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## Appendix: Recent Virginia Tax Developments

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## Appendix RECENT VIRGINIA TAX DEVELOPMENTS

BY WILLIAM L.S. ROWE

### I. PROCEDURAL DEVELOPMENTS.

#### A. *Limited procedural rights prior to 1980.*

1. *Regulations* — Only sales and use tax regulations and a handful of income tax circulars published. No opportunity for public comment.

2. *Refund actions* — Administrative remedies limited to claim for refund and informal “appeals conference” with State Tax Commissioner. Court challenge limited to refund action following payment of the tax.

3. *Burdens of proof* — Taxpayer faced extremely difficult burdens of proof and adverse rules of statutory construction.

a. The tax collector’s assessment is prima facie correct. *Commonwealth v. Bluefield Sanitarium, Inc.* 216 Va. 686, 689, 222 S.E.2d 526, 528-29 (1976).

b. Exemptions from taxation are strictly construed. Va. Const. art. X, § 6(f). When a statute is subject to two possible constructions, one granting the exemption and another not granting it, court will follow construction that denies exemption. *Commonwealth v. Community Motor Bus Co.*, 214 Va. 155, 157, 198 S.E.2d 619, 621 (1973).

c. Construction of a statute by a State official charged with its administration is entitled to great weight. *Department of Taxation v. Progressive Community Club of Washington County, Va., Inc.*, 215 Va. 732, 739, 213 S.E. 2d 759, 763 (1975). Administrative interpretations could be proved by published regulations, private letter rulings, and even oral testimony of taxing officials.

d. Taxpayer faced with long practical odds in the Virginia Supreme Court losing 69% of State tax cases over 35 years and 92% in the years 1973-1978.

#### B. *The Income Tax Allocation Cases: Commonwealth v. Champion Int’l Corp.*, 220 Va. 981, 265 S.E.2d 720 (1980).

1. Supreme Court decision involved three separate suits all turning on whether Virginia’s allocation and apportionment statutes follow distinction of Uniform Division of Income for Tax Purposes Act between business and nonbusiness income. Department of Taxation asserted that statutes should be construed to imply such a distinction and argued long-standing, consistent administrative interpretation supported the result. Department’s interpretation was established by oral testimony, tax instructions published after tax years in question, and “confirming” statutes enacted after tax years in question.

a. *Champion* — Timber gains treated as capital gains for federal tax purposes under I.R.C. §§ 631 & 1231 are allocated to the state of

situs for tax purposes. Unpublished administrative interpretations not entitled to "great weight." *Id.* at 992-93, 265 S.E.2d at 726-27.

b. *Weaver Bros.* — Interest income allocated to corporation's principal place of business. Administrative interpretation embodied in unpublished regulation not entitled to great weight. *Id.* at 993-94, 265 S.E.2d at 727.

c. *Merrill Lynch* — Dividend and interest income allocated to corporation's principal place of business. Tax instructions published after year in question not controlling especially since instructions not consistent with legislative history, wording of statute, and prior administrative interpretation. *Id.* at 995-96, 265 S.E.2d at 728-29.

2. Court's rejection of Department's attempted retroactive application of changed administrative interpretation indicates that only published regulations will be accorded the "great weight" given by previous decisions to opinions of State Tax Commissioner.

### C. *Procedural legislation.*

1. State Tax Law Revision Task Force Report, prepared by the Tax Committees of the Virginia Bar Association, Virginia Society of Certified Public Accountants, and the Virginia State Bar, leads to Report of the Practices and Procedures in the Collection and Administration of State Taxes Study Committee, H. Doc. No. 30 (1980), recommending establishment of Virginia Tax Court and making Department of Taxation subject to Administrative Process Act.

2. House Bill No. 990 (1980) effected sweeping revisions in Virginia tax procedures. 1980 Va. Acts, ch. 633.

a. *Regulations* — State Tax Commissioner given broad authority to issue rulings and regulations subject to Administrative Process Act. Va. Code § 58-48.6 (Supp. 1981).

(1) Department of Taxation required to publish ruling letters and circuit court opinions in tax cases. Va. Code § 58-48.7 (Supp. 1981).

(2) Weight accorded administrative interpretation specified by statute. Va. Code § 58-48.8 (Supp. 1981).

(a) After 1984 — Only published materials admissible into evidence, and only regulations promulgated after opportunity for public comment accorded "great weight."

(b) Transition rules in effect until 1985.

(1) All regulations published after June 30, 1980 subject to Administrative Process Act.

(2) "Documented" administrative interpretations established as in effect prior to July 1, 1980 are admissible into evidence and given "such weight as the reviewing authority deems appropriate."

(a) *Forst v. Rockingham Poultry Marketing Coop.*, 222 Va. 270, 279 S.E.2d 400 (1981). In construing statute

to deny cooperative exemption from State capital taxation, Court held that "any provision granting an immunity from taxes, whether called an exclusion, limitation or exemption, is narrowly construed." *Id.* at 276, 279 S.E.2d at 403. Private letter ruling to one of taxpayers in 1954 asserting its liability for the tax, followed by payment of tax for number of years, held to be long-standing consistent administrative interpretation to be accorded "great weight."

(b) *County of Henrico v. Management Recruiters, Inc.*, 221 Va. 1004, 277 S.E.2d 163 (1981). Ordinance taxing "a furnisher of domestic or clerical help, labor or employment" held to require license of an employment agency, 80% of whose business was the placement of job applicants in permanent managerial positions. Although statute was to be strictly construed against the locality because it imposed a tax and did not grant an exemption, unchallenged testimony by license supervisor that ordinance had been applied consistently for 20 years to similar businesses by County and other localities under similar ordinances held to be long-standing, consistent administrative interpretation entitled to "great weight" *Id.* at 1010-11, 277 S.E.2d at 167.

(c) *City of Richmond v. VNB Mortgage Corp.* Cir. Ct. City of Richmond (Div. I) (January 23, 1980) (Walker, J.), *appeal denied* (October 2, 1980). 1975 ordinance, effective January 1, 1976, taxing "mortgage brokers" not applicable to corporation making, selling and servicing mortgage loans, i.e., "mortgage banker." Ordinances of other localities much more specific than "mortgage brokers." No "mortgage banker" had ever paid Richmond tax voluntarily. City council rejected 1973 ordinance subjecting mortgage bankers to tax.

(d) *Conclusion* — Except in cases in which specific statutory rules apply, weight to be given administrative interpretations is a factual issue that depends on public knowledge (i.e., quality and quantity of publication), consistency of application, evidence of legislative acquiescence and intent, reasonableness of the interpretation, and equities.

(c) Discovery of all facts concerning administrative interpretations is critical. Discovery is available in state tax refund actions brought under Va. Code § 58-1130 (Supp. 1981), which declares that "the proceedings shall be conducted as an action at law, subject to the Rules of Court." See also *United Airlines, Inc. v. Commonwealth*, Cir. Ct. City of Richmond (Div. I) (April, 1975) (Sands, J.), *aff'd in part and rev'd in part without considering discovery issue*, 219 Va. 374, 248 S.E.2d 124 (1978) (on motion by the Commonwealth, discovery procedures under Part Four of the Rules of Court held applicable to special statutory refund action brought prior to amendment to § 58-1130 that specifically subjects such actions to Rules of Court). Discovery also should be available in local tax actions under § 58-1145, except in real estate cases involving less than \$100,000 of valuation. See Va. Code § 58-1145 (Supp. 1981).

b. *Revenue rulings* — Are they reliable?

(1) *Commonwealth v. Washington Gas Light Co.*, 221 Va. 315, 269 S.E.2d 820 (1980). The State Corporation Commission (SCC), sitting as a court and reviewing its own actions as tax administrator, found that taxpayer had justifiably relied on ruling from the SCC and ordered the refund of \$241,000 assessed by staff after SCC revoked ruling retroac-

tively. Supreme Court, without deciding whether equitable estoppel applies in a Virginia tax case, reversed and held that taxpayer had not proved by "clear, precise, and unequivocal evidence" justifiable reliance to its detriment. *Id.* at 324-326, 269 S.E.2d at 826-27.

(2) *WGL* has little practical effect on taxes administered by Department of Taxation. Va. Code § 58-48.6B (Supp. 1981), copied from I.R.C. § 7805(b), allows the Commissioner to "prescribe the extent, if any, to which any ruling or regulation shall be applied without retroactive effect." *See* 26 Treas. Reg. § 601.201(1)(5).

(3) Would *WGL* result have occurred with any agency except SCC, which was required under statutory procedures in effect when suit was filed to exercise discretionary refund functions in judicial proceeding in which Attorney General was made a party? *See* Va. Code § 58-1123 (1974) (amended 1978).

c. *Procedural pitfalls* — Clarified by House Bill 990.

(1) Except in jeopardy cases, taxes cannot be collected until the Commissioner makes a final determination concerning the correctness of the assessment. Va. Code § 58-1119 (Supp. 1981).

(2) New protective claim for refund procedure permits taxpayer to toll statute of limitations by paying assessment and filing a claim for refund. Va. Code § 58-1119.1 (Supp. 1981).

(3) Definitions clarified to give clear standing to sue to retail merchants, who collect sales tax from customers and others, providing they agree to pass refund on to their customers. Va. Code § 58-1117.20 (Supp. 1981).

(4) Department of Taxation prohibited from making computer registered assessments. All assessments must be made in writing and are effective when mailed to the taxpayer. *Id.*

(5) Court refund procedures clarified by adopting Rules of Court and giving court jurisdiction to hear as one lawsuit case involving tax divided between State and localities. Va. Code §§ 58-1130 & 58-1136. (Supp. 1981).

(6) Statute of limitations increased to three years and measured from the *date of assessment* — i.e., date written notice is mailed to taxpayer, not date registered on computer. Va. Code §§ 58-1130 & 58-1117.20 (Supp. 1981).

(7) Commissioner's right to demand trial *de novo* reduced from 6 months to 21 days. Va. Code § 58-1137 (Supp. 1981); *see Forst v. Rockingham Poultry Marketing Coop.*, 222 Va. 270, 274-75, 279 S.E.2d 400, 402-03 (1981) (upholding Commissioner's right to demand new trial even after time for appeal expired).

d. *Virginia Tax Court.*

(1) Did not survive as part of House Bill 990 as finally enacted.

(2) *See generally* Philipps, *Virginia Tax Procedures: Unfinished Business*, 38 Wash. & Lee L. Rev. 1115 (1981) for interesting review of procedural history and argument in favor of establishing a Virginia tax court.

## II. Income Taxes.

### A. *Champion* fallout.

1. *Department of Taxation will owe large refunds to many multistate corporations audited during the years 1974-1980.*

a. *Refunds* — Non-Virginia headquartered corporations are most likely to benefit.

b. *Double tax* — Virginia headquartered corporations are faced with double tax problem under *Merrill Lynch* and *Weaver Bros.* since interest and dividend income allocated to Virginia by Virginia but apportioned by other states. Problem made worse if Department of Taxation reverses its administrative interpretation that allocation applies only to *net* interest income, thereby requiring Virginia headquartered corporations to allocate to Virginia gross interest income and to deduct interest expenses from apportionable income.

2. *Senate Bill No. 641 (1981) completely revises Virginia allocation and apportionment procedures. 1981 Va. Acts, ch. 402.*

(a) *Mathias Bill* — Virginia Tax Allocation Cases reversed by Virginia General Assembly's adoption of Mathias Bill, S. 893, 96th Cong., 1st Sess. §§ 301-303, 351-361 (1979).

(i) All income taxable by apportionment except dividends from less than 50% owned corporations. All other dividends subtracted from taxable income. Va. Code §§ 58-151.032(g) & 58-151.037 (Supp. 1981).

(ii) Three factor apportionment formula retained with changes. Sales factor now utilizes simple destination test without any throwback. *Compare* Va. Code §§ 58-151.041-.048 with Va. Code §§ 58-151.041-.048 (1974 & Supp. 1978) (amended in part 1981).

(b) *Merrill Lynch* and *Weaver Bros.* reversed by clarification of Va. Code §58-151.050:1 taxing "financial corporations" under a one factor cost of performance formula. Any corporation can be a "financial corporation" if it receives 70% or more of its gross income from interest, taxable dividends, securities transactions, and financial services. Va. Code § 58-151.050:1 (Supp. 1981).

(c) *Unitary business* — Worldwide and nationwide apportionment rejected: Virginia is an international tax haven.

(i) National trend is to subject major corporations to tax by apportioning all unitary business income from both domestic and foreign sources. *See Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980) (separate accounting for Wisconsin marketing operations disallowed); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980) (tax on dividends received from foreign subsidiaries constitutionally included within Vermont's apportionable income).

(ii) Senate Bill 641 rejects taxation of all foreign source income by deducting foreign dividend gross-up, Subpart F income, and all "foreign source income" from Virginia taxable income. Va. Code §58-151.013(c)(6), (8), & (9) (Supp. 1981). Three factor formula limits

factors to property, payroll, or sales "effectively connected with the conduct of a trade or business within the United States." Va. Code § 58-141.042-.048 (Supp. 1981). Worldwide consolidation or combination of income of affiliated group of corporations prohibited. Va. Code §58-151.079:1 (Supp. 1981).

(d) *Election* — 1981 taxable year is an election year for purposes of corporations choosing to file separate, consolidated, or "combined" tax returns. Department of Taxation may require pro forma request for permission to change reporting method. Va. Code §58-151.079 (Supp.1981). *See also* Va. Corp. Income Tax Circular No. 2 (May 9, 1978).

B. *Pending Litigation* — *General Electric v. Commonwealth*, Cir. Ct. City of Richmond (Div. I) (Walker, J.).

1. Issue is whether income of a non-resident DISC is subject to Virginia taxation by including its income with that of its parent corporation. Stipulated facts are that GE DISC is a non-operating commission DISC that does not do business in Virginia and is not subject to Virginia income tax.

2. Case will turn on meaning of Va. Code § 58-151.083 (1974), which permits Department of Taxation to require a combined return when "any arrangements exist in such a manner as to improperly reflect the business done or the Virginia taxable income earned from business done in this State." When a taxpayer enters into a transaction that is valid and proper under federal law, is the Department of Taxation entitled to deem it "improper," notwithstanding Virginia's absolute conformity to federal tax law, if the effect is to reduce the Virginia taxable income?

### III. Sales and Use Taxes.

#### A. *Miscellaneous legislation.*

1. *Home fuel* — Fuel for domestic consumption exempted from State tax with local option to exempt dealer sales. Va. Code §§ 58-441.6(gl) & 58-441.49:3 (Supp. 1981); *see* Va. Tax Bulletin 81-20 (August 20, 1981).

2. *Vending machines* — Vending machine operators must report and pay tax (4% to state and 1% to locality) based on wholesale purchases. Va. Code § 58-441.34 (Supp. 1981) (effective July 1, 1982).

3. *Other* — Numerous exemptions added or expanded in reaction to results produced by rule of strict construction.

B. *Litigation* — Cases begin to clarify scope of exemption for "machinery or tools . . . or supplies, used directly in processing, manufacturing, refining, mining or conversion of products for sale or resale." Va. Code § 58-441.6 (Supp. 1981).

1. *Processing* — Department's narrow view that "manufacturing" and "processing" are synonymous terms rejected.

a. *Commonwealth v. Orange-Madison Coop. Farm Services*, 220 Va. 655, 261 S.E.2d 532 (1980). Processing "merely requires that the product undergo a treatment rendering the product more marketable or useful." Blending of grains and additives to make feed and mixing of chemicals to make fertilizer held to be exempt processing. The fact products were

sold at retail and not wholesale was irrelevant. *Id.* at 658-59, 261 S.E.2d at 534-35.

b. *Solite Corp. v. County of King George*, 220 Va. 661, 261 S.E.2d 535 (1980) (local license tax case decided the same day as *Orange-Madison Coop.*). Crushing, blending and mixing of sand and stone held not manufacturing. Manufacturing requires transformation of raw materials into articles of substantially different character. *Id.* at 665, 261 S.E.2d at 537-38.

c. *State Tax Commissioner v. Flow Research Animals, Inc.* 221 Va. 817, 273 S.E.2d 811 (1981) (two justices dissenting). Raising laboratory animals in controlled environment for later resale held not exempt processing. Processing requires application of some process, something more than letting nature take its course. *Id.* at 820, 273 S.E.2d at 813.

2. *Direct use* — Direct use depends on determination of where exempt activity begins and ends and what items are used as an integral part of that activity. See Va. Code § 58-441.3(p) & (q).

(a) *Commonwealth v. United Airlines, Inc.*, 219 Va. 374, 248 S.E.2d 124 (1978). Ticket and reservation equipment, baggage handling equipment, headrest covers on passenger seats, and anti-hijacking surveillance equipment were used directly in “common carrier service.” *Id.* at 385-87, 248 S.E.2d at 130-31. *But cf. Commonwealth v. Community Motor Bus Co.*, 214 Va. 155, 159, 198 S.E.2d 619, 622 (1973) (exempting only items needed to keep the buses on the road in rendition of its “public service”).

(b) *Webster Brick Co. v. Department of Taxation*, 219 Va. 81, 245 S.E.2d 252 (1978). Only items that are an immediate part of production — on the assembly line — are used directly. Essential items such as outside oil storage tanks, crane, tools used to repair equipment, chemicals used to maintain equipment, and specially designed parts of building are not exempt. *Id.* at 87-89, 245 S.E.2d at 256-57.

(c) *Wellmore Coal Corp. v. Commonwealth*, Cir. Ct. Buchanan County (August 4, 1981) (Phillips, J.), *pet. for appeal filed by Commonwealth* (November 4, 1981). Involves direct use exemptions for mining and processing.

(i) Trial court held scales used to weigh in coal trucks at processing plant were used directly in processing and found that fine coal processing plant (a “tipple”) was essentially a one purpose machine so that concrete and steel used to erect tipple was sales tax exempt. Question involves scope of direct use exemption — where “machine” begins and ends.

(ii) Trial court held supplies used to reclaim strip mined lands, maintain and construct haul roads, and repair parts for coal trucks were not used directly in mining. Trucking question involves where “coal mining” begins and ends.

3. *Nontaxable services* — Distinction between taxable sales of property and non-taxable rendition of services still uncertain.

a. *WTAR Radio-TV Corp. v. Commonwealth*, 217 Va. 877, 234 S.E.2d 245 (1977). Charges for creating commercial advertisement broadcast over airwaves held taxable since “true object” of the buyer was to buy completed film. Broadcasting over airwaves constituted taxable transfer of possession. *Id.* at 883-84, 234 S.E.2d at 248-49.

b. *Designing Women, Inc. v. Commonwealth*, Cir. Ct. Arlington County (Feb. 24, 1978) (Duff, J.), *appeal denied*, 219 Va. lxx (1978). The Treasurer of Virginia League of Women Voters, a candidate for Commonwealth's Attorney, and the Clerk of the Circuit Court all testified that their purpose in hiring the advertising agency was to obtain its design skills and knowledge. Judge Duff held that "true object" of the buyers was to obtain expertise and know-how, not tangible designs. Department's petition for appeal was denied on procedural grounds.

c. *Charlottesville Newspapers, Inc., v. Commonwealth*, Cir. Ct. City of Charlottesville (March 29, 1978) (Pickford, J.), *appeal denied*, 219 Va. lxx (1979). Monthly charges for UPI and AP wire news services not taxable even though news stories were transmitted through tangible machines and displayed in printed form.

d. Department of Taxation Ruling dated May 14, 1981, Va. State & Loc. Taxes (P-H) ¶23,081. Charges for pager communication service held tax exempt. Charges for pager unit taxable only if rented or sold without corresponding communications service.

e. Department of Taxation Ruling dated January 26, 1981, Va. State & Loc. Taxes (P-H) ¶23,085. Charges for sale and maintenance of "canned" computer programs held taxable.

4. *Inventory withdrawals — Commonwealth v. Miller-Morton Co.*, 220 Va. 852, 263 S.E.2d 413 (1980). Since imposition of use tax requires a "commercial transaction," no use tax may be imposed on materials withdrawn from inventory for use as samples until the materials are segregated physically for such purposes. Department's attempt to impose Virginia use tax on percentage of products manufactured here but then shipped to and stored in other states held invalid. Manufactured goods maintained resale exempt status until actual withdrawal from inventory. *Id.* at 857-59, 263 S.E.2d at 416-18.

#### IV. Capital Not Otherwise Taxed (CNOT) Tax.

##### A. Legislation.

1. *Nuisance* — Repeal efforts continue. *E.g.*, Senate Bill No. 547 (1981) (died in Senate).

2. *Advances* — Intercompany advances excluded from taxation in "category 3" after 1979. Exemption applies only to advances to affiliates that are not made as part of taxpayer's regular course of business. Otherwise, advances and offsetting payables are taxed in "category 2." Va. Code § 58-411A(3) & (4) (Supp. 1981).

3. *Contractors* — Contractors using percentage of completion method of accounting report underbillings and overbillings in "category 2" after 1980. Va. Code § 58-411B (Supp. 1981). Prior to that time, Department argued that underbillings created taxable assets in "category 3," and offsetting overbillings were wasted deduction.

##### B. Litigation — Soon.

C. *Proposed regulations issued February 20, 1981.*

1. *Money* — Exempt “money on hand and on deposit” includes checking accounts, savings accounts, and certificates of deposit, but does not include commercial paper or master notes issued by bankholding companies, banks, and others. Proposed CNOT Reg. § 8.58-411(4)A(9)(b). No comment on money market funds or other investments subject to ready conversion to cash. *See Commonwealth v. Stringfellow*, 173 Va. 284, 291-92, 4 S.E.2d 357, 360 (1939) (credit balance with broker taxed as money, not as debt instrument).

2. *Usual course of business* — The excess of bills and accounts receivable over bills and accounts payable is taxable in “category 2.” Va. Code § 58-411A(3) (Supp. 1981). Proposed CNOT Reg. § 8.58-411(3)A requires both receivables and payables to be contracted “in the usual course of the taxpayer’s business and not for purposes of capital outlay.” Proposed regulations define “usual course of business” to mean *directly related* to the acquisition, production, or sale of taxpayer’s products or services. Proposed CNOT Reg. § 8.58-411(3)A(1).

3. *Valuation* — Audit position is apparently that accounting reserves will not be allowed in determining “actual value.” Burden is on taxpayer (in administrative appeal) to show that reserve for bad debts or otherwise is necessary to reflect actual value. *See* Proposed CNOT Reg. § 8.58-411(3)E.

4. *Evasion* — Any conversion of property into nontaxable form for purposes of “evading taxation” deemed voidable. Proposed CNOT Reg. § 8.58-421. Statute is much narrower. Va. Code § 58-421 (1974) (conversion must occur within 30 days prior to first day of taxable year).

V. Pending Virginia Tax Cases\*.

A. *Income taxes.*

1. *General Electric Co. v. Commonwealth*, Circuit Court of City of Richmond, Division I. Issue is whether income of a non-resident DISC is subject to Virginia taxation by including its income with that of its parent corporation. Stipulated facts are that GE DISC is a non-operating commission DISC that does not do business in Virginia and is not subject to Virginia income tax. Case will turn on meaning § 58-151.083, which permits Department of Taxation to require a combined return when “any arrangements exist in such a manner as to improperly reflect that business done or the Virginia taxable income earned from business done in this State.” Several other pending cases await a final decision in *General Electric*.

2. *E.I. DuPont de Nemours & Co. v. Department of Taxation*, Circuit Court, City of Richmond, Division I. Petitions put in issue (a) the DISC question under consideration in the *General Electric* case and (b) the inclusion in Virginia taxable income of certain income that the taxpayer claims

is allocable income under §§ 58-151.037 & 58-151.039 (only one petition involves this issue).

3. *E-Systems, Inc. v. Department of Taxation*, Circuit Court of the City of Richmond, Division I. Petition puts in issue (a) DISC question under consideration in *General Electric* case and (b) inclusion in Virginia taxable income of certain amounts that were recovered by taxpayer and that were deducted previously on federal returns for years prior to the year in which the taxpayer first became subject to the Virginia income tax.

4. *H.B. Rowe & Co. v. State Tax Commissioner*, Circuit Court of the City of Richmond, Division I. Taxpayer's federal taxable income for a prior year was adjusted by the IRS, and the taxpayer filed a claim for refund. The claim was denied by the State Tax commissioner on the basis that the claim for refund was not timely filed with 60 days from the final determination made by the IRS.

5. *Associated Transport, Inc. v. Commonwealth*, Circuit Court, City of Richmond. Application, relating to years 1962-1966, was filed in 1968, was answered, and has remained dormant since then. The issues involve the assertion that application of the apportionment formula to the interstate trucking business of the taxpayer violates the due process and commerce clauses. In addition, the inclusion of certain "passive income" in apportionable income is disputed.

6. *Groom v. Commonwealth*, petition for appeal filed by the Commonwealth from the decision of the Circuit Court for Arlington County. The issue involves the creditability of the District of Columbia's unincorporated business franchise tax against the individual's Virginia income tax liability under § 58-151.015. During pendency of the Commonwealth's appeal, the Circuit Court for the District of Columbia ruled that the District's unincorporated business franchise tax was, in part, in violation of its Home Rule Charter and refunded to the taxpayers herein those amounts sought to be credited against the taxpayers' Virginia income tax liability. By joint motion of counsel, the Commonwealth's petition was dismissed for mootness after the payment of all the Commonwealth's delinquent assessments for the years in question.

7. *Hill v. Commonwealth*, Circuit Court, County of Loudoun. The issue is identical to that in the *Groom* case and deals with the creditability of the District of Columbia's unincorporated business franchise tax against Virginia income tax liability under § 58-151.015.

8. *Mead Corp. v. Commonwealth of Virginia*, Circuit Court, City of Richmond, Division I. The question raised involves the interpretation of § 58-151.039. Both parties agree that the case of *Champion International Corp. v. Commonwealth* controls disposition of the legal issue involved. Certain computational difficulties, however, still may remain.

9. *Quinn Patent Drawing Service, Inc. v. Commonwealth*, Circuit Court, County of Arlington. Application contests the inclusion of certain

income generated from the sales of real estate and improvements located in Washington, D.C., in apportionable income.

10. *Roadway Express, Inc. v. Commonwealth*, Circuit Court, City of Richmond, Division I. The taxpayer contests the validity of § 58-151.050, which details how the income of motor carriers is apportioned for Virginia income tax purposes, asserting that as applied to its particular interstate trucking operation, the statute produces an unconstitutional result in taxing more than Virginia's share of the company's income.

11. *B.J. McAdams, Inc. v. Commonwealth*, Circuit Court, City of Richmond, Division II. In a declaratory judgment proceeding, the taxpayer contended that income earned in its interstate trucking business did not constitute income from Virginia sources under the Code of Virginia. The trial court ruled in favor of the taxpayer. The Commonwealth is expected to file a petition for appeal in November, 1981.

#### B. *Sales and Use Taxes.*

1. *E.B.C., Inc. v. Commonwealth*, Circuit Court of Wise County. Taxpayer, a corporation formed to engage in mining and mineral extraction as well as construction and land excavation, challenges the assessment of the use tax on the purchase of certain pieces of equipment that it uses in its coal operations and in unrelated earth moving and construction activities. The Department issued the assessment based upon prorated usage between the coal and construction activities. The taxpayer claims total exemption.

2. *J.T. Newman v. Forst*, Circuit Court of Lunenburg County. Taxpayer, a trucking concern holding a contract carrier status, leased its trucks to a common carrier. Taxpayer claims an exemption from the use tax assessment contending that the lease of his equipment to a common carrier qualifies his concern for common carrier status and the attendant exemption.

3. *Princess Anne Inn, Inc. v. Commonwealth*, Circuit Court of the City of Virginia Beach. Taxpayer challenges a use tax assessment on charges for "pay-TV movies" furnished to guests in their rooms, as well as a tax on the equipment and movies that it purchases, claiming that it is providing a nontaxable service.

4. *Nelson M. Diehl v. Forst*, Circuit Court, County of Rockingham. The taxpayer, a farmer in the business of raising cattle for sale at wholesale, contends that certain retail sales of cattle, never more than 15 on an annual basis, are exempt from sales and use tax as an occasional sale under § 58-441.6(m). The taxpayer also contends that he relied on certain oral advice for interpretation of the occasional sale exemption.

5. *Bruce Flourney Motor Corp. v. Department of Taxation*, Circuit Court, City of Norfolk. The issues involve the use of the estimation technique for the audit period and the inclusion of certain items in the tax base, including warranties/maintenance contracts and certain items purchased for either warranty work or rental car maintenance and repair.

6. *Harman Mining Corp. v. Commonwealth*, Circuit Court, County of Buchanan. The taxpayer is engaged in the business of mining coal for sale and alleges that taxes were assessed erroneously on certain machinery, tools, and other materials utilized in his business.

7. *Miller-Morton Co. v. Commonwealth*, Circuit Court, City of Richmond, Division I, on remand from the Supreme Court of Virginia on the issue of certain dual purpose items. Because of the trial court's ruling on a threshold issue, the trial court did not entertain certain other legal issues. These issues related to certain dual purpose items such as display stands and containers that served two purposes: promotional purposes and packaging/delivery purposes. Two legal arguments were raised by the taxpayer, disputed by the Department of Taxation, and not decided below. These issues were whether these items were resold by the taxpayer and whether the packaging exemption granted by § 58-441.6 was met.

8. *Reynolds Metals Co. v. Commonwealth*, Circuit Court, City of Richmond. The issues are similar, if not identical, to those involved in the *Miller-Morton* case.

9. *A.H. Robins Co. v. Commonwealth*, Circuit Court, City of Richmond, Division I. The issues are similar, if not identical, to those involved in the *Miller-Morton* case.

10. *Nationwide Communications v. Commonwealth*, Circuit Court, City of Richmond, Division I. Application contests use tax assessment imposed upon tangible personal property employed in the taxpayer's business. The issue involves the applicability of the broadcasting exemption granted by § 58-441.6(j) and the proration of use tax liability based on percentages of exempt versus taxable use.

11. *Derwood L. Runion v. Forst*, Circuit Court, County of Rockingham. The taxpayer asserts that in the operation of its business of constructing agricultural buildings, equipping agricultural buildings, and selling equipment that was installed by others in agricultural buildings, it is not liable for either the payment or the collection of sales taxes.

12. *Ryan Homes, Inc. v. Commonwealth*, Circuit Court, City of Richmond, Division I. The taxpayer is a construction contractor that also is engaged in a manufacturing business. The dispute involves the Department's interpretation of § 58-441.15, Regulation § 1-27, and Sales and Use Tax Circular No. 4.

13. *Wellmore Coal Corp. v. Commonwealth*, Circuit Court, County of Buchanan. The dispute centers on the taxability of various items of tangible personal property purchased for use in the taxpayers' coal mining operation. The trial court decided that the following items were exempted: real estate construction materials used to build a coal preparation facility (tipple), coal scoops, testing equipment, scales, methanometers, and first aid equipment. The court ruled that these items were used directly in the exempted activity under § 58-441.6. The trial court ruled that the following items were taxable: repair parts and maintenance materials for trucks used to haul coal

between the mine and the coal preparation facility, items used to build and maintain haul roads in and around the mine site, and reclamation materials. The court ruled that these items were not used directly in the exempted activity. The Commonwealth filed a petition for appeal in November, 1981.

14. *Graves v. Commonwealth*, Circuit Court for the City of Norfolk. Petition contests inclusion of certain "cash advances" in taxpayer's taxable base or measure when the lump-sum method of reporting is elected under § 1-41(b) of the Virginia Retail Sales and Use Tax Regulations. Court has indicated that it will grant the Department's motion for summary judgment.

15. *Ocean Sands Holding Corp. v. Commissioner*, Circuit Court of the City of Virginia Beach. Petition contests certain sales and use tax assessments arrived at by using various methods of reconstructing taxpayer's gross receipts. Federal cases for the same taxable periods involving assessment of understated corporation income tax, together with fraud penalties, have been decided partially in favor of the government in a decision reported at 41 T.C.M. (CCH) 1 (1980).

### C. CNOT.

1. *Atlantic Concrete Products v. Commonwealth & Roanoke Ready Mix Concrete Corp. v. Commonwealth*, Circuit Court of the City of Roanoke. These companion cases involve challenges to assessments for CNOT based upon intercorporate advances. Taxpayers challenge only the current valuation of the advances and not their taxability under law.

2. *Pepsi Cola Bottling Co. of Danville v. Commonwealth*, Circuit Court of the City of Danville. Taxpayer challenges a CNOT assessment on the value of goodwill and the value of "bottles-with-trade." Taxpayer claims that goodwill is not among those intangible assets subject to the CNOT and that it has no ownership interest in those soft drink bottles out of its possession in circulation in the marketplace.

3. *Leonard Smith Sheet Metal & Roofing, Inc. v. Department of Taxation*, Circuit Court, City of Salem. The case involves several issues including the taxation of equity in contracts, the definition of accounts payable and accounts receivable, consideration of whether certain loans were accounts payable when not incurred in the usual course of business, and whether sales taxes are includible as accounts payable. A procedural objection in terms of compliance with the requirements of § 58-1130 was raised by the Department of Taxation.

4. *Daily Press, Inc. v. Forst*, Circuit Court of the City of Newport News. Petition contests (a) valuation of receivables at their face amount without deduction for an allowance or reserve for bad debts and (b) inclusion in "capital" of certain intercompany advances between members of an affiliated group.

5. *Hilton Enterprises Virginia, Inc. v. Forst*, Circuit Court of Prince William County. Petition contests inclusion of certain intercompany advances in "capital" under § 58-410.

D. *Miscellaneous.*

1. *Holloman v. Department of Taxation*, on appeal to the Virginia Supreme Court from the Circuit Court of the City of Richmond, Division II. The Department has appealed an adverse decision holding that North Carolina farmers producing hogs for slaughter who use the services of a contract carrier to transport their hogs to markets in the Commonwealth are not subject to the Virginia Pork Excise Tax on slaughter hogs and feeder pigs for hogs sold into slaughter in Virginia.

2. *Continental Telephone Company of Virginia v. Commonwealth*, Circuit Court, City of Richmond. Application for correction of recordation tax assessment. The issues involve the meaning of the terms "deed of confirmation" as used in § 58-61 and "supplemental deed of trust" as used in § 58-60. The taxpayer contends that the recordation of certain instruments reflecting the consolidation of certain subsidiaries with its parent is exempt from recordation tax as either a deed of confirmation, or supplemental deed of trust, or both.

