



Southeast State & Local Tax: Important Developments - June Update

By: Kyle H. Wingfield

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VIRGINIA

BUSINESS PROFESSIONAL AND OCCUPATIONAL LICENSE TAX

- **Department Lacked Jurisdiction to Address BPOL Appeal** The Department of Taxation held that it lacked jurisdiction to address a taxpayer's BPOL appeal because the County making the assessment failed to issue a proper final determination letter. Under Title 23 of the Virginia Administrative Code § 10-500-710(D) and Va. P.D. 04-28 (Guidelines for Appealing Local Business Taxes), localities must include specific language regarding the taxpayer's appeals rights with respect to a BPOL assessment in the final determination letter. The County did not include the required language in its determination letter to the taxpayer. Also, the taxpayer did not give notice to the County before appealing the assessment to the Department. Accordingly, the Department returned the case to the County for a proper determination letter. Va. P.D. 14-72.

SALES AND USE TAX

- **Internet Service Provider Exemption.** The Department of Taxation ruled that certain assets purchased by an Internet service provider (?ISP?) would not qualify for the exemption to the retail sales and use tax under Va. Code § 58.1-609.6(2) outside of Fairfax County, Virginia to the extent that the services were provided at wholesale rather than at retail. The Department's long-standing position is that the ISP exemption only applies to retail ISPs and not wholesale ISPs. In *Cisco Systems v. Thorson Tax Commissioner*

, La No. 219609 (8/17/05), the circuit court for Fairfax County, Virginia ruled that the ISP exemption was available to both retail and wholesale ISPs. In the ruling, the Department notes that it has declined to apply *Cisco Systems* on a statewide basis because the Supreme Court of Virginia has not reviewed the issue or issued an opinion addressing the scope of the ISP exemption. Va. P.D. 14-92.

- **Communications Services ? Activation Fees.** The Department of Taxation held that tax associated with activation fees should be removed from the taxpayer's audit because the fees are not for communication services under Va. Code § 58.1-647. The taxpayer was a cellular telephone service provider that was assessed tax on ?activation fees? charged to its customers. The Taxpayer maintained that the separate activation fee charged to its customers was an equipment charge, not a fee associated with activating an account, and that it used the fee to recoup some of its losses associated with selling the telephones phones. The Department noted that the taxpayer's activation fees were not for activating ?communication services? under Va. Code § 58.1-647. Therefore, the Department held that the taxpayer's activation fees were not subject to the communications sales tax and must be removed from the audit. Va. P.D. 14-64.
- **Materials Not Attached to Real Property.** The Department of Taxation held that a contractor was not subject to retail sales and use tax on furniture, fixtures and equipment purchased under a contract for real property construction between the contractor and a governmental agency. Citing P.D. 87-210, the Department noted that if materials are actually resold to customers and do not become permanently affixed to the real property, the contractor may qualify for the sale-for-resale exemption to the retail sales and use tax. The Department also held that the contractor qualified for the governmental exemption under Va. Code § 58.1-609.1 because the purchases were made for use or consumption by the Commonwealth or its political subdivisions. P.D. 14-91.

PROPERTY TAX

- **Refund Denied.** The Virginia Attorney General opined that a locality may not refund erroneously assessed real estate taxes beyond the three (3) year period provided by local ordinance for issuing such refunds. In this case, the city assessor corrected assessments retroactively for nine (9) years and authorized a refund for the entire period. The actions were taken administratively by the city assessor. No lawsuit was ever filed, there was no settlement agreement, and no court had authorized the refund. Citing a prior opinion, the Attorney General noted that three procedures are available to correct an erroneous tax assessment: (i) administrative correction, (ii) administrative correction pursuant to a local ordinance and (iii) judicial correction. Since the city assessor chose to refund the taxpayer using an administrative adjustment, the Attorney General concluded that the taxpayer was bound by the three (3) year limitation imposed by the Code of Virginia and the local ordinance. 2014 Op. Va. Att'y. Gen. 13-081.

NORTH CAROLINA

- **Sales Tax ? Rentals of Certain Accommodations.** H.B. 1050, signed into law May 29, 2014 by Governor McCrory, provides that the gross receipts derived from the rental of a private residence, cottage, or similar accommodation listed with a real estate broker or agent where a person occupies or has the right to occupy such on or after June 1, 2014 is subject to the 4.75% general state and applicable local and transit rates of sales and use tax, plus any local occupancy tax imposed by a city or county. Also, a retailer is not liable for an overcollection or undercollection of sales tax or occupancy tax if the retailer (i) has made a good-faith effort to comply with the law and collect the proper amount of tax and (ii) has, due to the statutory change, overcollected or undercollected the amount of sales tax or occupancy tax due for the period beginning June 14, 2012, and ending July 1, 2014. N.C. Dept. of Rev., *Important Notice: Rentals of Private Residences, Cottages, or Similar Accommodations* (5/30/2014).

MARYLAND

- **Wynne Update.** The U.S. Supreme Court granted certiorari in an appeal from the Maryland Court of Appeals case holding that the failure of the Maryland income tax law to allow a credit against the county tax for a Maryland resident taxpayer with respect to pass-through income of an S corporation that arises from activities in another state and that is taxed in that state violates the federal dormant Commerce Clause. *Wynne v. Comptroller of the Treasury*, Md. Ct. App., Dkt. No. 107 Sept. Term 2011 (2013); cert. granted, U.S. S. Ct., Dkt. No. 13-485, 05/27/2014. On a related note, Governor O'Malley recently signed S.B. 172, which provides an interest rate reduction for income tax refunds attributable to the final decision in *Wynne*. S.B. 172 Leg. 2014 (Md. 2014).

AROUND THE NATION

- **Permanent Internet Tax Freedom Act** On June 18, 2014, the House Judiciary Committee approved H.R. 3086 (the Permanent Internet Tax Freedom Act). The Internet Tax Freedom Act (the ?IFTA?) prohibits federal, state and local governments from taxing Internet access and from imposing discriminatory taxes on electronic commerce. The IFTA is set to expire on November 1, 2014. If it is enacted, H.R. 3086 would eliminate the expiration date and make the IFTA

permanent. The current version of the bill includes a grandfather clause and would allow certain states to tax Internet access if their statutes were in place before the IFTA was enacted in 1998. H.B. 3086, 113th Cong. (2014).

Related People

- Kyle H. Wingfield ? 804.420.6445 ? kwingfield@williamsmullen.com

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