TAXATION

Craig D. Bell *

INTRODUCTION

This article reviews significant recent developments in the laws affecting Virginia taxation. Each section covers legislative changes, judicial decisions, and selected opinions or pronouncements from the Virginia Department of Taxation (the "Tax Department") and the Virginia Attorney General over the past year.

Part I of this article addresses legislative changes and judicial decisions made to Virginia corporate and individual income tax law. Part II covers legal changes pertaining to retail sales and use taxes.

Parts III and IV address changes to the law in Virginia regarding real and personal property taxes. Part V addresses legislative changes and an official opinion from the Virginia Attorney General addressing miscellaneous local taxes. Part VI addresses legislative changes and judicial decisions made to the Business Professional and Occupational License ("BPOL") Tax.

* Partner, McGuireWoods LLP, Richmond, Virginia. LL.M., 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, chair of the McGuireWoods Tax and Employee Benefits Department, 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 (United States 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 United States 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 them. However, this article does not discuss many of the numerous technical legislative changes to Title 58.1 of the Virginia Code which covers taxation.

I. TAXES ADMINISTERED BY THE TAX DEPARTMENT

A. *Recent Significant Legislative Activity*

1. Fixed Date of Conformity

The 2014 Virginia General Assembly amended Virginia Code section 58.1-301, which mandates conformity with the terms of the Internal Revenue Code ("IRC"), to advance Virginia's fixed date of conformity from January 1, 2013 to January 1, 2018.[1] Virginia continues to disallow the federal bonus depreciation deductions allowed under IRC § 168(k), but allows any bonus depreciation permitted under § 168(n), "which is designed to benefit qualified disaster assistance property."[2] Virginia law also continues 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 debt cancellation under IRC § 108(i), for taxable year 2014 and future taxable years.[3] The legislation extends Virginia's conformity to the federal enhanced earned income tax credit under IRC § 32(b)(3) for taxable years 2013 through 2017.[4]

1. Act of Feb. 5, 2014, ch. 1, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-301 (Supp. 2014)); Act of Feb. 20, 2014, ch. 2, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-301 (Supp. 2014)); *see* VA. DEP'T OF TAXATION, PUB. DOC. 14-1 (Feb. 20, 2014), *available at* www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Tax Bulletins" hyperlink; then follow "2014" hyperlink; then follow "VTB14-1 (PD 14-18)" hyperlink) [hereinafter TAX BULL. 14-1].

2. Craig D. Bell, *Annual Survey of Virginia Law: Taxation,* 48 U. RICH. L. REV. 169, 170 (2013); *see* VA. CODE ANN. § 58.1-301(B)(1) (Supp. 2014); TAX BULL. 14-1, *supra* note 1.

3. VA. CODE ANN. § 58.1-301(B)(3)–(4) (Supp. 2014); TAX BULL. 14-1, *supra* note 1.

4. *See* VA. CODE ANN. § 58.1-301(B)(6) (Supp. 2014).

2. Intangible Holding Company Additions

In a special session of the 2014 General Assembly, the Virginia legislature amended the Appropriations Act for the 2012–2014 biennium and added a retroactive interpretation in Virginia Code section 3-5.11 of this budget legislation to the intangible holding company additions and addbacks located in section 58.1-402(B)(8).[5] The retroactive interpretations in this budget bill legislation concern two exceptions to the addback requirement. Section 58.1-402(B)(8)(a) codifies the two exceptions as follows:

> (1) The corresponding item of income received by the related member is subject to a tax based on or measured by net income or capital imposed by Virginia, another state, or a foreign government that has entered into a comprehensive tax treaty with the United States government;
> (2) The 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.[6]

With regard to these two exceptions, the budget bill states:

> Notwithstanding the provisions of section 58.1-402(B)(8), Code of Virginia, for taxable years beginning on and after January 1, 2004:
>
>> (i) The exception in § 58.1-402(B)(8)(a)(1) for income that is subject to a tax based on or measured by net income or capital imposed by Virginia, another state, or a foreign government shall be limited and apply only to the portion of such income received by the related member, which portion is attributed to a state or foreign government in which the related member has sufficient nexus to be subject to such taxes; and
>> (ii) The exception in § 58.1-402(B)(8)(a)(2) for a related member deriving at least one-third of its gross revenues from licensing to unrelated parties shall be limited and apply only to the portion of such income derived from licensing agreements for which the rates and terms are comparable to the rates and terms of agreements that the related member has actually entered into with unrelated entities.[7]

5. Act of Apr. 1, 2014, ch.1, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 3-5.11 (Cum. Supp. 2014)).
6. VA. CODE ANN. § 58.1-402(B)(8)(a)(1)–(2) (Repl. Vol. 2013).
7. Ch. 1, 2014 Va. Acts ___.

In effect, the foregoing two exceptions reverse the Richmond City Circuit Court's decision in *Wendy's International, Inc. v. Virginia Department of Taxation,* interpreting the second exception of section 58.1-402(B)(8)(a)(2).[8] Since the enactment of the addback statute in 2004, the Tax Department has argued that only the "portion" of income taxed in exception (i) or derived from licensing agreements in exception (ii) is eligible for the exception and that this was the original intent of the legislative exceptions.[9] For example, in Public Document 07-153, the Virginia Tax Commissioner interpreted the addback exception requirement narrowly stating that "[t]he exception is limited to the portion of the taxpayer's royalty payments to its parent that correspond to the portion of the parent's income subjected to tax in other states."[10] The Tax Commissioner's reference to "the portion of the [t]axpayer's royalty payments" does not appear in the statutory exception language.[11] Instead, the 2014 budget bill supplies this missing language and makes the legislation retroactive to 2004, the year the addback statute was enacted.[12] This legislation impacts at least two pending Virginia court cases and presumably numerous pending audits.[13] This 2014 budget bill overcomes the Tax Department's failure in the 2013 General Assembly to codify its desired interpretation of the state.[14] Furthermore, "hiding" the retroactive language in the 2014 budget bill enabled the legislature to codify the Tax Department's litigation and simultaneously to avoid the appropriate tax-writing committees and due consideration. It also avoided debate over the issues and the implications that typically occur in a public setting. According to the Council on State Taxation ("COST"), in a letter to the Virginia

8. 84 Va. Cir. 398, 399 (2012) (Richmond City); *see* Craig D. Bell, *Annual Survey of Virginia Law: Taxation*, 47 U. RICH. L. REV. 307, 315–18 (2012).

9. *Wendy's*, 84 Va. Cir. at 398–99.

10. *See, e.g.*, VA. DEP'T OF TAXATION, PUB. DOC. 07-153 (Oct. 2, 2007), *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "rulings of the Tax Commissioner" hyperlink; then follow "2007" hyperlink; then click on "PD07-153" hyperlink) [hereinafter PUB. DOC. 07-153].

11. *Id.*; *see* VA. CODE ANN. § 58.1-402(B)(8)(a) (Repl. Vol. 2013).

12. Ch. 1, 2014 Va. Acts ___.

13. The two pending cases are *Lorillard Tobacco Co. v. Virginia Dep't of Taxation,* No. CL 13000509-00 (Va. Cir. Ct. filed July 22, 2013) (Danville City), and *Kohl's Dep't Stores, Inc. v. Virginia Dep't of Taxation,* No. CL 12001774-00 (Va. Cir. Ct. filed Apr. 16, 2012) (Richmond City).

14. S.B. 1036, Va. Gen. Assembly (Reg. Sess. 2013).

Senate and House Budget Conferees, "[t]he ten-year period of application far exceeds the 'modest period of retroactivity' sanctioned by the United States Supreme Court in *United States v. Carlton*."[15]

3. Tax Credit for Research and Development Expenses Expanded

The 2014 General Assembly enacted legislation that provides for several changes to the credit against Virginia corporate and personal income tax for qualified research and development expenses.[16] First, the legislature increased the annual credit cap from $5 million to $6 million, effective for fiscal years beginning on or after July 1, 2014, and extended the sunset date by three years, from December 31, 2015 to December 31, 2018.[17] The legislation also increased the amount of credit that each taxpayer can claim to an amount

> equal to . . . 15 percent of the first $234,000 in Virginia qualified research and development expenses paid or incurred by the taxpayer, . . . or 20 percent of the first $234,000 in Virginia qualified research and development expenses paid or incurred by the taxpayer . . . if the Virginia qualified research was conducted in conjunction with a Virginia public or private college or university, to the extent the expenses exceed the Virginia base amount for the taxpayer.[18]

In the event that the total amount of credits is less than $6 million for any taxable year, the statute requires the Tax Department to "allocate credits up to the maximum of $6 million, on a pro rata basis, to taxpayers who are already approved for the tax credit" in an amount equal to 15% of the second $234,000 in Virginia qualified research and development expenses paid or incurred by the taxpayer, or 20% of the second $234,000 in such expenses if the research was conducted in conjunction with a Virginia college or university.[19] The legislation also allows part-

15. Letter from Ferdinand S. Hogroian, Tax & Legislative Counsel, to Members of Joint Conferee Comm. on the Budget 2 (Apr. 11, 2014) (citing United States v. Carlton, 512 U.S. 26 (1994)).

16. Act of Mar. 7, 2014, ch. 227, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-439.12:08 (Cum. Supp. 2014)).

17. *Id.*

18. VA. CODE ANN. § 58.1-439.12:08 (Supp. 2014).

19. Ch. 227, 2014 Va. Acts ___.

nerships, limited liability companies, or electing S corporations to choose to receive and claim the credit at the entity level.[20]

4. Interest Charged-Domestic International Sales Corporation Exclusion from Tax Enacted

An Interest Charged-Domestic International Sales Corporation ("IC-DISC") is a tax-exempt entity that an export company may form as part of a planning technique to lower its federal rate of taxation on export income.[21] Specifically, in this planning technique, an export company forms a corporation that elects to be an IC-DISC. The export company then pays the IC-DISC commission payments for services provided."[22] According to the Tax Department's 2014 Fiscal Impact Statement:

> [t]he amount of commission payments may not exceed the greater of 50 percent of the export company's net export income or 4 percent of the export company's export sales revenue. The export company may claim a deduction from ordinary income for the amount of the commission payments.
>
> The IC-DISC does not pay federal corporate income tax on the commission payments it receives, as long as it is exempt from taxation. Such payments are not subject to taxation until the IC-DISC distributes the payments to its shareholders as dividends. However, the shareholders must pay annual interest on the deferred tax liability, hence the term "interest charged-DISC."
>
> Once the dividends are distributed, the IC-DISC's shareholders will pay income tax on the dividends at the long-term capital gains rate for qualified dividends. Because the maximum federal long-term capital gains rate for qualified dividends is 20 percent and the maximum federal corporate income tax rate is 35 percent, the tax savings from using this planning technique may be 15 percent or more.[23]

The 2014 General Assembly enacted Virginia Code section 58.1-401(9) to exempt IC-DISCs from Virginia corporate income tax, the minimum tax on telecommunications companies, and the tax imposed on electric suppliers, pipeline distribution compa-

20. *Id.*

21. *See* VA. DEP'T OF TAXATION, 2014 FISCAL IMPACT STATEMENT 3 (Mar. 4, 2014), *available at* http://leg1.state.va.us (click on the "2014" hyperlink; then enter SB515 and click search tab; click on "LIS Bill Tracking SB515 2014 session" hyperlink; and click on the "02/21/14 impact statement" hyperlink) (discussing Senate Bill 515).

22. *Id.*

23. *Id.* at 3–4.

nies, gas utilities, and gas suppliers.[24] This new tax exclusion is effective for taxable years beginning on or after January 1, 2014.[25]

5. Motion Picture Production Tax Credit Expanded

The 2014 General Assembly amended Virginia Code section 58.1-439.12:03 to increase the motion picture production tax credit cap from $5 million per biennium to $6.5 million per fiscal year, beginning on July 1, 2015, and to extend the sunset provisions for this credit amount until December 31, 2018.[26] In subsection (H), this legislation also requires the Tax Department to publish information relating to the location of sites used in a movie production and to qualify expenses for which credits are claimed, the number of people employed in Virginia with respect to tax credits claimed, and the total cost of the credit to the General Fund.[27] This disclosure provision supersedes any nondisclosure or taxpayer classified information such as those prevented from disclosure by section 58.1-3.[28]

6. Education Improvement Scholarships Credit Program Amended

The 2014 General Assembly amended Virginia Code section 58.1-439.26 to permit taxpayers to claim the education improvement scholarships credit against corporate income, personal income, bank franchise, public service corporation, and insurance premium taxes for the taxable year in which they made monetary or marketable securities donations to qualifying scholarship foundations.[29] Prior to this legislative change, a taxpayer was required to wait to claim the credit until he or she filed a tax return

---

24. Act of Feb. 27, 2014, ch. 26, 2014 Va. Acts ___, ___ (codified as amended VA. CODE ANN. § 58.1-401(9) (Supp. 2014)); Act of Mar. 5, 2014, ch. 186, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-401(9) (Cum. Supp. 2014)).

25. Ch. 26, 2014 Va. Acts ___.

26. Act of Apr. 6, 2014, ch. 730, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-439.12:03 (Cum. Supp. 2014)).

27. *Id.* (codified as amended at VA. CODE ANN. § 58.1-439.12:03(H) (Cum. Supp. 2014)).

28. VA. CODE ANN. § 58.1-439.12:03(H)(4) (Supp. 2014).

29. Act of Mar. 5, 2014, ch. 176, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-439.26 (Cum. Supp. 2014)).

for the taxable year following the year of the donation.[30] This enactment is effective for monetary or marketable securities donations made in tax years beginning on or after January 1, 2013.[31]

B. *Recent Judicial Decision*: Forest Lodge, LLC v. Virginia Department of Taxation

In a lengthy and hotly disputed case involving judicial review of a qualified donation of land for which the applicant sought to receive Virginia land preservation tax credits, the Albemarle County Circuit Court held in *Forest Lodge, LLC v. Virginia Department of Taxation*, that the value of Forest Lodge, LLC's ("Forest Lodge") qualified donation, for purposes of the Virginia Land Preservation Incentives Act of 1999 (the "Virginia Land Preservation Incentives Act"), was $76,700,000, thereby entitling Forest Lodge to tax credits in the amount of $30,680,000.[32] The court also sustained Forest Lodge's plea in bar, holding that the actual owners of Forest Lodge were necessary parties to the case if the Tax Department desired to challenge the charitable donation deduction claimed by Forest Lodge and reported to the owners on its partnership information return.[33] The court also upheld Forest Lodge's plea in bar assertion that the statute of limitations had expired with respect to the Forest Lodge owners.[34]

Forest Lodge is important because it is the first case litigated to fruition that tests multiple aspects of the Virginia Land Preservation Incentives Act.[35] *Forest Lodge* involved a number of critical procedural and substantive tax law issues generated in multiple letter opinions leading up to the final judgment order that formally ended the case. All of the procedural holdings by the court were matters of first judicial impression. In an effort to illustrate these critical rulings, this article sets out the facts and arguments made by the parties to provide a comprehensive picture of this bitterly contested case and of the various rulings by the court.

30. VA. CODE ANN. § 58.1-439.26(A) (Supp. 2014).

31. *Id.*

32. Final Order at 2, No. CL11000654-00 (Va. Cir. Ct. Oct. 16, 2013) (Albemarle County) [hereinafter Final Order].

33. *Id.* at 2–3.

34. *Id.* at 3.

35. The Virginia Land Preservation Incentives Act is codified at VA. CODE. ANN. §§ 58.1-510 to -520 (Repl. Vol. 2013 & Cum. Supp. 2014).

1. Background on the Biscuit Run Acquisition, Charitable Donations, and Subsequent Administrative and Judicial Proceedings

At a highly competitive auction in 2005, Forest Lodge acquired Biscuit Run, a unique piece of land in Albemarle County, for $46.2 million.[36] Mainly due to zoning restrictions, only 5% of Albemarle County is developable.[37] All but 400 acres of Biscuit Run is within the developable area of Albemarle County.[38] At the time of acquisition, only 1024 home units could be constructed on Biscuit Run in a by-right development based on its zoning.[39] After its acquisition of Biscuit Run, Forest Lodge received three offers from national home builders to purchase Biscuit Run.[40] Pulte Homes offered $152 million; Newland Communities, LLC offered $120 million; and Entertainment Enterprises, LLC offered $92 million, plus 25% of the profits of the potential Biscuit Run Development.[41] The three offers shared one common feature: the consideration offered was contingent on the rezoning of Biscuit Run to allow for the construction of at least 3000 units.[42]

Forest Lodge sought to rezone Biscuit Run to Neighborhood Model District zoning, a process which lasted approximately two years and cost nearly $7 million.[43] The Albemarle Planning Commission initially rejected the Biscuit Run rezoning application by a vote of 7-0.[44] However, the Planning Commission ultimately approved the rezoning with proffers attached to its future development.[45] Biscuit Run was rezoned in September 2007 to Neighbor-

36. Transcript of Proceedings vol. 2 at 70, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL11000654-00 (Va. Cir. Ct. Apr. 16, 2013) (Albemarle County) [hereinafter *Forest Lodge* Transcript vol. 2] (on file with author).

37. Transcript of Proceedings vol. 1 at 25, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL11000654-00 (Va. Cir. Ct. Apr. 15, 2013) (Albemarle County) [hereinafter *Forest Lodge* Transcript vol. 1] (on file with author).

38. *Id.* at 75.

39. *Id.* at 74–75.

40. *Id.* at 35.

41. *Id.* at 35–37.

42. *Id.* at 37.

43. *Id.* at 78.

44. *Id.* at 39.

45. *Id.* at 90–91.

hood Model District zoning.[46] This rezoning allowed Forest Lodge to construct a total of 3000 units on Biscuit Run.[47] After the rezoning, another appraisal was commissioned by a financial institution to determine the highest and best use of Biscuit Run as of October 23, 2007.[48] The appraisal determined the fair market value of Biscuit Run to be $120 million.[49]

For various reasons, none of the three offers closed and Forest Lodge retained Biscuit Run.[50] In mid-2009, the members of Forest Lodge sought to donate Biscuit Run to the state for the creation of a park in Albemarle County. After negotiations with the Virginia Department of Conservation and Recreation ("DCR"), Forest Lodge donated Biscuit Run in a bargain sale transaction for $9.8 million on December 30, 2009.[51] Forest Lodge hired Patricia O'Grady Filer to appraise the value of Biscuit Run as of December 30, 2009, the date of donation, for purposes of applying for land preservation tax credits.[52] Filer valued Biscuit Run at $87.7 million.[53] Filer employed a valuation method using both the sales comparison approach and the income approach. Filer used five comparable sales: the 2005 sale of Biscuit Run, three sales in Culpeper County, and one additional sale in Albemarle County.[54] In the discounted cash flow calculations performed under the income approach, Filer used a discount rate based on interviews with local developers, the national average, and an absorption rate based on Biscuit Run's favorable location.[55]

Even though not required to do so, Forest Lodge took one additional step and hired James H. Boykin, a national conservation easement appraiser expert, to review Filer's appraisal.[56] Boykin requested changes and clarifications to Filer's appraisal.[57] Once

46. *Id.* at 40.
47. *Id.*
48. *Id.* at 38.
49. *Id.*
50. *Id.* at 95–99.
51. *Id.* at 106–07.
52. *See, e.g.*, *id.* at 206–10.
53. *Id.* at 200.
54. *Id.* at 166–67.
55. *Id.* at 195–99.
56. *Id.* at 264–65, 272.
57. *Id.* at 278.

Boykin was satisfied with the changes and clarifications, he recommended approval of the appraisal based on the Uniform Standards of Professional Appraisal Practice.[58]

2. Application to the Tax Department for Credits

Forest Lodge filed its application for land preservation tax credits in late December 2009.[59] Despite the fact that Forest Lodge submitted a qualified appraisal and fulfilled every other requirement under Virginia Code section 58.1-510, the Tax Department withheld the land preservation tax credits.[60] The Tax Department also never concluded that the qualified appraisal was either false or fraudulent.[61] After meetings with Forest Lodge's representatives, the Tax Department ordered its own appraisal of Biscuit Run.[62]

The Tax Department ultimately hired Lawrence Salzman of Salzman Real Estate Services in Richmond to appraise Biscuit Run.[63] Salzman is a licensed appraiser, an attorney, and a land developer.[64] The Tax Department had previously hired Salzman on numerous occasions to act as counsel in disputes over land preservation tax credits.[65] Salzman also reviews appraisals submitted with credit applications on a regular basis for the Tax Department.[66] Salzman performed these services so frequently that the Tax Department supplied him with his own workspace at the Tax Department, a security badge, and an email address at tax.virginia.gov.[67] Salzman first reviewed Filer's appraisal in his capacity as an advocate/attorney working for the Tax Department to identify any issues or weaknesses in her appraisal.[68] Prior to hiring Salzman to perform the independent appraisal for the Tax Department, two appraisers located in the Charlottesville Metro-

58. *Id.* at 274, 283.
59. *Forest Lodge* Transcript vol. 2, *supra* note 36, at Ex. 18.
60. *Forest Lodge* Transcript vol. 1, *supra* note 37, at 21, 115–16.
61. *Forest Lodge* Transcript vol. 2, *supra* note 36, at 132.
62. *Id.* at 129.
63. *Id.* at 130–31.
64. *Id.* at 148.
65. *Id.*
66. *Id.* at 148–50.
67. *Id.* at 151–52.
68. *Id.* at 148–49.

politan Statistical Area ("MSA") were contacted to appraise Biscuit Run.[69] Both appraisers declined the engagement.[70] At this juncture, Salzman and an assistant tax commissioner decided that the Tax Department would hire Salzman to perform the independent appraisal.[71]

Salzman delivered an appraisal to the Tax Department in which he determined the value of Biscuit Run to be $39 million as of December 30, 2009.[72] Salzman used both the sales comparison approach and the income approach to derive a value of Biscuit Run. In the appraisal, Salzman used eight comparable sales: the 2005 sale of Biscuit Run, three sales in Chesterfield County, three sales in Henrico County, and one sale in Culpeper County.[73] Forest Lodge believed Salzman's determination of the per unit value of the 2005 sale of Biscuit Run to be flawed as he did not use the 2005 zoning of Biscuit Run in his calculation; instead, he used the figures from the 2007 rezoning of Biscuit Run in his calculations.[74] Salzman gave no weight to the three offers to purchase Biscuit Run. The absorption rate used in the discounted cash flow in the income approach was based on the number of permits issued for lots in Albemarle instead of the actual number of lots available for sale, and the discount rate used in the same calculation was based on false information given to Salzman by a representative of a non-affiliated developer.[75] Regardless, the Tax Department issued land preservation tax credits based on Salzman's valuation.[76]

3. Forest Lodge Files an Administrative Appeal

Forest Lodge filed an administrative appeal with the Tax Department for the issuance of the full amount of land preservation

69. *Id.* at 130–31.

70. *Id.* at 131.

71. *Id.*

72. *See id.* at 212; Transcript of Proceedings vol. 3 at 50, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL11000654-00 (Va. Cir. Ct. Apr. 17, 2013) (Albemarle County) [hereinafter *Forest Lodge* Transcript vol. 3] (on file with author).

73. *Forest Lodge* Transcript vol. 2, *supra* note 36, at 206–11.

74. *Id.* at 260–69.

75. *Forest Lodge* Transcript vol. 3, *supra* note 72, at 58–61.

76. *Forest Lodge* Transcript vol. 2, *supra* note 36, at 130–31.

tax credits requested.[77] The Tax Department determined that a second appraisal was needed.[78] After requesting bids on the appraisal, the Tax Department selected Samuel Long of Miller Long and Associates of Roanoke to perform this appraisal. Long is an appraiser with extensive experience appraising real property located in Southwest Virginia.[79] Prior to this appraisal, however, Long had never appraised any property in Albemarle County and had only appraised one parcel in the adjacent counties.[80] On August 4, 2011, Long delivered an appraisal to the Tax Department in which he valued Biscuit Run at $32,000,200.[81] Long made no attempt to interview any of Forest Lodge's representatives.[82] Due to this neglect, Long was unaware of the three offers to purchase Biscuit Run and thus, did not consider them.[83] Furthermore, Long determined the value of Biscuit Run solely using the sales comparison approach. Long used ten comparable sales: five sales from Chesterfield County, one sale from Culpeper County, one sale from Henrico County, one sale from Botetourt County, one sale from Bedford County, and one sale from Orange County.[84]

Forest Lodge acquired a second appraisal of Biscuit Run from Ivan Romenesko of Appraisal Group, Inc.[85] Romenesko determined that the fair market value of Biscuit Run as of December 30, 2009 was $86.5 million.[86] Romenesko arrived at this fair market value using both the sales comparison approach and the income approach.[87] Romenesko used five comparable sales and one offer: two sales in Albemarle County, one sale in Culpeper County, one sale in Caroline County, one sale in Stafford County, and one offer to purchase a tract of land in Albemarle County.[88] For the discounted cash flow performed under the income approach, Romenesko conducted a substantial survey of developers local to

77. *Id.* at 131.
78. *Id.* at 90–91.
79. *See Forest Lodge* Transcript vol. 3, *supra* note 72, at 85–90.
80. *Id.* at 131–34.
81. *Id.* at 122–23.
82. *Id.* at 136–37.
83. *Id.* at 89–90.
84. *Id.* at 110–14.
85. *Forest Lodge* Transcript vol. 2, *supra* note 36, at 32–33.
86. *Id.* at 33, 69.
87. *Id.* at 63.
88. *See id.* at 56–61.

Albemarle County to determine the proper discount rate.[89] Also, Romenesko reviewed the permits for units issued in Albemarle County to determine the actual number of lots available for sale as opposed to the number of permits issued.[90] This review revealed less than 200 lots actually available for sale in Albemarle County, as opposed to the 7000 permits issued by Albemarle County.[91] After the exchange of additional appraisals, the Tax Department refused to issue additional credits.

4. Overview of Judicial Proceedings

Forest Lodge filed an Application for Correction of an Erroneous Action with Respect to a Tax Attribute ("Correction Application") under Virginia Code section 58.1-1825 in the Albemarle County Circuit Court.[92] After discovery and several failed pretrial motions filed by the Tax Department in an attempt to have the case dismissed, the trial began on April 15, 2013.[93] At trial, the court heard testimony and received evidence over three days.[94] All four appraisers testified with respect to their appraisals.[95]

After hearing all of the testimony and receiving evidence, the court issued a ruling from the bench in which Judge Paul D. Peatross discussed all four appraisals.[96] The court first addressed the Tax Department's appraisals.[97] Judge Peatross began by stating that Long was a competent appraiser, but he had no experience in Albemarle County.[98] Judge Peatross was also troubled by the fact that Long gave no consideration to the purchase offers.[99] Moving to Salzman, Judge Peatross questioned Salzman's bias and noted that Salzman had a conflict given his role in the Biscuit Run tax credit dispute as both an attorney and an appraiser

89. *Id.* at 66–68.
90. *Id.* at 56–61.
91. *Id.* at 66–68.
92. *Forest Lodge* Transcript vol. 1, *supra* note 37, at 51–52.
93. *See* Final Order, *supra* note 32, at 1.
94. *Forest Lodge* Transcript vol. 3, *supra* note 72, at 262.
95. *See id.* at 261–62.
96. *Id.* at 262–63.
97. *Id.*
98. *Id.*
99. *See id.* at 262–65.

for the Tax Department.[100] Furthermore, Judge Peatross stated that he did not understand why Salzman gave no weight to the offers to purchase Biscuit Run and questioned several decisions Salzman made in his appraisal.[101] For Filer's appraisal, the court noted that there were some understandable criticisms regarding Filer's allocation of development costs for the income approach.[102] Judge Peatross concurred with Romenesko's characterization of Biscuit Run as a valuable piece of property based on several aspects.[103] Ultimately, the court focused on the offers and their contingency on rezoning.[104] Judge Peatross found that these offers showed the value of Biscuit Run and its rezoning, which Salzman and Long basically ignored.[105] Based on all the information presented, Judge Peatross found Romenesko's appraisal of $86.5 million the most credible.[106] Accordingly, the court ordered the Tax Department to issue the additional $19 million of land preservation tax credits based on this $86.5 million fair market value determination, bringing the total land preservation tax credits awarded to Forest Lodge on the Biscuit Run transaction to $30,680,000.[107]

5. Significant Rulings from the Forest Lodge Case

a. Grantor Tax Paid Record Bargain Sale Deed Does Not Establish Fair Market Value of Donation

On December 30, 2009, Forest Lodge conveyed a 1194-acre property known as "Biscuit Run" to the Commonwealth of Virginia DCR for use as a state park in exchange for $9,800,000.[108] Because the consideration paid was less than the fair market value of Biscuit Run, this donation was a bargain sale and a qualified

100. *Id.* at 263.
101. *Id.*
102. *Id.* at 264.
103. *Id.* at 263–65.
104. *Id.* at 262, 264–65.
105. *Id.* at 262–65.
106. *Id.*
107. Final Order, *supra* note 32, at 2.
108. Applicant's Memorandum Supporting Plea in Bar to Defendant's Amended Counterclaim at 1, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL11000654-00 (Va. Cir. Ct. July 10, 2013) (Albemarle County) [hereinafter Applicant's Memorandum Supporting Plea in Bar] (on file with author).

donation for purposes of the Virginia Land Preservation Incentives Act.[109] The sale of Biscuit Run to DCR was a bargain sale under IRC § 170(h)(2)(A) for United States and Virginia income tax purposes.[110] The recorded deed, titled "DEED OF BARGAIN AND SALE," states:

> Grantee acknowledges and agrees that Grantor intends to treat part of this transaction as a charitable contribution pursuant to Section 170 of the IRS Code. Grantor has informed Grantee that the Property has a Fair Market Value in excess of the purchase price and that a material inducement for Grantor to enter into the sale of the Property is that Grantee qualifies as a tax exempt public body eligible to receive charitable contributions.[111]

The Albemarle County Circuit Court Clerk's Cover Sheet, ("Cover Sheet") requests the amount of consideration to be provided. Forest Lodge listed the $9,800,000 consideration it received from DCR on the Cover Sheet.[112] Forest Lodge did not indicate the fair market value of Biscuit Run on the Cover Sheet as it solely requested the amount of consideration paid.[113] The court clerk assessed Forest Lodge with $9800 in recordation tax, based on the reported $9,800,000 consideration paid, which Forest Lodge paid when the deed was submitted for recordation.[114]

The Tax Department filed a demurrer in response to the Forest Lodge Correction Application.[115] The Tax Department asserted that Forest Lodge was judicially estopped from asserting that the value of Biscuit Run was greater than $9,800,000, based on the recording of the deed. The Tax Department argued that the value for purposes of the recordation tax determined both the tax liability for recordation tax purposes and the resulting amount of the

109. VA. CODE ANN. §§ 58.1-510, 512(C) (Repl. Vol. 2013 & Supp. 2014).

110. *Forest Lodge* Transcript vol. 1, *supra* note 37, at 104–08.

111. Applicant's Opposition to Defendant Commonwealth of Virginia Department of Taxation's Demurrer at 1–2, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL11000654-00 (Va. Cir. Ct. Dec. 14, 2011) (Albemarle County) [hereinafter Applicant's Opposition to Defendant's Demurrer] (on file with author).

112. *Id.* at Ex. C.

113. *Id.*

114. *Id.* at Ex. E.

115. Memorandum [of Defendant] Supporting Demurrer at 1, Forest Lodge, LLC v. Virginia, Dep't of Taxation, No. CL111000654-00 (Va. Cir. Ct. Nov. 18, 2011) (Albemarle County) (on file with author).

land preservation tax credits Forest Lodge was entitled to receive.[116]

Forest Lodge argued that it consistently asserted that the Biscuit Run transaction was a bargain sale, pointing out that the deed was labeled as a deed of bargain sale and that the language within the deed itself proclaimed that Forest Lodge and DCR agreed that Forest Lodge intended to treat part of this transaction as a charitable contribution pursuant to IRC § 170.[117] Forest Lodge also argued that the grantor tax is solely imposed on the consideration paid, not on the fair market value of the property, noting that according to the statute's plain text in Virginia Code section 58.1-802(A), the tax is triggered when the consideration or the value of the interest, whichever is greater, exceeds $100.[118] Forest Lodge also pointed to the regulation promulgated by the Tax Department, which states that the grantor's tax is based upon the net consideration as opposed to the greater of either the net consideration paid or the actual value of the property conveyed, and a number of state Tax Commissioner rulings holding that the grantor's tax is imposed solely on the consideration of the deed.[119] Lastly, Forest Lodge argued that judicial estoppel did not apply because they did not take any factual position that is inconsistent with a stance taken in prior litigation.[120] The filing of a deed with the court clerk's office for processing recordation taxes

116. The Tax Department asserted the issue was nonjusticiable because the action of recording the deed by the court clerk rendered the dispute moot as the clerk's actions were judicial in nature thus eliminating a live controversy. *Id*. at 2–4 (citing Bentley Funding Group, LLC v. SK&R Group, LLC, 269 Va. 315, 325–27, 609 S.E. 2d 49, 54–55 (2005); Hankins v. Town of Virginia Beach, 182 Va. 642, 644, 29 S.E. 2d 831, 832 (1944); Potts v. Mathieson Alkali Works, 165 Va. 196, 225, 181 S.E. 521, 533 (1935)).

117. Applicant's Opposition to Defendant's Demurrer, *supra* note 111, at 1–2.

118. *Id.* at 5.

119. *Id.* at 5–7 (citing 23 VA. ADMIN. CODE § 10-320-30(B) (Cum. Supp. 2013)); VA. DEP'T OF TAXATION, PUB. DOC. 11-186 (Nov. 16, 2011), *available at* http://www.policylibrary.tax.virginia,gov/OTP/policy.nsf (follow the "Tax Bulletins" hyperlink; then follow the hyperlink for 2011; then follow the "11-186" hyperlink); VA. DEP'T OF TAXATION, PUB. DOC. 10-266 (Dec. 15, 2010), *available at* http://www.policylibrary.tax.virginia,gov/OTP/policy.nsf (follow the "Tax Bulletins" hyperlink; then follow the hyperlink for 2010; then follow the "10-266" hyperlink); VA. DEP'T OF TAXATION, PUB. DOC. 10-130 (July 9, 2010), *available at* http://www.policylibrary.tax.virginia,gov/OTP/policy.nsf (follow the "Tax Bulletins" hyperlink; then follow the hyperlink for 2010; then follow the "10-130" hyperlink); VA. DEP'T OF TAXATION, PUB. DOC. 04-97 (Sept. 8, 2004), *available at* http://www.policylibrary.tax.virginia,gov/OTP/policy.nsf (follow the "Tax Bulletins" hyperlink; then follow the hyperlink for 2004; then follow the "04-97" hyperlink).

120. *See* Applicant's Opposition to Defendant's Demurrer, *supra* note 111, at 9.

is a ministerial, clerical matter, not a judicial action.[121] Forest Lodge argued that all of its actions were consistent and that the fair market value of Biscuit Run exceeded the consideration received from DCR, thereby demonstrating a justifiable controversy.[122]

The circuit court overruled the Tax Department's demurrer.[123] In a letter opinion, the court found that judicial estoppel did not apply because Forest Lodge never made a representation that the $9,800,000 payment it received from DCR was the fair market value of Biscuit Run and that the recording of a deed in the clerk's office was not a prior judicial proceeding.[124]

b. The Circuit Court Decides the Qualified Appraisal Issue and the Appropriate Standard of Review

The Tax Department next filed a motion for summary judgment to dispose of the case asserting that Forest Lodge's appraisal supporting its request for land preservation tax credits was not a "qualified appraisal" as defined by the IRC, and that the proper license was not obtained by the appraising entity to satisfy the requirements of Virginia Code section 54.1-2011.[125] Their motion also asserted that Forest Lodge lacked the donative intent necessary to qualify for the tax credits because the requirements of IRC § 170 apply to the fee simple gift.[126]

The Tax Department argued that Virginia Code section 58.1-512(B), setting forth the requirements an applicant must follow to

121. VA. CODE ANN. § 54.1-2130 (Repl. Vol. 2013 & Supp. 2014).

122. Specifically, Forest Lodge argued it consistently took the position that the fair market value exceeds the DCR payment as reflected in the deed itself, the application for tax credits filed with the Tax Department, and the judicial application filed by Forest Lodge to initiate the litigation. Applicant's Opposition to Defendant's Demurrer, *supra* note 111, at 9.

123. Order Overruling Defendant's Demurrer, Forest Lodge, LLC v. Virginia, Dep't of Taxation, No. CL111000654-00 (Va. Cir. Ct. Feb. 27, 2012) (Albemarle County) [hereinafter Order Overruling Defendant's Demurrer] (on file with author).

124. Letter from Paul M. Peatross, Jr., Judge Designate, to Counsel of Record, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL111000654-00 (Va. Cir. Ct. Feb 3, 2012) (on file with author).

125. Tax Department's Motion for Summary Judgment at 2, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL11000654-00 (Va. Cir. Ct. Nov. 13, 2012) (Albemarle County) (on file with author).

126. *Id.*

obtain land preservation tax credits, should be strictly construed in the same manner as exemptions from tax, with all doubts being resolved against the taxpayer.[127]

Relying on this standard, the Tax Department argued that Forest Lodge's appraisal company allowed its corporate charter to lapse and under Virginia Code section 54.1-2011(E), the appraiser's corporation was required to be licensed by the Virginia Real Estate Appraiser Board and it was not so licensed. Therefore, the Tax Department contended that Forest Lodge's appraisal was not a qualified appraisal within the meaning of section 58.1-512(B).[128] Lastly, the Tax Department argued that all transfers of real property interests must meet the requirements of IRC § 170(h), and Forest Lodge did not meet those requirements because it replaced the Biscuit Run property, which it pledged as security for its acquisition financing, with an assignment of the land preservation tax credits it was to receive on the bargain sale donation of the property to DCR (a substitution of collateral) because DCR needed the property to be debt free upon receipt of the gift.[129] The Tax Department argued that this exchange of collateral was indicative of a lack of donative intent by Forest Lodge which under the rules of strict construction, disqualified Forest Lodge's application for land preservation tax credits.[130]

As to the appropriate standard of review that should be applied to the statutory requirements a donor must meet to receive tax credits, Forest Lodge argued that the customary rules of statutory construction apply.[131] Forest Lodge asserted that the heightened "strict construction" rule applicable to a tax exemption should not apply to a statute that generates tax credits.[132] A tax

127. *Id.* at 2–3.

128. Memorandum Supporting Motion for Summary Judgment at 6–7, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL11000654-00 (Va. Cir. Ct. Nov. 13, 2013) (Albemarle County) [hereinafter Memorandum Supporting Motion for Summary Judgment] (on file with author).

129. *Id.* at 9–10, 12.

130. *Id.* at 12.

131. Forest Lodge's Memorandum in Opposition to the Department of Taxation's Motion for Summary Judgment at 4, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL11000654-00 (Va. Cir. Ct., Dec. 17, 2012) (Albemarle County) [hereinafter Forest Lodge's Memorandum in Opposition of Summary Judgment] (on file with author).

132. *Id.*

credit is not equivalent to a tax exemption.[133] It has not been defined or classified as an exemption from tax by the General Assembly or by any published decision by a Virginia court. A tax credit does not reduce or change the tax liability of a taxpayer; rather it is a method of tax payment.[134] Forest Lodge noted that the Tax Department, in its own published tax return forms, differentiates tax credits from tax exemptions because tax credits serve a different function (i.e., payment of a tax versus exclusion or exemption from tax).[135] The determination of whether an exemption should apply is determined well before any amount of liability for the tax is ever taken into account.[136] It is not analogous to a tax credit that is used as a payment to reduce, satisfy, and offset tax liability.[137] Additionally, Forest Lodge pointed out that in those judicial decisions that involved tax credits, the Supreme Court of Virginia never applied the statutory interpretation rule of strict construction advocated by the Tax Department in this case. Rather, Forest Lodge argued that the supreme court has provided clear guidance on how Virginia statutes must be interpreted by the courts when the meaning of a statute is at issue.[138] When determining the implication of a section of the Virginia Code, the supreme court instructs as follows:

> While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.[139]

In its decision on the applicable rule of statutory construction, the circuit court judge agreed with Forest Lodge's position and held that the traditional statutory construction rules apply as the supreme court has not applied "strict construction" to tax credits.[140]

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *See id.*
138. *Id.* at 6.
139. *Id.* (citing City of Winchester v. American Woodmark Corp., 250 Va. 451, 456, 464 S.E.2d 148, 152 (1995)).
140. Letter Opinion, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL11000654-

With respect to the Tax Department's argument that Filer's appraisal was not a "qualified appraisal" as the term is used in Virginia Code section 58.1-512(B), Forest Lodge noted that its appraiser was licensed by the Real Estate Appraiser Board of the Virginia Department of Professional and Occupational Regulations (the "Appraiser Board") and that she met all of the requirements of a qualified appraisal set out by statute.[141] While Filer's company had lapsed as a corporation, Filer, who was properly licensed at all times, signed the appraisal. The wording within Filer's appraisal report indicated that the report was "her" report and the certification used the words "I" and "my" which indicated that the report was by the person, not by the former corporation.[142] Filer continued to use the name of her former corporation after its corporate charter lapsed and operated her appraisal business as a sole proprietorship.[143] Forest Lodge also argued that a sole proprietorship is not a separate business entity such as a corporation, partnership, limited liability company, or any "other business entity" requiring the appraiser to register her sole proprietorship.[144]

The circuit court agreed with Forest Lodge and found that the appraisal report met the requirements of section 58.1-512(B) and that the appraiser was qualified.[145] The court noted that the appraisal report was prepared by the individual appraiser because of how it was signed and certified, even though the cover page of the report said it was prepared by Piedmont Appraisal Company (Filer's former corporation).[146] The court also found that a sole proprietorship is not an "other business entity" under Virginia Code section 54-2011, so the proprietorship did not need to be registered with the Appraiser Board provided that the individual appraiser was properly registered.[147]

00 (Va. Cir. Ct. Feb. 5, 2013) (Albemarle County) [hereinafter *Forest Lodge* Letter Opinion] (on file with author).

141. Forest Lodge's Memorandum In Opposition of Summary Judgment, *supra* note 131, at 8.

142. *Id.* at 11.

143. *Id.*

144. *Id.* at 11–13.

145. Forest Lodge, LLC v. Virginia Dep't of Taxation, 86 Va. Cir. 230, 232, 234 (2013) (Albemarle County).

146. *Id.*

147. *Id.* at 233.

c. Circuit Court Decides That Only Donations of Less-Than-Fee Interests in Real Property Must Meet Requirements of IRC § 170(h) to Receive Tax Credits

Virginia Code sections 58.1-511 and 58.1-512(c)(2) require a less-than-fee simple interest, such as an open-space easement or conservation easement, to satisfy all of the IRC § 170 requirements for a charitable contribution deduction.[148] The Tax Department argued that section 58.1-512(c) requires the application of the same rules for donations of less-than-fee interests, such as conservation easements, to apply to donations of fee simple interests.[149] Specifically, the Tax Department asserted that the substitution of collateral related to Forest Lodge's acquisition financing of Biscuit Run, from the subject Biscuit Run property to an assignment of the land preservation tax credits to serve as the new collateral interest for the loan, demonstrated a lack of donative intent by Forest Lodge.[150] The inference is that Forest Lodge was motivated by a business or financial reason as opposed to a charitably disposed reason. If correct, the Tax Department argued that the requirements of IRC § 170 are not met and therefore no tax credits may be awarded to Forest Lodge.[151]

Forest Lodge contended that the Tax Department's argument ignores the plain language in section 58.1-512(c)(2), which states in pertinent part:

> Qualified donations shall include the conveyance of a fee interest in real property or the conveyance in perpetuity of a less-than-fee interest in real property, such as a conservation restriction, preservation restriction, agricultural preservation restrictions, or watershed preservation restriction, *provided that such less-than-fee interest qualifies as a charitable deduction under § 170(h) of the United States Internal Revenue Code of 1986, as amended.*[152]

Forest Lodge also noted that the General Assembly repeated its intent in this same section with the requirement of affidavits to be included with land preservation credit applications, certifying

148. VA. CODE ANN. §§ 58.1-511, -512(C)(2) (Repl. Vol. 2013 & Supp. 2014).

149. Tax Department's Reply Memorandum Supporting Motion for Summary Judgment at 8–9, Forest Lodge, LLC v. Virginia Dep't of Taxation, CL 11000654-00 (Va. Cir. Ct. Dec. 20, 2012) (Albemarle County) (on file with author).

150. *See id.* at 13–14, 16.

151. *Id.* at 12.

152. VA. CODE ANN. § 58.1-512(C)(2) (Repl. Vol. 2013 & Supp. 2014) (emphasis added).

that the donation of a “less-than-fee” interest meet the requirements of IRC § 170(h).[153]

Agreeing with Forest Lodge, the court found that the traditional “words of plain and definite import” rule of construction applied, and that there was no requirement that Forest Lodge needed to meet the requirements of IRC § 170. The Tax Department’s motion for summary judgment was denied on that ground.[154]

d. Circuit Court Sustained Forest Lodge’s Plea in Bar

Following the court’s decision to deny the Tax Department’s motion for summary judgment, the Tax Department was permitted to add a counterclaim to challenge Forest Lodge’s charitable contribution deduction on its Biscuit Run gift to DCR.[155] In essence, the Tax Department wanted to disallow the charitable deduction reported on Forest Lodge’s pass-through entity information return so that the individual members of Forest Lodge would have their individual income tax returns adjusted.[156] By disallowing each member’s pro rata share of the charitable donation deduction allocated to them, the individual members were excluded as parties in the Forest Lodge tax credit case.[157]

Before addressing the parties’ arguments and the court’s decision, it is helpful to establish the background on Virginia pass-through entity income taxation. Virginia Code section 58.1-390.1 defines pass-through entities as “any entity, including . . . a limited liability company . . . that is recognized as a separate entity for federal income tax purposes, in which the partners, members or shareholders report their share of the income, gains, losses, deductions and credits from the entity on their federal income tax returns.”[158] Owners of pass-through entities are liable for Virginia

153. *Id.* § 58.1-512(D)(2) (Repl. Vol. 2013 & Supp. 2014).

154. Forest Lodge, LLC v. Virginia Dep’t of Taxation, 86 Va. Cir. 230, 232 (2013) (Albemarle County).

155. *See* Graelyn Brashear, *Judge Says State Devalued Biscuit Run Property*, C-VILLE.COM (Apr. 23, 2013, 7:00 AM), http://www.c-ville.com/judge-says-state-devalued-biscuit-run-property/#.U6Y3Ro1dX58.

156. *See* Applicant’s Memorandum Supporting Plea in Bar, *supra* note 108, at 2.

157. Will Goldsmith, *Taxpayer State Park*, C-VILLE.COM (Oct. 26, 2013, 12:00 AM), http://www.c-ville.com/Taxpayer_State_Park/#.U6Yz7I1dX58.

158. VA. CODE ANN. § 58.1-390.1 (Repl. Vol. 2013).

income tax in their individual capacities on pass-through entity income.[159] Every pass-through entity doing business in Virginia, or having income from Virginia sources, is required to file an information return with the Tax Department.[160] This return shows the distribution of pass-through entity income to the owners, who then report the income and pay income tax on their personal Virginia income tax returns.[161]

Forest Lodge filed a plea in bar against the Tax Department's counterclaim, seeking to disallow the charitable donation deduction reported on Forest Lodge's 2009 pass-through entity information return.[162] Forest Lodge argued in support of its plea in bar that Forest Lodge is the wrong party to defend the challenge to the charitable contribution deduction because it is not a taxpayer with respect to Virginia income tax.[163] Forest Lodge's owners are the taxpayers with respect to Forest Lodge's income tax attributes (for example, deduction) and they are the proper parties upon whom any claim should be asserted with regard to an income tax attribute of Forest Lodge.[164] There is no provision in the Virginia Code that allows a pass-through entity, such as Forest Lodge, to act as a substitute for its owners in a representative capacity when it comes to the payment of Virginia income tax on the pass-through entity income.[165] In essence, Forest Lodge argued that the Tax Department is trying to obtain the equivalent of a declaratory judgment action before assessing any additional income taxes.[166] Forest Lodge asserted that the Tax Department is side-stepping the explicit procedure in the Virginia Code for collecting additional taxes which revolves exclusively around the taxpayer, and is not a substitute for the taxpayer such as a pass-through entity.[167]

Forest Lodge also argued that the Tax Department cannot assess taxes against such individual taxpayers who are members of

159. *Id.* § 58.1-390.2 (Repl. Vol. 2013).
160. *Id.* § 58.1-392 (Repl. Vol. 2013).
161. *Id.* § 58.1-391 (Repl. Vol. 2013).
162. Applicant's Memorandum Supporting Plea in Bar, *supra* note 108, at 2–3.
163. *Id.* at 2.
164. *Id.*
165. *Id.* at 4–5.
166. *Id.* at 3.
167. *Id.* at 6.

Forest Lodge with respect to any item of pass-through tax attribute from Forest Lodge to its members because of the statute of limitations with respect to such attributes.[168] Virginia Code section 58.1-1812(A) requires an assessment to be issued within three years after the filing of the return, which, according to the Tax Commissioner, contains an understatement of the proper taxes owed.[169] However, the General Assembly adopted a separate statute of limitations that applies solely to pass-through entity items. Virginia Code section 58.1-394.3(A) states:

> The period for assessing any tax imposed by this chapter that is attributable to any pass-through entity item with respect to any owner of a pass-through entity shall not expire before the date that is three years after the later of (i) the last day for filing the pass-through entity return for the taxable year of the pass-through entity, as extended, or (ii) the date on which the pass-through entity return for such taxable year was filed.[170]

Within the same section, subsection (E) states:

> The provisions of this section shall apply to any tax attributable to items of income, gain, loss, deduction, credit, or other tax attribute that is recognized or reportable by the pass-through entity that is required to be reported by the owner of the pass-through entity pursuant to § 58.1-391 or the other sections of this chapter.[171]

Forest Lodge argued that by including subsection (E) to section 58.1-394.3, the General Assembly left no question that the period for assessing income tax applies to deductions reported by a pass-through entity to the owners of the pass-through entity.[172] Section 58.1-394(A) explicitly gives the Tax Department a deadline of three years after the last day for filing the pass-through entity return to assess additional income taxes attributable to any pass-through entity item.[173]

The Tax Department argued that section 58.1-1826, which deals with the correction of tax assessments or the correction of an action of transferred credit or other tax attribute, is broad and provides the court with "all the powers and duties" of the tax au-

---

168. *Id*. at 10.
169. VA. CODE ANN. § 58.1-1812(A) (Repl. Vol. 2013).
170. *Id.* § 58.1-394.3(A) (Repl. Vol. 2013).
171. *Id.* § 58.1-394.3(E) (Repl. Vol. 2013).
172. Applicant's Memorandum Supporting its Plea Bar, *supra* note 108, at 8–9.
173. VA. CODE ANN. § 58.1-394(A) (Repl. Vol. 2013).

thority which made the assessment complained of as of the time the assessment was made to correct the assessment or action.[174]

In response to the Tax Department's arguments, the circuit court stated that the point made in the plea in bar is that the Tax Department has no legal authority to correct a "charitable deduction" of Forest Lodge because Forest Lodge, as a pass-through entity, pays no tax. Accordingly, the Tax Department cannot assess additional income tax to Forest Lodge.[175] The court noted that it is not aware of any legal authority for Forest Lodge, as a pass-through entity, to substitute as proxy for the individual taxpayers.[176] The court also held that the Tax Department could not make any assessments against the members of Forest Lodge because the statute of limitations in this case set out in Virginia Code section 58.1-394(A) now bars any such tax assessments.[177] The Forest Lodge charitable contribution deduction for the 2009 taxable year was reported on the 2009 pass-through entity information return that was timely filed on or before April 15, 2010.[178] As of April 15, 2013, no tax assessments have been made.[179] This statute of limitations applies to the owners not parties to this case.[180] The court noted that even in the event that Forest Lodge could substitute as a proxy for the member taxpayers, the statute of limitations bars any assessment.[181] In conclusion, the court held that section 58.1-1826 does not give the court power to disallow a charitable deduction and allow the Tax Department to collect additional taxes; the court noted that even if it could, the statute of limitations had run and no additional taxes, may be collected.[182] The court sustained Forest Lodge's plea in bar.

174. Applicant's Memorandum Supporting Plea in Bar, *supra* note 108, at 6–7; VA. CODE ANN. § 58.1-1826 (Repl. Vol. 2013).

175. Letter Opinion on Forest Lodge's Plea in Bar at 2, Forest Lodge, LLC v. Virginia, Dep't of Taxation, No. CL111000654-00 (Va. Cir. Ct. Oct. 8, 2013) (Albemarle County) [hereinafter Letter Opinion on Forest Lodge's Plea in Bar] (on file with author).

176. *Id.* at 3.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

e. Post Script to the Trial

On October 23, 2013, the Tax Department filed an emergency motion for stay pending appeal with the Supreme Court of Virginia in an attempt to prevent the portion of the trial court's decision ordering the Tax Department to issue Forest Lodge the remaining $19 million land presentation tax credits.[183] In support of their request for the extraordinary action, the Tax Department asserted the same positions as it presented at trial.[184] On October 31, 2013, Forest Lodge submitted its response.[185] First, Forest Lodge argued that the stay pending appeal is moot because the Tax Department issued the $19 million in tax credits to Forest Lodge one day after it filed its emergency motion for stay with the supreme court.[186] Forest Lodge also argued that the Tax Department could not meet the four-part test necessary for a stay.[187] Specifically, Forest Lodge argued that: (1) the Tax Department cannot show likelihood of success; (2) the Tax Department will not suffer any harm by issuing the tax credits; (3) Forest Lodge and potential tax credit purchases will be harmed by the issuance of a stay; and (4) it is in the public interest for the tax credits to be issued.[188] The supreme court entered an order denying the stay on November 7, 2013.[189] On June 25, 2014, the supreme court extended an order denying the Tax Department's petition for appeal, indicating that the circuit court's decision contains no reversible error.[190]

183. Emergency Motion for Stay Pending Appeal at 2, Virginia Dep't of Taxation v. Forest Lodge, LLC, No. CL11000654-00 (Va. Cir. Ct. Oct. 23, 2013) (Albemarle County) (on file with author).

184. *See generally* Respondent's Response to Emergency Motion for Stay Pending Appeal at 5, Forest Lodge, LLC v. Virginia Dep't of Taxation, No. CL11000654 (Va. Cir. Ct. Oct. 31, 2013) (Albemarle County) (on file with author) (referencing arguments raised in prior motions filed by the Tax Department and stating that "[i]n its motions before [the] Court, the Tax Department regurgitates [those] arguments").

185. *Id.* at 12.

186. *Id.* at 3.

187. *Id.* at 4.

188. *Id.*

189. Order Denying Dep't of Taxation's Emergency Motion for Stay Pending Appeal, Virginia Dep't of Taxation v. Forest Lodge, LLC (Va. Nov. 7, 2013) regarding No. CL 111000654 (Va. Cir Ct. Oct. 28, 2013) (Albemarle County) [hereinafter *Forest Lodge*, Nov. 7 Order] (on file with author).

190. *Id.*

II. RECENT SIGNIFICANT ACTIVITY AFFECTING SALES AND USE TAX

The 2014 General Assembly amended Virginia Code section 58.1-602 to impose the Retail Sales and Use Tax on separately stated charges for equipment available for lease or purchase by a provider of satellite television programming to a customer of such programming.[191] Such equipment sold to a provider of satellite television programming for subsequent lease or purchase would be deemed a sale for resale.[192] Prior to this legislative change, satellite television programmers, and not their customers, were liable for the sales and use tax on tangible personal property used and consumed in connection with the provision of a service, regardless of whether the tangible personal property will be subsequently sold or leased to customers of the satellite television programmer.[193]

III. REAL PROPERTY

A. *Recent Significant Legislative Activity*

1. Exemption for Religious Bodies Expanded

The 2014 General Assembly amended Virginia Code section 58.1-3606(A)(2), which provides for the exemption of real property for churches and religious bodies, to include:

> (a) property used for outdoor worship activities; (b) property for ancillary and accessory purposes as allowed under the local zoning ordinance, the dominant purpose of which is to support or augment the principal religious worship use; and (c) property used as required by federal, state, or local law.[194]

---

191. Act of Mar. 27, 2014, ch. 359, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-602 (Cum. Supp. 2014)).

192. *Id.*; VA. CODE ANN. § 58.1-602 (Supp. 2014).

193. VA. CODE ANN. § 58.1-602 (Supp. 2014); *see* VA. DEP'T OF TAXATION, PUB. DOC. 13-130 (July 5, 2013), *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Rulings of the Tax Commissioner" hyperlink; then follow "2013" hyperlink; then click on "13-130" hyperlink); VA. DEP'T OF TAXATION, PUB. DOC. 97-392 (Sept. 29, 1997), *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "1997" hyperlink; then click on "97-392" hyperlink).

194. Act of Apr. 4, 2014, ch. 555, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-3606(A)(2) (Supp. 2014)); Act of Apr. 4, 2014, ch. 615, 2014 Va. Acts ___,

The legislation contains an enactment clause indicating that the "dominant purpose" language is intended to follow the Supreme Court of Virginia's interpretation in *Virginia Baptist Homes, Inc. v. Botetourt County*.[195]

2. Statute of Limitations Reduced for Non-Judicial Sale of Tax Delinquent Real Property

The 2014 General Assembly amended Virginia Code section 58.1-3975 to reduce the period of local Virginia property tax delinquency from five years to three years before a local treasurer or other officer may publicly auction any unimproved parcel of real property that is assessed at less than $10,000 and that measures less than 4000 square feet or is a parcel of any size that is determined to be unsuitable for building due to its size, shape, zoning, or soils.[196]

3. Notice of Change in Real Property Assessment to Require More Information

The 2014 General Assembly amended Virginia Code sections 58.1-3300 and 58.1-3301 to require additional information to be included in a notice of change in the assessment or the reassessment issued by localities relating to real property taxes.[197] The notice must include the current appraised values and the two immediately preceding appraised values.[198] The notice must also inform each property owner of the right to view and make copies of records maintained by the local assessment office.[199] In addition, for all notices, except those where the change in assessment is solely the result of the construction or the addition of new improvements to the real estate, the notice must identify the tax

___ (codified as amended at VA. CODE ANN. § 58.1-3606 (Cum. Supp. 2014)).

195. Ch. 555, 2014 Va. Acts ___; ch. 615, 2014 Va. Acts ___; VA. CODE ANN. § 58.1-3606 (Supp. 2014) (citing Virginia Baptist Homes, Inc. v. Botetourt Cnty., 276 Va. 656, 668, 668 S.E.2d 119, 125 (2008)).

196. Act of Feb. 27, 2014, ch. 28, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-3975 (Cum. Supp. 2014)).

197. Act of Mar. 3, 2014, ch. 71, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-3300 (Cum. Supp. 2014)); Act of Apr. 23, 2014, ch. 802, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. §§ 58.1-3300, 3301 (Cum. Supp. 2014)).

198. VA. CODE ANN. §§ 58.1-3330(B), -3301(B) (Supp. 2014).

199. *Id.*

rates, the amount of the total tax levies, and the percentage changes from the immediately two preceding tax years.[200]

B. *Recent Significant Opinions of the Attorney General*

1. Short-Term Rental Property

The Commissioner of the Reserve for Culpeper County inquired as to how a locality that does not have a local ordinance establishing either a merchants' capital tax or a tax on short-term rental property, may tax short-term rental property.[201] This issue arose because in 2010 the Virginia legislature amended Virginia Code section 58.1-3510.6(E) to exclude short-term rental property from classification and taxation as tangible personal property.[202] The Virginia Code now provides that short-term rental property may be taxed as merchants' capital, or a locality may adopt a local ordinance authorizing a short-term rental property tax.[203] The attorney general opined that short-term rental property shall be classified as a distinct category of merchants' capital and that locality may tax it as merchants' capital or as short-term rental property, but not as tangible personal property.[204] He also opined that a locality may lawfully decline to impose a tax or merchants' capital, including short-term rental property.[205] Finally, "the attorney general stated that absence of a local ordinance imposing a tax on merchants' capital or short-term rental property represents a choice by the locality's governing body not to impose a tax on such property."[206]

2. Interplay Between Land Use Assessments and Conservation Easements

Larry Davis, the County Attorney for Albemarle County, inquired as to three issues relating to real estate assessments and

200. *Id.*

201. Op. to Hon. Terry L. Yowell 1 (July 12, 2013), *available at* http://www.oag.state.va.us/ (follow "Official Opinions" hyperlink; then follow "2013" hyperlink; then follow "July" hyperlink; then follow "12-105" hyperlink) [hereinafter Op. 12-105].

202. VA. CODE ANN. § 58.1-3510.6(E) (Supp. 2014).

203. *Id.* § 58.1-3510.4(A) (Supp. 2014).

204. Op. 12-105, s*upra* note 201, at 1–2.

205. *Id.* at 3.

206. *Id.* at 1.

property subject to conservation easements for purposes of land assessment.[207] First, the County Attorney inquired as to whether a perpetual conservation easement must satisfy the minimum acreage requirements of Virginia Code section 58.1-3233 in order to qualify for land use assessment and taxation under section 10.1-1011.[208] The second question raised was whether land under a conservation easement must continue to meet the minimum acreage standards of section 58.1-3233 in order to annually qualify for land use assessment and taxation.[209] The last question concerned whether back taxes and roll-back must be imposed to correct any erroneous under-assessment of non-qualifying property.[210]

The attorney general opined on each of the three questions posed.[211] First, the attorney general noted that conservation easement land covered by provisions of the land use assessment and taxation statute must meet the minimum acreage requirement of section 58.13-233 at the time the easement is dedicated, unless the easement was placed on the property before the local land use assessment ordinance was adopted.[212] The attorney general then stated that subsequent changes in acreage in use "permitted under the conservation easement would not affect the continuing eligibility of the land for use assessment under [Virginia Code section] 10.1-1011(C)."[213] The attorney general further stated that no back taxes, including the roll-back tax, may be imposed when conservation easement land, through apparent unpermitted use or development, no longer appears to qualify for use assessment under section 10.1-1011(C).[214] The attorney general concluded that "upon the initiation of appropriate proceedings and the making of factual findings respecting the land and

207. Op. to Larry W. Davis, Cnty. Att'y, Albemarle Cnty. 1 (Sept. 20, 2013), *available at* http://www.oag.state.va.us/ (follow "Official Opinions" hyperlink; then follow "2013" hyperlink; then follow "September" hyperlink; then follow "12-099" hyperlink).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

easement in question, such subsequent violations of the conservation easement could render the land ineligible for [land use] assessment under [Virginia Code section] 10.1-1011(C)."[215]

IV. TANGIBLE PERSONAL PROPERTY

A. *Recent Significant Legislative Activity*

1. Separate Classification for the Tangible Personal Property of a New Business

The 2014 General Assembly amended Virginia Code section 58.1-3506(A) to create a separate classification for the tangible personal property of a business for its first two taxable years.[216] To qualify, the business must meet the requirements of a local business incentive program, even if the locality at issue does not currently provide such a program.[217] Section 58.1-3703 states the terms of a local business incentive program and provides that a qualifying business is one that locates for the first time in the locality, excluding those businesses that first locate in the locality as a result of a merger, acquisition, similar business combination, name change, or a change in business form.[218] This legislation authorizes localities to impose a tax on this tangible personal property at a lower rate than that applicable to the general class of tangible personal property.[219]

2. Exemption for Solar Energy Property No Longer a Local Option

The 2014 General Assembly enacted legislation to provide a local property tax exemption for solar energy equipment, facilities and devices owned or operated by businesses that collect, generate, transfer, or store thermal or electric energy, by expanding the definition of "certified pollution control equipment and facili-

215. *Id.* at 2.
216. Act of Mar. 31, 2014, ch. 409, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-3506(A)(44) (Cum. Supp. 2014)).
217. VA. CODE ANN. § 58.1-3506(A)(45) (Supp. 2014).
218. *Id.* § 58.1-3703(D) (Repl. Vol. 2013 & Supp. 2014)).
219. *Id.* § 58.1-3506(A)(45) (Supp. 2014); *see also id.* § 58.1-3703(D) (Repl. Vol. 2013 & Supp. 2014).

ties" in sections 58.1-3660(A) and 58.1-3661(B) to include such property.[220] The exemption also includes solar photovoltaic systems that have up to 20 megawatts of generation capacity.[221] Prior to adopting this legislation, local governing bodies were authorized, but not required, to exempt solar energy property.[222]

V. MISCELLANEOUS LOCAL TAXES

A. *Recent Significant Legislative Activity*

1. Mineral Lands and Severance Taxes Amended

The 2014 General Assembly enacted several changes to the assessment of mineral lands for property and severance taxes.[223] The new legislation authorizes the commissioners of revenue to enter into agreements with taxpayers that pertain to the fair market value of mineral lands for purposes of the real property tax and that pertain to the fair market value of gases for purposes of the local gas severance tax.[224] The legislation also treats all agreements entered into on or after January 1, 2013, but prior to July 1, 2014 as bona fide, valid and enforceable agreements.[225] The legislature also amended Virginia Code section 58.1-3713 to extend the sunset date to December 31, 2015 for the local gas severance tax dedicated to the Gas Road Improvement Fund, the Virginia Coalfield Economic Development Fund, and for water, sewer, and gas lines.[226]

220. Act of Apr. 6, 2014, ch. 737, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. §§ 58.1-3660(A), -3661(B) (Cum. Supp. 2014)); Act of Mar. 17, 2014, ch. 259, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. §§ 58.1-3660(A), -3661(B) (Cum. Supp. 2014)).

221. VA. CODE ANN. § 58.1-3660(B) (Supp. 2014).

222. *Id.* §§ 58.1-3660, -3661 (Repl. Vol. 2013).

223. Act of Mar. 5, 2014, ch. 179, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. §§ 58.1-3286, -3712 (Cum. Supp. 2014)); Act of Feb. 27, 2014, ch. 48, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. §§ 58.1-3286, -3712 (Cum. Supp. 2014)).

224. VA. CODE ANN. §§ 58.1-3286, -3712 (Supp. 2014).

225. *See id.*

226. Act of Mar. 5, 2014, ch. 187, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-3713(A), (C) (Cum. Supp. 2014)).

2. Limited Nonprofit Exemption for Local Meals Tax and Food and Beverage Tax

The 2014 General Assembly amended Virginia Code sections 58.1-3833 and 58.1-3840 to exempt nonprofit entities of fundraiser sales from paying county food and beverage taxes on the first $100,000 in gross receipts per calendar year, beginning with the fourth such sale in a calendar year.[227] In order for the exemption to apply, the legislation requires that the organization use gross proceeds from such sales exclusively for nonprofit, educational, charitable, benevolent, or religious purposes.[228]

3. Federal Credit Unions

The Chesapeake Circuit Court Clerk, the Honorable Faye W. Mitchell, inquired about whether federal credit unions are exempt from paying the recordation tax imposed upon grantees by Virginia Code section 58.1-801 pursuant to the exemption provided by 12 U.S.C. § 1768.[229] Under U.S.C. Chapter 14,

> Federal credit unions, their property, their franchises, capital, reserves, surpluses, and other funds, and their income is exempt from all taxation imposed by the United States or by any State . . . or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, . . . and local taxation to the same extent as other similar property is taxed.[230]

The attorney general noted, "Congress therefore permits the taxation of real or tangible personal property held by federal credit unions to the extent similar property is taxed, but otherwise exempts federal credit unions from 'all taxation' by state and local governments."[231] The attorney general went on to say that "'the recordation tax is not a tax on property but on civil privilege', [and] as such, the recordation tax does not fall within the bounds

227. Act of Apr. 6, 2014, ch. 673, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. §§ 58.1-3833, 3840 (Cum. Supp. 2014)).

228. VA. CODE ANN. §§ 58.1-3833, 3840 (Supp. 2014).

229. Op. to Hon. Faye W. Mitchell 1 (Jan. 3, 2014), *available at* http://www.oag.state.va.us (follow "Official Opinions" hyperlink; then follow "2014" hyperlink; then follow "January" hyperlink; then follow "13-105" hyperlink) [hereinafter Op. to 13-105].

230. 12 U.S.C. § 1768 (2012).

231. Op. 13-105, *supra* note 229, at 2.

of the exception stated in 12 U.S.C. § 1768 that applies to state and local taxation of federal credit unions' real and personal property."[232] Accordingly, the attorney general concluded that federal credit unions are exempt from paying the recordation tax imposed on grantees by Virginia Code section 58.1-801.[233]

VI. BUSINESS, PROFESSIONAL AND OCCUPATIONAL LICENSE TAX

A. *Recent Significant Legislation*

The 2014 General Assembly amended Virginia Code section 58.1-3703.1 to permit a taxpayer to appeal to the State Tax Commissioner or request a written ruling from him with regard to the classification of the business for purposes of the BPOL tax, regardless of whether the locality has conducted an audit, issued an assessment, or taken any other action.[234] Prior to this legislation, in order to appeal BPOL tax issues, taxpayers had to file an application for review within the later of either one year from the last day of the tax year for which an assessment is made or within one year from the date of the appealable event.[235]

B. *Recent Judicial Decisions*

1. *Ford Motor Credit Company v. Chesterfield County ("Ford Motor Credit II")*

On remand, two years after the Supreme Court of Virginia's decision in *Ford Motor Credit Co. v. Chesterfield County*, (*Ford Motor Credit I*),[236] the Chesterfield County Circuit Court granted Ford Motor Credit Company summary judgment on its proposed apportionment method of BPOL gross receipts.[237] In *Ford Motor Credit I*, the supreme court addressed how a locality should im-

232. *Id.*

233. *Id.*

234. Act of Feb. 27, 2014, ch. 27, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 58.1-3703.1 (Cum. Supp. 2014)).

235. VA. CODE ANN. § 58.1-3703.1(5)(b) (Repl. Vol. 2013).

236. 281 Va. 321, 343, 707 S.E.2d 311, 323 (2011).

237. Letter Opinion, Ford Motor Credit Co. v. Chesterfield Cnty., CL07000418-00 (Va. Cir. Ct. Aug 9, 2013) (Chesterfield County) [hereinafter *Ford Motor Credit II* Letter Opinion] (on file with author).

pose the BPOL tax on gross receipts generated outside its geographical boundaries.[238] In this case, the issue involved how Chesterfield County should tax interest earned on loans originating from the Ford Motor Credit Company's regional office located within the county where the taxpayer engaged in significant activities outside of Virginia to collect the periodic interest payments earned on automobile loans.[239] Chesterfield County sought to tax 100% of the interest earned on these loans.[240] The supreme court rejected this approach because evidence demonstrated that it was not reasonable that all of the income generating activities of the business occurred in Chesterfield County.[241] Accordingly, the supreme court held it appropriate to use payroll apportionment to determine the revenues taxable to Chesterfield County and remanded the case back to the circuit court.[242]

When the case returned to the Chesterfield County Circuit Court for further proceedings, the court considered the arguments made by both parties on the apportionment of the receipts.[243] The court rejected Chesterfield County's argument that the apportioned income base should be the total Virginia receipts with a payroll factor reflecting only Richmond payroll and Virginia payroll.[244] Rather, the court held that the receipts to be apportioned are the total loans originated by the Chesterfield Office multiplied by a payroll factor consisting of the Richmond branch payroll as a numerator and the payroll of all offices that contributed to generating those receipts (including Richmond) as a denominator.[245] The court used total payroll, both direct and indirect, noting that all parties agreed that the percentage difference between the two would not be significant.[246]

With respect to the "out-of-state deduction" provided by Virginia Code section 58.1-3732B(2), the court followed a three-part

238. *Ford Motor Credit I*, 281 Va. at 326, 707 S.E.2d at 313.

239. *Id.* at 328, 339–40, 707 S.E.2d at 314, 321.

240. *See id.* at 339, 707 S.E.2d at 320–21.

241. *See id.* at 339–40, 707 S.E.2d at 321.

242. *Id.* at 328, 340, 707 S.E.2d at 314, 321.

243. *Ford Motor Credit II*, Letter Opinion, *supra* note 237 at 4–5, 7–9. For a complete discussion of the *Ford Motor Credit I* decision by the Supreme Court of Virginia, see Craig D. Bell, *Annual Survey of Virginia Law: Taxation,* 46 U. RICH. L. REV. 203, 236–41 (2011).

244. *Ford Motor Credit II*, Letter Opinion, *supra* note 237, at 5–6.

245. *Id.* at 9.

246. *Id.* at 8.

test.[247] First, it asked if any employees at the Richmond office participated in interstate transactions. Second, it questioned whether the interstate participation can be tied to specific receipts. Third, it stated that if specific tying is not possible, then the same payroll factor must be applied.[248] The court held that the Richmond employees participated in interstate transactions when they sent the loans to offices in other states.[249] The court then appeared to agree with the taxpayer's expert that there could be no specific tracing of the receipts.[250] Before agreeing to utilize payroll apportionment, however, the court required a further hearing to determine "whether the Richmond branch receipts were actually reported on any out-of-state tax returns."[251]

2. *County Board of Arlington v. Nielsen Co.*

In *County Board of Arlington v. Nielsen Co.*, the Arlington County Circuit Court addressed the issue of how the Nielsen Company ("Nielsen") should apportion its receipts to Arlington County for its multi-state operations with over 100 offices, including one in the county, when use of payroll apportionment is required.[252] Specifically, the court addressed how to compute Virginia Code section 58.1-3732(B)(2) deductions from gross receipts.[253]

Nielsen filed a BPOL tax return with Arlington County for the 2007 tax year.[254] Nielsen used payroll apportionment to situs a share of its gross receipts to its Arlington office for purposes of that return.[255] It also used payroll apportionment to compute its

247. *Id.* at 9.

248. *Id.*

249. *Id.* at 10.

250. *Id.* at 10–11.

251. *Id.* at 11.

252. Letter Opinion, No. CL12-2872 (Va. Cir. Ct. Nov. 19, 2013) (Arlington County) [hereinafter *Nielsen*, Letter Opinion] (on file with author).

253. *Id.* at 2.

254. VA. DEP'T OF TAXATION, PUB. DOC. 12-146 (Aug. 31, 2013), *available at* http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf (follow "Rulings of the Tax Commissioner" hyperlink; then follow "2012" hyperlink; then follow "PD 12-146" hyperlink) [hereinafter PUB. DOC. 12-146].

255. *Id.*

deductions for receipts attributable to business in other states where Nielsen is subject to income tax.[256]

Arlington County audited Nielsen's BPOL return and, through its Commissioner of Revenue, issued an assessment that increased Nielsen's taxable gross receipts.[257] The county agreed with Nielsen's use of payroll apportionment to situs gross receipts.[258] However, the county disagreed with Nielsen's methodology for the deduction and therefore reduced Nielsen's deduction by several million dollars.[259] Nielsen filed an administrative appeal with the county challenging the assessment.[260] The Commissioner of Revenue upheld her assessment.[261]

Nielsen appealed to the State Tax Commissioner pursuant to Virginia Code section 58.1-3703.1(A)(6).[262] The State Tax Commissioner held that Nielsen's computation of the deduction to be correct so long as its Arlington office helped generate the out-of-state receipts and that situsing Nielsen's gross receipts by means other than payroll apportionment is impractical.[263] The State Tax Commissioner directed the county to determine whether those conditions were satisfied and, if so, to revise the assessment.[264]

The county did not make those determinations or revise its assessment as the State Tax Commissioner directed. The county instead appealed to the Arlington County Circuit Court, pursuant to Virginia Code section 58.1-3703.1(A)(7).[265]

The parties stipulated to a large portion of the evidence presented at trial.[266] The stipulations submitted during the trial established that Nielsen is a multi-state company that advises cli-

256. *Id.*
257. *Id.* at 2.
258. *Id.*
259. *Id.*
260. *Id.* at 1–2.
261. *Id.* at 3.
262. *Id.* at 1–2.
263. *Id.* at 3.
264. *Id.*
265. Transcript of Proceedings at 29–30, Cnty. Bd. of Arlington v. Nielsen Co., LLC, No. CL12-2872 (Va. Cir. Ct. Oct. 16, 2013) (Arlington County) [hereinafter *Nielsen* Transcript] (on file with author).
266. Joint Stipulations, Cnty. Bd. of Arlington v. Nielsen Co., LLC, No. CL12-2872 (Va. Cir. Ct. Oct. 16, 2013) (Arlington County) [hereinafter Joint Stipulations] (on file with author).

ents about consumer buying habits.[267] During 2006—the relevant year for purposes of computing the BPOL tax for Nielsen's 2007 return—Nielsen had over 100 offices in eighteen states, of which the Arlington County office was the only office in Virginia.[268] Nielsen's gross receipts in 2006 totaled $100,638,735.[269] The receipts from customers in Virginia totaled $2,456,460, less than 2.5% of Nielsen's total gross receipts.[270]

All of Nielsen's offices work together in an integrated manner to generate its gross receipts. This includes the Arlington office, which supports Nielsen's nationwide business through such services as data collection, solicitation of sales, and client support.[271] The parties stipulated that, because of the integrated nature of Nielsen's business, it is impractical or impossible to attribute Nielsen's gross receipts to particular places of business.[272] Nielsen argued that Virginia Code section 58.1-3703.1(A)(3)(b) required it to use payroll apportionment to situs a share of its gross receipts to its Arlington office for purposes of the BPOL tax.[273]

In 2006, the Arlington office constituted 23.8668% of Nielsen's total payroll.[274] Accordingly, 23.8668% of Nielsen's gross receipts, or $24,019,248,[275] was initially apportioned to the Arlington office. This large amount was sitused to Arlington even though only $2.4 million was earned from clients in Virginia.[276]

Nielsen filed income tax returns in Virginia and eleven other states for 2006.[277] Nielsen's receipts attributable to business in those eleven states totaled $54,352,536.[278] Nielsen determined the amount of those receipts apportioned to its Arlington office by applying the Arlington payroll factor to that sum, thereby

267. *Id.* at ¶ 3.
268. *Id.* at ¶¶ 4–5; PUB. DOC. 12–146, *supra* note 254, at 1.
269. Joint Stipulations, *supra* note 266, at ¶ 4.
270. *Id.* at ¶¶ 3–4.
271. *Id.* at ¶ 8.
272. *Id.* at ¶ 1.
273. *Id.*
274. *Id.* at ¶ 3.
275. This value is calculated by multiplying $100,638,735 (Nielsen's gross receipts in 2006) by 23.8668% (the Arlington office's percentage of Nielsen's total payroll).
276. *Id.* at ¶¶ 1, 4.
277. *Id.* at ¶ 5.
278. *Id.* at ¶ 4.

yielding a deduction of $12,972,213[279] and reducing total taxable gross receipts in Arlington to $11,047,034).[280]

The county disputed Nielsen's methodology for the deduction and maintained that the deduction was not properly determined by applying the Arlington payroll factor to all of Nielsen's receipts attributable to business in the eleven other taxing states. Rather, the county maintained before the trial court that the Arlington payroll factor can be applied only to the difference between the receipts generated in those states and the sum that would be fictionally assigned to them under the payroll apportionment formula.[281]

The court rejected the State Tax Commissioner's ruling and state-wide policy and reinstated Arlington County's assessment.[282] The court appeared unpleased with the lack of analysis or explanation in the State Tax Commissioner's ruling on how the payroll apportionment should work and further found that the State Tax Commissioner's ruling was contrary to the law governing BPOL deductions.[283] While the court recognized that Virginia Code section 58.1-3732 clearly allows for the "exemption," it stated that Nielsen presented no evidence of "what that exemption should be other than proffer that it should be the payroll percentage applied to the out-of-state taxable gross receipts."[284] The court concluded that the August 31, 2012 State Tax Commissioner decision was "erroneous, contrary to law and precedent and is arbitrary and capricious in its application."[285]

Nielsen filed a Petition for Appeal with the Supreme Court of Virginia. On June 4, 2014, the supreme court awarded an appeal to Nielsen.[286]

---

279. This value is calculated by multiplying $54,352,536 (Nielsen's receipts attributable to business in the eleven other states in 2006) by 23.8668% (the Arlington office's percentage of Nielsen's total payroll).

280. The $11,047,034 value is calculated by subtracting $12,972,213 (the value calculated in note 273) from $24,019,248 (the value calculated in note 270).

281. *Nielsen* Transcript, *supra* note 265, at 12.

282. *Nielsen* Letter Opinion, *supra* note 252, at 5.

283. *Id.* at 4–5.

284. *Id.* at 4.

285. *Id.* at 5.

286. Order, Nielsen Co. v. Cnty. Board of Arlington, Virginia Supreme Court Record No. 140422 (June 4, 2014) (on file with author).