TAXATION

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INTRODUCTION

This Article reviews significant recent developments in the laws affecting Virginia state and local taxation. Its Parts cover legislative activity, judicial decisions, and selected opinions and other pronouncements from the Virginia Department of Taxation (the "Tax Department") and the Attorney General of Virginia over the past year.

Part I of this Article addresses state taxes. Part II covers local taxes, including real and tangible personal property taxes, license taxes, recordation taxes, and administrative local tax procedures.

The overall purpose of this Article is to provide Virginia tax and general practitioners with a concise overview of the recent developments in Virginia taxation that are most likely to impact their clients. However, it does not address many of the numerous minor, locality-specific or technical legislative changes to Title 58.1 of the Virginia Code, which covers taxation.

I. TAXES ADMINISTERED BY THE TAX DEPARTMENT

A. *Significant Legislative Activity*

1. Sales and Use Taxation

The most significant legislative action in 2019 involved sales and use taxation and imposed obligations on non-Virginians that will affect nearly all who reside in the Commonwealth.

a. Remote Sellers and Marketplace Facilitators' Sales and Use Tax Obligations

In 2018, the sales and use tax tsunami that was the Supreme Court's decision in *South Dakota v. Wayfair*[1] swept away all apparent legal obstacles to states requiring sales tax collection and remission by remote sellers. In 2019, Virginia joined the wave of

1. 138 S. Ct. 2080 (2018).

states imposing sales tax obligations upon out-of-state retailers without in-state employees, operations, or property.[2]

Accepting the invitation extended by *Wayfair*, the Virginia General Assembly adopted House Bill 1722 (Chapter 815), which imposed, effective July 1, 2019, sales tax registration, collection, and remission obligations upon "remote sellers,"[3] or those "dealers" whose "sufficient contact with the Commonwealth" resulted in more than $100,000 of annual gross revenue from retails sales or "200 or more separate retail sales transactions . . . in the Commonwealth."[4] These thresholds mimic those used by South Dakota that were approved by the *Wayfair* Court as a sufficient gauge of "economic and virtual contacts" necessary for a substantial nexus to exist between the challenging businesses and that state.[5]

Using *Wayfair* as a springboard, House Bill 1722 also imposed upon "marketplace facilitators," for the first time, the sales tax registration, collection, and remission obligations applicable to sellers who qualify as "dealers" under Virginia law.[6] The bill defines marketplace facilitators to include those who "facilitate, for consideration and regardless of whether such consideration is deducted as fees from transactions, the sale of [another]'s products through a physical or electronic marketplace operated by such" marketplace facilitator, such as eBay.[7] However, to be liable for

2. Act of Mar. 26, 2019, ch. 815, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-601, -602, -604, -612, -612.1, -615, -625, -635 (Cum. Supp. 2019)).

3. *Id*. ch. 815, 2019 Va. Acts at __.

4. *Id*. ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612(C)(10)–(11) (Cum. Supp. 2019)).

5. 138 S. Ct. at 2099. It bears noting that the Court left unresolved whether South Dakota's law ran afoul of some other Commerce Clause principle besides the now-discarded "*Quill* physical presence rule." *Id.* The question as to whether these thresholds are appropriate for Virginia, a state with an annual GDP ten times that of South Dakota, also remains open. *Cf.* U.S. BUREAU OF ECON. ANALYSIS, GROSS DOMESTIC PRODUCT BY STATE: FOURTH QUARTER AND ANNUAL 2018 (2019), https://www.bea.gov/data/gdp/gdp-state [https://perma.cc/KDW4-WQP4]. This fact appears to have been recognized by the General Assembly, as the provisions imposing the thresholds upon both remote sellers and marketplace providers qualified the requirement with "or other minimum amount as may be required by federal law." *See* Act of Mar. 26, 2019, ch. 815, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-612(C)(10)–(11), -612.1(C)(3)(a)–(b) (Cum. Supp. 2019)). Besides this qualification, the General Assembly also included a severability provision. *See id*. ch. 815, 2019 Va. Acts at __.

6. Ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1 (Cum. Supp. 2019)).

7. *Id*. ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(A) (Cum. Supp. 2019)).

sales and use tax obligations, the marketplace facilitators must also "have sufficient contact with Virginia."[8] Contact statutorily arises when the marketplace facilitator conducts certain activities connecting buyers and sellers, assists in their exchange of goods or currency, and has "economic nexus through either" facilitation of "sales in Virginia that, in the aggregate, generate more than $100,000 in gross revenue" for the marketplace facilitator or facilitation of "200 or more separate retail sale transactions . . . in the Commonwealth."[9] If this standard is met, the marketplace facilitator must register as a dealer, collect sales and use tax "on all transactions that it facilitates through its marketplace," and remit payment of the same as do in-state retailers and (now) remote sellers.[10]

However, marketplace facilitators may obtain a waiver of their obligation from the Tax Department by showing that all of the marketplace sellers associated with their activity are already registered as dealers under Virginia Code section 58.1-613 or have sufficient contacts to require such registration, and that collecting on behalf of the sellers "would create an undue burden or hardship for either party."[11] If a waiver is given, the obligation to collect and remit would be the marketplace sellers'.[12]

Thus, while being a marketplace seller—or an unrelated party "that makes sales through any physical or electronic marketplace operated by such marketplace facilitator"[13]—does not subject the person to sales and use tax obligations,[14] it may not relieve the seller of duties that otherwise exist. A marketplace seller may al-

8. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(B) (Cum. Supp. 2019)).

9. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(C)(1)–(3) (Cum. Supp. 2019)).

10. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(B), (C)–(D)(1), (F) (Cum. Supp. 2019)).

11. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(D)(3) (Cum. Supp. 2019)). The Tax Department was tasked with "develop[ing] guidelines implementing the provisions of this act, including guidelines implementing the provisions of subsection D of § 58.1-612.1 of the Code of Virginia," creating a waiver of the collection requirement for certain marketplace facilitators. *Id.* ch. 815, 2019 Va. Acts at __.

12. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(D)(3), (F)(ii) (Cum. Supp. 2019)).

13. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(A) (Cum. Supp. 2019)).

14. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(B), (D)(2), (F) (Cum. Supp. 2019)).

so be subjected to audit and held liable if it provides "incorrect information" to the marketplace facilitator that results in a deficiency.[15]

Besides increasing the efficacy of sales and use tax compliance obligations, and so practically increasing the scope of such taxes, this revision may legally subject a facilitated sale to sales or use tax obligations that would not otherwise exist, imperfect or otherwise. That is because a marketplace facilitator's obligation to collect and remit sales tax is not affected by whether the "marketplace seller," the one who is actually selling the goods, "would not have been required to collect and remit sales and use tax had the sale not been made through such marketplace."[16]

The General Assembly recognized that this new regime exposes remote sellers and marketplace facilitators to substantial new liability and included a few provisions to address the most obvious concerns. One provision relieves the marketplace facilitator from all liability for "the incorrect collection or remittance of sales and use tax on transactions it facilitates or for which it is the seller if the error is due to reasonable reliance" upon incorrect or insufficient information provided by a marketplace seller, a purchaser, or the Commonwealth.[17] Another shields the marketplace facilitator from class actions in Virginia courts premised upon alleged "overpayment of sales and use tax collected on sales facilitated by the marketplace facilitator."[18] Another protects both marketplace facilitators and remote sellers from liability for erroneous sales and use tax collection "if the error is a result of the remote seller's or marketplace facilitator's reasonable reliance on information provided by the Commonwealth."[19]

The Tax Department anticipates significant additional revenue from this legislation. In its 2019 Fiscal Impact Statement anticipating Governor Northam's approval of the legislation, the Tax

15. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(E), (F)(i) (Cum. Supp. 2019)).

16. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(A) (Cum. Supp. 2019)).

17. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(E)(i)–(iii) (Cum. Supp. 2019)).

18. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-612.1(I) (Cum. Supp. 2019)).

19. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. §§ 58.1-625(D)(2), -635(D) (Cum. Supp. 2019)).

Department projected that the legislation would "result in an estimated positive revenue impact of up to $155 million in Fiscal Year 2020, $175 million per year for Fiscal Years 2021 through 2023, and $180 million for Fiscal Years 2024 and 2025."[20] Taking these numbers into account, Governor Ralph Northam's proposed 2018–20 Biennial Budget projected sales and use tax to represent approximately seven percent of the total revenues funding the Commonwealth's government, or more than seven billion dollars of revenue for Fiscal Years 2018–19, and 2019–20.[21]

Besides deriving significant new revenues from, and imposing substantial new compliance burdens (and potential liability) on, remote sellers and marketplace facilitators, the General Assembly also used the occasion to increase the Tax Department's workload. The Tax Department is now obliged to assist this expanded list of taxpayers with compliance by "[p]rovid[ing] adequate information to remote sellers to enable them to identify state and local sales and use tax rates and exemptions [and] to software providers to enable them to make software and services available to remote sellers."[22] These obligations extend to providing at least thirty days' prior notice of a change in local sales and use tax rates; no change will be effective until thirty days have passed following notice.[23] In administering the sales tax and auditing compliance, the Tax Department may require "no more than one sales and use tax return per month be filed with the Department by any remote seller or any software provider on behalf of such remote seller," and must enable the remote seller to "complete a single audit that covers the state and local sales and use taxes in all localities"—two provisions aimed at reducing taxpayer-compliance burdens.[24]

Further recognizing the extraordinary burdens that may reduce compliance by marketplace facilitators, the General Assembly also authorized the Tax Department to "temporarily suspend

20. DEP'T OF TAXATION, 2019 FISCAL IMPACT STATEMENT, H.B. 1722, at 1, http://lis.virginia.gov/cgi-bin/legp604.exe?191+oth+HB1722FER161+PDF [https://perma.cc/77VJ-HKLF].

21. FY 2018–20 TOTAL REVENUES, https://budget.lis.virginia.gov/sessionreport/2019/1/2084/ [http://perma.cc/2SXH-DXTN].

22. Ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-601(B)(1)–(2) (Cum. Supp. 2019)).

23. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-605(C)(2) (Cum. Supp. 2019)).

24. *Id.* ch. 815, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-601(B)(3)–(4) (Cum. Supp. 2019)).

or delay the collection or reporting requirements, or both, of a marketplace facilitator."[25] However, the marketplace facilitator must submit a "written application" with "good cause shown."[26] Even still, the suspension or delay may not "exceed 90 days after collection is required," or beyond September 29, 2019.[27]

Lastly, the Tax Department was charged with "develop[ing] guidelines implementing the provisions of this act," presumably to ease uncertainty and increase compliance.[28]

b. Reduced Sales and Use Tax Rate on Personal Hygiene Products

Another broad-based change wrought in 2019 was to the taxation of personal hygiene products. The Commonwealth imposes a sales and use tax rate of 4.3% "[o]f the gross sales price of each item or article of tangible personal property when sold at retail or distributed in this Commonwealth," and "of the cost price of each item or article of tangible personal property stored in or outside this Commonwealth for use or consumption in this Commonwealth."[29] However, the Commonwealth has long since taxed "food purchased for human consumption" at only "one and one-half percent of the gross sales price,"[30] subject to only an additional one percent sales and use tax by localities.[31] Localities are generally prohibited from applying additional local sales and use tax options to "food purchased for human consumption."[32]

In adopting Senate Bill 1715 (Chapter 550), the General Assembly defined a new category of tangible personal property for sales and use tax purposes, that of "essential personal hygiene products,"[33] and subjected it to the same favorable sales and use

25. *Id.* ch. 815, 2019 Va. Acts at __.
26. *Id.* ch. 815, 2019 Va. Acts at __.
27. *Id.* ch. 815, 2019 Va. Acts at __.
28. *Id.* ch. 815, 2019 Va. Acts at __.
29. VA. CODE ANN. §§ 58.1-603(1), (3), -604(2) (Repl. Vol. 2017).
30. *Id.* § 58.1-605(B) (Repl. Vol. 2017).
31. *Id.* § 58.1-611.1(A)(2) (Repl. Vol. 2017); *id.* § 58.1-605(B) (Repl. Vol. 2017).
32. *E.g.*, *id.* §§ 58.1-603.1, -603.2 (Repl. Vol. 2017).
33. Act of Mar. 18, 2019, ch. 550, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-611.1(C)(2) (Cum. Supp. 2019)). These are defined as "(i) nondurable incontinence products such as diapers, disposable undergarments, pads, and bed sheets and (ii) menstrual cups and pads, pantyliners, sanitary napkins, tampons, and other products used to absorb or contain menstrual flow." *Id.* ch. 550, 2019 Va. Acts at __.

tax treatment as "food purchased for human consumption," an effective 1.5%.[34] This included adding "personal hygiene products" to the preexisting food exemptions from local sales and use tax authority given to certain localities in Northern Virginia,[35] the Historic Triangle,[36] and Hampton Roads.[37]

The provisions of Senate Bill 1715 become effective January 1, 2020.[38] Once effective, the Tax Department expects these provisions to result in more than $4.5 million in annual sales and use tax savings.[39]

c. Payment of Retail Sales and Use Tax by Dealer Permitted

Prior to 2019, Virginia law generally prohibited all persons from "advertis[ing] or hold[ing] out to the public, directly or indirectly, that he will absorb all or any part of the sales or use tax, or that he will relieve the purchaser, consumer, or lessee of the payment of all or any part of such tax," no matter if he does in fact absorb or relieve such purchasers, consumers, or lessees of any part of the sales or use tax.[40] The only exception to this blanket prohibition has been for certain statutory sales tax holidays.[41]

Senate Bill 1615 (Chapter 758) both repealed this broad prohibition,[42] and adopted Virginia Code section 58.1-626.1, expressly permitting a "dealer" as defined by Virginia law[43] to "absorb and assume payment of all or any part of the sales or use tax otherwise due from the purchaser, consumer, or lessee."[44] If the dealer

34. *Id.* ch. 550, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-611(A), (B) (Cum. Supp. 2019)).

35. *Id.* ch. 550, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-603.1 (Cum. Supp. 2019)).

36. *Id.* ch. 550, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-603.2(B)–(C) (Cum. Supp. 2019)).

37. *Id.* ch. 550, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-604.01 (Cum. Supp. 2019)).

38. *Id.* ch. 550, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. §§ 58.1-603.1, -603.2, -604.01, -611.1 (Cum. Supp. 2019)).

39. DEP'T OF TAXATION, 2019 FISCAL IMPACT STATEMENT, S.B. 1715, at 2, http://lis.virginia.gov/cgi-bin/legp604.exe?191+oth+SB1715FER161+PDF [https://perma.cc/24RD-6ZWH].

40. VA. CODE ANN. § 58.1-626 (Repl. Vol. 2017).

41. *Id.* § 58.1-626(i)–(ii) (Repl. Vol. 2017).

42. Act of Mar. 21, 2019, ch. 758, 2019 Va. Acts __, __ (codified at VA. CODE ANN. § 58.1-626.1 (Cum. Supp. 2019)).

43. VA. CODE ANN. § 58.1-612(B) (Cum. Supp. 2019).

44. Ch. 758, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-626.1(A) (Cum. Supp. 2019)).

absorbs or assumes the tax due, it must "remit to the Department the full amount of tax due with the return that covers the period in which the dealer completed the sale or transaction."[45] In all cases, the dealer must "separately state the sales price of an item and the full amount of sales and use tax due on such item at the point of the sale or transaction, even if the dealer intends to absorb and assume the amount of tax due."[46]

d. Sales and Use Tax Exemption for Single Member LLC Solely Owned by a Nonprofit

Virginia law generally exempts a whole range of nonprofit entities with certificates of exemption from collecting or paying state or local sales or use taxes.[47] With the proliferation of limited liability companies, the Virginia General Assembly in 2019 adopted House Bill 1950 (Chapter 20) to clarify that a "single member limited liability company whose sole member is a nonprofit organization" may be an exempt "nonprofit organization" or "nonprofit entity."[48] House Bill 1950 also clarified that an entity qualifies as a "nonprofit organization" or "nonprofit entity" by fulfilling the preexisting criteria now contained in subsection (D) of Virginia Code section 58.1-609.11.[49]

2. Income Taxation

As Virginia sales and use taxation underwent significant changes in 2019 in response to actions taken across the Potomac, in the form of *Wayfair*, the law of Virginia income taxation also changed in response to federal action—the Tax Cuts and Jobs Act of 2017 (the "2017 Tax Act").[50]

45. *Id.* ch. 758, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-626.1(C) (Cum. Supp. 2019)).

46. *Id.* ch. 758, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-626.1(B) (Cum. Supp. 2019)).

47. VA. CODE ANN. § 58.1-609.11(A)–(C) (Repl. Vol. 2017).

48. Act of Feb. 15, 2019, ch. 20, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-609.11(A) (Cum. Supp. 2019)).

49. *Id.* ch. 20, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-609.11(A)–(B), (C)(1)(ii), (D)–(G) (Cum. Supp. 2019)).

50. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified at 26 U.S.C. §§ 59(A), 1400(Z)(1–2)).

a. Conformity to the Internal Revenue Code and Creation of Taxpayer Relief Fund

As has been its custom, the General Assembly in 2019 amended section 58.1-301 of the Virginia Code, the provision mandating conformity with the Internal Revenue Code ("I.R.C.") as of a certain date, to December 31, 2018, from February 9, 2018, made the legislation effective immediately and the changes effective for tax years beginning on and after January 1, 2018.[51] In adopting Senate Bill 1372, the Assembly conformed Virginia law to most provisions of the I.R.C., including most provisions of the 2017 Tax Act which had generally not been followed in 2018,[52] and all provisions of the Bipartisan Budget Act of 2018.[53]

On the business side, the General Assembly provided, for tax years beginning on and after January 1, 2018, a deduction of the "20 percent of business interest disallowed as a deduction" under I.R.C. section 163(j) from both individual and corporate taxable income.[54] The General Assembly also updated the existing rule of subtracting all I.R.C. section 951 income, known as Subpart F income, from corporate taxable income to also subtract all I.R.C. section 951A "Global Intangible Low-Taxed Income."[55] Lastly, the Assembly continued the Commonwealth's long-standing policy of not conforming Virginia law to certain business loss and depreciation provisions of the I.R.C. These included the "special depreciation allowance for certain property provided for under" I.R.C. sections 168(k), 168(l), 168(m), 1400L, and 1400N;[56] the five-year carry-back period for certain net operating losses under I.R.C. section 172(b)(1)(H);[57] and the income tax deductions related to "applicable high yield discount obligations" under I.R.C. section 163(e)(5)(F).[58] Virginia tax law also continues to disallow income

51. Act of Feb. 15, 2019 ch. 18, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. §§ 58.1-301, -322.03, -402 (Cum. Supp. 2019)).

52. *See* VA. CODE ANN. § 58.1-301(B)(6) (Cum. Supp. 2018).

53. *See* Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018).

54. Ch. 18, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. §§ 58.1-322.03(15), -402(A), (G) (Cum. Supp. 2019)).

55. *Id.* ch. 18, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-402(C)(7) (Cum. Supp. 2019)).

56. VA. CODE ANN. § 58.1-301(B)(1) (Repl. Vol. 2017).

57. *Id.* § 58.1-301(B)(2) (Repl. Vol. 2017).

58. *Id.* § 58.1-301(B)(3) (Repl. Vol. 2017).

tax deductions related to the deferral of certain income from debt cancellation under I.R.C. section 108(i),

> unless the taxpayer elects to include such income in the taxpayer's Virginia taxable income ratably over a three-taxable-year period beginning with taxable year 2009 for transactions completed in taxable year 2009, or over a three-taxable-year period beginning with taxable year 2010 for transactions completed in taxable year 2010 on or before April 21, 2010.[59]

With the unexpected revenues resulting from generally conforming to the 2017 Tax Act "estimated to be approximately $450 million annually" for Fiscal Years 2019 through 2025, the General Assembly created "a special nonreverting fund known as the 'Taxpayer Relief Fund.'"[60] Revenues in the fund shall be appropriated "to effectuate permanent or temporary tax reform measures."[61] In the near term and assuming projections come to fruition, individual taxpayers who timely filed their 2018 return will receive an additional $110 refund, while those who were married and timely filed a joint 2018 return will receive an additional $220 refund, to be issued in early October 2019.[62]

For tax year 2019 forward, the General Assembly chose to use some of these additional revenues to both deconform to the 2017 Tax Act's limitation on deductions for state and local taxes to allow their subtraction and the 2017 Tax Act's suspension of the overall limit on itemized deductions for tax year 2019 forward, substantially increasing the standard deduction to grant relative tax relief to all Virginians.[63] Under this legislation, the standard deduction for tax years 2019 through 2025 increases from $3000 for single individuals and $6000 for married couples filing jointly to $4500 for singles and $9000 for married couples filing jointly.[64] The Tax Department projected that approximately $420 million in relief from personal income tax liability will be provided in tax year 2019 due to this change alone.[65]

59. *Id.* § 58.1-301(B)(4) (Repl. Vol. 2017).
60. Ch. 18, 2019 Va. Acts at __.
61. *Id.* ch. 18, 2019 Va. Acts at __.
62. *Id.* ch. 18, 2019 Va. Acts at __.
63. *Id.* ch. 18, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. §§ 58.1-301(B)(5), -322.03(16) (Cum. Supp. 2019)).
64. *Id.* ch. 18, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-322.03(1)(b)(ii) (Cum. Supp. 2019)).
65. DEP'T OF TAXATION, 2019 FISCAL IMPACT STATEMENT, S.B. 1372, at 4, http://lis.virginia.gov/cgi-bin/legp604.exe?191+oth+SB1372FER161+PDF [https://perma.cc/4RHG-

b. Income Taxation of Trusts Administered in the Commonwealth

Under former law, a "resident estate or trust" was defined for income tax purposes to include not only those estates and trusts created by persons domiciled at death in the Commonwealth and those trusts of living persons domiciled in the Commonwealth, but also those trusts or estates "administered in the Commonwealth."[66] Resident estates or trusts are taxed on their federal taxable income, with some adjustments to account for "distributable net income,"[67] while nonresident estates or trusts are taxed by reference to "[their] share of income, gain, loss and deduction attributable to Virginia sources," with certain adjustments.[68]

House Bill 2526 (Chapter 23) removes from the list of resident estate or trust those merely being "administered in Virginia"—i.e., those owning assets in Virginia, having a Virginia resident fiduciary, or being supervised by a Virginia court[69]—and so redefines them as "nonresident estate or trust."[70] As a result, these estates and trusts will now only have to file a Virginia income tax return and be liable for Virginia income tax in proportion to their Virginia sourced income, as provided in Virginia Code sections 58.1-362 and -363. The statute's timing is noteworthy, as the Supreme Court of the United States granted certiorari in a case involving state power to tax nonresident trusts a little more than a month before the General Assembly passed House Bill 2526.[71]

c. Eminent Domain Gain Subtracted from Virginia Taxable Income

Since the Supreme Court's decision in *Kelo v. City of New London*,[72] the issue of eminent domain has been the subject of significant state legislative attention throughout the country, including

PP7A].

66. VA. CODE ANN. § 58.1-302 (Repl. Vol. 2017).

67. *Id.* § 58.1-361 (Repl. Vol. 2017).

68. *Id.* § 58.1-362 (Repl. Vol. 2017).

69. *See* 23 VA. ADMIN. CODE § 10-115-10 (2017).

70. Act of Feb. 15, 2019, ch. 23, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-302 (Cum. Supp. 2019)).

71. *See* N.C. Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust, 814 S.E.2d 43 (N.C. 2017), *cert. granted*, 139 S. Ct. 915 (Jan. 11, 2019 (No. 18-457)).

72. 545 U.S. 469 (2005).

in the Commonwealth.[73] In 2019, that attention turned to addressing the tax consequences of receiving just compensation for a taking.[74]

Preserving the value of the award to the condemnee, the General Assembly adopted Senate Bill 1256 (Chapter 270), providing that "any gain recognized from the taking of real property by condemnation proceedings" shall be subtracted from the Virginia taxable income of both individuals and corporations for tax year 2019 forward.[75]

3. Tax Credits and Exemptions

a. Extension of the Major Business Facility Tax Credit and Publication of Claim Data

In the mid-1990s, the General Assembly created the "major business facility job tax credit" against individual income tax, estate tax, corporate income tax, bank franchise tax, insurance premium license tax, and public service company license tax, claimable by a "qualified company" who commenced or expanded a "major business facility" in the Commonwealth.[76] This legislation was adopted to attract job-creating investments into the economy of Virginia and administered by both the Tax Department and what is now the Virginia Economic Development Partnership ("VEDP").[77]

At the time of adoption, the credit created by Virginia Code section 58.1-439 was to sunset in 2005.[78] Instead, the section has since been amended numerous times, including to extend the

73. *See, e.g.*, VA. CONST. art. I, § 11; VA. CODE ANN. § 1-219.1(A) (Repl. Vol. 2017).
74. Act of Mar. 8, 2019, ch. 270, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-322.02(29), -402(27) (Cum. Supp. 2019)).
75. *Id.* ch. 270, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. §§ 58.1-322.02(29), -402(27) (Cum. Supp. 2019)).
76. Act of Apr. 11, 1994, ch. 750, 1994 Va. Acts 1141, 1141 (codified at VA. CODE ANN. § 58.1-439 (Cum. Supp. 1994)).
77. *Id.* ch. 750, 1994 Va. Acts at 1141, 1142–43 (codified at VA. CODE ANN. § 58.1-439(C)(1), (E), (K), (N) (Cum. Supp. 1994)).
78. *Id.* ch. 750, 1994 Va. Acts at 1141 (codified at VA. CODE ANN. § 58.1-439(A)(1) (Cum. Supp. 1994)).

provision through 2019. While the number of claimants has decreased over the last five years, taxpayers claimed nearly $7 million in credits in 2017.[79]

House Bill 2003 (Chapter 669) extends the credit to July 1, 2022.[80] It also tasks the Tax Department and the VEDP with publishing for tax year 2019 forward the location of facilities claiming credits, the type of business claiming the credits, the number of jobs for which a credit is claimed, and the total cost of the credits to the Commonwealth's general fund.[81] This annual publication, the first installment of which will not be due until November 2021, must be done in a "manner that prevents the identification of particular taxpayers, reports, returns, or items."[82]

b. Worker Retraining Tax Credit Replaced

The 2019 session saw the General Assembly again revise the Worker Retraining Tax Credit found in section 58.1-439.6, supplementing the types of training that are eligible for a credit and renaming the credit the "Worker Training Tax Credit" to reflect this change. House Bill 2539 (Chapter 189) revised that Virginia Code section to advance the sunset date for the Worker Retraining Tax Credit, from January 1, 2022, to January 1, 2019,[83] and adopted Vignia Code section 58.1-439.6:1 to afford a Worker Training Tax Credit for tax years 2019 through 2022.[84]

The new Virgnia Code section affords substantially the same credit to businesses "primarily engaged in manufacturing," allowing thirty-five percent of its "direct costs incurred during the taxable year in conducting orientation, instruction, and training in the Commonwealth relating to the manufacturing activities un-

79. DEP'T OF TAXATION, 2019 FISCAL IMPACT STATEMENT, H.B. 2003, at 2, http://lis.virginia.gov/cgi-bin/legp604.exe?191+oth+HB2003FER161+PDF [https://perma.cc/Y3ZR-ND8P].

80. Act of Mar. 21, 2019, ch. 699, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-439(A) (Cum. Supp. 2019)).

81. *Id.* ch. 699, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439(U)(1)–(4) (Cum. Supp. 2019)).

82. *Id.* ch. 699, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439(U) (Cum. Supp. 2019)).

83. Act of Mar. 5, 2019, ch. 189, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-439.6(B)(1)–(2) (Cum. Supp. 2019)).

84. *Id.* ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.6:1 (Cum. Supp. 2019)).

dertaken by the business" to be used as a credit against personal and corporate income tax liability for tax years 2019 through 2022.[85] The annual $2000-credit-per-business limit still applies.[86] Note that after tax year 2018, VEDP no longer has a role in certifying orientation, instruction, or training programs; or in reporting to the Assembly "on the status and implementation of the credit."[87] Instead, the Department of Education oversees the certification of these programs, and the Tax Commissioner now reports "on the status and implementation of" the Worker Training Tax Credit to the General Assembly.[88]

However, the primary change wrought by House Bill 2539 was to the sort of training now eligible for a credit. Under the Worker Retraining Tax Credit, still applicable to tax year 2018, a business may claim a credit "in an amount equal to 30 percent of all expenditures paid or incurred by the employer during the taxable year for eligible worker retraining," defined as the "retraining of a qualified employee that promotes economic development in the form of (i) noncredit courses at any of the Commonwealth's comprehensive community colleges or a private school or (ii) worker retraining programs undertaken through an apprenticeship agreement approved by the Commissioner of Labor and Industry."[89] Where the retraining occurred at a private school, additional limitations on the amount of credit applied, depending on the courses taken.[90]

Under the Worker Training Tax Credit, applicable to tax year 2019 and those "prior to July 1, 2022," a business may claim a credit "in an amount equal to 35 percent," up from thirty percent, "of expenses incurred by the business during the taxable year for eligible worker training."[91] Eligible worker training includes the

85. *Id.* ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.6:1(B)(2) (Cum. Supp. 2019)).

86. *See* VA. CODE ANN. § 58.1-439.6:1(B)(2) (Cum. Supp. 2019)).

87. Ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. §§ 58.1-439.6(D)(2), (G)–(H), -439.6:1(D)(2), (G) (Cum. Supp. 2019)).

88. *Id.* ch. 189, 2019 Va. Acts at __.

89. *Id.* ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.6(A), (B)(1) (Cum. Supp. 2019)).

90. *Id.* ch. 189, 2019 Va. Acts at __.

91. *Id.* ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.6:1(B)(1) (Cum. Supp. 2019)).

> training of a qualified employee or non-highly compensated worker in the form of (i) credit or noncredit courses at any institution recognized on the Eligible Training Provider List that results in the qualified employee or non-highly compensated worker receiving a workforce credential or (ii) instruction or training that is part of an apprenticeship agreement approved by the Commissioner of Labor and Industry.[92]

The "Workforce Innovation Opportunity Act Title 1 Administrator" is responsible for providing the Tax Commissioner with the annual Eligible Training Provider List.[93]

While a business may claim a credit of no more than $500 annually per qualified employee, and no more than $1000 per "non-highly compensated worker annually," no unique limit applies for expenses incurred for training from a private school (which for years prior to tax year 2019 were limited to no more than $300 per employee for any type of training).[94] Although capping expenditures per employee, House Bill 2529 expanded the types of eligible training to include those leading to a "workforce credential," and substantially expanded the number of potential trainees to include "non-highly compensated workers," who need not be full-time, benefited employees, but merely have an income "less than Virginia's median wage, as reported by the Virginia Employment Commission, in the taxable year prior to applying for the credit."[95] While the scope of the allowable credit has substantially expanded, the provision limiting "the total amount of tax credits granted under this section for each fiscal year [to] $1 million" remains unchanged.[96]

c. Virginia Port Volume Increase Tax Credits Made Transferrable

Virginia Port Volume Increase Tax Credits may be claimed by "a taxpayer that is an agricultural entity, manufacturing-related

92. *Id.* ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.6:1(A) (Cum. Sup. 2019)).

93. *Id.* ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.6:1(D)(1) (Cum. Supp. 2019)).

94. *Id.* ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. §§ 58.1-439.6(B)(1), -439.6:1(B)(1) (Cum. Supp. 2019)).

95. *Id.* ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.6:1(A), (B)(1) (Cum. Supp. 2019)). A "workforce credential" is defined as "an industry-recognized (i) certification, (ii) certificate, or (iii) degree." *Id.* ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.6:1(A) (Cum. Supp. 2019)).

96. *Id.* ch. 189, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. §§ 58.1-439.6(B)(3), -439.6:1(B)(3) (Cum. Supp. 2019)).

entity, or mineral and gas entity that uses port facilities in the Commonwealth and increases its port cargo volume at these facilities by a minimum of five percent in a single calendar year over its base year port cargo volume" to claim a credit against individual or corporate tax liability, with such credit amount as "determined by the Virginia Port Authority."[97] The Virginia Port Authority calculates the amount of credit available by reference to the "TEU, unit of roll-on/roll-off cargo, or 16 net tons of noncontainerized cargo" used by the taxpayer, and no taxpayer may "receive more than $250,000 for each calendar year except" where the "maximum amount of credits allowed for all qualifying taxpayers," $3.2 million for each calendar year, has not been claimed, in which case the claiming taxpayers "shall be allowed a pro rata share of the remaining allocated credit up to $3.2 million."[98] Under that section, "[i]f the credit exceeds the taxpayer's tax liability for the taxable year, the excess amount may be carried forward and claimed against income taxes in the next five succeeding taxable years."[99]

Senate Bill 1652 (Chapter 759) authorizes a holder of Virginia Port Volume Increase Tax Credits issued for tax years 2018 through 2021 to "transfer unused but otherwise allowable credit for use by another taxpayer on Virginia income tax returns."[100] The taxpayer must effectuate such transfer "within one calendar year of the credit holder earning such credit."[101] The taxpayer receiving the credits may retroactively apply them, and "may file an amended return under this chapter to claim such transferred credit for a prior tax year," provided the time for filing an amended return or other statute of limitation has not passed.[102] Transferring taxpayers are obliged to give "notification of such transfer to the Department in accordance with procedures and forms prescribed by the Tax Commissioner."[103]

97. VA. CODE ANN. § 58.1-439.12:10(B)(1) (Repl. Vol. 2017); *see id.* § 58.1-439.12:10 (C)(1)–(2) (Repl. Vol. 2017).

98. *Id.* § 58.1-439.12:10(B)(2), (C)(2) (Repl. Vol. 2017).

99. *Id.* § 58.1-439.12:10(B)(3) (Repl. Vol. 2017).

100. Act of Mar. 21, 2019, ch. 759, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-439.12:10(D)(1), (3) (Cum. Supp. 2019)).

101. *Id.* ch. 759, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.12:10(D)(2) (Cum. Supp. 2019)).

102. *Id.* ch. 759, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.12:10(D)(1)–(2) (Cum. Supp. 2019)).

103. *Id.* ch. 759, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-

d. Education Improvement Scholarship Tax Credits Expand for Students with Disabilities

Virginia law provides Education Improvement Scholarship Tax Credits against individual and corporate income tax liability, as well as bank franchise tax, insurance premium license tax, and public service license tax liability, for sixty-five percent of the value of a donation (in excess of $500) made to a "scholarship foundation," defined as a nonprofit "established to provide financial aid for the education of students residing in the Commonwealth,"[104] subject to the approval of the Department of Education.[105]

Prior to 2019, "scholarship foundations" could award scholarships from tax-credit-derived funds for use at "eligible schools"[106] to cover the cost of "qualified educations expenses only to students whose family's annual household income [was] not in excess of 300 percent of the current poverty guidelines or [to] eligible students with a disability."[107] Both had been defined to embrace only Virginia residents whose educational circumstances fit certain narrow categories[108] and, in the case of an "eligible student with a disability," were limited to those with a finalized "individualized educational program" ("IEP") under the "federal Individuals with Disabilities Education Act" and whose family income was not in excess of four times the current poverty guidelines.[109]

439.12:10(D)(1) (Cum. Supp. 2019)).

104. VA. CODE ANN. §§ 58.1-439.25, -439.26(A) (Repl. Vol. 2017).

105. *Id.* § 58.1-439.27 (Repl. Vol. 2017).

106. *Id.* § 58.1-439.28(C)–(D) (Repl. Vol. 2017).

107. *Id.* § 58.1-439.28(C)(i) (Repl. Vol. 2017).

108. Apparently unwilling to state the circumstances that would not qualify, being a Virginia resident child who was already attending a nonpublic school, the Virginia General Assembly required that the child be a "resident of Virginia" who

> (i) in the current school year has enrolled and attended a public school in the Commonwealth for at least one-half of the year, (ii) for the school year that immediately preceded his receipt of a scholarship foundation scholarship was enrolled and attended a public school in the Commonwealth for at least one-half of the year, (iii) is a prior recipient of a scholarship foundation scholarship, (iv) is eligible to enter kindergarten or first grade, or (v) for the school year that immediately preceded his receipt of a scholarship foundation scholarship was domiciled in a state other than the Commonwealth and did not attend a nonpublic school in the Commonwealth for more than one-half of the school year.

Id. § 58.1-439.25 (Repl. Vol. 2017).

109. *Id.*

Senate Bill 1365 (Chapter 808) liberalized some of these requirements for Virginia children who have an IEP for tax years 2019 through 2023.[110] First, it expanded the definition of "eligible student with a disability" to include all Virginia resident children with an IEP, whether or not their educational circumstances fit the narrow definition of a "student" under Virginia Code section 58.1-439.25.[111] Second, it increased the amount of scholarship monies that could be provided to an eligible student with a disability for a single school year. Before, eligible students with disabilities, like less disadvantaged students were limited to

> the lesser of (i) the actual qualified educational expenses of the student or (ii) 100 percent of the per-pupil amount distributed to the local school division (in which the student resides) as the state's share of the standards of quality costs using the composite index of ability to pay as defined in the general appropriation act.[112]

Now, eligible students with disabilities may receive the lesser of "the actual qualified educational expenses" or "300 percent of the per-pupil amount" (calculated as stated above).[113]

However, this increased amount of scholarship funding may be granted only to the eligible student with a disability who attends "a school for students with disabilities, as defined in § 22.1-319," that meets certain other licensing and accreditation requirements, qualifies as a nonprofit, and does not receive public funding to educate the eligible students with disabilities.[114] The means-testing for receipt of scholarships from "tax-credit-derived funds" by eligible students with disabilities remains; therefore, those whose "family's annual household income is . . . in excess of 400 percent of the current poverty guidelines" are not eligible for these scholarships.[115] Finally, the limit on the total amount of credits that may be issued annually by the Commonwealth remains at $25 million,[116] about half of which were issued in Fiscal

110. Act of Mar. 26, 2019, ch. 808, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 58.1-439.25, -439.28 (Cum. Supp. 2019)).

111. *Id.* ch. 808, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.25 (Cum. Supp. 2019)).

112. VA. CODE ANN. § 58.1-439.28(E) (Repl. Vol. 2017).

113. Ch. 808, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.28(E)(2)(a)(i)–(ii) (Cum. Supp. 2019)).

114. *Id.* ch. 808, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.28(E)(2)(b)(i)–(iv) (Cum. Supp. 2019)).

115. *Id.* ch. 808, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.28(C)(i) (Cum. Supp. 2019)).

116. VA. CODE ANN. § 58.1-439.26(B)(1) (Repl. Vol. 2017).

Year 2018, continuing the steady rise over the life of the credit program.[117]

e. Education Improvement Scholarship Tax Credits Expands to Pre-K Education

Senate Bill 1015 (Chapter 817) further expanded the Education Improvement Scholarship Tax Credits program to embrace a new class of recipients, allowing scholarships from tax-credit-derived funds also to be awarded to "eligible pre-kindergarten children" attending a certified "nonpublic pre-kindergarten program."[118]

The "eligible pre-kindergarten child" is defined to include only certain disadvantaged children.[119] The "nonpublic pre-kindergarten program" includes only those pre-kindergarten programs not operated directly or indirectly by any level of government that is either "a preschool program designed for child development and kindergarten preparation that complies with nonpublic school accreditation requirements administered by the Virginia Council for Private Education," participates in and enjoys at least a Level 3 rating in the "quality rating and improvement system for early childhood programs administered in partnership between the Virginia Early Childhood Foundation and the Office of Early Childhood Development of the Department of Social Services" (known as "Virginia Quality"), or is a child day center that is licensed by the Department of Social Services and implements "a curriculum, professional development program, and coaching model developed and endorsed by a baccalaureate public institution of higher education."[120] The nonpublic pre-kindergarten program's curriculum must meet certain requirements as certified by the Virginia Council for Private Education or by the Virginia Early Childhood Foundation.[121]

117. DEP'T OF PLANNING AND BUDGET, 2019 FISCAL IMPACT STATEMENT, S.B. 1365, at 2 (2019), http://lis.virginia.gov/cgi-bin/legp604.exe?191+oth+SB1365FER122+PDF [https://perma.cc/4JFN-3NSW].

118. Act of Mar. 26, 2019, ch. 817, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-439.28(C)(i), (D)(1)(iv)(b) (Cum. Supp. 2019)).

119. *Id.* ch. 817, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.25 (Cum. Supp. 2019)).

120. *Id.* ch. 817, 2019 Va. Acts at __.

121. *Id.* ch. 817, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.28(D)(2) (Cum. Supp. 2019)).

Scholarships to pre-kindergarten children cannot exceed, in the aggregate, "the lesser of the actual qualified educational expenses of the child or the state share of the grant per child under the Virginia Preschool Initiative for the locality in which the eligible pre-kindergarten child resides."[122]

Senate Bill 1015 also reduced the civil penalty applicable to scholarship foundations for their first violation of the disbursal requirements. Previously, scholarship foundations that failed to "disburse an amount at least equal to 90 percent of the value of the donations it receives (for which tax credits were issued under this article) during each 12-month period ending on June 30 by the immediately following June 30 for qualified educational expenses through scholarships to eligible students" were subject to "a civil penalty equal to 200 percent of the difference between 90 percent of the value of the tax-credit-derived donations it received in the applicable 12-month period and the amount that was actually disbursed."[123] Now, under Senate Bill 1015, the civil penalty "for the first offense" is cut in half to an amount equivalent to "the difference between 90 percent of the value of the tax-credit-derived donations it received in the applicable 12-month period and the amount that was actually disbursed."[124]

f. Limit on Historic Rehabilitation Credits Made Permanent

Since 2000, Virginia law has permitted individuals, trusts, estates, and corporations to take a credit against applicable income, bank franchise, insurance premium license, and public service corporation license taxes in the amount of one quarter of rehabilitation expenses incurred in rehabilitating certified historic structures when such expenses are certified as eligible by the Virginia Department of Historic Resources.[125] Because these tax credits were previously uncapped, the amount claimed rose to $98 million for Fiscal Year 2016.[126]

122. *Id.* ch. 817, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.28(E)(2) (Cum. Supp. 2019)).

123. VA. CODE ANN. § 58.1-439.28(A) (Repl. Vol. 2017).

124. Ch. 817, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-439.28(A) (Cum. Supp. 2019)).

125. VA. CODE ANN. § 58.1-339.2(A), (C)(1), (D) (Cum. Supp. 2019).

126. DEP'T OF TAXATION, 2019 FISCAL IMPACT STATEMENT, H.B. 2705, at 2, http://lis.virginia.gov/cgi-bin/legp604.exe?191+oth+HB2705FER161+PDF [https://perma.cc/4LR8-G62P].

For tax year 2017, the General Assembly acted to limit the amount of credits that a single taxpayer may claim annually to $5 million for tax years 2017 and 2018.[127] House Bill 2705 (Chapter 25) now makes this limitation applicable to tax years 2019 forward.[128]

g. Land Preservation Tax Credits Available for Lands on Which Facilities Operated, Fees Charged, If Donated to Commonwealth or Instrumentality

Since 2000, Virginia law has afforded substantial, nonrefundable tax credits against Virginia income tax liability for qualifying donations of land for preservation purposes ("Land Preservation Tax Credits").[129] Since 2007, those credits have been in an amount equal to "40 percent of the fair market value of the land or interest in land" "located in Virginia," that

> is conveyed for the purpose of agricultural and forestal use, open space, natural resource, and/or biodiversity conservation, or land, agricultural, watershed and/or historic preservation, as an unconditional donation by the landowner/taxpayer to a public or private conservation agency eligible to hold such land and interests therein for conservation or preservation purposes.[130]

The interest in land must be conveyed in a certain fashion to be a "qualified donation" and thus potentially eligible for issuance of Land Preservation Tax Credits.[131] It also must be conveyed to a "public or private conservation agency eligible to hold such land and interests therein for conservation or preservation purposes" to be eligible for such credits.[132] This has been statutorily determined to include qualifying donations "made to the Commonwealth of Virginia [or] an instrumentality thereof," among other nonprofit organizations.[133]

127. Act of Mar. 24, 2017, ch. 721, 2017 Va. Acts 1273, 1273 (codified as amended at VA. CODE ANN. § 58.1-339.2(C)(2) (Repl. Vol. 2017)).

128. Act of Feb. 15, 2019, ch. 25, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-339.2(C)(2) (Cum. Supp. 2019)).

129. VA. CODE ANN. § 58.1-512(A) (Repl. Vol. 2017).

130. *Id.* § 58.1-512(A) (Repl. Vol. 2017).

131. *Id.* § 58.1-512(B), (C)(2) (Repl. Vol. 2017).

132. *Id.* § 58.1-512(A) (Repl. Vol. 2017); *see id.* § 58.1-511 (Repl. Vol. 2017) (defining "Public or Private Conservation Agency").

133. *Id.* § 58.1-512(C)(4) (Repl. Vol. 2017).

Current law, however, does not make clear whether the recipient's use of the donated land, including by charging fees or leasing the donated land to another profit-making enterprise, bars a taxpayer from claiming Land Preservation Tax Credits for an otherwise eligible conveyance. House Bill 2482 (Chapter 649) answers that question for purposes of donations to "the Commonwealth or an instrumentality thereof."[134]

As amended, Virginia Code section 58.1-512 now provides that the Commonwealth or its instrumentalities may "operate[] a facility on a conveyance, including charging fees for the use of such facility, . . . so long as any fees are used for conservation or preservation purposes," and that they may "enter[] into an agreement with a third party to lease or manage a facility on a conveyance . . . for conservation or preservation purposes," even where such third party "is operated primarily as a business with intent for profit," without disqualifying the conveyance from generating Land Preservation Tax Credits.[135]

h. Time To Apply for Land Preservation Tax Credits Extended

Under current law, taxpayers may not be allowed any Land Preservation Tax Credits unless they file a complete application with the Tax Department "by December 31 of the year following the calendar year of the conveyance."[136] The materials required for a complete application are fairly extensive.[137]

House Bill 1816 (Chapter 183) extends the window of time in which a taxpayer must apply to be allowed Land Preservation Tax Credits.[138] For conveyances made by the end of 2019, an application will be timely and credits may be allowed if filed by December 31, 2022, it being "the third year following the calendar year of the conveyance."[139] For conveyances made on January 1, 2020, or thereafter, the application must be filed "by December 31

134. Act of Mar. 19, 2019, ch. 649, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-512 (Cum. Supp. 2019)).

135. *Id.* ch. 649, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-512(A)(2) (Cum. Supp. 2019)).

136. VA. CODE ANN. § 58.1-512(D)(4)(a) (Repl. Vol. 2017).

137. *See id.* § 58.1-512(D)(1)–(2) (Repl. Vol. 2017).

138. *See* Act of Mar. 5, 2019, ch. 183, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-512 (Cum. Supp. 2019)).

139. *Id.* ch. 183, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-512(D)(4)(a)(i) (Cum. Supp. 2019)).

of the second year following the calendar year of the conveyance," also by December 31, 2022.[140]

i. Exemption from Recordation Tax for Deeds of Distribution

Virginia law generally provides for a tax upon the recordation of every deed "except a deed exempt from taxation by law,"[141] the recordation of every "deed[] of trust or mortgage[]" including every "construction loan deed[] of trust or mortgage[]" (except as specifically provided),[142] and "every contract or memorandum thereof relating to real or personal property admitted to record" (except as provided by statute).[143] Some exemptions are provided depending on whom the real estate or lease of real estate is being conveyed to or from, or whether the deed purposes to secure certain obligations.[144]

Senate Bill 1610 (Chapter 757) amends Virginia Code section 58.1-811 to add an exemption dealing with transfers of trust assets and revise that Code section's other provisions to conform with this exemption.[145] New subsection (K) provides for an exemption from all recordation taxes levied pursuant to the Virginia Recordation Tax Act[146] on "any deed of distribution when no consideration has passed between the parties."[147] A deed of distribution "shall state therein on the front page that it is a deed of distribution" and is defined as a

> deed conveying property from an estate or trust (i) to the original beneficiaries of a trust from the trustees holding title under a deed in trust; (ii) the purpose of which is to comply with a devise or bequest in the decedent's will or to transfer title to one or more beneficiaries after the death of the settlor in accordance with a dispositive

140. *Id.* ch. 183, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-512(D)(4)(a)(ii) (Cum. Supp. 2019)).

141. VA. CODE ANN. § 58.1-801(A) (Repl. Vol. 2017).

142. *Id.* §§ 58.1-803(A), -804(B) (Repl. Vol. 2017).

143. *Id.* § 58.1-807(A) (Repl. Vol. 2017).

144. *See id.* § 58.1-811(A)–(C) (Repl. Vol. 2017).

145. Act of Mar. 19, 2019, ch. 757, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-811 (Cum. Supp. 2019)).

146. *See* VA. CODE ANN. §§ 58.1-800 to -817 (Repl. Vol. 2017).

147. Ch. 757, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-811(K) (Cum. Supp. 2019)).

> provision in the trust instrument; (iii) that carries out the exercise of a power of appointment; or (iv) is pursuant to the exercise of the power under the Uniform Trust Decanting Act.[148]

4. Miscellaneous: Joint Study on Exempting Military Retirement Income

Under current Virginia law, the only "military retirement income" allowed preferred tax treatment is that received "by an individual awarded the Congressional Medal of Honor."[149] As there are few living recipients,[150] with even fewer living in Virginia, this is a relatively minor tax benefit.

Recognizing that neighboring states and many other states provide more favorable treatment for military retirement income and desirous that Virginia "maintain its reputation as a veteran-friendly state and, more importantly, strive to reward veterans for their service to Virginia and the United States by fully exempting military retirement income from state income tax," the House and Senate jointly requested that the Department of Veterans Services and the Tax Department "convene a joint working group to study the feasibility of exempting military retirement income from taxation."[151] There were no votes against the advancement of this resolution at any stage in either house.[152]

The General Assembly directed these agencies to evaluate the effects of "phasing in a full exemption of military retirement income," and to consider

> (i) the impact of fully exempting military retirement income on Virginia's current population of veterans, (ii) the projected effect of such exemption on Virginia's competitiveness as a desirable state of residence for veterans in comparison with other states, (iii) the revenue losses associated with fully exempting military retirement income from state income tax, and (iv) any other factors the Agencies deem relevant.[153]

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148. *Id.* ch. 757, 2019 Va. Acts at __ (citations omitted).
149. VA. CODE ANN. § 58.1-322.02(18) (Cum. Supp. 2019).
150. *See Living Recipients*, CONGR. MEDAL OF HONOR SOC'Y, https://www.cmohs.org/living-recipients.php [https://perma.cc/CT9F-CV9R].
151. H.J. Res. 674, Va. Gen. Assembly (Reg. Sess. 2019).
152. *2019 Session: House Joint Resolution No. 674, History*, LEGIS. INFO. SERVS., https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HJ674 [https://perma.cc/RD28-D3ML].
153. H.J. Res. 674.

All agencies of the Commonwealth are directed to lend their aid to the study "upon request" and the Tax Department and Department of Veterans Services are required to submit an executive summary and report "no later than the first day of the 2020 Regular Session of the General Assembly."[154]

B. *Significant Judicial Decision Concerning Corporate Income Tax*—Corporate Executive Board Co. v. Virginia Department of Taxation

In this case, the Supreme Court of Virginia considered a taxpayer's challenge to Virginia's method of apportionment of sales of services for corporate income tax reporting and held that there was no violation of the U.S. Constitution, even though portions of the taxpayer's sales revenue were subject to taxation by Virginia and other states.[155] When a company has income from business activity both within Virginia as well as in other states or countries, then the Virginia Code establishes a statutory method to allocate and apportion the Virginia taxable income (the "Statutory Method").[156] Corporate Executive Board Company ("CEB") challenged the Statutory Method as applied by the Tax Department in this case.[157]

CEB is a multinational corporation headquartered in Arlington, Virginia.[158] "CEB describes itself as 'the premier "best practices" advisory firm in the world.'"[159] Most of CEB's revenue, over ninety-five percent, comes from an "annual fixed fee subscription service of its 'Core Product.'"[160] CEB's Core Product includes "online access to best practices research, executive education and networking events, and tools used by executives to analyze business functions and processes," along with customized support.[161] For the three tax years at issue in this case, only $66 million of

154. *Id.*

155. *See* Corp. Exec. Bd. Co. v. Va. Dep't of Taxation (*CEB*), 297 Va. 57, 822 S.E.2d 918 (2019).

156. *See* VA. CODE ANN. §§ 58.1-406 to -420 (Repl. Vol. 2017).

157. *CEB*, 297 Va. at 63, 822 S.E.2d at 920.

158. *Id.* at 63, 822 S.E.2d at 920.

159. *Id.* at 63, 822 S.E.2d at 920.

160. *Id.* at 63, 822 S.E.2d at 920.

161. *Id.* at 63, 822 S.E.2d at 920. For a complete description of the facts and analysis set out in the Arlington County Circuit Court's decision, see Craig D. Bell & Michael H. Brady, *Annual Survey of Virginia Law: Taxation*, 53 U. RICH. L. REV. 135, 154–57 (2018) (discussing the trial court's decision).

CEB's $1.76 billion in total sales were attributable to customers located in Virginia (about five percent).[162] However, the majority of CEB's employees who developed and improved the Core Product were located in Virginia, as well as all of CEB's computer servers that housed the Core Product.[163] Additionally, CEB's Information Technology function, located in Arlington, Virginia, managed and controlled these servers.[164]

Virginia uses a formulary apportionment that has been in effect since 1960. This Statutory Method is based on the average of "a payroll factor, a property factor, and a double-weighted sales factor."[165] This Statutory Method had been adopted by most states after the National Conference of Commissioners on Uniform States Laws first put it out as a model statute in 1957.[166] Virginia's application of the Statutory Method resulted in CEB's overall Virginia apportionment of 87% in 2011, 81% in 2012, and 80% in 2013, and in CEB paying millions of dollars in Virginia Corporation Income Tax in each of these three tax years based on these apportionment percentages.[167]

CEB also paid income tax in many other states based on those states' apportionment schemes, resulting in CEB paying apportioned state corporate income tax on its multistate income in excess of 120% of its multistate nationwide income.[168] Virginia uses the "cost of performance" formula for the sales factor of its Statutory Method.[169] When a business generates income as a result of actions performed in Virginia and other states, gross receipts are allocated to Virginia if "a greater portion of the income-producing activity is performed in the Commonwealth than in any other state, based on costs of performance."[170]

CEB argued that "[b]ecause [its] products are intangible goods, the apportionment methodology applied to CEB's income under the Virginia statute deemed almost all of CEB's sales to have been made in Virginia" based on its cost of performance being so

162. *CEB*, 297 Va. at 63, 822 S.E.2d at 920.
163. *Id*. at 64, 822 S.E.2d at 920.
164. *Id*. at 64, 822 S.E.2d at 920.
165. *Id*. at 65, 822 S.E.2d at 921.
166. *Id*. at 65, 822 S.E.2d at 921.
167. Brief of Appellant at 9, *CEB*, 297 Va. 57, 822 S.E.2d 918 (2019) (No. CL16-1525).
168. *CEB*, 297 Va. at 68, 822 S.E.2d at 923.
169. *Id*. at 69, 822 S.E.2d at 923.
170. VA. CODE ANN. § 58.1-416(A)(2) (Cum. Supp. 2019).

heavily performed in Virginia.[171] In essence, the Statutory Method allocated to Virginia 97% of its sales in 2011, 91% in 2012, and 88% in 2013.[172] Accordingly, CEB sought to use an alternative apportionment method pursuant to Virginia Code section 58.1-421 (the "Relief Statute").[173] The Relief Statute permits a taxpayer to propose an alternative method to the Tax Department when the Statutory Method "operates to subject a corporation to taxation on a greater portion of its Virginia taxable income than is reasonably attributable to business or sources within" Virginia.[174]

The alternative apportionment method proposed by CEB was to source sales revenue based on customer location, changing only the sales factor of the Statutory Method; the payroll and property factors of the Statutory Method would remain unchanged. CEB argued that its alternative method would assign sales to the "source of the revenue (i.e., the location of the customer) to reflect the actual market for CEB's products (i.e., destination-based sourcing, also called market-based sourcing)."[175]

The supreme court took note that "[a] growing number of [s]tates have revisited their method of apportioning income from the sale of services," with the cost of performance method waning and market sourcing taking its place.[176] The court also noted that the revision of apportionment formulas by the states was not being done in a uniform manner with "[s]ome states tax[ing] services where the benefit is received, others where the service is delivered, and still others where the receipts are derived."[177] Additionally, the supreme court observed that "[s]till other [s]tates . . . modified their apportionment rules for specific industries."[178] Varying approaches on the sales factor "expose corporations to potential or actual multiple taxation."[179]

CEB argued on appeal that the Tax Department's enforcement of its Statutory Method, coupled with its failure to accept CEB's alternative apportionment methodology, resulted in an unconsti-

171. Brief of Appellant, *supra* note 168, at 8.
172. *Id*.
173. *CEB*, 297 Va. at 69, 822 S.E.2d at 923.
174. *Id*. at 68, 822 S.E.2d at 923 (citing VA. CODE ANN. § 58.1-421 (Repl. Vol. 2017)).
175. Brief of Appellant, *supra* note 168, at 13.
176. *CEB*, 297 Va. at 67, 822 S.E.2d at 922.
177. *Id.* at 68, 822 S.E.2d at 922.
178. *Id*. at 68, 822 S.E.2d at 923.
179. *Id.* at 68, 822 S.E.2d at 923.

tutionally apportioned income for tax years 2011 to 2013, in violation of the "dormant" Commerce Clause and the Due Process Clause of the Fourteenth Amendment.[180]

The Supreme Court of Virginia rejected CEB's challenge of its Virginia corporate income tax assessments. The court ruled that double taxation on its own did not violate the Commerce Clause and held that CEB did not suffer from an unconstitutional income apportionment as the State's formula reasonably reflected the in-state component of the company's activities that were being taxed.[181] The court found nothing in the Statutory Method of apportioning corporate income violative of the Supreme Court of the United States's analysis and test for evaluating a state's apportionment requirement as set forth in *Complete Auto Transit, Inc. v. Brady*[182] and *Container Corp. of America v. Franchise Tax Board*.[183]

The court stated it could find nothing in the Supreme Court's precedent "interpreting the dormant Commerce Clause or the Due Process Clause that requires one of two taxing states to 'recede simply because both have lawful tax regimes reaching the same income.'"[184] The court noted "the stipulated facts establish[ed] that the content for CEB's Core Product was developed by CEB employees working in Virginia" as the computer servers on which the product resided were located in Virginia.[185] Therefore, "[e]ach time a customer use[d] CEB's Core Product, the customer reache[d] into Virginia to consult materials develope[d] . . . and stored in Virginia."[186]

The court held that "[t]he Tax Department's apportionment of income did not 'reach[] beyond that portion of value that is fairly attributable to economic activity within'" Virginia and, thus, that "Virginia's apportionment method satisfies the constitutional standard."[187] The court further held that the alternative appor-

180. *Id.* at 69–70, 822 S.E.2d. at 923–24.

181. *Id.* at 72–73, 822 S.E.2d. at 925–26.

182. *Id.* at 71, 822 S.E.2d. at 924 (citing 430 U.S. 274, 279 (1977)).

183. *Id.* at 71, 822 S.E.2d. at 925 (citing 463 U.S. 159, 169 (1982)).

184. *Id.* at 73, 822 S.E.2d at 926 (quoting Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1813 (2015) (Ginsburg, J., dissenting)).

185. *Id.* at 73, 822 S.E.2d at 926.

186. *Id.* at 73, 822 S.E.2d at 926.

187. *Id.* at 73–74, 822 S.E.2d at 926 (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 185 (1995)).

tionment relief afforded by Virginia Code section 58.1-421 does not apply under its plain language, there being no inequitable result, and also that any such double taxation was not due to any inequity caused by Virginia's apportionment statutes, but rather to the fact that some other state has a unique method of allocation and apportionment due to changes adopted more recently by other states in their apportionment formulas and the increased trend of using single-factor sales apportionment.[188] As Virginia's apportionment formula has been adhered to for nearly sixty years, "CEB's double taxation did not 'occur[] in consequence of or on account of' Virginia law."[189] The circuit court's decision was affirmed by the Supreme Court of Virginia.[190]

II. TAXES ADMINISTERED BY LOCALITIES

A. *Significant Legislative Activity*

1. Real Estate Taxation

2019 could be termed the year of the exemption in local taxation. It saw the General Assembly amend a wide array of statutes governing the constitutionally permitted deviations from uniform, fair market value assessment and taxation.

a. Annual Increase of Special Use Lands' Assessed Value May Be Limited by Ordinance

Exercising the authority recognized by article X, section 2 of the Virginia Constitution,[191] the General Assembly allows real estate to be subject to special assessment for land preservation pur-

188. *Id.* at 75–76, 822 S.E.2d at 927–28.

189. *Id.* at 76, 822 S.E.2d at 926–27 (quoting Nielsen Co. (US), LLC v. Cty. Bd., 289 Va. 79, 94 (2015)).

190. *Id.* at 81, 822 S.E.2d at 930.

191. VA. CONST. art. X, § 2 ("The General Assembly may define and classify real estate devoted to agricultural, horticultural, forest, or open space uses, and may by general law authorize any county, city, town, or regional government to allow deferral of, or relief from, portions of taxes otherwise payable on such real estate if it were not so classified, provided the General Assembly shall first determine that classification of such real estate for such purpose is in the public interest for the preservation or conservation of real estate for such uses. In the event the General Assembly defines and classifies real estate for such purposes, it shall prescribe the limits, conditions, and extent of such deferral or relief. No such deferral or relief shall be granted within the territorial limits of any county, city, town, or regional government except by ordinance adopted by the governing body thereof.").

poses. The special assessments may be extended to four classifications of real estate—that devoted to "agricultural," "horticultural," "forest," or "open-space" use[192]—if a locality elects to "adopt an ordinance to provide for the use value assessment and taxation, in accord with the provisions of this article, of real estate [so] classified."[193] For land so classified in a locality that has adopted such an ordinance, the assessor "shall consider only those indicia of value which such real estate has for agricultural, horticultural, forest or open space use, and real estate taxes for such jurisdiction shall be extended upon the value so determined."[194] The result is assessment at "use value," rather than traditional "fair market value," which would reduce the overall assessment.[195] Most of Virginia's localities authorize use valuation of one or more of these classifications.[196]

House Bill 2365 (Chapter 22) further empowers localities to undertake real estate taxation in a manner that aids the preservation of these lands from market forces.[197] House Bill 2365 does so by allowing localities to adopt or amend ordinances for use value assessment and taxation to provide "that the annual increase in the assessed value of property within the classes of real estate" recited above "shall not exceed a dollar amount per acre specified in the ordinance."[198]

b. Dwelling Defined for Purposes of Tax Exemption for Elderly and Disabled

Article X, section 6 of the Virginia Constitution permits the General Assembly to authorize localities to exempt "from local property taxation, or a portion thereof, . . . of real estate and personal property designed for continuous habitation owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled."[199] The General Assembly may also authorize localities "to establish ei-

192. VA. CODE ANN. § 58.1-3230 (Repl. Vol. 2017).

193. *Id.* § 58.1-3231 (Repl. Vol. 2017).

194. *Id.* § 58.1-3236(A) (Repl. Vol. 2017).

195. *Id.* § 58.1-3236(D) (Repl. Vol. 2017).

196. *See* DEP'T OF TAXATION, 2019 FISCAL IMPACT STATEMENT, H.B. 2365, at 2, http://lis.virginia.gov/cgi-bin/legp604.exe?191+oth+HB2365FER161+PDF [https://perma.cc/L894-QF97].

197. Act of Feb. 15, 2019, ch. 22, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3231 (Cum. Supp. 2019)).

198. *Id*. ch. 22, 2019 Va. Acts at __.

199. VA. CONST. art. X, § 6(b).

ther income or financial worth limitations, or both, in order to qualify for such relief."[200] The General Assembly has authorized localities to extend this exemption and establish these limitations.[201]

Although used twenty-four times in chapter 32, article 2, which governs this exemption, the term "dwelling" is not defined nor its contours delineated. House Bill 2150 fills that lacuna, defining "[d]welling" to include any "improvement to real estate exempt pursuant to this article and the land upon which such improvement is situated," provided certain conditions are met.[202] The improvement must be "used to house or cover any motor vehicle" within the classes created by Virginia Code section 58.1-3503(A)(3) through (A)(10), any "households goods" or personal effects within the class created by Virginia Code section 58.1-3503(A)(14), or any "household goods exempted from personal property tax[ation]" by Virginia Code section 58.1-3504, and may not be "used principally" for "a business purpose."[203]

c. Income Limits Claiming Exemption for Elderly and Disabled May Exclude Disability Benefits for Co-Occupants of Dwelling

As noted above, localities are authorized "to establish either income or financial worth limitations, or both, in order to qualify for" the property tax exemption otherwise available to elderly and disabled persons.[204] In the event they choose to use an "annual income limitation" as part of their means-testing, the localities must aggregate

> the income received during the preceding calendar year . . . by (i) owners of the dwelling who use it as their principal residence, (ii) owners' relatives who live in the dwelling, except for those relatives living in the dwelling and providing bona fide caregiving services to the owner whether such relatives are compensated or not, and [may also aggregate the income received by] (iii) . . . nonrelatives of the owner who live in the dwelling except for bona fide tenants or bona fide caregivers of the owner, whether compensated or not.[205]

200. *Id.*
201. VA. CODE ANN. § 58.1-3210(A) (Repl. Vol. 2017); *id.* § 58.1-3212 (Repl. Vol. 2017).
202. Act of Mar. 21, 2019, ch. 736, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3210(C) (Cum. Supp. 2019)).
203. *Id.* ch. 736, 2019 Va. Acts at __.
204. VA. CONST. art. X, § 6(b); VA. CODE ANN. § 58.1-3212 (Repl. Vol. 2017).
205. VA. CODE ANN. § 58.1-3212 (Repl. Vol. 2017).

In 2019, the General Assembly authorized localities when applying their annual income limitation, to exclude from their aggregation "disability income received" by others who live in the dwelling who are "permanently and totally disabled."[206]

d. Surviving Spouse May Take Disabled Veteran Exemption to New Residence

Section 6-A supplements the list of authorized property tax exemptions found in section 6 of the Virginia Constitution with an exemption from real property taxation of the principal place of residence of any veteran with "a one hundred percent service-connected, permanent, and total disability," with the exemption extending to the veteran's surviving spouse "so long as the surviving spouse does not remarry."[207] Prior to 2019, the surviving spouse could claim the exemption only if he or she "continue[d] to occupy the real property as his or her principal place of residence."[208] Section 6-A affords the same exemption to the surviving spouse of "any member of the armed forces of the United States who was killed in action" who does not remarry, without regard to whether the surviving spouse moves "to a different principal place of residence."[209] Section 6-B affords the same exemption to the surviving spouse of "any law-enforcement officer, firefighter, search and rescue personnel, or emergency medical services personnel who was killed in the line of duty" who does not remarry, similarly without regard to whether the surviving spouse moves "to a different principal place of residence."[210]

In November 2018, Virginia voters removed the requirement that the surviving spouse of a disabled veteran had to "continue[] to occupy the real property as his or her principal place of residence" to claim the exemption.[211] Accordingly, in 2019, the General Assembly updated the general law, extending this exemption to provide that "[t]he exemption applies without any restriction on the spouse's moving to a different principal place of resi-

206. Act of Feb. 15, 2019, ch. 16, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3212 (Cum. Supp. 2019)).

207. VA. CONST. art. X, § 6-A(a).

208. *Id.*

209. *Id.* art. X, § 6-A(b).

210. *Id.* art. X, § 6-B.

211. *Id.* art. X, § 6-A(a).

dence."[212] At the same time, the General Assembly updated its prior statutory grants of the exemptions permitted to those surviving spouses of service members killed in action and of "any law-enforcement officer, firefighter, search and rescue personnel, or emergency medical services personnel . . . killed in the line of duty"[213] to remove language requiring, inconsistently with the constitutional terms, that the surviving spouse had to "continue[] to occupy the real property as his principal place of residence."[214]

These provisions apply to tax year 2019 forward.[215] However, if previous surviving spouses of a disabled veteran lost their exemptions prior to tax year 2019 "solely because [they] moved to a different principal place of residence, then [they] shall be eligible to claim such exemption for taxable years beginning on and after January 1, 2019," provided they are otherwise eligible.[216]

e. Department of Health To Certify Water Pollution Control Projects for Exemption

The Virginia Constitution also authorizes the General Assembly to "define as a separate subject of taxation any property, including real or personal property, . . . used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth or for the purpose of transferring or storing solar energy," and to either "directly exempt or partially exempt such property from taxation" or allow localities "to exempt or partially exempt such property from taxation."[217] The General Assembly has elected to directly exempt such property that meets the statutory definition of "[c]ertified pollution control equipment and facilities" from state and local taxation.[218]

212. Act of Feb. 15, 2019, ch. 15, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3219.5(B) (Cum. Supp. 2019)).

213. *Id.* ch. 15, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. §§ 58.1-3219.9(C), -3219.14(C) (Cum. Supp. 2019)).

214. VA. CONST. art. X, § 6-B.

215. Ch. 15, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-3219.9 (Cum. Supp. 2019)).

216. *Id.* ch. 15, 2019 Va. Acts at __.

217. VA. CONST. art. X, § 6(d).

218. VA. CODE ANN. § 58.1-3660(A)–(B) (Repl. Vol. 2017).

Prior to 2019, the State Water Control Board was the sole certifying agency of "pollution control equipment and facilities" directed at "water pollution."[219] In 2019, however, the General Assembly elected to divide this responsibility between the State Water Control Board and the Virginia Department of Health.[220] House Bill 2811 (Chapter 441) gave the latter the responsibility to certify for exemption all "pollution control equipment and facilities" directed at "water pollution," that consists of "onsite sewage systems that serve 10 or more households, use nitrogen-reducing processes and technology, and are constructed, wholly or partially, with public funds."[221] The General Assembly declared that an "emergency" exists, and so, House Bill 2811 was made effective on its passage on March 18, 2019.[222]

f. Partial Exemption May Be Granted for Flood Mitigation Efforts

In November of 2018, the voters of the Commonwealth approved an amendment to the Virginia Constitution, permitting the General Assembly to authorize

> by general law the governing body of any county, city, or town to provide for a partial exemption from local real property taxation, within such restrictions and upon such conditions as may be prescribed, of improved real estate subject to recurrent flooding upon which flooding abatement, mitigation, or resiliency efforts have been undertaken.[223]

Pursuant to this constitutional authorization, the General Assembly adopted Senate Bill 1588 (Chapter 754), authorizing all localities to provide by ordinance for a "partial tax exemption for improved real estate that is subject to recurrent flooding and upon which qualifying improvements have been made."[224] To be "qualifying flood improvements," it must be a "flooding abatement, mitigation, or resiliency improvements that do not increase

219. *Id.* § 58.1-3660(B) (Repl. Vol. 2017).

220. Act of Mar. 18, 2019, ch. 441, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3660(B) (Cum. Supp. 2019)).

221. *Id.* ch. 441, 2019 Va. Acts at __.

222. *Id.* ch. 441, 2019 Va. Acts at __ (codified as amended at VA. CODE ANN. § 58.1-3660 (Cum. Supp. 2019)).

223. VA. CONST. art. X, § 6(k) (2019).

224. Act of Mar. 21, 2019, ch. 754, 2019 Va. Acts __, __ (codified at VA. CODE ANN. § 58.1-3228.1(B) (Cum. Supp. 2019)).

the size of any impervious area and are made either to qualifying structures or to land."[225] If the latter, "the improvements must be made primarily for the benefit of one or more qualifying structures," defined as "a structure that was completed prior to July 1, 2018, or a structure that was completed more than 10 years prior to the completion of the qualifying flood improvements."[226] Additionally, the qualifying improvements that may provide the basis for the partial exemption must have been made on or after July 1, 2018.[227]

Senate Bill 1588 authorized the partial exemption ordinances to

> (i) establish flood protection standards that qualifying flood improvements must meet in order to be eligible for the exemption; (ii) determine the amount of the exemption; (iii) set income or property value limitations regarding eligibility for the exemption; (iv) provide that the exemption shall last for only a specified number of years; (v) determine, based upon flood risk, zones or districts within the locality in which the exemption shall be available, . . . ; and (vi) establish preferred actions that qualify for the exemption.[228]

g. Assessed Value Threshold Increased for Conveyance of Delinquent Lands to Localities

Virginia law provides localities a range of mechanisms for recovering delinquent real estate taxes or other charges that operate as a lien on the real estate, including providing for judicial sale by public auction.[229] Under certain defined circumstances, a locality may bypass the process of a public auction of the property that is subject to a tax or other lien and petition a circuit court to appoint a special commissioner to transfer title of the property to the locality.[230]

Prior to 2019, most localities could petition for such an appointment if (1) the parcel that was the subject of a lien(s) had an assessed value of $50,000 or less; and (2) the parcel's aggregate

225. *Id.* ch. 754, 2019 Va. Acts at __ (codified at VA. CODE ANN. § 58.1-3228.1(A) (Cum. Supp. 2019)).
226. *Id.* ch. 754, 2019 Va. Acts at __.
227. *Id.* ch. 754, 2019 Va. Acts at __ (codified at VA. CODE ANN. § 58.1-3228.1(B) (Cum. Supp. 2019)).
228. *Id.* ch. 754, 2019 Va. Acts at __ (codified at VA. CODE ANN. § 58.1-3228.1(C) (Cum. Supp. 2019)).
229. VA. CODE ANN. § 58.1-3965(A) (Repl. Vol. 2017).
230. *Id.* § 58.1-3970.1(A) (Repl. Vol. 2017).

taxes and liens (including penalties and interest), exceeded one-half, or the taxes alone exceeded one-quarter, of that assessed value.[231] For parcels in the Cities of Norfolk, Richmond, Hopewell, Newport News, Petersburg, Fredericksburg, and Hampton, the same procedure but different thresholds applied.[232] If the property was worth more than $100,000, a petition could be filed only if the aggregate delinquent charges, including penalties and interest, exceeded 35%, or the percentage of taxes alone exceeded 15%, of the property's assessed value.[233] If the property was worth $100,000 or less, a petition could be filed only if the aggregate delinquent charges, including penalties and interest, exceeded 20%, or the percentage of taxes alone exceeded 10%, of the property's assessed value.[234] In such a case, as long as the property is not "an occupied dwelling," the locality must "enter[] into an agreement for sale of the parcel to a nonprofit organization to renovate or construct a single-family dwelling on the parcel for sale to a person or persons to reside in the dwelling whose income is below the area median income."[235]

The $100,000 limit had been set in 2014,[236] while the $50,000 limit had been increased from $20,000 back in 2004.[237] House Bill 2060 (Chapter 541) further raised these thresholds for the appointment of a commissioner from $100,000 to $150,000 in the cities of Fredericksburg, Hampton, Hopewell, Newport News, Norfolk, Petersburg, and Richmond, and from $50,000 to $75,000 in all other localities.[238] House Bill 2405 (Chapter 159) moved the City of Martinsville into the category for urban localities.[239]

231. *Id.* § 58.1-3970.1(A)(i)–(iii) (Repl. Vol. 2017).
232. *Id.* § 58.1-3970.1(B) (Repl. Vol. 2017).
233. *Id.* § 58.1-3970.1(B)(i) (Repl. Vol. 2017).
234. *Id.* § 58.1-3970.1(B)(ii) (Repl. Vol. 2017).
235. *Id.*
236. Act of Apr. 3, 2014, ch. 519, 2014 Va. Acts 858, 858 (codified as amended at VA. CODE ANN. § 58.1-3970.1(B)(ii) (Repl. Vol. 2017)).
237. Act of Apr. 15, 2004, ch. 968, 2004 Va. Acts 1895, 1896 (codified as amended at VA. CODE ANN. § 58.1-3970.1 (Cum. Supp. 2004)).
238. Act of Mar. 18, 2019, ch. 541, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3970.1(A)(i), (B)(ii) (Cum. Supp. 2019)).
239. Act of Feb. 27, 2019, ch. 159, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3970.1(B) (Cum. Supp. 2019)).

h. Private Collections Agents Authorized To Collect Amounts Other Than Local Taxes

Depending on the period of delinquency, localities may employ various methods to seek collection of delinquent taxes and other charges. Where the local taxes and other charges are six or more months overdue, a locality may employ an attorney, the sheriff, or "a local delinquent tax collector."[240] Prior to 2019, if local taxes "remain[ed] delinquent for a period of three months or more and . . . the appropriate statute of limitations ha[d] not yet run," treasurers of localities could also employ "the services of private collection agents to assist with the collection of any local taxes," but not any other charges.[241]

Senate Bill 1301 (Chapter 271) enlarged the authority of localities to employ private collection agents "to assist with the collection of . . . other amounts due to the locality," not just "local taxes."[242]

2. Tangible Personal Property Taxation—Local Gas Severance Tax Authority Extended Through 2021

Localities are authorized to "adopt a license tax on every person engaging in the business of severing gases from the earth," and to levy the same at a rate not to exceed one percent of the gross receipts of the licensee "from the sale of gases severed within such county."[243] Known as the "[l]ocal gas road . . . improvement tax," the

> moneys collected for each county or city from the taxes imposed under authority of this section and subsection B of § 58.1-3741 shall be paid into a special fund of such county or city to be called the Coal and Gas Road Improvement Fund of such county or city, and shall be spent for such improvements to public roads as the coal and gas road improvement advisory committee and the governing body of such county or city may determine.[244]

240. VA. CODE ANN. § 58.1-3934(A)–(B) (Repl. Vol. 2017).

241. *Id.* § 58.1-3919.1 (Repl. Vol. 2017).

242. Act of Mar. 8, 2019, ch. 271, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3919.1 (Cum. Supp. 2019)).

243. VA. CODE ANN. § 58.1-3713(A) (Repl. Vol. 2017); *see id.* § 58.1-3712(A) (Repl. Vol. 2017).

244. *Id.* § 58.1-3713(A) (Repl. Vol. 2017).

Certain portions of the funds may be used for purposes other than roads "[i]n those localities that comprise the Virginia Coalfield Economic Development Authority."[245] This tax is presently imposed by the eight Southwest Virginia localities that make up the Virginia Coalfield Economic Development Authority.[246]

The authority to impose the local gas road improvement tax was to sunset at the end of 2019; however, House Bill 2555 (Chapter 24) extended this authority through 2021.[247]

3. BPOL Taxation—Start-Up Food Carts Subject to Only One BPOL License

Virginia localities generally impose business, profession, occupation and licensure, or "BPOL" taxes, on the basis of gross receipts at a "definite place of business."[248] As a result, itinerant businesses may be exposed to BPOL licensing, reporting, and taxation in numerous localities, thereby presenting knotty sourcing issues that they may be ill-equipped to manage.[249]

In 2019, the General Assembly adopted Senate Bill 1425 (Chapter 791), granting some relief from these BPOL burdens to start-up food cart owners.[250] As is the want of modern legislation, the anodyne term "mobile food unit" was adopted and is defined as "a restaurant that is mounted on wheels and readily moveable from place to place at all times during operation."[251]

Owners of a mobile food unit that is a "new business," i.e., one that "locates for the first time to do business in a locality," who pay "the license tax required by the locality in which the mobile food unit is registered, . . . shall not be required to pay any fur-

245. *Id.*

246. *See* DEP'T OF TAXATION, 2019 FISCAL IMPACT STATEMENT, H.B. 2555, at 1, http://lis.virginia.gov/cgi-bin/legp604.exe?191+oth+HB2555FER161+PDF https://perma.cc/ZQP5-N24V] (listing the City of Norton and the Counties of Buchanan, Dickenson, Lee, Russell, Scott, Tazewell, and Wise as those who impose the tax); *see also* VA. CODE ANN. § 15.2-6002 (Repl. Vol. 2017) (listing these localities).

247. Act of Feb. 15, 2019, ch. 24, 2019 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 58.1-3713(C) (Cum. Supp. 2019)).

248. VA. CODE ANN. §§ 58.1-3703(A), -3708 (Repl. Vol. 2017).

249. VA. CODE ANN. §§ 58.1-3700, -3708(A)–(B) (Repl. Vol. 2017).

250. Act of Mar. 22, 2019, ch. 791, 2019 Va. Acts __, __ (codified at VA. CODE ANN. § 58.1-3715.1 (Cum. Supp. 2019)).

251. *Id.* ch. 791, 2019 Va. Acts at __ (codified at VA. CODE ANN. § 58.1-3715.1(A) (Cum. Supp. 2019)).

ther license tax imposed by any other locality for conducting business from such mobile food unit in the confines of such other locality."[252] This partial exemption may be extended to "up to three mobile food units."[253]

This partial exemption expires "two years after the payment of the initial license tax in the locality in which the mobile food unit is registered" and does not exempt the owner of the "mobile food unit" from the requirement "to register with the commissioner of the revenue or director of finance in any locality in which he conducts business from such mobile food unit."[254]

4. Machinery and Tools Taxation—Assessed Value Measure for Machinery and Tools Remains Undefined

Virginia Code section 58.1-3507(A) lists and segregates "as a class of tangible personal property . . . subject to local taxation only" non-idle "[m]achinery and tools . . . used in a manufacturing, mining, water well drilling, processing or reprocessing, radio or television broadcasting, dairy, dry cleaning or laundry business."[255] Under Virginia Code section 58.1-3507(B), "[m]achinery and tools segregated for local taxation pursuant to subsection A, other than energy conservation equipment of manufacturers, shall be valued by means of depreciated cost or a percentage or percentages of original total capitalized cost excluding capitalized interest."[256]

This measure for the assessment of machinery and tools ("M&T") dates back to 1980.[257] However, it has never received an authoritative interpretation. When it was interpreted at the behest of a local commissioner of the revenue by Virginia's Office of the Attorney General, it was interpreted to mean the same thing

252. *Id.* ch. 791, 2019 Va. Acts at __ (codified at VA. CODE ANN. § 58.1-3715.1(A)–(B) (Cum. Supp. 2019)).

253. *Id.* ch. 791, 2019 Va. Acts at __ (codified at VA. CODE ANN. § 58.1-3715.1(B) (Cum. Supp. 2019)).

254. *Id.* ch. 791, 2019 Va. Acts at __ (codified at VA. CODE ANN. § 58.1-3715.1(B)–(C) (Cum. Supp. 2019)).

255. VA. CODE ANN. § 58.1-3507(A) (Repl. Vol. 2017).

256. *Id.* § 58.1-3507(A) (Repl. Vol. 2017).

257. Act of Mar. 29, 1980, ch. 412, 1980 Va. Acts 478, 479 (codified as amended at VA. CODE ANN. § 58-829.7 (Cum. Supp. 2019)).

as "original cost," to wit, the "original cost paid by the original purchaser of the property from the manufacturer or dealer," not the taxpayer's purchase cost.[258]

House Bill 2640 proposed to countermand that opinion by defining "[o]riginal total capitalized cost" to mean "the cost of the machinery and tools when acquired by the current owner of the machinery and tools plus any amount incurred by such owner to extend the useful life of the machinery and tools," provided the current owner acquired the M&T "in a bona fide, arm's-length transaction."[259] The legislation proposed to create a presumption that all purchases "from anyone other than a member of the current owner's affiliated group, as defined in § 58.1-3700.1," were "bona fide, arm's-length transaction[s] unless the contrary is shown."[260] On the other hand, acquisitions "from a member of the [purchaser's] affiliated group" would be presumed to not "be a bona fide, arm's-length transaction unless the contrary is shown."[261] Where a taxpayer did not acquire the M&T through "a bona fide, arm's-length transaction," original total capitalized cost was to be defined as "the prior owner's original total capitalized cost."[262]

The Bill was reported from the House Committee on Finance and subjected to two readings, but engrossment was refused.[263]

B. *Significant Judicial Decisions*

1. Real Property Tax Assessments Upheld; Virginia Code Section 58.1-3984(B) Held Constitutional

When a taxpayer fails to show that real property tax assessments were not arrived at in accordance with generally accepted appraisal practices, the tax assessments stand.[264] A taxpayer,

258. It has, however, been the subject of a recent advisory opinion by Virginia's Office of the Attorney General, exercising the authority granted by Virginia Code section 2.2-505(A). *See* 2014 Va. Att'y Gen. Op. 103, 105 (June 26, 2014).

259. H.B. 2640, Va. Gen. Assembly (Reg. Sess. 2019) (proposing to codify this amendment at VA. CODE ANN. § 58.1-3507(D)(1)).

260. *Id.*

261. *Id.* (proposing to codify this amendment at VA. CODE ANN. § 58.1-3507(D)(2)).

262. *Id.*

263. *2019 Session: House Bill No. 2640, History*, LEGIS. INFO. SERVS., https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HJ674 [https://perma.cc/RD28-D3ML].

264. Kingstowne M&N LP v. Fairfax County, No. CL2017-12241 at 2 (2018) (Fairfax County) (letter opinion).

Kingstowne M&N LP ("Kingstowne" or "Taxpaper"), challenged its real property tax assessments for tax years 2012, 2013, 2014, and 2015.[265] "The property in question [was] the last undeveloped tract of 4.6 acres in the Kingstowne Center, a mixed-use development of 43.37 acres in Alexandria, [Virginia]." The comprehensive plan contemplates a mixed use to include high rise residential use.[266] In 2008, Fairfax County granted an amendment that allowed density on Parcel M, the subject property, to 1.2 million square feet of office space.[267] During the tax years at issue, the property was zoned office use.[268] In 2015, the Taxpayer requested, and in 2016, Fairfax County granted an amendment to allow a change to multifamily residential and retail space.[269]

Fairfax County assessed the real property by means of a mass appraisal.[270] Kingstowne filed suit challenging the assessment, asserting that the assessment exceeded fair market value of the property.[271] Fairfax County contended that the Taxpayer failed to meet its burden of proof under Virginia Code section 58.1-3984 and further that the County properly assessed the property.[272] The trial court held that Kingstowne failed to meet its burden of proof and upheld the County's tax assessments for each of the four tax years.[273]

Tax assessments are entitled to a "statutory presumption that the valuation determined by the assessor or [the] Board of Equalization is correct."[274] Virginia Code section 58.1-3984(B) sets forth the requirements a taxpayer must establish to successfully rebut this presumption.

> The taxpayer may rebut the presumption by showing by a preponderance of the evidence: (1) that the property in question was valued at more than its fair market value, and (2) that its fair market value was not arrived in accordance with generally accepted appraisal

265. *Id.* at 1.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* at 4–5.
274. *Id.* at 2.

> practices, procedures, rules and standards as prescribed by nationally recognized professional appraisal organizations such as the IAAO and applicable Virginia law relating to valuation of property.[275]

Kingstowne contended that the law under *West Creek Associates LLC v. County of Goochland*[276] still stands and that a "taxpayer may carry its burden of establishing manifest error in an assessment by the [C]ounty by showing only that it is substantially higher than the fair market value of the property."[277] Kingstowne asserted that the additional language added to Virginia Code § 58.13984(B) was merely instructional by the General Assembly "on the various ways in which a taxpayer could meet its burden of proof."[278]

The court rejected those arguments and adopted the reasoning of the court in *Staunton Mall Realty Management, L.L.C. v. Augusta County Board of Supervisors*,[279] that the "amendment makes it clear that it is no longer an option for the taxpayer to prove manifest error solely by showing a sufficient disparity between fair market value and assessed value without also showing that the taxing authority employed an improper methodology."[280]

Kingstowne also contended that the "Virginia Constitution mandates only that assessments be at fair market value."[281] However, article X, section 2 of the Virginia Constitution states "all assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law."[282] This phrase does not limit the General Assembly from enacting legislation circumscribing the appeal by a taxpayer of a County's assessment.[283] In short, Virginia Code section 58.1-3984(B) does not permit the County to make non-fair-market value assessments; it merely provides for what a taxpayer must es-

275. *Id.*

276. 276 Va. 393, 665 S.E.2d 834 (2008).

277. *Kingstowne*, at 2 (internal quotation marks omitted).

278. *Id.* (internal quotation marks omitted).

279. 92 Va. Cir. 96 (2015) (Augusta County).

280. *Kingstowne*, at 3 (citing *Staunton Mall*, 92 Va. Cir. at 105–06). For a well-reasoned opinion regarding the requirements to successfully challenge a real property tax assessment under Virginia Code section 58.1-3984(B) after the 2012 legislation amending this statute, see Hershey Chocolate of Va., Inc. v. Cty. of Augusta, CL140 02172-00, 2018 Va. Cir. LEXIS 722 (2018) (Augusta County).

281. *Kingstowne*, at 3.

282. *Id.* (citing VA. CONST. art. X, § 2).

283. *Id.*

tablish to overcome the presumption that the County has made a fair market value assessment.[284]

The circuit court held that Kingstowne's evidence failed to establish "that these assessments were not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by any nationally recognized professional appraisal organizations."[285]

> Even assuming that Taxpayer met his burden of proof that the county assessment was not arrived at in accordance with generally accepted appraisal practices, or that the Taxpayer need only prove that the property in question is valued at more than its fair market value; the [c]ourt found that the presumption of the correctness of the county's assessment was not overcome.[286]

The court found the County's expert to be more credible than the Taxpayer's expert as to the fair market value of the property in question.[287]

> In comparing these fair market values with the mass appraisal assessments performed by the Board of Equalization, and in rejecting the fair market values opined by the Taxpayer's expert the [c]ourt decline[d] to conclude that they are so stark as to warrant an inference of manifest error or to overcome the presumption of correctness.[288]

The court denied the Taxpayer's petition for relief and entered judgment for Fairfax County.[289]

2. City of Fairfax Commits Manifest Error by Using Valuation Approach Not in Accordance with Generally Accepted Appraisal Practices

For real property tax assessment purposes, the City of Fairfax must assess the Army Navy Country Club's land as residential property and omit the golf club's improvements (e.g., clubhouse, pool, tennis courts) that would be demolished in the event of residential development.[290] The Army Navy Country Club ("ANCC")

284. *Id.*
285. *Id.*
286. *Id.* at 4.
287. *Id.*
288. *Id.* at 5.
289. *Id.*
290. Army Navy Country Club v. City of Fairfax, 99 Va. Cir. 232, 233, 237–38 (2018) (Fairfax County).

owned 232 acres of real property located in the City of Fairfax that for many years had been used as a country club and golf course.[291] For tax years 2012 to 2016, the City assessed the property at approximately $53 million.[292] The subject property was "zoned for by-right residential development," and the parties agreed that the property's highest and best use was for residential development, despite it being used as a country club and golf course.[293] ANCC asserted the fair market value of the property for the five years at issue should have been no greater than $20 million to $29.88 million.[294]

To rebut the presumption of correctness of the challenged tax assessments, ANCC argued that the City's property tax assessments exceeded the fair market value for the five tax years and that the City derived its assessments from a flawed methodology.[295] Both parties presented a number of appraisers and other fact witnesses to establish their fair market value determinations for the ANCC property and the methodologies used in arriving at their opinions of value.[296]

The Fairfax County Circuit Court held the tax assessments were improper because the City used an improper methodology that was not in accordance with generally accepted appraisal practices.[297] Both parties agreed that the highest and best use for the property "requires the [p]roperty to be evaluated as if it consist[ed] of residential lots" and not as a country club and golf course.[298] Both parties agreed the ANCC property could yield 332 lots.[299] However, the City "not only valued the land, but valued the improvements on the property."[300] The City conceded that the improvements would need to be demolished if the property was to be developed for residential use.[301] However, the City's assessor valued the improvements and "assigned them a reduced value,

291. *Id.* at 232.
292. *Id.* at 233.
293. *Id.*
294. *Id.*
295. *Id.* at 235.
296. *Id.* at 233.
297. *Id.*
298. *Id.* at 237–38.
299. *Id.* at 238.
300. *Id.*
301. *Id.*

and then depreciated that value."[302] Placing a value on the improvements increased the overall assessment of the property.[303] The City assessor testified "the improvements would have been used during the development of the [p]roperty."[304] The circuit court held "it was improper [for the City] to value the land under a residential scheme, and also value the improvements, because the improvements, would be nonexistent if the [p]roperty consisted of residential lots."[305] The court also noted that the City's valuation of the improvements was inconsistent with a recent real property tax case between the parties on this same property in which the earlier court noted no value should be assigned to the improvements.[306]

By holding that the City's valuation methodology was flawed and not in accordance with generally accepted appraisal practices, the circuit court determined that the resulting values were greater than its fair market value. The court then evaluated all of the appraiser's opinions of value and other evidence presented at trial and concluded the correct fair market value for the property was $44,632,900 for each of the five tax years in the litigation.[307]

3. Court Finds County Real Property Tax Assessments Manifestly Erroneous and Grants Relief

In *Jewell Smokeless Coal Corp. v. Buchanan County*, the Buchanan County Circuit Court held that the landowner carried its burden of showing that Buchanan County's tax assessments were manifestly erroneous and awarded a refund.[308] Jewell Smokeless Coal Corporation ("Jewell Smokeless") owned a coke manufacturing and processing plant located on seven tracts of land in Buchanan County.[309]

"The Jewell Smokeless plant in Buchanan County [was] a unique industrial coke manufacturing facility with 142 coke ov-

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*; *see* Army-Navy Country Club v. City of Fairfax, 86 Va. Cir. 1 (2012) (Fairfax County).

307. *Id.* at 240.

308. *See* Jewell Smokeless Coal Corp. v. Cty. of Buchanan, No. CL 16-578 (2018) (Buchanan County) (letter opinion).

309. *Id.* at 1–2.

ens with several buildings and structures supporting the coke ovens."[310] Only six of the seven parcels of land were the subject of the judicial tax assessment challenge.[311] "In 2013 and 2014, the total assessed value for all parcels was $17,345,200," with the land valued at $277,000 and the "Buildings/Structures" valued at $17,068,200.[312] In 2015, the County hired Wampler-Eanes Appraisal Group, Ltd. ("Wampler-Eanes") to conduct a county-wide reassessment, and the County increased the assessment of the Jewell Smokeless plant from $17,345,200 (for tax year 2014) to over $255,000,000 for 2015.[313] The assessment by Wampler-Eanes placed $254,430,200 of the total assessment on one tract, 2HH 118004, of the seven tracts owned by Jewell Smokeless.[314]

Mr. Wampler testified at trial that he used the "cost approach method" for his values.[315] "He determined a cost figure of $3.7 million per coke oven and multiplied that amount by 142 ovens."[316] He then depreciated that $525 million amount down to the $255 million assessment.[317] During a three-day trial, Jewell Smokeless called two expert appraisers to testify regarding the improvements, which totaled $32,262,000.[318] The County took the unique position of not offering a counter expert to defend its own assessment.[319] Instead, the County relied on the presumption of correctness afforded to the tax assessments by Virginia Code section 58.1-3984(B).[320] The County also called two appraisers to critique and highlight what they considered to be errors by Jewell Smokeless's experts who testified about the fair market value of the subject property and its improvements.[321]

The trial court held that the County's assessor, Wampler-Eanes, committed a manifest error in making his assessment.[322] Wampler-Eanes placed 99.58% of the total assessment of value on

310. *Id.* at 3.
311. *Id.*
312. *Id.*
313. *Id.* at 4.
314. *Id.* at 3–4.
315. *Id.* at 4.
316. *Id.*
317. *Id.*
318. *Id.* at 4–5.
319. *Id.* at 5.
320. *Id.*
321. *Id.* at 4.
322. *Id.* at 7.

one parcel—2HH 118004.[323] This allocation of value was "inconsistent with the evidence and conflict[ed] with the expert testimony."[324] Mr. Wampler, called as a witness by Jewell Smokeless despite being the County's assessor, could not satisfactorily explain how he ended up putting 99.58% of the value on one tract when a number of coke ovens (about 112), which he had valued at $3.7 million each, were located on other tracts of the subject property at issue in the trial.[325] The disparity in value between the County's assessment ($254 million) and that opined by the County's expert witness ($23,783,500) for the one parcel 2HH 118004 was massive, and the court ruled it "shows a manifest error in Wampler-Eanes['] methodology that is not within the range of a reasonable difference of opinion" among experts.[326]

After evaluating the evidence and testimony of the appraisers, the trial court held the County's tax assessments were erroneous and ruled the fair market value of the property and improvements for each of the three tax years at issue in the case (2015, 2016, and 2017) to be $41,437,712.[327] In reaching the court's opinion of value for the property, the court made three other rulings. First, the court held Jewell Smokeless is not required to prove a value to the land that was already established by the County's assessments and with which Jewell Smokeless agreed.[328] The property owner never contested the land values assessed by the County, only the assessments of the improvements.[329] Second, the court dismissed the County's argument that Jewell Smokeless offered no evidence that the value approved by the Board of Equalization ("BOE") "was not arrived at in accordance with generally accepted appraisal practices" so the presumption of correctness of the tax assessment should remain in effect.[330] The court relied on the chairman of the BOE letter put into evidence by Jewell Smokeless showing a reduction in assessed value of the property from $254,430,200 to $199,685,000.[331] In the letter, the BOE failed to include any of the other parcels of land and placed nine-

323. *Id*. at 6.
324. *Id*.
325. *Id*. at 4–6.
326. *Id*. at 7.
327. *Id*. at 12.
328. *Id*. at 9.
329. *Id*.
330. *Id*.
331. *Id*.

ty-nine percent of the value on one parcel, similar to the Wampler-Eanes methodology that the court previously held to be flawed.[332] The court also noted that, unlike the assessor, the BOE appears to have no statutory requirement to comply with generally accepted appraisal practices and the BOE decision to reduce the assessment lacked any explanation.[333]

The third finding by the court was that it believed no "entrepreneurial incentive" should be used by an appraiser for a specific use property such as the coke oven plant that is owner operated.[334] The court noted that an entrepreneurial incentive is more applicable in other types of development as a "developer profit," as opposed to an owner-user.[335] The court concluded its finding that the County's tax assessments were erroneous by establishing fair market value for the buildings and structures.[336] The court added its fair market valuations for the improvements to the County's assessments of land value to reach the court's fair market value for each of the parcels.[337]

CONCLUSION

The 2019 session of the Virginia General Assembly diverged sharply from its recent trend toward targeted and technical changes in the tax laws. The prime example of this break was the legislature's enactment of new economic sales and use tax nexus laws which require remote, e-commerce sellers and marketplace facilitators who sell or facilitate sales to Virginia customers to register for the collection of sales and use tax. Under the new economic nexus laws, a remote seller or marketplace facilitator creates an economic nexus with Virginia if they sell or facilitate the sales of more than $100,000 in annual gross retail sales or 200 or more transactions to Virginia customers annually. Virginia joins a growing number of states implementing new tax laws to capitalize on the 2018 decision by the Supreme Court of the United States in *Wayfair*. The remainder of the General Assembly's

332. *Id.*
333. *Id.* at 10.
334. *Id.* at 11–12.
335. *Id.* at 12.
336. *Id.* at 12–13.
337. *Id.*

state tax legislation largely conforms to its habit of targeted and technical changes.

As to local taxes, the most notable trend was the extent to which the trial courts continued to wrestle with real property tax challenges. The ambiguously worded 2012 amendment to the long-standing relief statute, Virginia Code section 58.1-3984, established a new standard as to what a taxpayer must prove to be successful in challenging a real estate tax assessment and sowed the seeds of taxpayer, locality, and trial court confusion. The latest circuit court decisions, reviewed previously, confirm the difficulties of identification, interpretation, and application, suggesting that legislative guidance may be required. The problem is especially acute for challenges to assessments of large manufacturing or special purpose facilities which invariably require courts to delve into the niceties of real property appraisal practice now that the general principles of which have been made elements of real estate assessment challenges. The identification, interpretation, and application of this vague body of real estate appraisal standards by individual circuit court judges now controls whether relief from overassessment may be granted. We anticipate the next few years will bring more real property tax assessment challenges and, with them, still more judicial grappling with real estate valuation principles.