58.1-612(C)(9), the Taxpayer would have sufficient connection or "nexus" with Virginia to be required to register as a dealer and collect Virginia sales tax. See also P.D. 17-102 (June 21, 2017); P.D. 17-104 (June 21, 2017) and P.D. 17-103 (June 21, 2017) (similar ruling on similar facts).

16. **Fences.** P.D. 17-84 (June 2, 2017). Department accepted the Taxpayer’s corrected invoices that separated charges for fencing (taxable) from installation (nontaxable). The Department noted that, effective July 1, 2017, the vendor of the fencing and installation would be treated as a real property contractor and would be responsible for paying sales tax.

17. **Software and Related Support.** P.D. 17-83 (June 2, 017). Taxpayer was able to prove that its software purchases were electronically downloaded; thus, those purchases were removed from the assessment. As for the annual software support contract, the Department determined that it fit the description of a maintenance contract, providing for both repair/replacement parts and repair labor; thus, one-half of the purchase price was subject to tax.

18. **Industrial Processing/Recycling.** P.D. 17-82 (June 2, 2017). The Department determined that removing contaminants and sorting paper into different grades at a recycling facility was not “processing” as it did not make the paper more marketable or useful. Further, its recycling operation was not “industrial in nature” because its NAICS Code was not in Sectors 31-33 (a bright line rule for the Department). The Department noted that if the Taxpayer’s operation included shredding, fluffing, compacting, compressing or densifying waste paper, the industrial processing exemption would apply to its purchase of equipment.

19. **Fabrication Labor.** P.D. 17-88 (June 8, 2017). The Taxpayer, a real property contractor, contested an assessment on separately stated labor charges it paid in connection with the purchase of fabricated construction materials. The Department upheld the assessment, noting that real property contractors must pay sales tax on labor to fabricate tangible personal property. The only exceptions to this policy are service charges with statutory exemptions, such as delivery, repair labor and installation labor.

20. **Fabrication Labor/Countertops.** P.D. 17-100 (June 20, 2017). Fabrication services billed in connection with the sale of countertops are taxable to the customer. While the Taxpayer, which fabricates, sells and installs countertops, received tax advice from the Department regarding the classification of its business as a contractor or a retailer, it did not receive advice regarding the taxation of fabrication labor. The Department noted that, effective July 1, 2017, the Taxpayer is considered a real property contractor and must pay tax on items it purchases for use in its business.

21. **Responsible Officer.** P.D. 17-105 (June 21, 2017). The Taxpayer, a 15% owner of a corporation, was not the responsible officer and is not liable for the converted assessments of the corporation. The Taxpayer did not have the specific duty of timely reporting and paying taxes, was not responsible for paying the corporation’s bills and did not have
authority to prevent the failure of the corporation from paying its tax bills. While the Taxpayer was aware of the delinquency, he did not willfully fail to pay taxes to the Department.

22. Statute of Limitations/Raising New Issues. P.D. 17-106 (June 21, 2017). The Department determined that the Taxpayer, which operated a restaurant, was collecting but not remitting sales tax on its sales of food and beverages. The Taxpayer filed a protest letter, arguing that the auditor erroneously included exempt gift card sales and sales to a nonprofit organization. Because the Taxpayer could not produce an exemption certificate from the nonprofit group, only the gift card sales were removed from the audit. The Taxpayer subsequently filed another administrative protest, contending that customer gratuities were included in its monthly sales, which inflated the assessment. The Department determined that the 2nd administrative protest was filed outside of the 90 day window for filing an assessment (although filed within 90 days of receipt of the Department’s first determination letter). The Taxpayer could not treat its 2nd administrative protest as a request for reconsideration because it was raising a new issue, not providing additional evidence.

23. Automobile Repair Shops. Tax Bulletin 17-7 (June 28, 2017). Effective July 1, 2017, Va. Code § 58.1-602 was amended to provide that separately stated shop supply charges by automobile repair shops are taxable to the customer. Repair shops can purchases these supplies exempt from tax as a sale for resale. These Guidelines provide that a “shop fee,” “shop supply charge,” or similar fee which is a flat-fee or a percentage of the total amount charged are now taxable to the customer. The repair shop should continue paying tax on purchases of office supplies, service forms, toiletries and waiting room items offered for the customer’s convenience.

24. Installation of Property. Tax Bulletin 17-8 (June 29, 2017) Effective July 1, 2017, Va. Code § 58.1-610 was amended to repeal the requirement that dealers that both make retail sales and also install fences, venetian blinds, window shades, awnings, storm windows and doors, floor coverings, cabinets, countertops, kitchen equipment, window air conditioning units and other similar items (the “listed items”) to collect tax from their customers on such sales. Now, the retailers are treated as a real property contractor with respect to the listed items and the retailers must pay tax on their purchase or use of the listed items. With respect to any item purchased with a resale exemption certificate that the business subsequently makes an installation sale, the business should report and remit use tax on its purchase price at the time it withdraws the item from inventory. 23 VAC 10-210-410(G) is no longer valid.

25. Interstate Sales. P.D. 17-116 (June 29, 2017). Taxpayer made purchases of store fixtures from a business in Oklahoma, paying Oklahoma sales tax. It arranged for a common carrier to deliver the fixtures to Virginia and was billed by the common carrier for its services. The Department upheld the audit that assessed use tax on the fixtures and refused to give a credit for Oklahoma sales tax paid. Under Oklahoma law, the sale should have been an exempt interstate commerce sale. The Taxpayer did not take possession of the property in Oklahoma.

26. Substantiation. P.D. 17-114 (June 29, 2017). Exemption certificates provided after the audit will be scrutinized more closely by the Department. Because the exemption certificates provided after the audit were dated after the audit period, they could not have been accepted in good faith. Also, the Taxpayer could not substantiate its claim that the
bags—purchased by it exempt from tax—were used by it when purchases were made by its customers. The assessment stands.

27. **Substantiation.** P.D. 17-115 (June 29, 2017). Taxpayer was unable to prove that it paid tax to vendors on purchases of tangible personal property. Therefore, the auditor was correct in assessing use tax on the subsequent resale of that property and denying the taxpayer a credit for sales taxes paid.

28. **Responsible Officer.** P.D. 17-141 (Aug. 1, 2017). The Taxpayer, a 50% owner of the corporation, was not a responsible officer of the corporation and is not liable for the corporation's converted assessments. She was the secretary of the corporation, and managed one of its stores. She was not responsible for any of the financial aspects of the corporation and had no knowledge of the bookkeeping, accounting, payroll and tax matters of the corporation. The Department relied upon an affidavit submitted by her and her husband, the other 50% owner.

**D. Guidelines**

1. **Cigarette Exemption Certificates.** PD 17-155 (Aug 21, 2017). Effective for transactions on and after January 1, 2018, a dealer must use the new cigarette resale exemption certificate, Form ST-10C, to purchase stamped cigarettes exempt from sales tax. Form ST-10 will no longer be valid. Pursuant to Va. Code § 58.1-623, as amended, the Department will issue the new cigarette resale exemption certificates to qualifying dealers purchasing cigarettes for resale in Virginia, who apply for it and pass a background check. The Guidelines explain application process (fast-track, expedited, and full) for dealers wishing to receive an exemption certificate. The new certificate is not valid for the purchase of cigarettes that will be taken outside of Virginia. *See also* PD 17-69 (Tax Bulletin 17-4 (May 15, 2017)).

**IV. PROPERTY (AD VALOREM) TAXES**

**A. 2017 Legislation**

1. **Enterprise Zone for Green Development Zones.** House Bill 1565 (Chapter 27) amends § 58.1-3245.12 and adds § 58.1-3854 to authorize local governing bodies to create, by ordinance, one or more green development zones, inside which localities would be permitted to grant tax incentives and provide certain regulatory flexibility for a maximum period of ten years to green development businesses and businesses operating in energy-efficient buildings located in a green development zone. A "green development business" is a business engaged primarily in the design, development, or production of materials, components, or equipment used to reduce negative impact on the environment. Local governing bodies are also authorized to adopt a local enterprise zone development taxation program for the green development zone, regardless of whether the green development zone has been designated by the Governor as an enterprise zone, and would make the laws that apply to enterprise zones also applicable to green development zones. This legislation became effective on July 1, 2017.

2. **Partial Exemption for Certain Commercial and Industrial Structures.** House Bill 1455 (Chapter 24) amends § 58.1-3221 to authorize localities to partially exempt from real estate taxation any structure or other improvement older than 15 years that has undergone substantial rehabilitation, renovation or replacement for commercial or industrial use.
that is located in a local technology zone. Currently, this exemption may only be given to structures that are 20 years old or 15 years old and within an enterprise zone. This legislation became effective on July 1, 2017.

3. Producing Leases for Purposes of a Special Assessment for Land Preservation. House Bill 1476 (Chapter 25) amends § 58.1-3234 to prohibit any locality from requiring any taxpayer who is the lessee of real property to produce the lease for the purpose of determining whether the property is eligible for land use assessment and taxation. This legislation became effective on July 1, 2017.

4. Board of Equalization Members in Certain Counties. House Bill 1820 (Chapter 435) amends §§ 15.2-716 and 15.2-716.1 to require that a board of equalization for real estate assessments in any county having the county manager plan of government be composed of an odd number of not less than three nor more than 11 members. The circuit court of the county will appoint members equal to the lowest number that constitutes a majority of the board and the local governing body would appoint the remainder of the board. The circuit court and the governing body will be required to make the initial appointment of the members of the board on or before November 1, 2017. Such appointments will be for the remaining portion of the terms of the current members.

5. Nonjudicial Sale of Delinquent Property. House Bill 1909 (Chapter 437) amends § 58.1-3975 to permit the nonjudicial sale of unimproved real property valued at less than $5,000 if taxes are delinquent for at least three years. This legislation also makes numerous other changes to the Virginia Code concerning these sales. Those changes are:

- The nonjudicial sale of real property valued at no less than $5,000 but no greater than $20,000 will also be permitted if taxes are delinquent for at least three years and the property (i) is unimproved and measures less than 4,000 square feet; (ii) is unimproved and has been determined to be unsuitable for building (the bill expands the bases on which unsuitability may rest); (iii) has a structure on it that has been condemned by the local building official; (iv) has been declared a nuisance by the locality; (v) contains a derelict building; or (vi) has been declared to be blighted by the locality.
- In addition to the existing notice requirements under current law, the treasurer must publish notice of the sale in a newspaper of general circulation within the locality between 7 and 21 days prior to the sale or, in lieu of publication where the annual taxes assessed are less than $500, public notice may be placed on the treasurer or local government’s website for at least 21 days leading up to the sale.
- The 12-month time limitation on agreements for the owner to pay over time will be removed.
- To redeem the property, an owner must pay reasonable attorney’s fees instead of the pro-rata costs of publication and mailing.
- Nonjudicial sales of property will be free and clear of all prior recorded liens unless the treasurer has given the lienholder written notice of the sale at least 30 days prior to the sale.
- The property must pass by special warranty deed as a result of the sale to the highest bidder.
- Any excess proceeds would be property of the prior owner, subject to claims of creditors, and the evaluation of claims for such excess proceeds will be handled by the circuit court.
This legislation became effective on July 1, 2017.

6. **Lien Priority.** Senate Bill 920 (Chapter 118) and House Bill 1992 (Governor’s approval pending) amend §§ 15.2-901, 15.2-906, 15.2-907, 15.2-908, 15.2-908.1, and 15.2-1115 to clarify that certain liens have the same priority as liens for real estate taxes, not all local taxes. This legislation became effective on July 1, 2017.

7. **Exemption for Certain Surviving Spouses.** House Bill 1884 (Chapter 248) adds §§ 58.1-3219.13 through 58.1-3219.16 to provide the necessary statutory authorization required by the constitutional amendment adding § 6-B to Article X of the *Constitution of Virginia* authorizing the General Assembly to allow localities to exempt from taxation real property that is the principal residence of a surviving spouse of any covered person (including, inter alia, law enforcement and emergency medical first responders). This legislation became effective on July 1, 2017.

8. **Exemption for Flooding Remediation (Constitutional Amendment).** Senate Joint Resolution 331 is the first resolution proposing to amend the Virginia Constitution by allowing the General Assembly to authorize the governing body of any locality to provide for a partial exemption from local real property taxation, within such restrictions and upon such conditions as may be prescribed, of improved real estate subject to recurrent flooding upon which flooding abatement, mitigation, or resiliency efforts have been undertaken.

9. **restriction on the deferral of taxes – stafford county.** Senate Bill 1248 (Chapter 448) and House Bill 2219 (Chapter 438) do not amend the Code of Virginia but authorizes Stafford County to adopt, by ordinance, a program allowing deferral of real property tax for a taxpayer’s sole occupied dwelling where that dwelling has seen at least a 25 percent increase in real property tax levy over the levy for 2015, and the increase is due to improvements completed by Stafford County in 2015 to real property that, together with any adjacent property owned by Stafford County, is adjacent to the taxpayer’s real estate. This legislation became effective on July 1, 2017.

**B. Recent Court Decisions**

1. **PHF II Norfolk, LLC v. City of Norfolk,** 2016 Va. Cir. LEXIS 179 (Cir. Ct. of Norfolk, November 14, 2016). A taxpayer challenged the city's real estate tax assessments for years 2011-2014 under § 58.1-3984. The court found that as to the 2011 valuation, the taxpayer rebutted the presumption of a correct assessment by proving the city committed manifest error in miscalculating the assessment, which resulted in a tax-assessed value that exceeded fair market value, and the taxpayer was entitled to a refund. However with respect to the city's 2012, 2013, and 2014 property valuations, the court found that the taxpayer failed to prove the following that the city performed its assessments in a nonuniform manner, that the City's assessed values exceed the property's fair market value as a result of either manifest error or disregarding controlling evidence, and that the city's assessments were not arrived at in accordance with generally accepted appraisal practice.
This case is a unique case in that the first tax year (2011) was decided under a version of § 58.1-3984 that was amended effective January 1, 2012. Tax years 2012-2014 were decided under the amended version of the statute. For the 2011 tax year, the circuit court determined that the taxpayer had to only establish fair market value of the property and show that the property was assessed at a higher value than its fair market value or that the assessment was not uniform. For the 2012, 2013, and 2014 tax years, the circuit court determined that the taxpayer had to (1) establish a fair market value for the Property; (2) prove any one of the following: (i) the city's assessment is not entitled to a presumption of correctness—in which case the taxpayer must merely prove error on the city's part; (ii) the assessed value exceeds fair market value because the city committed manifest error or totally disregarded controlling evidence; or (iii) the assessed value has not been calculated in a manner uniform with similar properties; and (3) prove that the city did not comply with generally accepted appraisal practices when calculating the assessment. While the circuit court determined that the taxpayer proved the fair market value of the property for tax years 2012-2014, the taxpayer did not show error on the city’s part, that the city committed manifest error, that the assessed value was not uniform, and that the city did not comply with generally accepted appraisal practices. Therefore, the taxpayer did not rebut the presumption of correctness for the 2012-2014 tax years.

C. Opinions of the Attorney General

1. Exemption for Surviving Spouses. Op. Va. Atty. Gen. 16-060 (June 22, 2017). The Attorney General of Virginia responded to a question from the Commissioner of the Revenue for the City of Newport News that the real property tax exemption for disabled veterans and surviving spouses in § 58.1-3219.5 is retroactive in application to January 1, 2011 based upon language in the enacting legislation. In other words, the exemption requests are not limited to just the prior three years.

The question about the exemption is not the most interesting part of this opinion however. The Commissioner also asked whether there may be an administrative correction of erroneous assessments resulting from a mistake made by the taxpayer. The Attorney General correctly and very succinctly said “an erroneous assessment arising from a mistake of a taxpayer is entitled to administrative correction under § 58.1-3980.” Localities are already complaining about paying interest on a refund caused by a taxpayer “mistake.” This is the first time that a locality has dipped its toe into the water about not having to pay a refund at all due to a taxpayer mistake. The interest argument is weak because the purpose of paying interest is to compensate on the time that the locality had the use of the money. It is not and was never intended to be a penalty. If a locality decides to set its interest rate at 10%, that is how it has chosen to value the time value of money. What is good for the goose is good for the gander. But not having to pay a refund at all means that taxpayers likely have to file a perfect return originally.

V. PROCEDURAL

A. 2017 Legislation

1. Virginia Tax Amnesty Program. Senate Bill 1438 (Chapter 433) and House Bill 2246 (Chapter 53) adds § 58.1-1840.2 to authorize the Tax Commissioner to oversee the Virginia Tax Amnesty Program to be administered by the Department for a period ranging
between 60 and 75 days during Fiscal Year 2018. All penalties and 50 percent of the interest would be waived upon payment of the taxpayer's remaining balance. At the conclusion of the amnesty period, any remaining amnesty-qualified liabilities would be assessed an additional 20 percent penalty. This legislation became effective on July 1, 2017.

2. **Penalty Waiver.** Senate Bill 793 (Chapter 793) adds § 58.1-1817.1 to require that tax penalties be waived for a small business during its first two years of operation, provided that such small business enters into an installment agreement with the Tax Commissioner. The term "small business" is defined as an independently owned and operated business that has been organized pursuant to Virginia law or maintains a principal place of business in Virginia and has ten or fewer employees. This legislation only applies to penalties related to taxes administered by the Tax Department. This legislation became effective on July 1, 2017.

3. **Discharge of Treasurer from Legal Proceedings.** Senate Bill 1459 (Chapter 677) amends § 58.1-3146 to provide for the allowance of the local attorney, or counsel assigned by the court, to file a pleading showing cause as to why a treasurer should not be discharged from the proceeding. This legislation became effective on July 1, 2017.

4. **Publication of List of Delinquent Taxpayers by Local Government.** House Bill 1463 (Chapter 409) amends § 58.1-3924 to allow local treasurers to publish, whether or not based on information as it exists at the end of the fiscal year 1) a list of tax delinquent real estate, and 2) a list of tax delinquent tangible personal property, machinery and tools and merchants' capital, and other subjects of local taxation. This legislation became effective on July 1, 2017.

5. **Collection of Vehicle License Fees and Taxes.** Senate Bill 1211 (Chapter 119) amends § 46.2-752 to authorize a county treasurer to enter into a reciprocal agreement with the treasurer of a town wholly or partially within such county allowing the town treasurer to collect delinquent local vehicle license fees or taxes owed to the county or the county treasurer to collect such fees or taxes owed to the town. This legislation became effective on July 1, 2017.

**B. Recent Court Decisions**

No recent court decisions.

**C. Rulings of the Tax Commissioner**

1. **Administrative Fees.** P.D. 17-87 (June 7, 2017). The Tax Department issued Tax Bulletin 17-5 in which the following administrative fees would be imposed beginning July 1, 2017:

<table>
<thead>
<tr>
<th>Type of Request</th>
<th>Fee Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offer in Compromise – Doubtful Collectibility</td>
<td>$50</td>
</tr>
<tr>
<td>Ruling Letter</td>
<td>$275</td>
</tr>
<tr>
<td>Local Business Tax Advisory Opinion</td>
<td>$275</td>
</tr>
<tr>
<td>Corporate Income Tax Filing Status Change</td>
<td>$100</td>
</tr>
</tbody>
</table>
D. Guidelines


VI. BUSINESS LICENSE TAXES

A. 2017 Legislation

1. Regulations for Deducting Gross Receipts. House Bill 1961 (Chapter 50) does not amend the Code of Virginia but requires the Department of Taxation to promulgate regulations that clarify the appropriate methodology for determining deductible gross receipts attributable to business conducted in another state or a foreign country. The regulations will be based on previous Rulings of the Tax Commissioner and the decision of the Supreme Court of Virginia in The Nielsen Company, LLC v. County Board of Arlington County, 289 Va. 79 (2015). This legislation became effective on July 1, 2017.

2. Exemption for Certain Defense Production Businesses. Senate Bill 1274 (Chapter 430) and House Bill 1889 (Chapter 111) amend §§ 58.1-3700 and 58.1-3703 to clarify that the manufacturing exemption from the BPOL fee and tax extends to a manufacturer who is also a defense production business selling manufacturing, rebuilding, repair, and maintenance services at the place of manufacture i) to the United States or ii) for which consent of the United States is required. This legislation became effective on July 1, 2017.

3. Adhesive Labels. House Bill 1626 (Chapter 28) amends § 58.1-3717 to require localities that impose a requirement that peddlers and itinerant merchants subject to the BPOL tax display their license on their vehicle or temporary place of business to supply those peddlers and merchants with a decal, sticker, or adhesive label that satisfies the display requirement. This legislation became effective on July 1, 2017.

B. Recent Court Decisions

1. Dulles Duty Free, LLC v. County of Loudoun, No. 160939, 2017 Va. LEXIS 106 (August 24, 2017). Dulles Duty Free, LLC (“Duty Free”) is a subsidiary of Duty Free Americas, Inc. which is a duty free retailer that operates in many locations throughout the United States. Duty Free conducted retail operations in five locations within Dulles International Airport in Loudoun County for the years 2009 through 2011 and a sixth location in 2012 and 2013. Duty Free paid to Loudoun County (the “County”) BPOL taxes for the years 2009 through 2013 and seeks a refund.

Duty Free sells wine, spirits, tobacco, luxury gifts, fragrances, edibles, cosmetics, skincare items, and other various goods. For the tax years at issue, between 92 and 99 percent of Duty Free’s gross sales were exports. For those sales, Duty Free transferred the goods, in sealed packages, to outbound international passengers on the jetway. Duty Free follows specific protocols when handling its merchandise and preparing it for sale. Much of its inventory enters the United States under a bonded warehouse entry. 19 U.S.C. § 1555(a). Bonded warehouses
hold goods on which no import duty has yet been paid. Accordingly, the warehouses remain under the joint custody of the customs service and the goods' owner. 19 U.S.C. § 1555(a). Goods held in bonded warehouses may be earmarked for export, and if properly handled and exported, no import duty is ever owed. 19 U.S.C. § 1555(b).

Duty Free takes steps to ensure that its imported goods qualify for this duty-free treatment. Duty Free’s parent corporation, Duty Free Americas, Inc., imports merchandise to Miami, Florida or Laredo, Texas. Bonded land carriers move the goods to bonded warehouses that serve as distribution centers in Miami and Laredo, thus legally avoiding the need to pay import duties. When Duty Free needs to re-stock its shelves, bonded carriers move the goods to Duty Free’s bonded warehouse at Dulles Airport. Credentialed employees, called cartmen, then bring the goods through security and into the “sterile” international outbound area of Dulles Airport.

Like its warehouses, Duty Free’s shops are customs bonded, and so its goods remain under joint custody of the U.S. Customs and Border Protection. Duty Free then stocks its goods and sells them. Duty Free’s operations fully comply with federal law, 19 U.S.C. § 1555, and the County did not dispute it. Duty Free’s goods avoid all federal taxation—they never pass through customs on entry into the United States. Instead, they are sold as exports, which the Constitution bars the federal government from taxing. U.S. Const. Art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State [by Congress]”). Federal law specifically envisions and blesses this arrangement. See 19 U.S.C. § 1555(b)(1) (“duty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise in accordance with this subsection”); id. at § 1555(b)(3)(B) (setting special rules for “duty-free sales enterprise[s]” that are “airport stores”). Based upon these facts, the court agreed that these goods are “in the stream of commerce for export.”

In Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946), the Supreme Court held that a California tax violated the Import-Export Clause when imposed on certain sales of oil for export. Richfield Oil sold oil to the government of New Zealand. Richfield delivered the oil by pipeline from its refinery to storage tanks in the Los Angeles harbor, where it pumped the oil into a vessel hired by New Zealand to transport the oil to that country. Meanwhile, California exacted a tax on "the privilege of conducting a retail business" in California. The tax was measured by the "gross receipts" from all of Richfield's sales. Richfield contended that the tax, as applied to its oil exports, violated the Import-Export Clause. The Supreme Court agreed. The Court invalidated the tax because the state levied it directly on goods in export transit. That is, at the time of the sale and delivery of the oil into the tanker, "the export had begun." The Court rejected the idea that California could make the tax constitutional by calling it a "privilege of conducting a retail business" tax and measuring it by gross receipts. The Court said that the "issue turns not on the characterization which the state has given the tax, but on its operation and effect." The Court saw no difference in substance between California's tax and a tax directly on the goods. Therefore, the Court determined that the tax was unconstitutional.

**Trial Court Decision**

Duty Free argued that the Import-Export Clause of the federal Constitution bars states and localities from exacting “any Imposts or Duties on Imports or Exports” and that the governing rule is that localities cannot directly tax goods in export transit. U.S. Const., Art. I, §
Supreme Court precedent, particularly Richfield, shows that gross receipts taxes imposed on sales qualify as “directly” taxing the sold goods. Richfield, among other cases, also teaches that goods being sold and delivered to those preparing to imminently go abroad means the goods are “in export transit” and cannot be taxed. Therefore, the County’s BPOL tax, when collected on Duty Free’s export sales, violates the Import-Export Clause.

The County argued that its BPOL tax is not a sales, property or income tax. It is not a tax on a particular transaction. Rather, it is an "indirect" tax for the privilege to engage in a business in Loudoun County. Tax liability is triggered by the decision to operate a business in Loudoun County. It is a means to collect revenue from a business using the roads and variety of protections and services that are afforded by the County. While gross receipts above $200,000 are utilized in determining the tax, this is only a measure of the overall business activity.

Even though it determined that the goods are “in the stream of commerce for export,” the Court found that Duty Free was not entitled to the requested refunds. The Court came to this conclusion by relying on two U.S. Supreme Court cases, Michelin Tire Corp v. Wages, 423 U.S. 276 (1976) and Dep’t of Revenue v. Ass’n of Washington Stevedoring Cos., 435 U.S. 734, 756 n.21 (1978), not involving goods in the stream of commerce for export. To do this, the Court made three findings. First, the trial court concluded that the U.S. Supreme Court’s decision in Richfield could be distinguished. Second, the trial court held in any event that Richfield is “no longer applicable.” And third, the trial court relied on off-point Virginia case law classifying taxes for state law purposes.

The trial court distinguished Richfield by focusing on the timing of the imposition of the California sales tax. The circuit court noted that at the point the oil in Richfield passed into the control of a foreign purchaser and there was nothing that created the probability the oil would be diverted to domestic use. In other words, there was a certainty of the foreign destination at that point. It was at that point when the sales tax was imposed. In contrast, the trial court found that the BPOL tax in dispute was accrued when Duty Free began conducting business in Loudoun. Therefore, the BPOL tax was not a tax on the goods themselves like the California sales tax in Richfield. This is odd since the BPOL tax is measured by gross receipts just like the California sales tax.

The trial court wrestled with whether Richfield remains good law. Ultimately, the court decided that Richfield’s holding “is no longer applicable.” Instead, the court applied Michelin and Washington Stevedoring Cos. and concluded that “this BPOL tax is not an impost or duty, and does not transgress any of the policy dictates behind the Import Export Clause.” However, neither Michelin nor Washington Stevedoring addressed taxes that fell directly on goods in export transit.

Lastly, the circuit court relied on Virginia Supreme Court opinions that gave no consideration to the U.S. Constitution or the Import-Export clause. The court opined that under Virginia case law, the BPOL tax is deemed an indirect tax. The cases cited by the trial court concern whether Virginia taxes qualified as “property” taxes under the 1902 Virginia Constitution and 1930s-era tax laws and have nothing to do with the federal Import-Export Clause.
Decision by Supreme Court of Virginia

In a unanimous decision, the Supreme Court of Virginia overruled and reversed the decision of the circuit court and determined that Richfield, not Michelin or Washington Stevedoring Cos., does in fact apply. The Supreme Court of Virginia noted that the United States Supreme Court has not overruled Richfield. The County argued that Richfield was distinguishable, but the Court found the County’s arguments unpersuasive. The County argued that the tax is placed on the privilege to engage in a business activity, and that is not the same as a tax on goods. The Court disagreed and noted that the characterization of a tax for purposes of state law does not control whether the tax violates the Import-Export Clause.

Specifically to Richfield, the Supreme Court of Virginia determined that the disputed BPOL tax was a direct tax on the export goods in transit just like the tax in Richfield and stated, “We are hard pressed to see a difference of constitutional magnitude between the BPOL tax and the tax at issue in Richfield Oil. Indeed, the parallels between the BPOL tax and the tax under review in Richfield Oil are striking.”

C. Rulings of the Tax Commissioner

1. Broker Services. P.D. 17-8 (February 8, 2017). A Taxpayer appealed a local determination that determined that certain revenues received by the Taxpayer were the Taxpayer’s gross receipts as opposed to receipts received on behalf of another as a broker. The Department determined that the Taxpayer was an agent of the motor carriers it serviced as well as the customers whose items are shipped. Therefore because the Taxpayer was acting in a fiduciary capacity, the Taxpayer was directed to show the locality that it separately accounted for the funds so that those funds would not be included in its gross receipts. Comment: Another remand.

2. Real Estate Services. P.D. 17-10 (February 24, 2017). A Taxpayer appealed a local determination that classified it as a contractor for BPOL purposes. The Taxpayer contended that it was not a contractor and its primary business is the purchase, repair and resale of real estate. The Taxpayer also indicated that it rents real estate when it cannot be sold. Ultimately, the Tax Commissioner upheld the assessment, not because it concluded that it is a contractor but because the taxpayer offered no alternative classification. The rates applicable to purchasing and rehabilitating real property are the same as those of a contractor. The Tax Commissioner also remanded the case to the locality to determine if the Taxpayer is operating multiple businesses by renting real property. Comment: Another remand.

3. Statute of Limitations. P.D. 17-11 (February 28, 2017). A Taxpayer appealed a letter from a locality titled “Final Determination Letter.” This letter was generated after a review of the taxpayer’s returns which created an assessment. The Taxpayer appealed the assessment to the Tax Department. The Tax Department determined that it did not have jurisdiction as no local appeal was filed. Lesson: Even if a taxpayer receives a letter titled “Final Determination Letter,” the letter must be pursuant to a local appeal before it can be appealed to the Tax Department.
4. Classification. P.D. 17-14 (March 10, 2017). A Taxpayer requested an advisory opinion regarding its classification. The Taxpayer purchases defaulted debt and bankruptcy claims from creditors and then pursues collection on the purchased debts from financial institutions. The Taxpayer has a definite place of business in two Virginia localities and has been filing BPOL tax returns as a financial service business. The Taxpayer, however, believes that it should be classified as a collection agency. The Tax Department opined that the Taxpayer should be classified as a financial service business. Among several key distinctions noted by the Tax Department is that the Taxpayer owns its debt whereas a “collection agency” collects on the debts of another.

5. Separate Businesses, Other Location, and Other Issues. P.D. 17-17 (March 13, 2017). A Taxpayer appealed a BPOL assessment based on a number of issues. One issue concerned whether the Taxpayer operated multiple businesses. The Taxpayer sold motor vehicles but their gross receipts also included processing fees and commissions earned from the sale of warranties and insurance. The Tax Department determined that those activities were ancillary and did not constitute a separate business. Another issue concerned whether the Taxpayer had another definition place of business. The Tax Department determined the information provided to be insufficient and denied the appeal of that issue. On all other issues, the Tax Department remanded the case back to the City. Comment: Another remand.

6. Proper Appeal. P.D. 17-60 (May 2, 2017). Just as in P.D. 17-11 above, a Taxpayer appealed a letter from a locality titled “Final Determination Letter.” This letter was generated by the locality’s audit staff pursuant to audit not an appeal. The Tax Department determined that it did not have jurisdiction as no local appeal was filed. See also: P.D. 17-79 (June 1, 2017); P.D. 17-80 (June 1, 2017); P.D. 17-81 (June 1, 2017).

7. Staffing Firm. P.D. 17-68 (May 10, 2017). A Taxpayer filed an appeal of the denial of a local appeal for a refund where the locality determined that it was not a “staffing firm” and eligible for the BPOL exemption under § 58.1-3732.4. The Tax Department relied on NAICS definitions to make the determination that to be eligible for the exemption that the staffing must support or supplement and existing service provided by the client’s existing workforce.

8. Contractor. P.D. 17-70 (May 19, 2017). The Tax Department agreed with a prior ruling that a business does not have to possess a contractor’s license to be classified as a contractor for BPOL purposes. Comments: What is this letter? It is not an appeal or reconsideration and not a request for an advisory opinion.

9. Remand to Tax Department and a Proper Appeal. P.D. 17-90 (June 8, 2017). The Tax Commissioner refused to consider an appeal citing lack of jurisdiction. For tax years 2008 – 2012, the case was appealed to the circuit court which ultimately applied the methodology in Nielsen. Upon remand back to the County for calculation, the Taxpayer disagreed with the County’s calculations and appealed them to the Tax Commissioner. The Tax Commissioner refused to consider the appeal as it had no authority to consider matters decided by a court. For tax years 2013 and 2014, the County issued a “Final Determination Letter” as a result of an audit, not an appeal. The Tax Commissioner declined to consider those years as well.
for lack of jurisdiction. **Comment:** Tax years 2008 – 2012 should have been taken back to the circuit court, not to the Tax Commissioner.

10. **Out of State Deduction.** P.D. 17-93 (June 9, 2017). A locality denied the taxpayer the deduction for receipts attributable to out of state business as the Taxpayer did not provide the locality with requested income tax returns. Allegedly, the locality sought to verify that the receipts were reported to another state. The Tax Commissioner, however, noted that while the amount of gross receipts sitused to a definite place of business for BPOL tax purposes will almost never equal the gross receipts reported on another state's income tax return, such gross receipts would be included in the income tax return. Ultimately, the Tax Commissioner remanded the appeal back to the locality to review the tax returns. **Comment:** Another remand.

11. **Internet Access.** P.D. 17-94 (June 9, 2017). A Taxpayer appealed a decision from a locality imposing BPOL tax on Internet access charges. After a long review; the Tax Commissioner determined that the BPOL tax was a tax on Internet access despite the locality's arguments otherwise. However, the Tax Commissioner determined that the tax was grandfathered and upheld the assessment.

12. **First Year Estimation of Gross Receipts.** P.D. 17-95 (June 9, 2017). A Taxpayer appealed a decision from a locality assessing additional BPOL tax against the Taxpayer after its first year estimation was below its actual gross receipts. The Taxpayer argued that because its first full year gross receipts were again used to determine its second full year liability, the result was double taxation. While the Tax Commissioner did not disagree, he upheld the assessment as it followed the correct methodology.

13. **Farm Products.** P.D. 17-113 (June 26, 2017). A Taxpayer appealed a decision from a locality assessing BPOL tax against the Taxpayer as a wholesaler of produce. The Tax Commissioner determined that the Taxpayer was exempt from BPOL tax as § 58.1-3703(C)(2) provides an exemption for the sale of farm products.

14. **Premature Appeal.** P.D. 17-137 (July 20, 2017). A taxpayer appealed a local assessment of BPOL tax without appealing to the locality first. As a local appeal is required, the Tax Commissioner had no jurisdiction to consider the appeal.

15. **Out of State Deduction.** P.D. 17-? (September 8, 2017). (As of the date of this outline, this ruling has not been assigned a P.D. number.) The Taxpayer, a provider of laboratory testing and services, has several facilities located in the County. Specimens are collected either at doctors' offices or at Taxpayer centers and sent to a laboratory within the County. A small percentage of specimens are tested in the County, but the remaining specimens are sent to Taxpayer laboratories located outside of Virginia for testing. The Taxpayer filed amended BPOL tax returns requesting a refund for the 2010 through 2013 tax years. The returns apportioned gross receipts according to payroll and claimed the deduction for receipts attributable to business conducted in another state (the "out-of-state deduction"). The County concurred that payroll apportionment was appropriate, but disallowed the out-of-state deduction. The Taxpayer appealed the County's adjustments. In its final determination, the County determined that it properly denied the out-of-state deduction because the Taxpayer's employees
located in the County did not participate in transactions with out-of-state customers. The Taxpayer appealed the County's final determination, contending it qualified for the out-of-state deduction because it only requires that its County employees participate in transactions with employees located outside of Virginia. The Tax Commissioner upheld the assessment because none of the Taxpayer's employees at the definite place of business in the County participated in transactions with customers in other states.

The Tax Commissioner reasoned that where gross receipts attributable to the out-of-state employees have already been removed from gross receipts, the Taxpayer is limited to considering whether the activities of its Virginia employees somehow contributed to receipts in another state. Because payroll apportionment was used to source receipts, there must be actual evidence that one or more employees at the licensed definite place of business (i.e., whose wages were included in the numerator of the payroll apportionment formula) participated in transactions that generated receipts attributable to another state, and that the taxpayer filed an income tax return in that state (i.e., not de minimis or otherwise exempt from tax).

Comment: Per § 58.1-3732(B)(2), the deduction is for “receipts attributable to business conducted in another state or foreign country.” Nothing in the statute limits the deduction to situations where a Virginia employee works out-of-state. This requirement has no basis in the statute.

D. Rulings of the Attorney General

No recent opinions.

E. Regulation Development

1. Deduction for Out-of-State Gross Receipts. 2017 House Bill 1961 (Chapter 50) requires the Department of Taxation to promulgate regulations that clarify the appropriate methodology for determining deductible gross receipts attributable to business conducted in another state or a foreign country. The regulations will be based on previous Rulings of the Tax Commissioner and the decision of the Supreme Court of Virginia in The Nielsen Company, LLC v. County Board of Arlington County, 289 Va. 79 (2015).

To comply with 2017 House Bill 1961 (Chapter 50), the Tax Department published the proposed regulation (edited to include only the new language) below. In short, this regulation does nothing. In fact, the Tax Department agrees with this point as it states in the economic impact of this regulation, “Because the intent of this regulatory action is to incorporate policies recently upheld by the Virginia Supreme Court, this amendment will result in no changes to Virginia’s policies.” Despite this, there are other issues that could have been addressed in this regulation that would have been helpful to taxpayers and localities in the administration of this deduction. One such issue is whether “total payroll” or “productive payroll” should be used. The Tax Department has previously issued rulings saying “productive payroll” should be used for apportionment. However in an effort to minimize the deduction, localities insist that “total payroll” be used. This issue is not addressed.
Another issue is that this “new” regulation is supposed to address a deduction that is codified separately from the apportionment scheme that the current regulation addresses. However, the Tax Department has chosen to include it in the apportionment regulation. Although Virginia taxpayers and the business community have been explicitly requesting new regulations providing tax guidance, the General Assembly has to pass legislation to force the Tax Department to do something that they should already be doing. When they do it, it does not provide the guidance taxpayers were hoping to see.


B. If apportionment has been used to divide the gross receipts of the business among its definite places of businesses, then the use of apportionment to assign gross receipts to a definite place of business is presumed to have compromised the ability of the taxpayer to determine the situs of the assigned gross receipts for any other purpose, such as the other-state deduction. For the purposes of this section, "other-state deduction" means a deduction for receipts attributable to business in another state in which it is subject to income tax as described in § 58.1-3732 B of the Code of Virginia. Generally, the same apportionment method used to assign gross receipts to a definite place of business must be used to subdivide those receipts unless the taxpayer has demonstrated that some other method is feasible and more accurate. This requires an analysis of the facts and circumstances applicable to each taxpayer and its definite places of business. Both of the following conditions must be satisfied before apportionment can be used to subdivide receipts assigned to a definite place of business by any method.

1. The business satisfies the conditions in subsection A of this section that make it necessary to subdivide the gross receipts assigned to a definite place of business. For example, in the case of the other-state deduction this would require determining if any employees at the Virginia definite place of business participated in interstate transactions by, for example, contacting or shipping goods to customers in other states, participating with employees in other offices in transactions, etc. If there has been no participation in transactions that generate interstate receipts, then the business is not eligible for the deduction and it has no need to subdivide the receipts assigned to the definite place of business.

2. It must be impossible or impractical to use specific criteria to subdivide the receipts assigned to a definite place of business. This will normally be the case when gross receipts have been assigned to a definite place of business by apportionment because apportionment ignores anything related to a specific transaction other than the criteria used for apportionment, which usually is payroll.

C. Examples:

3. A service business has two divisions, one national and the other regional. Both divisions operate out of an office in County A. While the business can segregate its receipts by division, it cannot assign the receipts of its national division to each office, and it uses payroll apportionment to assign receipts to the office in County A. The receipts of the regional division are assigned to County A using the criteria in § 58.1-3703.1 A 3 a of the Code of Virginia. Assuming that the business meets the requirements to be eligible for the other-state deduction with respect to both divisions, the business may use the same payroll apportionment factor of the national division to subdivide the receipts of the national division assigned to County A. The business will be required to identify specific receipts of the regional division assigned to County
eligible for the other-state deduction unless the business can show that it is impractical or impossible to identify specific receipts for this purpose.

VII. TANGIBLE PERSONAL PROPERTY AND MACHINERY AND TOOLS TAXES

A. 2017 Legislation

1. Tangible Personal Property Tax: Business Property. House Bill 2193 (Chapter 116) amends § 58.1-3506 to increase the maximum original cost of each item of tangible personal property that localities are required to allow business taxpayers to report in an aggregate summary of all such miscellaneous and incidental tangible personal property employed in a trade or business rather than reporting each item individually from $250 to $500. This legislation became effective on July 1, 2017.

2. Tangible Personal Property Tax: List of Uncollected Taxes. House Bill 2455 (Chapter 440) amends § 58.1-3921 to expand the annual list of uncollected balances of previously billed tangible personal property taxes to taxes on trailers, semitrailers, watercraft, and manufactured homes from only vehicles. This legislation became effective on July 1, 2017.

3. Tangible Personal Property Tax: Commercial Fishing Vessels. Senate Bill 1205 (Chapter 447) amends § 58.1-3506 to create a separate classification for commercial fishing vessels for the purposes of the tangible personal property tax. This legislation became effective on July 1, 2017.

B. Recent Court Decisions

1. Western Refining Yorktown Inc. v. County of York, 793 S.E.2d 777 (Va. 2016). Western Refining Yorktown Inc. (“Western Refining”) challenged the County of York’s valuation of its machinery and tools (“M&T”) for the 2010 and 2011 tax years. Ultimately, the Virginia Supreme Court upheld the assessments in a 4-3 split decision. However, Chief Justice Lemons concurred in the result and stated that Western Refining failed to carry its burden and did not prove that its M&T was overvalued. Because Chief Justice Lemons did not join in the prevailing opinion or in the dissenting opinion, there is no opinion from this case issued by a majority of the Court.

The County assessed Western Refining’s M&T in a facility in York County (that was later sold) based upon 25% of its original cost. The County (specifically the Commissioner of the Revenue) uses this same methodology regardless of the age of the M&T. The Commissioner of the Revenue did not commission any studies to support the 25% rate and did not physically evaluate the M&T assessed. Despite this, the Commissioner of the Revenue concluded that over time this percentage equates to the fair market value of the M&T.

Western Refining challenged the assessments of its M&T. With its appeal, it submitted an appraisal characterized as “very comprehensive” by the Commissioner of the Revenue. The appraiser ultimately determined that the value of the M&T for 2010 and 2011 was $24 million and $36 million, respectively. The M&T was originally assessed for $96 million and $99 million for the 2010 and 2011 tax years, respectively. The County also obtained an appraisal of the M&T
which concluded that the values were $215.4 million and $198 million for the 2010 and 2011 tax years, respectively.

Both Western Refining’s appraisal and the County’s relied upon the three approaches: sales comparison, income, and cost methods. Both relied upon the sales and cost methods for determining the fair market value. In Western Refining’s appraisal regarding the cost method the appraiser used a “top down” approach whereby the total value of the site was determined and the value of component parts, such as real estate and its improvements, tankage, pollution control assets, and what remained was deducted to determine the fair market value of the machinery and tools. The County criticized this approach. The County also pointed out that in a 10-K statement filed with the Securities and Exchange Commission in 2009, Western Refining told its shareholders that the assets at the facility had a carrying value of $725 million.

The circuit court upheld the County’s assessment. Western Refining appealed and argued that (1) the County’s methodology for determining fair market value could not reasonably determine fair market value; (2) that the County ignored its appraisal; (3) the County’s conclusion of fair market value did not comply with § 58.1-3503(B); (4) the trial court failed to consider the subsequent sale of the facility; and, (5) the County took inconsistent positions with regard to the highest and best use of the property.

As stated above, the Virginia Supreme Court upheld the circuit court’s opinion and the County’s assessments. The main basis for this was that Western Refining did not carry its burden to prove the fair market value of the M&T. The Court (in the prevailing opinion) did not find fault with the Commissioner of the Revenue’s decision to reject the “top down” approach used by Western Refining. The “top down” approach was criticized by the Court, which also noted the SEC report and a business decision by Western refining to sell the facility after the tax years. The prevailing opinion also found that that the percentage of original cost methodology was an acceptable method to perform what would otherwise be a “herculean task,” that § 58.1-3503(B) did not compel a different conclusion, and that the County had not taken inconsistent positions with regard to the highest and best use of the property.

2. Joseph A. Horbal v. Verizon Online, LLC, 2017 Va. LEXIS 19 (2017); Also Joseph A. Horbal v. Verizon Online, LLC, Case No 13-78 (Circuit Court of Chesterfield County, September 25, 2015) and Eugene H. Walter, Director of Finance of Henrico County v. Verizon Online, LLC, Case No. CL13-3050 (Circuit Court of Henrico County, March 2, 2016). Both of these cases involve identical facts and issues. These cases involve the question of whether localities may impose property taxes on set top cable boxes. However this summary of the circuit court opinion is based on the Henrico case because the Henrico Circuit Court issued a written letter opinion setting out the court’s ruling and rationale for its decision.

The issue for the circuit courts was whether Verizon’s set-top boxes, which it rents to customers, are considered “machines” and therefore subject to local taxation. Code of Virginia § 58.1-1101(A)(2a) states that the following is classified as intangible personal property:

Personal property, tangible in fact, used in cable television businesses, except machines and tools, motor vehicles and delivery equipment of such
businesses, trunk and feeder cables, studio equipment, antennae and office furniture and equipment of such businesses.

Intangible personal property is not subject to local taxation. Therefore, “machines and tools, motor vehicles...and office furniture and equipment of [cable television businesses] are subject to local taxation. Prior to 1984, the statute did not mention “machines” but provided that “tuners and converters” were subject to local taxation.

Henrico argued that even if it is determined that the legislature intended to exclude converters from local taxation, the set-top boxes used today are significantly different devices and more akin to computers, making them "machines" within the meaning of the statute. The Court reviewed the evidence which compares and contrasts the components, uses, and functions of Verizon's set-top boxes at issue in this case and converters used in 1984. While the Court recognized that there have been significant technological advances regarding cable converters since 1984, the Court found Verizon's evidence more persuasive in showing that the primary purpose of the set-top boxes at issue is the same as the cable converters in 1984, which is to provide cable television customers with the ability to watch cable television programming. Therefore, the Court determined that Henrico’s assessments of property tax on set-top boxes was not allowed because they were not “machines.”

Decision by the Supreme Court of Virginia

The Supreme Court of Virginia, which granted certiorari to Chesterfield, upheld the circuit court’s determination that the set-top cable boxes were not taxable by Chesterfield for the reasons set forth above. In this determination, the Court gave great weight to the Tax Commissioner’s determination since the meaning of the statute in question was doubtful.

The most important part of this decision to all Virginia taxpayers is the Court’s discussion of local tax appeals. This discussion was prompted by Verizon’s assignment of error to the circuit court’s determination that its refund requests for 2008 and 2009 were untimely. In Verizon’s initial appeal to Chesterfield, it labeled the appeal as an appeal under §§ 58.1-3980 and 58.1-3983.1. The appeal of the denial of the 2008 and 2009 refunds was beyond the one year window for appeals under § 58.1-3983.1 but within three years from the last day of the tax year being appealed under § 58.1-3980. After Chesterfield denied the appeal for all three tax years (2008, 2009, and 2010), Verizon appealed all three tax years to the Tax Commissioner even though appeals under § 58.1-3980 do not provide for a subsequent appeal to the Tax Commissioner. Chesterfield did not raise the issue that the Tax Commissioner had no jurisdiction with regard to 2008 and 2009, and the Tax Commissioner subsequently ordered refunds for all three tax years. The circuit court determined [on Chesterfield’s motion] that the Tax Commissioner had no such authority with respect to 2008 and 2009.

The Court reversed the circuit court and reinstated the refunds for tax years 2008 and 2009. In doing so, the Court stated that the circuit court’s role was as an appellate court reviewing the agency decision of the Tax Department. Because Chesterfield did not raise the jurisdiction issue with the Tax Department with regard to 2008 and 2009, it had waived the issue and the circuit court could not review.
The implications for this ruling are tremendous. Essentially, every appeal of local taxes filed with the Tax Commissioner must discuss all issues. If an issue is not raised, then it is deemed waived under *Horbal v. Verizon* in the subsequent litigation initiated in circuit court that challenges the Tax Commissioner’s ruling. This decision generates a few issues. Will the circuit court recognize the difference between an issue being raised on the administrative appeal or require that an argument must be made? Is there a difference between raising an issue versus raising an argument? Since the circuit court acts as an appellate court, is the only evidence that may be considered limited to the record created in the administrative appeal? Ostensibly, every appeal of local taxes to the Tax Commissioner now has more significance. If a taxpayer intends to keep its options open for a subsequent appeal to the circuit court, the taxpayer should have legal counsel at least review the appeal to ensure the adequacy of its arguments for the subsequent appeal.

3. **International Paper Company v. County of Isle of Wight**, Civil Action No. 14001026-00 (Cir. Ct. of Isle of Wight, March 15, 2017). International Paper Company ("IP") operates a manufacturing facility in Isle of Wight County (the "County"). The facility (the "Franklin Mill") began operations in the late 1800s. The Franklin Mill closed in 2010 due to the decline in demand for paper products. The Franklin Mill remained in an idle status until 2012. In July 2012, IP re-opened the Franklin Mill to begin manufacturing a new product, fluff pulp. IP maintains machinery at the Franklin Mill that it uses to produce fluff pulp. Machinery used in manufacturing may be taxed in Virginia by local governments as machinery and tools. The County taxed machinery and tools based on 100% of the original cost of the machinery and tools. By using 100% of the original cost of the machinery and tools as a method of valuation, the County’s method did not take into account depreciation or obsolescence of machinery and tools after the purchase date. Specific to IP’s machinery and tools, the County made no attempt to ascertain the fair market value of IP’s machinery and tools other than to value them based on 100% of their original cost. IP completed and filed all machinery and tools tax returns and timely paid all tax assessments to the County.

Virginia Code Section 58.1-3507(B) provides the controlling statutory standard for the M&T by which fair market value is to “be ascertained” and those properties assessed. Under Virginia Code Section 58.1-3507(B):

Machinery and tools . . . shall be valued by means of depreciated cost or a percentage or percentages of original total capitalized cost excluding capitalized interest.

Which of the two standards to employ, and the percentage if the latter is to be employed, may be determined by the Commissioner of the Revenue, who must merely give 30 days’ public notice before implementing the change. *See* Va. Code § 58.1-3507(B). Although a locality may employ, as a starting point, a "static" percentage of original cost when valuing machinery and tools, this is subject to a number of caveats, most significantly the requirement that the “[m]ethod[] of valuing property . . . reasonably be expected to determine actual fair market value" for the property in question. *Va. Code § 58.1-3503(B).* The Board of Supervisors for the County sets the rate of taxation on such property, which was $0.70 per $100 of original cost during the applicable years.
The County argued that an instance of accidental over-reporting by IP on its M&T returns amounted to willful failure or refusal to furnish it with necessary information under § 58.1-3987 such that the court would not be prevented from determining the fair market value for two of the three years appealed. The court placed the burden of proof on the County to prove the willful failure or refusal. The County argued that all it had to do to meet this burden was show an error by the taxpayer. The court determined that the County failed to meet its burden as this standard was interpreted to be an intentional act and taxpayers do not overpay taxes intentionally.

Unlike in the Western Refinery case discussed above, the appraisal of IP’s M&T was a “bottom up” appraisal. IP’s appraisal valued the M&T directly and did not subtract non-M&T from the value of the entire site to get to the M&T. Ultimately, the court determined that IP had proven a lower fair market value for its M&T for the three tax years at issue. However, the Court did not agree that IP properly accounted for functional obsolescence and adjusted downward the fair market value expert testimony of values by about 4 percent resulting in IP obtaining judgment for 96 percent of the tax refund it sought from the County.

C. Rulings of the Tax Commissioner

1. Nurseries. P.D. 17-15 (March 10, 2017). A taxpayer requested an advisory opinion on two questions. First, he asked if nurseries could be deemed exempt from BTPP tax if farm equipment is also exempt. The Tax Commissioner said it could if the locality defined “farms” to include nurseries. Second, he asked if a locality could impose both a merchants’ capital tax and a BTPP tax. The Tax Commissioner opined that it could since there was no statutory prohibition and the property taxed by each tax is different.

2. Valuation of Property. P.D. 17-16 (March 10, 2017). A taxpayer appealed an assessment of merchant’s capital tax alleging that the assessment was based on incorrect information, the property was not inventory because it was financed by a bank, and that the rates were excessive. The Tax Department determined that even though the property was financed by a bank, the Taxpayer was the owner for tax purposes and that the rates did not exceed those permitted by statute. However the Tax Department remanded the case back to the locality to “investigate and resolve the proper inventory amount.” Comment: Wasn’t the purpose of appealing to have the Tax Department determine the correct amount?


4. Property Taxes Paid to Another State. P.D. 17-41 (March 29, 2017). A taxpayer appealed local assessments of personal property tax on motor vehicles claiming that property tax was paid on the vehicles to another state. Virginia Code § 58.1-3511 provides that tax should be refunded to a taxpayer upon a showing of sufficient evidence that the Taxpayer has paid the tax for the same year in the state in which he is domiciled. In this case, the Taxpayer provided no evidence. Instead of denying the appeal, the Tax Department remanded it back to the locality and directed the taxpayer to provide evidence within 30 days. Comment: There are two questions with this ruling. First, why couldn’t the Tax Department simply requested the evidence which is probably not more than a few receipts/proof of
payment? Second, this was an appeal where the locality did not respond within one year. Has the locality waived its right to respond? What if the Taxpayer submits evidence, may the locality respond at that point in time?

5. **Property Used in Manufacturing.** P.D. 17-128 (June 29, 2017). A taxpayer appealed a local appeal again after it was remanded by the Tax Commissioner back to the locality. At issue was whether certain property was used in manufacturing and how it was valued. The subject property were rotogravure cylinders, ink jet printers, and certain safety equipment. The Tax Commissioner determined that the rotogravure cylinders were used in a pre-production process similar to the press plates discussed in *Daily Press*, the ink jet printers were used in the manufacturing process as they were used to print customer-specific information on the inside of the products, and the safety equipment was protective and not used in the manufacturing process. The valuation issue of the correct original cost was not addressed as it was not raised in the local appeal.

6. **Setoff Debt Collection.** P.D. 17-142 (August 7, 2017). After a Taxpayer’s income tax refund was seized for local personal property taxes, the Taxpayer appeal contending that the Tax Department must show how the taxes are applied. The Tax Commissioner declined to consider the appeal for lack of jurisdiction.

**D. Rulings of the Attorney General**

1. **Port Authority/Ownership of Property.** No. 16-067 (March 20, 2017). Pursuant to an installment sale contract, the Virginia Port Authority (the “Authority”) leases tangible personal property from Virginia International Gateway, Inc. (“VIG”) Pursuant to the contract, VIG has a security interest in the assets, but the Authority holds legal title and is responsible for insuring them. The Authority’s operating agent is responsible for maintaining and repairing the property. The attorney general opined that the Authority has sufficient ownership attributes over the assets. Because the Authority is a political subdivision of the Commonwealth, the assets are exempt from taxation.

**VIII. MISCELLANEOUS TAXES**

**A. 2017 Legislation**

1. **Meals Tax Referendum Limitations.** Senate Bill 1296 (Governor’s approval pending) amends § 58.1-3833 to impose a three year moratorium on any referenda initiated by a resolution of the board of supervisors to impose a local food and beverage tax once the voters of a county fail to approve the levy of the tax in a referendum. This legislation also requires any referendum held for the purposes of approving a food and beverage tax contain language specifying the total percentage of all ad valorem taxes [Ed. Note: Ad valorem tax?] to be assessed on meals including the proposed four percent meals tax. This legislation became effective on July 1, 2017.

2. **Cigarette Tax: Purchase for Resale, Penalties.** Senate Bill 1390 (Chapter 453) and House Bill 1913 (Chapter 112) amend §§ 58.1-623, 58.1-1000, and 58.1-1017.3 and add §§ 58.1-623.2 and 58.1-1017.4 to require possession of a newly created Department-issued
exemption certificate to purchase cigarettes bearing Virginia revenue stamps for resale, exempt from Retail Sales and Use Tax, beginning January 1, 2018.

3. **Cigarette Tax: Refund of Returned Tax Stamps.** House Bill 1950 (Chapter 113) amends § 58.1-3832 to clarify that any locality imposing a local cigarette tax must refund the purchase price of any stamp purchased to evidence payment of the tax, without penalties or additional fees, after verifying that the stamps have been returned to the locality. Under current law, refunds are only provided on returned state cigarette excise tax stamps. This legislation became effective on July 1, 2017.

4. **Motor Vehicle Sales and Use Tax: Refunds to Purchaser.** Senate Bill 1350 (Chapter 552) amends §§ 58.1-2403 and 58.1-2423 allows a purchaser to be refunded any motor vehicle sales and use tax paid if the vehicle is returned, and the purchase price refunded, pursuant to the Virginia Motor Vehicle Warranty Enforcement Act. A refund may be received by a purchaser who purchased and returned a vehicle within 45 days not subject to the Virginia Motor Vehicle Warranty Enforcement Act but due to a mechanical defect or failure. This legislation became effective on July 1, 2017.

5. **State License Tax of Public Service Corporations.** Senate Bill 1025 (Chapter 680) repeals Article 4 of Chapter 26 of Title 58.1 regarding provisions requiring that certain public service corporations (water companies with a tax liability exceeding $5,000) to make payments of estimated state license taxes to the State Corporation Commission. This legislation will be effective on January 1, 2019.

6. **Recordation Tax: Exemption for Certain Utility Cooperatives.** Senate Bill 875 (Chapter 875) and House Bill 1478 (Chapter 103) amend § 58.1-811 to clarify the law relating to an exemption from the recordation tax for deeds of trust or mortgages given by utility consumer services cooperatives or utility aggregation cooperatives. This exemption was erroneously deleted from this section in 1994, but the exemption has continued to be granted since that time. This legislation reinserts the exemption. This legislation became effective on July 1, 2017.

7. **Gas Severance Tax.** Senate Bill 886 (Chapter 443) and House Bill 2169 (Chapter 52) amend § 58.1-3713 to extend the sunset date for the local gas road improvement tax from January 1, 2018 to January 1, 2020.

8. **Recordation Tax: Pilot Program for the City of Danville.** House Bill 1699 (Chapter 131) does not amend the Code of Virginia but authorizes the City of Danville, after a public hearing, to enact an ordinance authorizing a pilot project providing that the clerk shall not record any deed with an assessed value of $50,000 or less unless the city director of finance certifies that there are no liens against the property for unpaid taxes, fines, or other charges that rank on a parity with liens for unpaid taxes owed to the City of Danville. The pilot project would not apply to deeds of trust, deeds of easement, deeds in which a public service company, railroad, or cable system operator is either a grantor or grantee, deeds prepared under the supervision of the Office of the Attorney General, deeds conveying property to the Danville Redevelopment and Housing Authority, and deeds conveying real property to satisfy liens or delinquent taxes. This legislation became effective on July 1, 2017.
9. **Admissions Tax: Washington County.** Senate Bill 1320 (Chapter 450) amends § 58.1-3818.03 to authorize Washington County to impose an admissions tax of up to ten percent on a multi-sports complex and entertainment venue, excluding movie theaters, within the county that is located on all or part of a parcel of land or on adjacent parcels of land, containing at least 250 acres and that is in business on or before June 30, 2027. The provisions of this legislation would expire on July 1, 2027 if no such multi-sports complex and entertainment venue is in business in Washington County on or before June 30, 2027.

B. **Recent Court Decisions**

No recent court decisions.

C. **Rulings of the Tax Commissioner**

1. **Communications Sales and Use Tax.** P.D. 17-27 (March 17, 2017). A cable operator requested a ruling solely regarding franchise fees. The Tax Commissioner responded to the ruling which had nothing to do with taxes imposed.

2. **Communications Sales and Use Tax.** P.D. 17-57 (April 26, 2017). A local government requested a ruling regarding rights-of-way fees. The Tax Commissioner responded to the ruling which had nothing to do with taxes imposed.

3. **Withholding Tax.** P.D. 17-74 (May 23, 2017). A Taxpayer failed with withhold taxes from its employees’ wages. All of the employees ultimately paid income tax to Virginia. Therefore, the Taxpayer only owed penalty and interest on the amounts that it failed to withhold. As the Taxpayer had no records, the auditor assessed the taxpayer with the 100% fraud penalty. As the Taxpayer was a new business and claimed to misunderstand withholding rules, the Tax Commissioner determined that there was no fraud and reduced the penalty.

4. **Fiduciary Income Tax: Filing Requirement.** P.D. 17-76 (May 23, 2017). An estate did not file a return with Virginia even though it apparently had Virginia Source Income. The estate claimed that it was not required to since the amount of income was small. The Tax Commissioner required the estate to file a return.

5. **Withholding Tax: Converted Assessments.** P.D. 17-85 (June 2, 2017). A Taxpayer was assessed with withholding tax as these were converted assessments from a business in which the Taxpayer was in senior management and a minority shareholder. The Tax Commissioner abated the assessments as the Taxpayer showed that he never had any direct or indirect responsibility for accounting, finances or payroll.

D. **Rulings of the Attorney General**

1. **Recordation Tax: Conveyance to State Agency.** No. 16-010; 2017 Va. AG LEXIS 5 (March 21, 2017). The attorney general opined that a private bank was not required to pay grantor’s tax on the transfer of land to the Virginia Department of Transportation for public use. Based on Va. Code §§ 25.1-401 and 25.1-418 and the agency’s interpretation of those
E. Regulation Development

1. Bank Franchise Tax: Computation of Net Capital. The Tax Department proposed amending Title 23 of the Virginia Administrative Code §§ 10-330-20 and 10-330-30 to conform the regulations with law changes from as early as 1999. The changes provide for the computation of net capital by adding one-half of the reserve for loan losses, deducting goodwill, and deducting certain interest when the expenses and costs were paid by a related member.