# TAXATION

*Craig D. Bell* *

## I. INTRODUCTION

This article reviews significant recent developments in the law affecting Virginia taxation. Each section covers legislative changes, judicial decisions, and selected opinions or pronouncements from the Virginia Department of Taxation and the Virginia attorney general over the past year.

Part One of this article discusses legal developments regarding taxes imposed and administered by the Commonwealth. Section II addresses legislative and judicial changes made to Virginia corporate and individual tax law. Section III covers legal changes pertaining to retail sales and use taxes. Section IV covers changes to state tax administration.

Part Two of this article documents legal developments in local government taxes. Sections V and VI address changes to the law regarding Virginia real and personal property taxes. Section VII addresses several miscellaneous local taxes and tax administration applicable to local government taxing authorities.

* Partner, McGuireWoods LLP, Richmond, Virginia. LL.M. in Taxation, 1986, Marshall-Wythe School of Law, College of William & Mary; J.D., 1983, State University of New York at Buffalo; M.B.A., 1980, Syracuse University; B.S., 1979, Syracuse University. Mr. Bell is chair of the law firm's Tax and Employee Benefits Department, and he practices primarily in the areas of state and local taxation, and civil and criminal tax litigation. He is a Fellow of the American College of Tax Counsel, a Fellow of the Virginia Law Foundation, a Fellow of the American Bar Foundation, a Barrister of the J. Edgar Murdock Inn of Court (U.S. Tax Court), an adjunct professor of tax law at the College of William & Mary School of Law, and a past chair of both the Tax and Military Law sections of the Virginia State Bar and the Tax Section of the Virginia Bar Association. Mr. Bell is an emeritus director of The Community Tax Law Project, a nonprofit pro bono provider of tax law services for the working poor, and is its recipient of the Lifetime Pro Bono Achievement Award for his pro bono work in representing hundreds of Virginians before the IRS and in U.S. Tax Court and federal district court, as well as developing and training many lawyers in the area of federal tax law to expand pro bono tax representation for low-income taxpayers.

The overall purpose of this article is to provide Virginia tax and general practitioners with a concise overview of the recent developments in Virginia taxation that will most likely impact those practitioners. This article does not, however, discuss many of the numerous technical legislative changes to title 58.1 of the Virginia Code, which covers taxation.

# PART ONE: TAXES ADMINISTERED BY THE VIRGINIA DEPARTMENT OF TAXATION

## II. RECENT SIGNIFICANT ACTIVITY AFFECTING INCOME TAX

### A. *Recent Significant Legislative Activity*

#### 1. Fixed Date of Conformity

The 2012 Virginia General Assembly amended Virginia Code section 58.1-301, which mandates conformity to the terms of the Internal Revenue Code ("IRC"), to advance Virginia's fixed date of conformity from December 31, 2010, to December 31, 2011.[1] "Virginia continues, however, to disallow the federal bonus depreciation deductions, except for any bonus depreciation allowed under IRC § 168(n), which is designed to benefit qualified disaster assistance property and any five-year carryback of federal net operating loss deductions."[2] Virginia also will continue to disallow the income tax deductions related to applicable high-yield discount obligations under IRC § 163(e)(5)(F) and the deferral of income from the cancellation of debt under IRC § 108(i), unless the taxpayer elects to include such income in Virginia taxable income ratably either over a three-year period beginning with tax year

1. Act of Apr. 4, 2012, ch. 578, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2012)); Act of Feb. 7, 2012, ch. 2, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301(B) (Cum. Supp. 2012)). For additional guidance, *see* VA. DEP'T OF TAXATION, PUB. DOC. 12-1 (Feb. 9, 2012) [hereinafter TAX BULLETIN 12-1], *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Tax Bulletins" hyperlink; then follow "2012" hyperlink; then follow "VTB 12-1 (PD 12-5)" hyperlink).

2. Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 46 U. RICH. L. REV. 203, 204 (2011); *see also* VA. CODE ANN. § 58.1-301(B)(2) (Repl. Vol. 2009 & Cum. Supp. 2012); TAX BULLETIN 12-1, *supra* note 1.

2009 for transactions completed in 2009 or over a three-year period beginning with tax year 2010 for transactions completed in tax year 2010 or before April 21, 2010.[3]

By separate legislation, the General Assembly also amended Virginia Code section 58.1-301(B)(5) to permit the entire amount of the deduction allowed for domestic production activities pursuant to IRC § 199 to be deducted for Virginia corporate and personal income tax purposes.[4] This full conformity with IRC § 199 will be applicable for tax years beginning on and after January 1, 2013.[5] Prior to this new legislation, section 58.1-301(B)(5) only permitted two-thirds of the amount deducted for federal income tax purposes pursuant to IRC § 199 to be deducted for tax years beginning after 2009.[6]

### 2. Education Improvement Scholarships Tax Credit Created

The General Assembly created a new tax credit against corporate income tax, personal income tax, bank franchise tax, insurance premiums license tax, and tax on public service corporations for contributions to approved scholarship foundations that provide scholarships to low-income students or eligible students with disabilities to attend non-public elementary or secondary schools.[7] For tax years after 2012 and before 2018, the new credit is available in an amount equal to sixty-five percent of the monetary donation made to a qualified scholarship foundation.[8] A qualified scholarship foundation is a (i) non-stock, nonprofit corporation that is exempt from taxation under IRC § 501(c)(3); (ii) approved by the Virginia Department of Education in accordance with the provisions of Virginia Code section 58.1-439.27; and (iii) estab-

3. TAX BULLETIN 12-1, *supra* note 1; *see also* Bell, *supra* note 2, at 204–05.

4. Act of Mar. 30, 2012, ch. 480, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301(B)(5) (Cum Supp. 2012)); Act of Mar. 22, 2012, ch. 335, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-301(B)(5) (Cum. Supp. 2012)).

5. Ch. 480, 2012 Va. Acts ___; ch. 335, 2012 Va. Acts ___.

6. VA. CODE ANN. § 58.1-301(B)(5) (Cum. Supp. 2011).

7. *See* Act of Apr. 9, 2012, ch. 731, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-439.18 to -439.21, 58.1-439.24 to -439.28 (Cum. Supp. 2012)); Act of May 18, 2012, ch. 842, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58-1.439.18 to -439.21, 58.1-439.25 to -439.28 (Cum. Supp. 2012)).

8. VA. CODE ANN. § 58.1-439.26(A) (Cum. Supp. 2012).

lished to provide financial aid for the education of Virginia resident students.[9]

The education improvement scholarship tax credits will be awarded to taxpayers on a first-come, first-served basis in accordance with procedures established by the Virginia Department of Education.[10] The total amount of credits available in any given fiscal year shall not exceed $25 million.[11] The amount of the credit used shall not exceed the person's tax liability, and any unused credits may be carried over for the next five succeeding taxable years or until the total amount of the credit has been taken, whichever is sooner.[12]

Under this new legislation, taxpayers must request and receive preauthorization for a specified tax credit amount from the superintendent of public instruction.[13] The preauthorization notice shall accompany the donation from the taxpayer to the scholarship foundation.[14] The scholarship foundation must then return the notice to the Department of Education within twenty days certifying the amount of the donation and the date received.[15] The taxpayer must make the preauthorization contribution within sixty days of issuance of the notice.[16] In order for the tax credit to be approved, the taxpayer claiming the credit must also submit verification from each scholarship foundation to which monetary donations are made to allow verification that each such scholarship foundation is on the Department of Education's annual list of approved scholarship foundations.[17]

The tax credit is not allowed if the monetary donation is less than $500.[18] Furthermore, "no more than $50,000 in tax credits shall be issued to an individual or to married persons in a taxable year."[19] No "such limitation on the amount of tax credits issued to

9. *Id*. § 58.1-439.25 (Cum. Supp. 2012).
10. *Id*. § 58.1-439.26(B).
11. *Id*. § 58.1-439.26(B)(1).
12. *Id*. § 58.1-439.26(B)(2).
13. *Id*. § 58.1-439.26(C) (Cum. Supp. 2012).
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*. § 58.1-439.27(A) (Cum. Supp. 2012).
18. *Id*. § 58.1-439.26(A) (Cum. Supp. 2012).
19. *Id*.

an individual shall . . . apply to credits issued to any business entity, including a sole proprietorship."[20]

### 3. Historic Rehabilitation Tax Credit Amended

The General Assembly amended the Virginia historic rehabilitation tax credit statute to provide that any gain or income under federal law from the allocation of the historic rehabilitation tax credit is not considered taxable gain or income for Virginia income tax purposes.[21] However, the legislation clarifies that this new statutory provision does not permit a subtraction or deduction if the gain or income otherwise is excluded, deducted, or subtracted in computing Virginia income taxes.[22] This legislation is declaratory of existing law.[23]

The legislation was initiated in response to a recent decision of the Court of Appeals for the Fourth Circuit that reversed the U.S. Tax Court and ruled that an allocation of Virginia historic rehabilitation tax credits is subject to federal income tax at the time of allocation.[24] In 2009, the Tax Court issued an opinion about the tax treatment afforded to the allocation of state tax credits and found that an investor could make a tax-free capital contribution to become a partner of a partnership, be allocated state credits in return, and soon thereafter sell its partnership interest for a nominal amount, allowing the partnership to receive the funds without current tax liability while the investor could use the state credits to pay its state taxes and take a tax loss on the sale of its partnership interest.[25] In reversing the Tax Court decision, the Fourth Circuit determined the foregoing transaction should be recharacterized as a sale of credits, thus generating taxable income for the partners of the partnership instead of receiving a non-taxable capital contribution.[26] The General Assembly's

20. *Id.*

21. Act of Apr. 5, 2012, ch. 639, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-339.2(F) (Cum. Supp. 2012)); Act of Mar. 6, 2012, ch. 92, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-339.2(F) (Cum Supp. 2012)).

22. Ch. 639, 2012 Va. Acts ___; ch. 92, 2012 Va. Acts ___.

23. Ch. 639, 2012 Va. Acts ___; ch. 92, 2012 Va. Acts ___.

24. Va. Historic Tax Credit Fund 2001 LP v. Comm'r, 639 F.3d 129, 132, 141, (4th Cir. 2011).

25. Va. Historic Tax Credit Fund 2001 LP v. Comm'r, 98 T.C.M. (CCH) 630, 640–41 (2009).

26. 639 F.3d at 145–46.

amendment to Virginia's historic rehabilitation tax credit statute is designed to ensure the Virginia conformity statute does not apply to recognize the federal income realized based on the allocation of state tax credits to investor partners for Virginia income tax purposes.

4. Single Sales Factor Apportionment Enacted for Retail Companies

The General Assembly enacted a new statute that provides how retailers with revenues from multiple states are to apportion income for Virginia income tax purposes. The legislation will require retail companies to use a single sales factor apportionment in computing Virginia corporate income tax liability.[27] Previously, Virginia used a three-factor formula of property, payroll, and double-weighted sales. The sum of the property factor, payroll factor, and twice the sales factor is divided by four to arrive at the final apportionment factor.[28] Under the new legislation, retailers are required to use a triple-weighted sales factor from July 1, 2012, to July 1, 2014, and a quadruple-weighted sales factor from July 1, 2014, to July 15, 2015.[29] For taxable years beginning on or after July 1, 2015, retail companies will be required to use the single sales factor method to apportion Virginia taxable income.[30]

For purposes of the new retailer apportionment statute, a retail company is defined as a "domestic or foreign corporation primarily engaged in activities that, in accordance with the North American Industry Classification System (NAICS), United States Manual, United States Office of Management and Budget, 1997 Edition, would be included in Sectors 44-45."[31]

5. Single Sales Factor Apportionment for Manufacturers Amended

In 2009, the General Assembly Virginia legislature enacted an alternative corporate income apportionment statute for manufac-

27. Act of Apr. 6, 2012, ch. 666, 2012 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-422.1 (Cum. Supp. 2012)); Act of Mar. 6, 2012, ch. 86, 2012 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-422.1 (Cum. Supp. 2012)).

28. VA. CODE ANN. § 58.1-408 (Repl. Vol. 2009).

29. *Id.* § 58.1-422.1(A)(1), (2) (Cum. Supp. 2012).

30. *Id.* § 58.1-422.1(A)(3) (Cum. Supp. 2012).

31. *Id.*§ 58.1-422.1(B) (Cum. Supp. 2012).

turing companies that wished to move their method to apportion income from the traditional three-factor apportionment formula with a triple-weighted sales factor to a single sales factor.[32] If elected by the manufacturer, the single sales factor apportionment formula had to be used for three taxable years before the election could be revoked.[33] When this 2009 legislation was adopted, any manufacturer that elected to use the alternative single sales factor apportionment method had to certify to the Virginia Department of Taxation that the average weekly wage of its full-time employees exceeded the lower of either the state or local weekly wages for the taxpayer's industry.[34] Additionally, the manufacturer was required to maintain an average annual number of full-time employees in Virginia for the first three years of the taxpayer's use of the single factor sales apportionment formula at least as high as in the base year to avoid a penalty of additional income taxes and interest based on a reduction of the number of full-time employees.[35]

In 2012, the General Assembly amended the employment level performance requirements for manufacturers electing to use the single sales factor apportionment method by requiring that employment levels be maintained at not less than ninety percent of the base year level or that average wages equal or exceed the state or local average for the three taxable years following the election.[36] The new legislation also eliminates the penalty provision for failing to meet the ninety percent requirement, but additional taxes and interest that result from failing to meet the employment requirements still will be assessed.[37]

6. Tax Treatment of Annuity Contract Death Benefit Payments Clarified

The General Assembly amended Virginia Code section 58.1-322(C)(32) to clarify that in computing taxable income for Virginia personal income tax purposes, a subtraction for death benefit payments from an annuity contract received by a beneficiary is

32. *Id.* § 58.1-422 (Repl. Vol. 2009).
33. *Id.* § 58.1-422(B).
34. *Id.*
35. *Id.* § 58.1-422(C) (Cum. Supp. 2012).
36. *Id.* § 58.1-422(C).
37. *Id.*

permitted, "provided that (i) the death benefit payment is made pursuant to an annuity contract with an insurance company, and (ii) the death payment is paid solely by lump sum."[38] The individual income tax subtraction for death benefit payments from annuity contracts only applies to that portion of the death benefit payment included in federal adjusted gross income.[39] This legislation codifies a ruling of the Virginia tax commissioner.[40]

### 7. Subtraction for Capital Gains from Investments in Qualified Businesses

Current law allows an individual and corporate income tax subtraction for income taxed for federal income tax purposes as a long-term capital gain or as investment services partnership interest income (frequently referred to as "investment partnership carried interest income").[41] The gain must relate to investments in "qualified businesses," as defined for the purposes of the Qualified Equity and Subordinated Debt Credit ("QESDC"), or in any other technology business approved by the secretary of technology, provided the qualified business's principal office or facility is in Virginia and has less than $3 million in annual revenues in the fiscal year prior to the investment.[42] The General Assembly amended Virginia Code sections 58.1-322(C)(35) and 58.1-402(C)(24) to extend the time period taxpayers may claim the subtraction for the capital gains in these investments from June 30, 2013, to June 30, 2015.[43]

### 8. Major Business Facility Job Tax Credit and Enterprise Zone Credit Amended

The General Assembly amended the major business facility job tax credit to clarify the existing prohibition against a business re-

---

38. Act of Mar. 21, 2012, ch. 305, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-322(C)(32) (Cum. Supp. 2012)).

39. *Id.*

40. *See id.*; VA. DEPT. OF TAXATION, PUB. DOC. 09-36 (Mar. 31, 2009), *available at* http:// www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Rulings of the Tax Commissioner" hyperlink; then follow "2009" hyperlink; then follow "PD 09-36" hyperlink).

41. VA. CODE ANN. §§ 58.1-322(C)(35), -402(C)(24) (Cum. Supp. 2011).

42. *Id.*

43. Act of Mar. 13, 2012, ch. 256, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-322(C)(35), -402(C)(24) (Cum. Supp. 2012)); Act of Mar. 6, 2012, ch. 96, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-322(C)(35), -402(C)(24) (Cum. Supp. 2012)).

ceiving both an enterprise zone grant and a major business facility jobs tax credit by allowing a qualifying business to receive both a grant and a tax credit, provided, however, that a grant and a tax credit cannot be claimed with respect to the same jobs.[44] Businesses may claim the major business facility jobs tax credit for the creation of at least fifty new full-time jobs in connection with the establishment or expansion of a major business facility.[45] If the business is located in an enterprise zone or in an economically distressed area, the threshold is reduced from fifty jobs to twenty-five.[46] The credit is equal to $1000 for each qualifying new job and must be claimed ratably over three taxable years, beginning with the taxable year following the year in which the facility is established or expanded or new qualifying jobs are added.[47]

The General Assembly also extended the time during which the major business facility job tax credit may be claimed by an extra two years so the taxable years encompassed by the credit are now January 1, 2009, through December 31, 2014.[48]

### B. *Recent Significant Judicial Decision*—Wendy's International, Inc. v. Virginia Department of Taxation

In *Wendy's International, Inc. v. Virginia Department of Taxation*, the Richmond City Circuit Court held that an exception to Virginia's related-party addback statute, which requires licensors to derive at least one-third of their gross revenue from the licensing of intangible property to unrelated members, does not require the royalty income to be derived directly from unrelated members.[49] Under Virginia law, taxpayers are required to make adjustments to their federal income when calculating Virginia taxable income. Those adjustments include the addback of intangible expenses and costs that were excluded from federal taxable in-

44. Act of Mar. 30, 2012, ch. 445, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-439(P), -547(G) (Cum. Supp. 2012)).

45. VA. CODE ANN. § 58.1-439(C)(2), -439(G) (Cum. Supp. 2012).

46. *Id.* § 58.1-439(K) (Cum. Supp. 2012).

47. *Id.* § 58.1-439(G) (Cum. Supp. 2012).

48. Act of Mar. 30, 2012, ch. 475, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439(G) (Cum. Supp. 2012)); Act of Mar. 6, 2012, ch. 93, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439(G) (Cum. Supp. 2012)).

49. No. CL 09-3757, 2012 Va. Cir. LEXIS 28, at *6 (Cir. Ct. Mar. 29, 2012) (Richmond City).

come. Virginia Code section 58.1-402(B)(8)(a) provides that the addback amount is

> the amount of any intangible expenses and costs directly or indirectly paid, accrued, or incurred to, or in connection directly or indirectly with one or more direct or indirect transactions with one or more related members to the extent such expenses and costs were deductible or deducted in computing federal taxable income for Virginia purposes.[50]

There are three exceptions to the Virginia addback statute. If any of the exceptions apply, the taxpayer is not required to add back the intangible expenses paid to a related member.[51] At issue in the *Wendy's* case was the second exception, which provided that no addback is required when

> [t]he related member derives at least one-third of its gross revenues from the licensing of intangible property to parties who are not related members, and the transaction giving rise to the expenses and costs between the corporation and the related member was made at rates and terms comparable to the rates and terms of agreements that the related member has entered into with parties who are not related members for the licensing of intangible property.[52]

The issue presented in this case was whether section 58.1-402(B)(8)(a)(2) applied only if a related member directly licenses intangible property to a non-related member or "whether the Statute applies where there is only an indirect connection between the related member and unrelated member."[53]

Wendy's International formed Scioto Insurance Company, which then formed Oldemark L.L.C.[54] Oldemark was formed solely to hold Wendy's trademarks and trade names.[55] Oldemark licensed the intangible property to Wendy's in return for royalty payments of three percent of the gross sales of Wendy's restaurants.[56] Oldemark also permitted Wendy's the right to sublicense the trademarks and trade names.[57] Wendy's licensed the intangible property to both related and unrelated restaurants in return

50. VA. CODE ANN. § 58.1-402(B)(8)(a) (Cum. Supp. 2011). For additional background on Virginia's addback statute, see Bell, *supra* note 2, at 424–28.

51. VA. CODE ANN. § 58.1-402(B)(8)(a) (Cum. Supp. 2011).

52. *Id.* § 58.1-402(B)(8)(a)(2).

53. *Wendy's*, 2012 Va. Cir. LEXIS 28, at *4.

54. *Id.* at *2.

55. *Id.*

56. *Id.* at *2–3.

57. *Id.*

for royalty payments of four percent of the restaurants gross sales.[58] Wendy's retained twenty-five percent of the four percent royalty payment received from all of the restaurants and paid the remaining seventy-five percent of the royalty payments received to Oldemark.[59]

In calculating its Virginia corporate income tax for tax years 2004 through 2007, Wendy's added back all of the three percent royalties paid to Oldemark.[60] Pursuant to Virginia's addback statute requirements, Wendy's filed a refund request with the Virginia Department of Taxation seeking a refund from Virginia for the income tax allocable to the royalty payments added back, claiming the addback exception in section 58.1-402(B)(8)(a)(2) entitled Wendy's to the refund because Oldemark derived at least one-third of its gross revenue through Wendy's from unrelated restaurants.[61] The Department of Taxation denied the refund claim by Wendy's.[62]

Upon cross motions for summary judgment, the Richmond City Circuit Court held that despite the lack of a direct connection between Oldemark and the unrelated restaurants, Wendy's qualified for the addback exception.[63] The court reasoned that Oldemark received at least one-third of its revenue from unrelated restaurants, even if it received the royalties through Wendy's.[64] The court looked at the plain meaning of the word "derives" and stated that the word does not imply that Oldemark must receive the royalty payments from direct licensing activities in order for Wendy's to qualify for the exception to the addback requirements.[65] The court looked at the plain language in the statutory exception and noted the General Assembly did not provide that only direct licensing agreements with unrelated members would qualify a taxpayer for the exception from the addback, thus adopting a common-sense reading of the statutory exception.[66]

58. *Id*. at *3.
59. *See id*. at *1.
60. *Id*. at *3.
61. *Id*. at *2–4.
62. *Id*. at *1.
63. *Id*., *6.
64. *Id*. at *5–6.
65. *Id*. at *5.
66. *Id*. at *5–6 (quoting Cisco Sys., Inc. v. Thorson, 68 Va. Cir. 385, 393 (2005) (Fairfax County)).

The court granted Wendy's summary judgment and a refund of the overpaid Virginia income taxes paid under the addback statute.[67]

## III. RECENT SIGNIFICANT ACTIVITY AFFECTING SALES AND USE TAX

### A. *Recent Significant Legislative Activity*

#### 1. "Amazon Law" Creating Presumption of Nexus for Certain Remote Sellers to Collect Tax Enacted

The General Assembly enacted legislation requiring certain remote sellers utilizing in-state facilities to collect Virginia sales tax.[68] The new law provides that a dealer is presumed to have sufficient activity within Virginia to require registration "if any commonly controlled person maintains a distribution center, warehouse, fulfillment center, office, or similar location within the Commonwealth that facilitates the delivery of tangible personal property sold by the dealer to its customers."[69] The presumption may be rebutted by demonstrating that the commonly controlled person's activities in Virginia "are not significantly associated with the dealer's ability to establish or maintain a market in the Commonwealth."[70] The new statute defines a "commonly controlled person" as "any person that is a member of the same 'controlled group of corporations' . . . as the dealer or any other entity that . . . bears the same ownership relationship to the dealer as a corporation that is a member of the same 'controlled group of corporations,' as defined in [IRC] § 1563(a)."[71]

The legislation has a unique effective date that depends upon whether federal legislation passes, authorizing states to require remote sellers to collect sales taxes on sales to in-state purchasers and the effective date of such federal legislation.[72] In particular, Virginia Code section 58.1-612(D) will "become effective on the

67. *Id.* at *7.

68. Act of Apr. 4, 2012, ch. 590, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-612 (Cum. Supp. 2012)).

69. VA. CODE ANN. § 58.1-612(D) (Cum. Supp. 2012).

70. *Id.*

71. *Id.*

72. Ch. 590, 2012 Va. Acts ___.

earlier of September 1, 2013, or the effective date of federal legislation authorizing states to require a seller to collect taxes on sales of goods to in-state purchasers without regard to" the seller's location.[73] However, the section will become effective as January 1, 2014, if such federal legislation is enacted prior to August 15, 2013, and the effective date of that federal legislation is after September 1, 2013, but on or prior to January 1, 2014.[74]

### 2. Exemption for Certain Computer Equipment and Enabling Software Expanded and Clarified

The General Assembly expanded the Virginia sales and use tax exemption for the purchase or lease of computer equipment or enabling software by data centers by extending the exemption to tenants of the data center if the data center and the tenants collectively meet the requirements to qualify for the data center exemption.[75] The data center operator, under this legislation, must also enter into a memorandum of understanding with the Virginia Economic Development Partnership Authority on behalf of itself and its tenants.[76]

The legislation also clarifies the job creation requirement by allowing new jobs created by tenants of the data center to count toward the threshold job creation requirement, in addition to new jobs created by the owner of the data center.[77]

### 3. Exemption of Printing Materials by Advertising Businesses Extended

The General Assembly extended the sunset date to July 1, 2017, for the Virginia sales and use tax exemption allowed for the purchase of printing materials by advertising businesses from a printer in Virginia when the printed materials are distributed outside Virginia.[78] The exemption was set to expire on July 1,

73. VA. CODE ANN. § 58.1-612 (Cum. Supp. 2012).
74. *Id.*
75. Act of Apr. 6, 2012, ch. 655, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-609.3(18) (Cum. Supp. 2012)); Act of Apr. 4, 2012, ch. 613, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-609.3(18) (Cum. Supp. 2012)).
76. VA. CODE ANN. § 58.1-609.3(18) (Cum. Supp. 2012).
77. *Id.*
78. Act of Mar. 30, 2012, ch. 477, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-609.6(4) (Cum. Supp. 2012)).

2012, if the legislature did not act to extend the sunset provision.[79] The exemption applies to advertising businesses that purchase printing from Virginia printers that are not deemed to be the users or consumers of printed materials distributed outside Virginia if the purchasers would qualify for either (i) the regularly issued publications exemption set forth in section 58.1-609.6(3), or (ii) the catalogs, letters, brochures, reports, and similar printed materials exemption set forth in section 58.1-609.6(4).[80]

4. Exemption for Certain Educational Materials Withdrawn from Inventory at Book Publishing Facilities Extended

The General Assembly extended the sunset date for the Virginia sales and use tax exemption for text books and other educational materials withdrawn from inventory at book publishing distribution facilities from July 1, 2012, to July 1, 2017.[81] This exemption applies when textbooks and other education materials are withdrawn from a publisher's inventory for free distribution to professors and other individuals with an educational focus.[82]

## B. *Recent Significant Opinion of the Attorney General*

Virginia House of Delegates member Lynwood W. Lewis, Jr., inquired whether "sales tax may be imposed on a fee a tire merchant charges for used tire disposal as part of a transaction involving the purchase and installation of new tires."[83] Delegate Lewis also inquired "what constitutes a 'connection' between the sale and the service that would permit such a tax to be imposed."[84] The transaction contemplated in the formal opinion request involves a tire merchant selling and installing new tires for a customer's vehicle and charging an invoice fee of $2.50, identified as the "disposal labor," that covers the expense of transporting the used tires to a landfill.[85] If the customer chooses not to use

79. VA. CODE ANN. § 58.1-609.6(4) (Repl. Vol. 2009).
80. VA. CODE ANN. § 58.1-609.6(4) (Cum. Supp. 2012).
81. Act of Mar. 20, 2012, ch. 275, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-609.6(7) (Cum. Supp. 2012)); Act of Mar. 30, 2012, ch. 411, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-609.6(7) (Cum. Supp. 2012)).
82. VA. CODE ANN. § 58.1-609.6(7) (Cum. Supp. 2012).
83. Op. to Hon. Lynwood W. Lewis, Jr. (Dec. 16, 2011).
84. *Id.*
85. *Id.*

this service and retains the used tires, the merchant does not charge the fee.[86]

The attorney general opined that "when the true object of a transaction is the acquisition of a good [such as new tires] and the service provided is incidental to that purchase, there is a connection between the sale and service that allows the imposition of the sales tax on the service."[87] The result is that "the tire disposal fee the tire merchant charges to a customer as part of a transaction for the sale of new automotive tires is subject to the retail sales and use tax."[88]

## IV. RECENT SIGNIFICANT LEGISLATIVE ACTIVITY AFFECTING STATE TAX ADMINISTRATION

### A. *Period of Time to Collect State Taxes Reduced*

The General Assembly amended Virginia Code section 58.1-1802.1(A) to reduce the period of time the Virginia Department of Taxation has to make or institute collection action by levy, proceeding in court, or any other means available to the tax commissioner from ten years to seven years from the date the taxes were assessed.[89] The legislation also reduced the period of limitations for the Virginia Department of Taxation to apply interest and any penalty to a delinquent tax liability from seven to six years from the date of the last contact with the taxpayer if no memorandum of lien has been appropriately filed in a jurisdiction in which such taxpayer owns real estate.[90]

### B. *Requirement for Sunset Provisions Established on State Tax Credits*

The General Assembly enacted Virginia Code section 30-19.1:11, which applies to any legislation that either creates or renews state tax credits.[91] The legislation provides that the General

86. *Id.*
87. *Id.*
88. *Id.*
89. Act of May 18, 2012, ch. 840, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-1802.1(A) (Cum. Supp. 2012)).
90. *See* VA. CODE ANN. § 58.1-1802.1(C) (Cum. Supp. 2012).
91. Act of. Mar. 20, 2012, ch. 265, 2012 Va. Acts ___ (codified at VA. CODE ANN. § 30-

Assembly may not "add a new state tax credit or renew an existing state tax credit . . . unless such bill contains an expiration date of not longer than five years from the effective date of the new or renewed state tax credit."[92]

# PART TWO: TAXES ADMINSTERED BY LOCALITIES CONCERNING REAL PROPERTY

## V. REAL PROPERTY

### A. *Recent Significant Legislative Activity*

#### 1. Criteria Provided for Determining Residential Rental Property Assessment

The General Assembly enacted new Virginia Code section 58.1-3295.1(A) to mandate that local Virginia boards of equalization consider the following in determining the fair market value of real property that is operated as residential rental housing of more than four units: "1. The actual gross income generated from [the] real property and any resultant loss in income attributable to vacancies, collection losses, and rent concessions; 2. The actual operating expenses . . . and the impact of any additional expenses . . . ; and 3. Any other evidence relevant to determining the fair market value . . . ."[93]

The legislation provides that if only a portion of the units on a given piece of property are operated as residential rental housing, only the portion determined to be residential rental housing is subject to this requirement.[94]

The legislation also requires the board of equalization to value the residential rental apartments using the income approach with several limited exceptions.[95] These exceptions include when the real property has been sold because the prior assessment or when

19.1:11 (Cum. Supp. 2012)).

92. VA. CODE ANN. § 30.19.1:11 (Cum. Supp. 2012).

93. Act of Apr. 9, 2012, ch. 707, 2012 Va. Acts ___ (codified at VA. CODE. ANN. § 58.1-3295.1 (Cum. Supp. 2012)); Act of Apr. 4, 2012, ch. 536, 2012 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3295.1(A) (Cum. Sup. 2012)).

94. VA. CODE ANN. § 58.1-3295.1(C) (Cum. Supp. 2012).

95. *Id.* § 58.1-3295.1(D) (Cum. Supp. 2012).

the value arrived at by the income approach does not accord with generally accepted appraisal practices and standards prescribed by the International Association of Assessing Officers.[96] When any of these exceptions apply, the board of equalization "may consider the market value of such property."[97]

### 2. Separate Assessment of Wetland Authorized

The General Assembly enacted new Virginia Code section 58.1-3284.3 to require local commissioners of the revenue or other assessing officials, upon request by the property owner, to separately assess all wetlands at their fair market value for real property assessments or reassessments.[98] "If the commissioner of the revenue or other assessing official disagrees with the property owner as to the presence of wetlands," then such "assessing official shall consider the National Wetlands Inventory Map prepared by U.S. Fish and Wildlife Services in making his determination, and such map also shall be considered in any administrative or judicial appeal."[99] Once the wetlands are separately assessed, the commissioner of the revenue or other local assessing officer is required to enter the area and fair market value for both the tracts consisting of wetlands and the remaining portion of each tract into the land book.[100] The legislation also provides that "the actual physical use of the property [is] the only determining factor of its land use value."[101]

### 3. Prior Use of Property Not Considered in Certain Land Use Valuations

The General Assembly amended Virginia Code section 58.1-3230 to prohibit local property tax-assessing officials from considering prior, discontinued uses of property in determining whether

96. *Id.*
97. *Id.*
98. Act of Apr. 18, 2012, ch. 742, 2012 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3284.3) (Cum. Supp. 2012)).
99. VA. CODE ANN. § 58.1-3284.3(A) (Cum. Supp. 2012).
100. *Id.* § 58.1-3284.3(B) (Cum. Supp. 2012).
101. *Id.* § 58.1-3284.3(D) (Cum. Supp. 2012).

the property qualifies for special assessment as land devoted to agricultural, horticultural, forest, or open space.[102]

4. Real Property Exemption for Disabled Veterans Subject to Several Changes

The General Assembly passed five items of legislation relating to real property tax exemptions for disabled veterans. The General Assembly created Virginia Code section 58.1-3219.7, which requires the commissioner of the Department of Veterans Services to promulgate rules and regulations governing the administration and implementation of the real property tax exemption for disabled veterans.[103] "Such rules and regulations shall include, but not be limited to, written guidance for veterans residing in" Virginia, as to the determination of eligibility for the property tax exemption and guidance on the procedures to appeal a decision by the commissioner of Veterans Services to circuit court.[104] Section 58.1-3219.7 also authorizes the commissioner of Veterans Services to make determinations on appeals by veterans whose application for the real property tax exemption has been denied.[105]

The General Assembly also amended Virginia Code section 58.1-3219.5 to permit a disabled veteran who owns his primary residence in trust, either alone or with his spouse, to qualify for the real property tax exemption.[106] The legislation provides that the exemption applies when the property is

> (i) held by a veteran alone or in conjunction with the veteran's spouse as tenant or tenants for life or joint lives, (ii) held in a revocable inter vivos trust over which the veteran or the veteran and his spouse hold the power of revocation, or (iii) held in an irrevocable trust over which a veteran alone or in conjunction with his spouse possesses a life estate or an estate for joint lives or enjoys a continuing right of use or support.[107]

102. Act of Apr. 6, 2012, ch. 653, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3230 (Cum. Supp. 2012)).

103. Act of Apr. 4, 2012, ch. 594, 2012 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3219.7 (Cum. Supp. 2012)).

104. VA. CODE ANN. § 58.1-3219.7 (Cum. Supp. 2012).

105. *Id.* § 58.1-3219.7(B).

106. Act of Mar. 13, 2012, ch. 263, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3219.5(D)–(E) (Cum. Supp. 2012)); Act of Mar. 6, 2012, ch. 75, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3219.5(D)–(E) (Cum. Supp. 2012)).

107. VA. CODE ANN. § 58.1-3219.5(D) (Cum. Supp. 2012).

If "one or more other persons have an ownership interest in the property that permits them to occupy the property," the tax exemption is prorated based on the percentage of persons having an ownership interest and qualifying for the exemption.[108] For a disabled veteran's real property that is jointly owned by two or more individuals but not held in one of the three ways described in the previous paragraph, the exemption is prorated based on the percentage of ownership interest held by those persons qualifying for the exemptions.[109]

The General Assembly also amended the Virginia Code to enable disabled veterans who acquire qualifying property after January 1, 2011, to be entitled to the property tax exemption beginning on the date the property is acquired.[110] Furthermore, if the veteran's disability rating occurs after January 1, 2011, then the exemption will begin on the date of such rating if the veteran has a qualified primary residence on the date of such disability rating.[111] If property taxes have been paid by the disabled veteran prior to receiving the disability rating, the disabled veteran may receive a prorated refund of tax without interest.[112] The legislation also added section 58.1-3219.8, which provides:

> The fact that veterans or their spouses who are otherwise qualified for tax exemption . . . are residing in hospitals, nursing homes, convalescent homes, or other facilities for physical or mental care for extended periods of time shall not be construed to mean that the real estate for which tax exemption is sought does not continue to be the sole dwelling of such persons during such extended periods of other residence so long as such real estate is not used by or leased to others for consideration.[113]

The last amendment to the disabled veteran's property tax exemption relates to when the exemption begins for a disabled veteran who obtains his or her disability rating after January 1, 2011. The 2012 General Assembly further amended section 58.1-3219.5(A) to clarify that the tax exemption for disabled veterans who are rated as having a one hundred percent service-connected, permanent, and total disability after January 1, 2011, begins on

108. *Id.* § 58.1-3219.5(E)(1) (Cum. Supp. 2012).

109. *Id.* § 58.1-3219.5(E)(2) (Cum. Supp. 2012).

110. Act of Apr. 18, 2012, ch. 782, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 58.1-3219.5 (Cum. Supp. 2012)).

111. VA. CODE ANN. § 58.1-3219.5(A) (Cum. Supp. 2012).

112. *Id.* §§ 58.1-3219.5(A), -3360 (Cum. Supp. 2012).

113. *Id.* § 58.1-3219.8 (Cum. Supp. 2012).

the date of such rating.[114] The legislation provides, however, that no locality will be "liable for any interest on any refund due to [a] veteran for taxes paid prior to the veteran's filing of the affidavit or written statement required" to claim the exemption.[115]

### B. *Recent Significant Judicial Decisions*

#### 1. *Riverside Owner, LLC v. City of Richmond*

In *Riverside Owner, LLC v. City of Richmond*, the Supreme Court of Virginia held that the valuation method used by the City of Richmond assessor to determine a rehabilitated property's partial tax exemption was illegal because the assessor was statutorily required to use the first assessed value after rehabilitation, and not a hypothetical value based on backdating.[116] In 2003, the City of Richmond and Richmond Power Plant, L.L.C., entered into a development agreement whereby Richmond Power Plant would rehabilitate two power plants into a mixed-use building with a parking garage.[117] The city agreed to enroll the property in the Rehabilitated Real Estate Program.[118] Richmond Power Plant previously had applied for the rehabilitation program in 2002, and "the City Assessor's office determined that the power plants each had a base value of $500."[119] The rehabilitation of the property was completed in 2005 at a cost of approximately $63.8 million.[120] Shortly after completing the rehabilitation of the two power plant buildings, Richmond Power Plant sold the property to Riverside Owner, L.L.C., for $85 million.[121]

The Rehabilitated Real Estate Program "provides a partial exemption from real estate taxes for qualifying rehabilitated property."[122] After the power plant property rehabilitation was completed, the city assessor's office conducted its final inspection of the property and determined that, based on the cost of the reha-

114. Act of Apr. 18, 2012, ch. 806, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3219.5(A) (Cum. Supp. 2012)).
115. VA. CODE ANN. § 58.1-3219.5(A) (Cum. Supp. 2012).
116. 282 Va. 62, 72, 711 S.E.2d 533, 539 (2011).
117. *Id.* at 66, 711 S.E.2d at 535.
118. *Id.* at 65–66; 711 S.E.2d at 534–35.
119. *Id.* at 66, 711 S.E.2d at 535.
120. *Id.*
121. *Id.*
122. *Id.* at 65, 711 S.E.2d at 534.

bilitation, the property was valued at $63.8 million.[123] In May 2006, the city assessor's office revised the amount of the property's rehabilitation value to roughly $45.2 million for purposes of the Rehabilitation Real Estate Program.[124] "The difference in the two amounts was due to the application of the 'Chandler policy.'"[125]

In 1981, former City Assessor Richard A. Chandler established a new policy for assessing a property's initial rehabilitated value under the Rehabilitated Real Estate Program.[126] He explained in an internal memorandum that, under the policy, the final estimate of value for the rehabilitations credit will be determined as of the date of application and calculated according to information available at the time the base value was established.[127] He further explained that the purpose of the policy was to eliminate any property enhancement created by anything other than rehabilitation or physical improvement from the final estimate of value.[128] This policy was not published in the program's materials until 2006.[129]

Following the Chandler policy, the city assessor's office took value of the property's office space when the rehabilitation was completed in 2005 and backdated it to 2002 when Richmond Power Plant, the former owner, applied for the program.[130] The backdating caused the value of the office space to fall from $63.8 million to around $45.2 million for the purposes of the program.[131]

Riverside Owner paid its 2006 real estate tax bill for the property under protest and appealed to the City Assessor, challenging the Chandler policy.[132] "The City Assessor denied the appeal, concluding that the Chandler policy was consistent with Code § 58.1-3221 and City Code § 27-83, and was therefore 'correct and legal.'"[133] In 2008, Riverside Owner filed a "Complaint and Applica-

123. *Id.* at 66, 711 S.E.2d at 535.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 66–67, 711 S.E.2d at 535 (footnote omitted).
132. *Id.* at 67, 711 S.E.2d at 535–36.
133. *Id.*, 711 S.E.2d at 536.

tion for Relief from Erroneous Assessments of Taxes Upon Real Property" pursuant to section 58.1-3984.[134] Riverside Owner "alleged that the Chandler policy was '*ultra vires* and an improper usurpation of legislative power by the City Assessor, and such policy [was] an improper methodology for setting the assessed value of rehabilitated improvements, and otherwise illegal.'"[135] It "sought a refund of the excess taxes . . . paid because of the application of the Chandler policy, interest on the overpayments, and attorney's fees."[136] The trial court held the policy used to assess the property departed from Virginia Code section 58.1-3221 and former Richmond City Code section 27-83, and ruled in favor of the taxpayers but denied their request for attorneys' fees.[137] The city and the taxpayers appealed.

Virginia Code section 58.1-3221 provides:

> A. The governing body of any county, city or town may, by ordinance, provide for the partial exemption from taxation of real estate on which any structure or other improvement no less than twenty years of age, or fifteen years of age if the structure is located in an area designated as an enterprise zone by the Commonwealth, has undergone substantial rehabilitation . . . subject to such conditions as the ordinance may prescribe. . . . The governing body of a county, city or town may establish criteria for determining whether real estate qualifies for the partial exemption authorized by this provision and may require the structure to be older than twenty years of age, or fifteen years of age if the structure is located in an area designated as an enterprise zone by the Commonwealth, or place such other restrictions and conditions on such property as may be prescribed by ordinance. . . .
> B. The partial exemption provided by the local governing body may not exceed an amount equal to the increase in assessed value resulting from the rehabilitation . . . as determined by the commissioner of revenue or other local assessing officer . . . .[138]

Richmond City Code section 27-83, adopted pursuant to Virginia Code section 58.1-3221, in pertinent part, provides:

> (a) *Exemption authorized*. Partial exemption from real estate taxes is provided for qualifying property rehabilitated . . . if eligible according to the terms of the Constitution, the Code of Virginia and the provisions of this section and Section 27-86.

134. *Id.*
135. *Id.* (alteration in original).
136. *Id.*
137. *Id.* at 67–68, 711 S.E.2d at 536.
138. VA. CODE ANN. § 58.1-3221 (Repl. Vol. 2009 & Cum. Supp. 2012).

> (b) *When deemed rehabilitated*. For the purposes of this section, commercial or industrial real estate shall be deemed to be substantially rehabilitated when a structure . . . has been so improved by renovation, reconstruction or replacement as to increase the assessed value of the structure by no less than forty (40) percent. . . . Upon receipt of an application for tax exemption, the Assessor shall determine the assessed value (hereafter referred to as base value) of the structure prior to commencement of rehabilitation. Such assessment shall serve as a basis for determining whether the rehabilitation undertaken increases the assessed value of such structure by at least forty (40) percent. The application to qualify for tax exemption shall be effective until December 31 of the third calendar year following the year in which [the] application is submitted . . . . When it is determined that a forty-percent increase in assessed value . . . has occurred, the tax exemption shall become effective beginning on January 1 of the next calendar year . . .
> (g) *Commercial or industrial structures in enterprise zones*. Commercial or industrial structures that are . . . qualified under this section shall be entitled to a fifteen-year period of exemption in the full amount of the difference in taxes computed upon the base value and the initial rehabilitated assessed value of the property for each year of the fifteen (15) years.[139]

The city argued that "initial rehabilitated assessed value" does not mean the first assessed value after rehabilitation determined by an appraiser for tax purposes.[140] The supreme court disagreed.[141]

> Contrary to the City's contention, the parenthetical in [City of Richmond Code section 27-83] does not define "initial rehabilitated assessed value," but rather describes what remains when the base value is subtracted from the initial rehabilitated assessed value, which is then used to calculate the amount of the tax credit to which an owner is entitled under the [Rehabilitated Real Estate] Program.[142]

Accordingly, the court read "initial rehabilitated assessed value" to mean what it says—the first assessed value after rehabilitation—and held that the Chandler policy is inconsistent with Virginia Code section 58.1-3221 and former Richmond City Code section 27-83.[143] The court affirmed the judgment of the circuit court in favor of the taxpayer.[144]

139. RICHMOND CITY, VA., CODE § 27-83 (1985).
140. *Riverside Owner*, 282 Va. at 71, 711 S.E.2d at 538.
141. *Id.*
142. *Id.*
143. *Id.* at 71–72, 711 S.E.2d at 538–39.
144. *Id.* at 77, 711 S.E.2d at 541.

2. *City of Richmond v. SunTrust Bank*

In *City of Richmond v. SunTrust Bank*, the Supreme Court of Virginia ruled that a municipal corporation does not have the authority to tax a bank as a non-exempt entity for the interest owed by a housing authority, a tax-exempt entity, in property owned by the bank and the housing authority as tenants in common because the city does not have express statutory authority to do so.[145]

SunTrust Bank and the Richmond Redevelopment and Housing Authority ("RRHA") owned two properties as tenants in common.[146] SunTrust held undivided interests of sixty-two percent and 80.27 percent, respectively, while RRHA held undivided interests of thirty-eight percent and 19.73 percent, respectively.[147] SunTrust and RRHA executed operating agreements for each property defining the parties' rights and obligations.[148] The agreements provided that SunTrust would have the exclusive right to use and occupy the properties and would retain the sole and exclusive management and control over all decisions affecting the properties as if it owned the entire fee simple interest, subject only to the rights of the RRHA.[149] According to the agreements, no rent or charges would be payable by SunTrust to RRHA as a result of its possession of the properties.[150]

Before 2009, the city taxed SunTrust only for its ownership interests in the properties.[151] Because property owned by a political subdivision of the Commonwealth of Virginia is exempt from taxation under section 58.1-3606, RRHA was not taxed for its ownership interests.[152] However, in 2009, the city determined that SunTrust was liable for the taxes on its ownership interests as well

145. 283 Va. 439, 445, 722 S.E.2d 268, 271 (2012).
146. *Id.* at 441, 722 S.E.2d at 269.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*

as RRHA's ownership interests.[153] The city also revised the tax assessments for 2006 through 2009 to reflect liability on SunTrust for both its own and RRHA's ownership interests.[154]

"The City first contend[ed] that it has the authority to tax SunTrust for the RRHA's ownership interests because, pursuant to the operating agreements, SunTrust has the exclusive right to use and possess the properties as if it were the fee simple owner."[155] The supreme court rejected this argument as it was not based on any statutory authority and because the court found the case law relied upon the city inapposite.[156] "Next, the City argue[d] that it ha[d] the authority to tax SunTrust for the RRHA's ownership interests, since SunTrust d[id] not use the properties for a 'public purpose.'"[157] In support of this contention, the city cited "Article XIII, Section 183(a) of the 1902 Constitution of Virginia, which exempted from taxation 'property lawfully owned by counties, cities, towns, or school districts, used wholly and exclusively for county, city, town or public school purposes.'"[158] The court rejected the city's "public purpose" argument for two reasons:

> First, neither the current Constitution nor [Virginia] Code requires that property owned by a subdivision of the Commonwealth be used for a "public purpose" in order to be exempt from taxation. Second, even if there were still a "public purpose" requirement, that would only mean that the RRHA—not SunTrust—could be taxed by the city.[159]

Finally, the city contend[ed] it had the authority to tax SunTrust for RRHA's ownership interests under Virginia Code section 58.1-3203, which provides that all leasehold interests in real property that is exempt from tax assessment for the owner shall be assessed for taxation for the lessee.[160] According to the city, the operating agreements between SunTrust and RRHA effectively created a leasehold interest by SunTrust in RRHA's undivided ownership interest.[161] The court determined this argument was

153. *Id.*
154. *Id.*
155. *Id.* at 443, 722 S.E.2d at 270.
156. *Id.*, 722 S.E.2d at 270–71.
157. *Id.* at 444, 722 S.E.2d at 271.
158. *Id.* (citing VA. CONST. of 1902, art. XIII, § 183(a)).
159. *Id.* (citation omitted).
160. *Id.* (citing VA. CODE ANN. § 58.1-3203 (Cum. Supp. 2012)).
161. *Id.*

procedurally barred.[162] The court noted that "[i]n granting SunTrust's motion for partial summary judgment, the circuit court held that the operating agreements are not leases and that SunTrust and the RRHA are tenants in common."[163] Because the city did not assign error to the circuit court's rulings, the court declined to review them on appeal.[164] In conclusion, the court stated the City of Richmond "failed to 'put [its] finger upon the statute which confers' upon it the authority to tax SunTrust for the RRHA's ownership interests in the properties."[165] Accordingly, the court held the city had no authority to do so, thus upholding the decision of the circuit court.[166]

## VI. RECENT LEGISLATIVE ACTIVITY AFFECTING TANGIBLE PERSONAL PROPERTY

### A. *Rules to Determine Situs of Motor Vehicle Used by Full-Time Student Changed*

The General Assembly amended Virginia Code section 58.1-3511(A) to change the rules for determining situs for local personal property tax assessment purposes of a motor vehicle that is used by a full-time student attending an institution of higher education.[167] The situs of the motor vehicle now will be the domicile of the owner of the motor vehicle, rather than the locality in which the vehicle is normally garaged or parked.[168] If the locality of the institution of higher education requests, the owner will need to present sufficient evidence that he or she has paid a personal property tax on the motor vehicle to the locality of his or her domicile.[169] Prior to this legislated change, the situs of a motor vehicle used by a full-time student was the domicile of the student, rather than the locality in which the vehicle was parked or

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 445, 722 S.E.2d at 271 (alteration in original) (quoting Woodward v. Staunton, 161 Va. 671, 673, 171 S.E. 590, 591 (1933)).

166. *Id.* at 445, 722 S.E. 2d at 270.

167. Act of Apr. 6, 2012, ch. 651, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3511(A) (Cum. Supp. 2012)).

168. VA. CODE ANN. § 58.1-3511(A) (Cum. Supp. 2012)).

169. *Id.*

garaged, if the full-time student was the owner of the motor vehicle.[170]

## B. *Farm Utility Vehicles may be Exempted from Taxation*

The General Assembly amended Virginia Code section 58.1-3505(A) so that trucks or tractor trucks exclusively used by farmers in transporting farm animals or other farm products or for the transport of farm-related machinery have been added to the list of farm property that a locality may, by ordinance, exempt or tax at a different local property tax rate than that applicable to the general class of tangible personal property.[171] "Motor vehicles that are used exclusively for agricultural purposes, for which the owner is not required to obtain a registration certificate, license plate, and decal or pay a registration fee" also are considered a separate item of taxation.[172]

## C. *Separate Classification of Machinery and Tools Created for Certain Motor Vehicle Cleaning Equipment*

The General Assembly enacted Virginia Code section 58.1-3508.5 to create a separate class of property for purposes of a machinery and tools property tax for machinery and tools used directly in cleaning motor vehicles by a motor vehicle cleaning business.[173] The legislation authorizes localities to levy a tax on this separate class of property at a different rate from that levied on other machinery and tools, but the rate of tax and the rate of assessment may not exceed the rate for the general class of machinery and tools.[174]

170. *Id*. § 58.1-3511(A) (Repl. Vol. 2009).
171. Act of Mar. 20, 2012, ch. 272, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3505(A)(13) (Cum. Supp. 2012)).
172. VA. CODE ANN. § 58.1-3505(A)(12) (Cum. Supp. 2012).
173. Act of Mar. 20, 2012, ch. 267, 2012 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3508.5) (Cum. Supp. 2012)).
174. VA. CODE ANN. § 58.1-3508.5 (Cum. Supp. 2012).

## VII. MISCELLANEOUS LOCAL TAXES

### A. *Recent Significant Legislative Activity*

#### 1. Recordation Tax to be Based on Value of Security Interest

The General Assembly amended Virginia Code section 58.1-803(A) to clarify that the recordation tax for deeds of trust will be based on the value of the security interest created by the deed of trust, not just the amount of the obligations described in the deed of trust.[175] Effective January 1, 2014,[176] in any case in which the obligations described in a deed of trust are not secured fully because they exceed the fair market value of the property conveyed, the recordation tax will be based on the fair market value of the property conveyed.[177]

#### 2. Deed Conveying Real Property Must State Actual Consideration

The General Assembly amended Virginia Code section 58.1-802 to require deeds or other documents submitted to record on or after July 1, 2012, to state on the first page of the document the actual consideration in order to be admitted to record by the clerk of the circuit court.[178]

#### 3. Recordation Tax Exemption for Certain Deeds of Trust Eliminated

The General Assembly amended Virginia Code sections 58.1-803(C) and (D) to equalize the recordation tax rate for all refinanced deeds of trust by establishing a maximum recordation tax rate of eighteen cents per $100 on refinanced deeds of trust, regardless of whether the loan is refinanced with the same lender or a different lender.[179] The legislation sets out a maximum tax

---

175. Act of Apr. 4, 2012, ch. 505, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-803(A) (Cum. Supp. 2012)).

176. *Id.*

177. VA. CODE ANN. § 58.1-803 (Cum. Supp. 2012).

178. Act of Apr. 4, 2012, ch. 513, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-802(A) (Cum. Supp. 2012)).

179. Act of Apr. 18, 2012, ch. 820, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-803(C) & (D) (Cum Supp. 2012)).

rate schedule that may be charged on the recordation of any deed of trust or mortgage or on any supplemental indenture.[180] The legislation also clarifies that for deeds of trust or mortgages that are refinanced the term "value" will mean "the portion of the amount of the bond or other obligation secured by the property conveyed by the deed of trust."[181]

4. Localities Required to Adopt Uniform Ordinance Provisions Applicable to the Coal, Gas, and Oil Severance License Tax

The General Assembly amended Virginia Code section 58.1-3713.3 to require Virginia local taxing jurisdictions that impose a license tax for the severance of coal, gas, or oil for the 2008, 2009, 2010, or 2011 license years to adopt the uniform ordinance provisions for the local business, professional, and occupational license tax with a retroactive effective date to the 2008 license year.[182] The legislation carried an emergency clause.[183]

The legislation provides that any person assessed with a severance tax for license years 2008 through 2013 is allowed to file an administrative appeal to the local assessing official only during the period beginning July 1, 2013, and ending July 1, 2014.[184] Such appeal may be further appealed to the tax commissioner and to the appropriate circuit court.[185] Collection activity is suspended on the assessment of severance taxes for license years 2008 through 2011 until July 1, 2013.[186] The collection activity for license years 2012 and 2013 also is suspended provided that the person filing the return for the taxes includes with the return a good faith payment of the tax due or a good faith report of the tax due.[187] Collection activity is not required to be suspended if collection of any tax, interest, or penalty is jeopardized by delay, nor is collection activity required to be suspended for any amount of un-

180. VA. CODE ANN. § 58.1-803(D) (Cum. Supp. 2012).
181. *Id.*
182. Act of Apr. 9, 2012, ch. 722, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3713.3(C) (Cum. Supp. 2012)); Act of Apr. 6, 2012, ch. 665, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3713.3(C) (Cum. Supp. 2012)).
183. Ch. 722, 2012 Va. Acts ___; ch. 665, 2012 Va. Acts ___.
184. VA. CODE ANN. § 58.1-3713.3(C)(5)(a) (Cum. Supp. 2012)).
185. *Id.*
186. *Id.* § 58.1-3713.3(C)(5)(d) (Cum. Supp. 2012).
187. *Id.*

paid license tax reported by a person as due in filing a severance tax return.[188]

## B. *Significant Recent Judicial Decisions*

### 1. *Level 3 Communications, LLC v. State Corporation Commission*

In *Level 3 Communications, LLC v. State Corporation Commission*, the Supreme Court of Virginia held that the State Corporation Commission ("SCC") does not have the authority to deduct a telecommunications company's Internet-related revenues when determining the gross receipts it certifies to the Virginia Department of Taxation.[189] Level 3 is a telecommunications company with a network in Virginia providing wholesale Internet services to major Internet service providers."[190] Level 3 filed four proceedings in the SCC to reduce the amount of its gross receipts for several tax years by the amount of its Internet-related revenues, certified by the SCC to the Department of Taxation for purposes of computing the company's potential minimum tax liability.[191]

Level 3 argued that, because the Federal Internet Tax Freedom Act ("ITFA") prohibited state taxation of its Internet-related revenues, "the SCC must exclude Internet-related revenues from its gross receipts certified to the [Virginia] Department [of Taxation] for purposes of the [Tax] Department['s] comput[ation of] the company's potential minimum tax liability."[192] The SCC argued that the statutes governing the SCC's duties require it to "collect information on gross receipts; to determine that the deductions provided by Virginia law have been properly taken; and to provide that information to the Department of Taxation."[193] The SCC also argued that "because the ITFA limits state and location taxation, and taxation is outside the scope of the SCC's duty . . . the

188. *Id.*
189. 282 Va. 41, 48, 710 S.E.2d 474, 478 (2011).
190. *Id.* at 44, 710 S.E.2d at 475.
191. *Id.*, 710 S.E.2d at 475–76.
192. *Id.*, 710 S.E.2d at 476.
193. *Id.* at 45, 701 S.E.2d at 477 (internal quotation omitted).

ITFA does not address the SCC's duty."[194] The Supreme Court of Virginia agreed with the SCC.[195]

The court noted that under Virginia Code sections 58.1-400 and 58.1-400.1, "telecommunications companies are subject to either a corporate income tax on income from Virginia sources or to a minimum tax on gross receipts."[196] "A telecommunications company pays the minimum tax only when its regular corporate income tax liability is less than the minimum tax."[197] "[Virginia] Code [section] 58.1-400.1 assigns the SCC the limited function of certifying telecommunications companies' gross receipts to the [Tax] Department . . . ."[198] The court noted that there are no deductions for Internet-related revenues from gross receipts.[199] The court concluded that "the SCC properly declined to allow a deduction for Internet-related revenues that the General Assembly did not provide in the gross receipts statute [and t]o allow for such a deduction would have required the SCC to exceed its statutory authority."[200] The court affirmed the SCC's order.[201]

2. *AMG National Trust Bank v. Commonwealth*

In *AMG National Trust Bank v. Commonwealth*, the Norfolk City Circuit Court determined that a trust company was exempt from the Virginia corporate income tax and instead subject to the Virginia bank franchise tax.[202] The trust company was chartered as a national banking association, yet did not accept any deposits at its Virginia location.[203] In addition, the circuit court declined a request from the Virginia tax commissioner to determine how the trust company should apportion its net capital for purposes of the Virginia bank franchise tax.[204]

194. *Id.*
195. *Id.*
196. *Id.* at 46, 710 S.E.2d at 477 (citing VA. CODE ANN. §§ 58.1-400 to -400.1 (Repl. Vol. 2009)).
197. *Id.* (citing VA. CODE ANN. § 58.1-400.1 (Repl. Vol. 2011)).
198. *Id.*
199. *Id.*
200. *Id.* at 48, 710 S.E.2d at 478.
201. *Id.*
202. (*AMG I*), No. CL 10-3031, 2011 Va. Cir. LEXIS 88, at *2, *9 (Cir. Ct. Apr. 17, 2011) (Norfolk City).
203. *Id.*
204. AMG Nat'l Trust Bank v. Commonwealth (*AMG II*), No. CL 10-3031, slip op. at 5

The taxpayer, AMG National Trust Bank ("AMG"), "was chartered as a national banking association pursuant to the National Bank Act, 12 U.S.C. §§ 21, et seq., in August 2001 and maintained that charter" and held itself out to the public as engaged in the banking business continuously from 2004 through 2009.[205] During this time period, AMG had an office located in Norfolk known as Old Dominion Trust Company.[206] Through this office, AMG offered trust services and investment management services, which AMG and the Commonwealth agreed were traditional and historical parts of banking.[207] AMG neither solicited nor accepted deposits at its Virginia office from January 1, 2004, through January 31, 2008.[208] After January 31, 2008, AMG solicited deposits and loans from its Virginia office, but the deposits and loans were not accepted in Virginia and rather were accepted at the main banking office in Colorado.[209]

In 2009, the Tax Department rejected AMG's 2009 tax return "on the ground that AMG did not meet the definition of 'bank' contained in the [Virginia Bank Franchise] Act."[210] The tax commissioner "determined that AMG was not conducting a banking business in Virginia because the Virginia branch did not accept deposits."[211] Therefore, she ruled that AMG was not subject to the bank franchise tax but instead subject to the corporate income tax.[212] Based on this conclusion, the tax commissioner "directed AMG to file corporate income tax returns for all the years that its trust office ha[d] operated in Virginia."[213] As a result, AMG filed suit and asked the circuit court to determine that it was a "bank" within the meaning of the Act.[214]

The Virginia Bank Franchise Tax Act requires every bank to pay annual franchise taxes based on the net capital of the tax-

(Va. Cir. Ct. July 6, 2011) (Norfolk City), *available at* http://issuu.com/norfolkcircuitclerk/docs/amgbankv-commonwealthtax.

205. *AMG I*, 2011 Va. Cir. LEXIS 88, at *2–3.
206. *Id.* at *3.
207. *Id.*
208. *Id.* at *4.
209. *Id.*
210. *Id.* at *2.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*

payer.[215] This annual franchise tax is paid in lieu of all other state or local taxes.[216] The Act provides four separate definitions of a "bank," plus a fifth exclusionary clause:

> "Bank" means:
>
> (1) any incorporated bank, banking association, savings bank that is a member of the Federal Reserve System, or trust company organized by or under the authority of the laws of the Commonwealth;
> (2) any bank or banking association organized by or under the authority of the laws of the United States, doing business or having an office in the Commonwealth or having a charter which designates any place within the Commonwealth as the place of its principal office;
> (3) any bank which establishes and maintains a branch in this Commonwealth under [Article 6 (§ 6.2-836 et seq.) of Title 6.2 or Article 7 (§ 6.2-849 et seq.) of Title 6.2], whether such bank or banking association is authorized to transact business as a trust company or not;
> (4) any joint stock land bank or any other bank organized by or under the authority of the laws of the United States upon which the Commonwealth is authorized to impose a tax;
> (5) The term shall exclude all corporations organized under the laws of other states and doing business in the Commonwealth, corporations organized not as banks under the laws of the Commonwealth and all natural persons and partnerships.[217]

The circuit court determined that AMG met the definition of a "bank" under the second and fourth clauses of the definition.[218] The circuit court also determined that AMG was not excluded under the exclusionary clause.[219]

The Tax Department made two arguments that AMG should not be considered a "bank" for purposes of the act, both based on the fact AMG did not accept deposits in Virginia.[220] First, the Tax Department argued that because the statute uses the word "bank" to define "bank," the court also should consider the definition of "bank" which is included in the Virginia Banking Act.[221] The Virginia Banking Act defines "bank" as "a corporation authorized by statute to accept deposits and to hold itself out to the

215. *Id*. at *5.
216. *Id.* (citing VA. CODE ANN. § 58.1-1202 (Repl. Vol. 2009)).
217. *Id.* at *5–6 (citing VA. CODE § 58.1-1201 (Repl. Vol. 2009)).
218. *Id.* at *6.
219. *Id.*
220. *Id.* at *6–7.
221. *Id.*

public as engaged in the banking business in this Commonwealth."[222] Based on this definition, the Tax Department argued that AMG should not be classified as a "bank" in Virginia because AMG did not accept deposits in Virginia.[223] The Tax Department's second argument was that the phrase "doing business or having an office in the Commonwealth" in the second clause of the definition in the Virginia Banking Act requires AMG to conduct the business of banking in the Commonwealth.[224] In support of this argument, the Tax Department pointed to the section of the Virginia Bank Franchise Tax Act that provides a treatment for banks that were only present in Virginia for part of the calendar year.[225] Virginia Code section 58.1-1204.1 defines "transacting business" as "accepting deposits from customers in the regular course of doing business."[226]

The circuit court rejected both arguments by focusing on the definition of a "bank" in the Virginia Bank Franchise Tax Act. First, the circuit court noted that "[t]he definition of 'bank' in the Virginia Banking Act is significantly shorter and less detailed than the definition of a bank within the Virginia Bank Franchise Act."[227] The court followed the principle that when two statutes address the same subject, the two statutes should be harmonized, if possible, and the more specific statute should prevail when they conflict.[228] Based on this principle, the circuit court concluded that the definition in the Virginia Bank Franchise Tax Act did not require AMG to accept deposits in Virginia to be considered a "bank."[229] The circuit court recognized that if the General Assembly had intended for such a requirement to be in effect, the General Assembly would have included the requirement in the Virginia Bank Franchise Tax Act.[230] Therefore, the circuit court determined that AMG met the definition of a "bank" under the

222. *Id.* at *7 (quoting VA. CODE ANN. § 6.2-800 (Repl. Vol. 2009)) (internal quotation marks omitted).

223. *Id.*

224. *Id.*

225. *Id.* (citing VA. CODE ANN. § 58.1-1204.1 (Repl. Vol. 2009)).

226. VA. CODE ANN. § 58.1-1204.1 (Repl. Vol. 2009)).

227. *AMG I*, 2011 Va. Cir. LEXIS 88, at *8.

228. *Id.* (quoting Lynchburg Div. of Soc. Servs. v. Cook, 276 Va. 465, 481, 666, S.E.2d 361, 369 (2008)).

229. *Id.*

230. *Id.* at *9.

Act and was subject to the bank franchise tax, not the corporate income tax.[231]

Following this determination by the circuit court, the Tax Department asked the circuit court to reconsider its ruling or, in the alternative, clarify its ruling regarding the proper method the Tax Department should use to apportion AMG's net capital.[232] The circuit court chose not to reconsider its determination that AMG was a "bank," and instead focused on the Tax Department's request for clarification. The circuit court declined to give guidance on the proper method the Tax Department should use to apportion AMG's net capital because the Tax Department did not file a declaratory action.[233]

The Tax Department requested guidance on apportionment because the Virginia Bank Franchise Tax Act fails to provide a method for apportionment of a multi-state bank's net capital as is required by the U.S. Constitution.[234] To adapt for this lack of a statutory apportionment method, the Tax Department has required banks present in Virginia to apportion net capital based on the location of deposits.[235] However, the Tax Department requires banks that do not accept deposits to request permission to use an alternative method for apportionment.[236] Because AMG fell into this latter category, it properly requested an alternative apportionment method based on its cost of performance.[237]

The Tax Department argued to the circuit court that under the Virginia Bank Franchise Tax Act, AMG's tax liability is zero because the Tax Department never approved an alternative apportionment method.[238] Therefore, AMG was not "subject" to the bank franchise tax and was subject to the corporate income tax.[239] The circuit court rejected this argument and stated that while AMG

231. *Id.*
232. *AMG II*, No. CL 10-3031, slip op. at 2 (Va. Cir. Ct. July 6, 2011) (Norfolk City), *available at* http://issuu.com/norfolkcircuitclerk/docs/amgbankv-commonwealthtax.
233. *See id.* at 5.
234. *See id.* at 2.
235. *Id.* at 2–3.
236. *Id.* at 3.
237. *Id.* at 4.
238. *Id.*
239. *Id.*

might have a bank franchise tax liability of zero, AMG still is subject to the bank franchise tax and exempted from the corporate income tax.[240] The circuit court added that if AMG's tax liability is indeed zero, it is only because the Tax Department failed to approve an alternate method of apportionment.[241]

240. *Id.*
241. *Id.*