

A large, stylized graphic in the background of the blue cover, consisting of two overlapping, elongated, arrow-like shapes pointing towards the right. The top shape is a lighter shade of blue, and the bottom shape is a darker shade, creating a layered effect.

**WILLIAMS MULLEN**

2023 Developments  
in Virginia Taxation

# 2023 DEVELOPMENTS IN VIRGINIA TAXATION

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*A Summary Review of Tax Legislation, Court Decisions, Opinions of the Attorney General and Published Rulings of the Tax Commissioner Published from January 1, 2023 through November 10, 2023.*



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## I. CORPORATE INCOME TAXES

### A. 2023 Legislation

1. Fixed Date Conformity. [House Bill 1595](#) and [Senate Bill 882](#) amend Va. Code § 58.1-301 by advancing Virginia's date of conformity with the Internal Revenue Code from December 31, 2021, to December 31, 2022. This legislation allows Virginia to conform to the Inflation Reduction Act of 2022 and the tax-related provisions contained in the Consolidated Appropriations Act of 2023. This legislation is effective January 1, 2022.
2. Rolling Conformity. [House Bill 2193](#) and [Senate Bill 1405](#) amend Va. Code § 58.1-301 by changing Virginia's conformity to the Internal Revenue Code from a "fixed date" system to a "rolling conformity" basis. This allows Virginia to conform to federal tax changes to the IRC as soon as they are enacted by Congress. This also allows Virginia to conform to the Inflation Reduction Act and the Consolidated Appropriations Act of 2023. This legislation is effective July 1, 2023 and applies to taxable years beginning on and after January 1, 2023.
  - a. Virginia deconforms from any amendment enacted on or after January 1, 2023 that would increase or decrease General Fund revenues by more than \$15 million in the fiscal year in which the amendment was enacted or any of the succeeding four fiscal years. This deconformity will not apply to any federal tax changes that the General Assembly subsequently adopts or a federal tax extender as defined under these Acts. Beginning January 1, 2024, the \$15 million threshold will be adjusted annually by the change in the Chained Consumer Price Index for All Urban Consumers (C-CPI-U) for the previous year.
  - b. Virginia also deconforms from all amendments enacted on or after January 1, 2023, and occurring between adjournment sine die of the previous regular session of the General Assembly and the first day of the subsequent regular session of the General Assembly if the cumulative impact of such amendments would increase or decrease General Fund revenues by more than \$75 million in the fiscal year in which the amendments were enacted or any of the succeeding four fiscal years. This deconformity will not apply to any federal tax changes that the General Assembly subsequently adopts or that are enacted before the date on which the cumulative projected impact is met. This deconformity will also not apply to any federal tax extender as defined under these Acts.
3. Clarification Regarding Conformity. [House Bill 6001](#) (Special Session I) clarifies that all of the conformity legislation enacted during the 2023 Regular Session continues to apply and override any conflicting legislation

in the second enactment of the 2023 Appropriations Act. Taxable Year 2022 returns may continue to be filed based on the December 31, 2022 date of conformity (HB 1595 / SB 882). Returns for Taxable Year 2023 may be filed based upon the Rolling Conformity provisions of HB 2193 and SB 1405.

4. [Increase in Income Tax Deduction for Disallowed Business Interest](#). [Item 4-14, Clause 23](#) of the 2023 Appropriations Act (House Bill 6001, Special Session I) amends Va. Code §§ 58.1-322.03 and 58.1-402 to increase the Virginia corporate and individual income tax deduction for business interest to 50 % of the business interest disallowed as a deduction under § 163(j) of the Internal Revenue Code. This legislation is effective for tax years beginning on and after January 1, 2024.
5. [Filing Method for Affiliated Corporations](#). [House Bill 1405](#) and [Senate Bill 796](#) amend the requirements under Va. Code § 58.1-442 for an affiliated group to elect to change its corporate income tax filing status by removing the requirement that its tax liability for the previous tax year not be decreased by its change in filing status. The legislation retains all other current requirements regarding changing an affiliated group’s filing status, including the requirements (i) the electing affiliated group has filed using the same status for the preceding 12 years and (ii) the affiliated group agree to file returns under both the new filing method and the former method and pay the greater of the two amounts for the taxable year in which the new election is effective and for the immediately succeeding taxable year. This legislation is effective for all applications filed on and after July 1, 2023.
6. [Apportionment for Internet Root Infrastructure Providers](#). [House Bill 1481](#) amends Va. Code § 58.1-416 and adds Va. Code § 58.1-422.5 by requiring that an internet root infrastructure provider (“Provider”) that meets certain criteria and chooses to enter into a memorandum of understanding (“MOU”) with the Virginia Economic Development Partnership Authority (“the Authority”) to use a hybrid sales factor in its income apportionment calculations when filing Virginia corporate income tax returns. For sales other than sales of tangible personal property, the hybrid sales factor would use a market-based sourcing rule for sales of services and the standard cost of performance rule for all other non-service sales. This legislation is effective for taxable years beginning on and after January 1, 2023, provided that the Provider and the Authority enter into an MOU no later than December 1, 2023.
7. [Apportionment for Retail Companies](#). [House Bill 1978](#) and [Senate Bill 1346](#) amend Va. Code § 58.1-422.1 by allowing an affiliated group of corporations with 80% or more of their sales derived from retail company activities to apportion all their income using the single sales factor on a Virginia consolidated return. Under current law, such affiliated groups must

use a combination of single sales factor apportionment and three factor apportionment to determine their income subject to Virginia corporate income tax if they contain at least one member that is not a retail company. This election is effective in years during which the 80% or more of sales test is met, and once made, the election cannot be changed without permission from the Department of Taxation. This legislation is effective for taxable years beginning on and after January 1, 2023.

## **B. Court Decisions**

1. *Commonwealth v. 1887 Holdings, Inc.*, 77 Va. App. 653, 887 S.E.2d 176 (Ct. App. 2023). The taxpayer, 1887 Holdings, Inc., f/k/a C.F. Sauer Company, is a Virginia corporation. The Department of Taxation audited the taxpayer's 2014 and 2015 corporate income tax returns. During the audit, the taxpayer advised the Department that it wished to elect the manufacturer's apportionment method permitted by Va. Code § 58.1-422. The Department denied the taxpayer's request taking the position that a corporation cannot make such an election in an amended return. The taxpayer filed an administrative appeal with the Department, which was denied. The taxpayer then filed suit in circuit court, which granted summary judgment in favor of the taxpayer. The Department then filed an appeal with the Virginia Court of Appeals. The Court of Appeals noted that Va. Code § 58.1-422 does not require that the manufacturer's apportionment method be made on or before the due date for filing the original return. Furthermore, the Court of Appeals held that the statute "does not prevent a taxpayer . . . from electing to use the manufacturer's apportionment method in a timely amended return." Because the statute was unambiguous, the Department's interpretation was afforded no weight. The Court of Appeals also found that the Department's Guidelines were afforded no weight because they do not have the force and effect of a regulation and therefore, do not control the court's analysis. See also [PD 23-75](#) (May 23, 2023).

## **C. Docketed Court Cases**

1. *Kohl's Department Stores, Inc. v. Virginia Department of Taxation*, Case No. CL17003275-00 (Richmond Cir. Ct. July 14, 2017).
2. *R.J. Reynolds Tobacco Company v. Virginia Department of Taxation*, Case No. CL13000509-00 (Danville Cir. Ct. July 22, 2013).
3. *Commonwealth of Virginia, Department of Taxation v. FJ Management Inc., d/b/a FJI, Inc.*, No. 0701-23-2 (Va. Ct. App. April 26, 2023).

## D. Administrative Rulings

1. Request for Filing Status Change. [PD 23-5](#) (January 6, 2023). A corporate taxpayer requested permission from the Department to file a separate corporate income tax return for the taxable year ending December 31, 2021 and for all subsequent tax years. The taxpayer and its subsidiaries previously filed on a consolidated basis in Virginia. On January 1, 2021, all subsidiaries of the taxpayer became disregarded entities. The Tax Commissioner ruled that because the taxpayer was no longer a member of an affiliated group for the 2021 tax year, the taxpayer had no option other than to file a separate Virginia return. Accordingly, no permission was needed to change the taxpayer's filing status.
2. Filing Date for Short Taxable Years. [PD 23-79](#) (July 6, 2023). Pursuant to a corporate reorganization, the taxpayer became a wholly owned subsidiary of Company A on April 3, 2020 and was required to a short year tax return. The taxpayer timely made an extension payment and filed a short period return on November 15, 2021, but the Department assessed a late filing penalty based on its determination that the return was due on August 18. Va. Code § 58.1-441 requires Virginia income tax returns to be filed on or before the 15<sup>th</sup> day of the 4<sup>th</sup> month following the close of the taxable year. Va. Code § 58.1-453 grants an extension of 30 days after the federal due date, as extended, or six months, whichever is later, provided a Virginia extension is filed. In this case, the federal due date was April 15, 2021, and the extended federal due date was October 15, 2021. Accordingly, the extended due date for the taxpayers Virginia tax return was November 15, 2021 – 30 days after the federal due date. Therefore, the Tax Commissioner abated all penalties related to the timeliness of the filing.

## II. PASS-THROUGH ENTITY TAXES

### A. 2023 Legislation

1. Pass-Through Entity Tax Election. [House Bill 1456](#) and [Senate Bill 1476](#) amend Va. Code §§ 58.1-390.1 and 58.1-390.23 by making the following changes to Virginia's pass-through entity tax election: The legislation (1) removes the requirement that to qualify for the tax election a pass-through entity must be 100% owned by natural persons or persons eligible to be shareholders in an S corporation; (2) defines "eligible owner" as an owner of a pass-through entity that is a natural person, estate, or trust; and (3) imposes the tax only on the share of income, gain, loss, or deduction attributable to eligible owners as opposed to imposing the tax on the entire entity. The legislation is effective July 1, 2023 and applies to taxable years beginning on and after January 1, 2021

**B. Court Decisions:** None

**C. Docketed Court Cases:** None

**D. Administrative Rulings:**

1. Scope of Appeals. [PD 23-104](#) (August 31, 2023). The Taxpayers filed consolidated Virginia corporate income tax returns for the taxable years at issue. Under audit, the Department removed certain subsidiaries of the Taxpayers from the consolidated returns on the basis that they lacked income tax nexus with Virginia, which resulted in adjustments to the groups' apportionment factors and deductions for net operating losses (NOLs). The Taxpayers appealed, contending that (1) certain affiliates erroneously sourced sales to Virginia; (2) another affiliate should have been removed from the consolidated returns because it had no Virginia sales and thus no nexus; and (3) the Taxpayers made numerous errors in reporting NOLs for federal income tax purposes. The Tax Commissioner found that the issues described by the Taxpayers in their appeal clearly arose from the Taxpayers' own alleged reporting errors on their original returns and that because no alleged errors were made against the audit assessment, the Taxpayers' filing did not qualify as an appeal under Va. Code § 58.1-1821. Also, the Tax Commissioner found that the 3-year period for the Taxpayers to file an amended return under Va. Code § 58.1-1823 had expired, as well as the 3-year period to file a protective claim for refund under Va. Code § 58.1-1824.

### **III. INDIVIDUAL INCOME TAXES**

**A. 2023 Legislation**

1. Individual Income Tax Rebates. [Item 3-5.28](#) of the Amendments to the 2023 Appropriations Act (House Bill 6001, Special Session I) allows an individual income tax rebate of up to \$200 for a single taxpayer, or up to \$400 for married taxpayers filing a joint return. In order to qualify, a Taxable Year 2022 return must be filed on or before November 1, 2023. The refund is allowed only up to the amount of the taxpayer's liability after the application of any deductions, subtractions or credits.
2. Standard Deduction Increase. [Item 4-14, Clause 20](#) of the 2023 Appropriations Act (House Bill 6001, Special Session I) amends and reenacts Va. Code § 58.1-322.03 to increase the standard deduction from \$8,000 to \$8,500 for single filers and from \$16,000 to \$17,000 for married taxpayers filing jointly for taxable years beginning January 1, 2024 and ending December 31, 2025.



3. Installment Agreements for Payment of Individual Income Taxes. [House Bill 1369](#) amends Va. Code § 58.1-1817 by requiring the Department of Taxation to offer installment agreements to individual income taxpayers in which the taxpayer may satisfy his or her entire tax liability over a term of up to five (5) years. The legislation does not affect installment agreements for any other tax. The legislation also repeals the Department’s authority to modify or terminate an installment agreement if the financial condition of the taxpayer has significantly changed or it fails to provide a financial condition update upon request. Virginia law does not currently set forth maximum or minimum terms with respect to installment agreements. Historically, the Department’s policy has been to limit the maximum term of installment agreements to two (2) years with some exceptions. The legislation also establishes a working group for the Department to study current federal and state policies concerning installment agreements and make recommendations regarding how the Department policies could better align with installment agreement policies adopted by the Internal Revenue Service. This legislation is effective July 1, 2023.
4. Individual Income Tax Subtraction for National Guard Pay. [House Bill 2373](#) and [Senate Bill 1210](#) amend Va. Code § 58.1-322.02 by increasing the individual income tax subtraction for National Guard pay from \$3,000 to \$5,500. The Acts also expand eligibility for the subtraction from persons in the ranks of O3 and below to persons in the ranks of O6 and below. The legislation is effective for tax years beginning on and after January 1, 2023.
5. Military Benefit Subtraction. [Item 4-14, Clause 21](#) of the 2023 Appropriations Act (House Bill 6001, Special Session I) amends and reenacts Va. Code § 58.1-322.03 to allow Virginia’s military benefit subtraction to be claimed regardless of age. Under prior law, the subtraction was only allowed for certain military benefits received by an individual age 55 or older. This legislation is effective beginning on and after January 1, 2024.

**B. Court Decisions:** None

**C. Docketed Court Cases:** None

**D. Administrative Rulings**

1. Change of Domicile. The following rulings deal with who is an actual or domiciliary resident for Virginia individual income tax purposes: [PD 23-11](#) (January 23, 2023); [PD 23-12](#) (January 23, 2023); [PD 23-14](#) (January 23, 2023); [PD 23-21](#) (March 1, 2023); [PD 23-32](#) (March 29, 2023); [PD 23-45](#) (April 19, 2023); [PD 23-46](#) (April 19, 2023); [PD 23-72](#) (June 23, 2023); [PD 23-64](#) (May 24, 2023); [PD 23-62](#) (May 24, 2023); [PD 23-66](#) (June 1, 2023); [23-82](#) (July 13, 2023); [23-83](#) (July 13, 2023); [23-84](#) (July 13, 2023); [23-85](#)

(July 13, 2023); [23-86](#) (July 13, 2023); [23-106](#) (October 5, 2023); [23-110](#) (October 19, 2023); [23-121](#) (October 23, 2023); [23-122](#) (October 26, 2023) [23-123](#) (October 26, 2023)

2. Credit for Taxes Paid to Another State. [PD 23-30](#) (March 29, 2023). The taxpayers, a married couple, were residents of Virginia but worked in North Carolina during the taxable years. Their employer withheld North Carolina taxes and not any Virginia taxes. The taxpayers claimed a credit on their Virginia return for income taxes paid to North Carolina. The taxpayers did not file a North Carolina return and relied solely on the Form W-2 to claim the credit. The Tax Commissioner ruled that Va. Code § 58.1-332(A) limits the credit to “taxes imposed by the other state” and that a Form W-2 is insufficient to show how much tax was actually due to North Carolina. Instead, the Tax Commissioner ruled that the taxpayer must actually file a return with the other state.
3. Business Expense Deduction. [PD 23-24](#) (March 1, 2023). The taxpayers, a married couple filed a Virginia return for 2018 and claimed charitable deductions and business expense deductions reported on Schedules A and C of their federal income tax return. Under audit, the Department requested documentation to support the deductions. When no response was received, the Department denied the deductions. On appeal, the Tax Commissioner ruled against the taxpayers. The Tax Commissioner observed that the Department generally relies on the accuracy of information and computations reported on the federal return. He noted, however, that under Va. Code § 58.1-219, the Department retains authority to adjust such items where there is clear evidence that the amounts reported on the return are incorrect.
4. Part-Year Resident: Credit for Taxes Paid to Another State. [PD 23-107](#) (October 5, 2023). The taxpayers, a husband and wife, filed a part-year Virginia resident income tax return for 2020 claiming both a credit for taxes paid to Maryland and a subtraction for income attributable to their period of residence outside of Virginia. The Department denied the credit and subtraction. Because their Maryland return showed that they had requested a refund of all Maryland income taxes withheld, the auditor concluded that the taxpayers should not have allocated any income to Maryland. On appeal, the Tax Commissioner noted that pursuant to Va. Code § 58.1-103, any individual who becomes a resident of Virginia during a taxable year can only be taxed on that portion of the year in which the person was a resident of Virginia. Thus, while the Tax Commissioner respected the allocation, he ruled that no credit was available for the following reasons: (1) Va. Code § 58.1-332 allows a credit for taxes paid to another state, and because the taxpayer’s Maryland return indicated no income tax liability, they were not entitled to a credit in Virginia; (2) Va. Code § 58.1-332 prohibits a part-year resident from claiming a credit against their Virginia tax liability for taxes

paid to another state; and (3) under Virginia's reciprocity agreement with Maryland, withholding should have been made in Maryland, but in any event, no credit would be permitted for the reasons stated above.

5. Subtraction for National Guard Income / Basic Military Pay. [PD 23-15](#) (January 23, 2023). The taxpayers, a husband and wife, claimed subtractions from their Virginia individual income tax return for the husband's basic military pay and National Guard pay. During an audit, the Department ruled that the taxpayers were not entitled to the subtractions. The taxpayers appealed, contending that the husband met the qualifications for subtraction. Va. Code § 58.1-322.02(8) allows a subtraction of wages or salaries received by any person for active or inactive service in the National Guard. The Tax Commissioner ruled that the taxpayer-husband was entitled to this deduction. However, the Tax Commissioner ruled that the husband was not entitled to the additional subtraction under Va. Code § 58.1-322.02(15) for basic military pay because he was not on extended active duty for a period in excess of 90 days.
  
6. Bonus Depreciation / Gain on Sale of Partnership Interest. [PD 23-39](#) (April 12, 2023). The taxpayers, a husband and wife, filed a joint Virginia individual income tax return for 2017. The husband was a partner in a partnership. Fixed date conformity (FDC) additions and subtractions for bonus depreciation were claimed each year from 2009 through 2017 and passed through to the taxpayers through the husband's partnership interest. The husband sold his partnership interest in 2017. At the time of the sale, the total of the additions from bonus depreciation exceeded the total of the subtractions. The Department denied the subtractions. On appeal, the Tax Commissioner observed that Virginia taxable income (VTI) begins with federal gross adjusted income (FAGI) because it is a conformity state. For the years at issue, Virginia decoupled from the Internal Revenue Code (IRC) in that it prohibited bonus depreciation for certain assets under IRC § 168(k). Because of this, the taxpayers' basis in the partnership interest was different for federal and state income tax purposes. Accordingly, the taxpayers' income tax liability for the sale must be adjusted. The Tax Commissioner remanded the case to the audit staff for correction.

7. Audit – Identity Theft. [PD 23-4](#) (January 6, 2023). The taxpayer filed Virginia resident individual income tax returns for 2018 and 2019 claiming itemized deductions for rental property. Under audit, the Department requested additional documentation. When no response was received, the Department disallowed the deductions and issued an assessment. Subsequently, the taxpayer filed an appeal on the grounds that she had been a victim of identity theft. On appeal, the Tax Commissioner noted that pursuant to Va. Code § 58.1-205, any assessment issued by the Department is prima facie correct. Because the taxpayer had not demonstrated how any identity theft had affected her 2018 and 2019 tax returns and had not offered to file amended returns correcting any issue, the Tax Commissioner held that he must uphold the Department’s assessments. He offered the taxpayer 30 days to provide any supplementing documentation to the Department.
8. Statute of Limitations to Claim Refund. [PD 23-56](#) (May 17, 2023). The Taxpayer filed a 2016 Virginia individual income tax return on June 1, 2020, requesting a refund of the overpayment of income tax. The Department denied the request because the return was filed beyond the refund period allowed by the statute of limitations. The Taxpayer appeals, contending that the filing deadline was extended to June 1, 2020, as the result of the COVID-19 pandemic. On appeal, the Tax Commissioner noted that the Department’s COVID-19 relief provisions extended the time to make income tax payments that would have been due in April or May of 2020 to June 1, 2020. They did not create a filing extension. Accordingly, because the taxpayer did not timely file its amended return for 2016, the Tax Commissioner ruled that the Department was correct to deny the taxpayer’s refund claim.
9. Erroneous Refund. [PD 23-57](#) (May 17, 2023). The taxpayers were issued an erroneous refund by the Department after it processed their 2019 Virginia tax return. When the Department found out about the error, the taxpayers protested that they should not have to pay interest because it was the Department’s mistake. Virginia Code § 58.1-312 provides that an erroneous refund is considered to be an underpayment of tax, which may be assessed by the Department within two years from the date the erroneous refund was made. Accordingly, the Tax Commissioner ruled that the assessment of interest on the refund was proper.
10. Indians – Exemption from Employment on Reservation. [PD 23-61](#) (May 24, 2023). The Tax Commissioner issued PD 23-61 regarding the taxation of Tribe members under various scenarios.
11. Taxes Paid to Another State. [PD 23-69](#) (June 7, 2023). The Taxpayers, a husband and wife, were Virginia residents, and the husband was a shareholder in a Subchapter S Corporation that paid corporate franchise tax to New York and corporate excise tax to Tennessee for the 2020 and 2021

taxable years. The S Corporation did not make the election under Virginia Code § 58.1-390.3 to be taxed at the entity level. The Taxpayers claimed a credit for payment of their proportionate share of the taxes on each of their 2020 and 2021 Virginia individual income tax returns. The Department denied the credits. On appeal, the Tax Commissioner noted that pursuant to Va. Code § 58.1-332(A), Virginia residents may claim a credit on their Virginia return for income taxes paid to another state. In this case, the Tax Commission ruled that the taxes paid to New York and Tennessee were not “income taxes” and therefore, no credit would be permitted in Virginia.

12. Withholding from Another State. [PD 23-30](#) (March 22, 2023). The Taxpayers, a husband and wife, were residents of Virginia and employed in North Carolina. Their employer withheld income tax for North Carolina and not in Virginia. The taxpayers filed Virginia resident returns and erroneously reported the tax withheld for North Carolina as withheld in Virginia. The Department disallowed the withholding and issued assessments. On appeal, the Tax Commissioner explained that the taxpayers could not claim income tax withheld and paid to North Carolina as payments of Virginia income tax on their Virginia returns. However, they may be able to claim the out of state tax credit for income tax paid to North Carolina on the Virginia return.
13. Deduction: Itemized – Medical Expenses for Part-Year Residents. [PD 23-103](#) (August 31, 2023). The Taxpayers filed a 2021 part-year Virginia resident individual income tax return, claiming itemized deductions attributable to their period of Virginia residence. The Taxpayers used the federal adjusted gross income (FAGI) attributable to their period of Virginia residence to calculate the 10% of FAGI “floor” below which medical expense deductions may not be claimed. Under review, the Department determined that the entire amount of FAGI should have been used to compute the floor, thereby decreasing their allowable medical expense deduction. As a result, the Taxpayers were issued a reduced refund. On Appeal, the Tax Commissioner found that Absent specific guidance, taxpayers should use only the FAGI, as adjusted for FDC modifications, attributable to their period of Virginia residence to determine the floor for any medical expenses allowed as a deduction on their part-year Virginia resident income tax return. The case was returned to the unit that the adjustment to allow the appropriate deduction.
14. Charitable Deductions. [PD 23-114](#) (October 19, 2023). The Department requested documentation to support charitable deductions and business expenses claimed by a taxpayer on his federal income taxes. No response was received by the taxpayer, so the Department issued an assessment. The taxpayer appealed. The Tax Commissioner noted that while Virginia generally conforms to the terminology and references in the Internal Revenue Code (the “IRC”), the Department is authorized under Va. Code §

58.1-219 to look behind the computations reported on a federal return and make appropriate adjustments. The Tax Commissioner gave the taxpayer an additional 30 days to provide documentation that would support his deductions.

#### IV. RETAIL SALES & USE TAXES

##### A. 2023 Legislation

1. Combined Sales and Use Tax Holiday. [Item 4-14, Clause 24](#) of the 2023 Appropriations Act (House Bill 6001, Special Session I) reinstates the combined retail sales and use tax holiday applicable to Energy Star or WaterSense qualified products, school supplies, clothing and footwear, and certain hurricane preparedness equipment. The holiday is authorized for three days. In past years, it has occurred on the first Friday in August and ends on the Sunday immediately following.
2. Exemption for Diagnostic Work for Automotive Repair. [House Bill 1677](#) amends Va. Code § 58.1-609.5 by providing an exemption from the Retail Sales and Use Tax for amounts separately charged for labor rendered in connection with diagnostic work for automotive repair and emergency roadside service for motor vehicles regardless of whether there is a sale of a repair or replacement part or a shop supply charge. Under current law, amounts charged for diagnostic services are exempt from sales tax when those charges are not made in connection with the sale of tangible personal property or the tangible personal property exchanged is inconsequential to the transaction. This legislation is effective July 1, 2023.
3. Agricultural Exemptions. [House Bill 1563](#) and [Senate Bill 1240](#) amend Va. Code §§ 58.1-609.2 and 58.1-610 and expand the Retail Sales and Use Tax agricultural exemption to include certain property, regardless of whether affixed to real property, used directly in producing agricultural products for market in an indoor, closed, controlled-environment agricultural facility. All items are required to be necessary to create, support and maintain the necessary growing environment for plants. The exemption does not apply to property used in producing cannabis. This legislation is effective July 1, 2023.
4. Exemption for Oil and Gas Drilling Equipment. [House Bill 1563](#) and [Senate Bill 1240](#) amend Va. Code §§ 58.1-609.2 and 58.1-610 and expand the Retail Sales and Use Tax agricultural exemption to include certain property, regardless of whether affixed to real property, used directly in producing agricultural products for market in an indoor, closed, controlled-environment agricultural facility. All items are required to be necessary to create, support and maintain the necessary growing environment for plants.

The exemption does not apply to property used in producing cannabis. This legislation is effective July 1, 2023.

5. Exemption for Data Centers. [House Bill 2479](#) and [Senate Bill 1522](#) amend Va. Code § 58.1-609.3 by extending the data center sales and use tax exemption to 2040 for a data center operator that (i) makes a capital investment of at least \$35 billion in data centers in the Commonwealth and (ii) creates at least 1,000 direct new jobs, of which at least 100 jobs pay 1.5 times the Commonwealth's prevailing average wage. A data center operator shall be considered to own a data center if it is operated on behalf of the data center operator pursuant to a long-term lease of at least 10 years. Such data center operator shall be eligible for further extension to 2050 if the data center operator (i) makes a total capital investment of at least \$100 billion, inclusive of the initial \$35 billion investment, and (ii) creates a total of at least 2,500 direct new jobs, of which at least 100 jobs pay 1.5 times the Commonwealth's prevailing average wage, inclusive of the 1,000 jobs initially created. The legislation is effective July 1, 2023.

**B. Court Decisions:** None

### C. Docketed Court Cases

1. *E-Labs, Inc. vs. Virginia Department of Taxation*, Case No. CL22-640-8. The taxpayer is a commercial laboratory facility located in Fredericksburg, Virginia. In June 2014, the Department initiated a sales tax audit for a six-year period between 2008 and 2014. The Department issued its assessment in 2015, and the taxpayer paid the bill in full. The taxpayer timely filed an administrative appeal and request for refund in 2016. The Tax Commissioner's final written determination denying the taxpayer's appeal was issued five years later in February 2021. The taxpayer then timely filed suit in circuit court in 2022. The taxpayer's position is that the items contested in the audit qualify for the exemption under Va. Code § 58.1-609.3(5), which relate to tangible personal property purchased for use or consumption in the experimental laboratory sense.

### D. Administrative Rulings

1. Manufacturing Exemption. [PD 23-26](#) (March 15, 2023). The taxpayer was an industrial manufacturer. Following an audit, the Department found that several purchases and fixed assets were taxable because the taxpayer could not show that tax had been properly charged and paid. On appeal, the taxpayer argued that the purchases and assets were not subject to retail sales and use tax because they qualified for the manufacturing exemption under Va. Code § 58.1-609.3. After examining each of the items under appeal, the Tax Commissioner determined that they did not qualify for the manufacturing exemption under Va. Code § 58.1-609.3 or 23 Va. Admin. Code § 10-210-920.
2. Medicines and Drugs Exemption. [PD 23-22](#) (March 1, 2023). The taxpayer, an operator of medical diagnostic laboratories, was denied a refund during an audit by the Department on certain reagents used in its facilities in Virginia. Va. Code § 58.1-609.10(9) provides an exemption for "medicines and drugs purchased for use or consumption by a licensed hospital, nursing home, clinic, or similar corporation." The Tax Commissioner ruled that the taxpayer did not qualify for this exemption because it provided diagnostic testing in a laboratory setting and does not provide direct medical treatment and care to individuals on an inpatient or outpatient basis.
3. Additional Information Provided in Appeal. [PD 23-20](#) (March 1, 2023). The taxpayer, an operator of gas stations in Virginia, was audited for the periods at issue relating to sales and use taxes on cigarettes. During the appeal, the taxpayer provided additional information showing that the exceptions identified by the auditor may have been overstated and that sales



taxes may have been paid on some of its inventory. The Tax Commissioner returned the audit to the field audit staff for revision.

4. No Adjustments to Audit. [PD 23-18](#) (February 21, 2023). The Tax Commissioner ruled that the taxpayer, a seller and installer of HVAC units and fireplaces, was required to remit all sales taxes it erroneously collected from its customers on its installation jobs to the Department unless it refunded the taxes to its customer. Second, the Tax Commissioner ruled that the taxpayer should have collected and remitted sales taxes on sales of tangible personal property to customers without installation. Third, the Tax Commissioner ruled that because the taxpayer had not provided any evidence that it had already paid sales or use taxes on tangible personal property used in installation jobs, no adjustment would apply to those items.
5. Taxes Erroneously Paid to Another State. [PD 23-17](#) (February 21, 2023). The taxpayer, a physician's office with two locations in Virginia, was audited for the period at issue. During an audit, the Department found that the taxpayer had erroneously paid sales taxes to another state on asset purchases that were taxable in Virginia. The taxpayer appealed. 23 Va. Admin. Code § 10-210-450 allows a credit for sales and use taxes paid elsewhere, but the credit does not apply to taxes erroneously charge or incorrectly paid to another state. Therefore, the Tax Commissioner ruled that no relief could be granted to the taxpayer. The taxpayer must apply to the out-of-state seller for a refund.
6. Credit Card Fees. [PD 23-16](#) (February 21, 2023). The taxpayer, a dealer that sells plumbing supplies, was audited for the periods at issue. During an audit, the Department determined that the taxpayer was liable for sales tax on credit card fees charged to customers in connection with the sale of tangible personal property. On appeal, the Tax Commissioner ruled that pursuant to Va. Code § 58.1-603, any charge in connection with the sale of tangible personal property is subject to tax unless it is specifically exempt. Accordingly, the Tax Commissioner offered no relief to the taxpayer.
7. Sales Price / Rental of Tangible Personal Property. [PD 23-9](#) (January 18, 2023). The taxpayer rented party inflatables, table games, and other entertainment items to customers in Virginia. The Department audited the taxpayer and assessed tax on transactions where inflatables were rented, and no tax was collected. The taxpayer contended the items should not be taxable, as they were rentals with an operator or attendant and many rentals were made to churches. The Tax Commissioner noted that under Va. Admin. Code § 10-210-4040, the true object of the rental was the rental of tangible personal property. "The attendant did not utilize specific skills required to maintain safety and control over the games." In addition, the rentals did not fall under the specific list of exemptions available to churches provided on Form ST-13A.

8. Exemption for Non-Profit Organizations. [PD 23-38](#) (April 12, 2023). The taxpayer, a 501(c)(3) organization, plans to operate a “donate what you can” restaurant in Virginia and requested a ruling on its sales tax liability. Meals will be offered to customers, who are asked to either make a monetary donation or volunteer their time as payment. The Tax Commissioner noted that prepared food and meals are tangible personal property and thus generally subject to retail sales and use tax. In general, no exemptions applied. Because the taxpayer must charge tax on the sales price of any non-exempt sales, the Tax Commissioner stated that it must have a method of accounting that separates the sales price from any donation received. If the taxpayer does have a method of accounting to separate payments made in one lump sum, the entire amount is taxable.
  
9. Exemption Certificates. [PD 23-40](#) (April 12, 2023). The taxpayer, a producer of corrugated packaging in Virginia, was audited for the period at issue. The taxpayer appealed the assessment, contending that sales made to two customers were exempt because it had a valid exemption certificate on file for both sales. On appeal, the Tax Commissioner observed that under 23 Va. Admin. Code § 10-210-280, a certificate that is incomplete is subject to greater scrutiny and will only be accepted if the Department can confirm that the customer’s use of the certificate was valid and proper. The exemption certificate provided by Customer #1 was incomplete. The certificate provided by Customer #2 was not presented to the auditor during the audit and therefore, was subject to greater scrutiny. In both cases, because he could not ascertain whether the customers’ use of the certificate was proper, the Tax Commissioner ruled that they must remain in the audit. *See also* [PD 23-41](#) (April 12, 2023).
  
10. Exemption Certificates Provided During Audit. [PD 23-68](#) (June 1, 2023). The taxpayer provided 353 exemption certificates and corrected ST-10Cs during the audit, but the auditor refused to review the documentation. On appeal, the Tax Commissioner noted that the Department more closely scrutinizes exemption certificates received during an audit receive than at the time of sale. The Department’s inquiry in such instances is to review the customer’s registration and filing history to see if it can reasonably conclude whether the purchases made by the customer would be exempt sales for resale. As no review was done by the Department, the Tax Commissioner returned the documentation to the auditor for review.

11. Exemption Certificates – Standard of Review. [PD 23-99](#) (August 17, 2023). The taxpayer, a wholesaler of clothing and apparel products, did not provide sale-for resale exemption certificates during the audit. The Department issued an assessment, and the taxpayer appealed. The Tax Commissioner noted the general rule under Va. Code § 58.1-623 that the dealer has the burden of proving a sale is not taxable unless he receives an exemption certificate from the customer. Va. Admin. Code § 10-210-280 states the certificate must be received in good faith by the dealer and that “reasonable care and judgment” must be exercised by all to prevent false or fraudulent certificates. *International Paper Company v. Virginia Dept. of Taxation*, CL-20090260 (2010) states the good faith and reasonable care standard is met if, upon examining the certificate, the dealer is able to reasonably conclude that the items could be used for the exempt purpose stated on the certificate. The *International Paper* standard is only acceptable when the certificate is received at the time of the transaction and produced at the time of the audit. Otherwise, the Department’s position is that the certificate was never accepted in good faith and that the dealer has the burden to prove the transaction was exempt. The Department provides greater scrutiny to certificates obtained during the audit or in an appeal. This scrutiny includes ascertaining whether the customer has a registration number and reviewing its sales and use tax filing history. Once this search is performed, the Department concludes whether the purchase was exempt. Turning back to the case, the Commissioner determined that some exemption certificates were acceptable while others were not because the customers were not registered with the Department to collect Virginia sales and use taxes.
  
12. Agricultural Exemptions – Structural Construction Materials. PD 23-8 (January 18, 2023). The taxpayer, a controlled indoor environment agriculture farm, asked the Department for a ruling on the application of Virginia retail sales and use tax to certain materials affixed to real property and other items of tangible personal property. The Tax Commissioner noted that while the agricultural exemption under Va. Code § 58.1-609.2.1 may apply to the taxpayer’s tangible personal property, it explicitly does not apply to structural construction materials affixed to real property. See [House Bill 1563](#) and [Senate Bill 1240](#), which now provide an exemption to agricultural property, regardless of whether it is affixed to real property, effective July 1, 2023.
  
13. Exemption for Pollution Control Equipment. [PD 23-6](#) (January 11, 2023). The taxpayer was awarded a contract for the construction of a bridge and tunnel system in Virginia. Va. Code § 58.1-609.3(9) provides an exempt from the retail sales and use tax for certified pollution equipment and facilities defined in § 58.1-3660, except for any equipment that has not been certified to the Department of Taxation by a state certifying authority

pursuant to such section.” The Department of Environmental Quality (DEQ) is the state agency that certifies the type of equipment for which the exemption is requested by the taxpayer. The Tax Commissioner ruled that the “Department’s position is that any property certified by the appropriate state certifying authority as pollution control equipment and facilities qualify for exemption from tax.”

14. Cabinet Installation. [PD 23-48](#) (April 26, 2023). The taxpayer was an operator of a chain of convenience stores located in Virginia that purchased cabinets, including installation from an out of state vendor. The transaction occurred prior to July 1, 2017, which removed language from Va. Code § 58.1-610(D) treating sellers of items such contractors who sell and install cabinets as retailers instead of consumers. Pursuant to the law change, contractors are now the end consumers and pay sales or use tax on such items, rather than collecting tax from their customers.
15. Exemption for Veterinary Drugs. [PD 23-55](#) (May 17, 2023). The Taxpayer requested a ruling on the application of the retail sales and use tax exemption provided in Virginia Code § 58.1-609.10(22) to all vaccinations purchased and administered by veterinarians to companion animals (canine, feline, equine). The Tax Commissioner ruled that pursuant to Va. Code § 58.1-609.10(9), medicines and drugs dispensed by or sold on prescriptions or work orders of veterinarians are exempt from the retail sales and use tax under. Also, Va. Code § 58.1-609.10 22 exempts veterinarians from retail sales and use tax on their purchases of prescription medicines and drugs that are administered or dispensed to patients within a veterinarian-client-patient relationship beginning July 1, 2022, and ending July 1, 2025.
16. Maintenance Contracts. [PD 23-115](#) (October 19, 2023). The taxpayer requested a ruling on the application of retail sales and use tax on optional vehicle service contracts (parts and labor) that can be added to a customer’s loan. The taxpayer indicated there are four parties involved in the facilitation of optional vehicle service contracts: Dealer A (the taxpayers) markets, negotiates, and sells the service contracts to the customers; Dealer B provides the actual maintenance (parts and labor); Dealer C is an insurance company that underwrites the contracts. In its ruling request, the taxpayer asked who was responsible for remitting sales taxes to the Department. The Tax Commissioner ruled that Dealer A was responsible, since it was the one making the sale and collecting sales taxes from the customer. The Tax Commissioner further noted that pursuant to Va. Code § 58.1-609.5(1), contracts which provide for labor and replacement parts are subject to 50% sales tax on the total charge.
17. Installation of Security Systems and Home Entertainment Systems. [PD 23-116](#) (October 19, 2023). The taxpayer sells, installs, services, and monitors security alarm systems, camera systems, smart home systems, and low

voltage structured cabling. It requested guidance regarding the application of the Virginia retail sales and use tax to various transactions. In the first scenario, the taxpayer installed security systems while the home was under construction. The monitoring of the alarm system would be contracted directly with the homeowner. Tax Commissioner noted that pursuant to Va. Admin. Code § 10-210-230(B), dealers making sales of non-monitored alarm systems are treated as making retail sales of such components and must collect and remit tax on the charge for the components. However, the dealer should pay tax at the time of purchase on all items used by it in the installation (e.g., wiring, nails, and other items that become part of the building). In the second scenario, the dealer inquired about wireless systems that it installed. Unlike the first scenario, the Tax Commissioner found it doubtful that such a system would become part of the real property. Consequently, he stated that it would likely be treated as a sale of tangible personal property subject to sales tax. In scenario three, the taxpayer asked about its installation of entertainment systems. The Tax Commissioner stated that he would have to better understand the installation and whether it was annexed to real property before providing any guidance.

18. Data Center Exemption. [PD 23-67](#) (June 1, 2023). The Tax Commissioner ruled that there is no requirement that equipment be delivered to a data center in order to qualify for the exemption under Va. Code § 58.1-609.3(18).
19. Event Venue – True Object Test. [PD 23-74](#) (June 23, 2023). The taxpayer, and event venue in Virginia, charged one lump sum amount for rental of the venue and any tangible personal property. The Department issued an assessment, and the taxpayer appealed. The Tax Commissioner gave the taxpayer a final opportunity to provide records. The taxpayer then appealed the revised assessments, arguing that they are not taxable because the provision of the space is not taxable and the tangible personal property included in the rental is not the true object of the transactions. On Appeal, the Tax Commissioner ruled that the true object test does not apply because the taxpayer did not provide a non-taxable service. Also, the Department's policy has been that when a dealer charges a lump sum amount for both taxable and nontaxable items in a transaction, the tax is applied to the entire transaction. For these reasons, the assessment was correct. *See also* [PD 23-73](#) (June 23, 2023).
20. Request for Reconsideration. [PD 23-120](#) (October 26, 2023). The taxpayer in 23-74 requested reconsideration of the Tax Commissioner's final determination pursuant to Va. Code § 58.1-1822. Although the request was timely filed within 45 days, the Tax Commissioner determined that the request did not satisfy the requirements for reconsideration. Specifically, the taxpayer alleged that the Tax Commissioner misstated the law because he failed to consider prior rulings holding that the rental of real estate

facilities was a non-taxable service. The Tax Commissioner ruled that those rulings did not apply here, as this case involved the rental of tangible personal property, which is subject to tax.

21. Statute of Limitations on Refund Claims. [PD 23-77](#) (July 6, 2023). The taxpayer, a truck dealership with locations inside and outside Virginia. The taxpayer filed amended returns with the Department to get a refund for sales taxes it overpaid. The Department sent a letter with questions to the taxpayer, but it did not respond before the three-year statute of limitations for claiming a refund expired. When the Department declined to extend the limitations period, the taxpayer filed an appeal. The Tax Commissioner ruled that for purposes of the three-years statute of limitations, an incomplete refund claim is not sufficient. Furthermore, the date of the request is the date when a complete refund claim is filed. As the taxpayer did not file a complete refund claim until after the statute had expired, the Tax Commissioner denied the taxpayer's refund claim.
22. Repair Charges Bundled with Tangible Personal Property. [PD 23-76](#) (July 6, 2023). The taxpayer, a tractor-trailer repair shop, invoiced its customer on a lump sum basis for sales of tangible personal property (repair parts) and charges for labor. The Department issued an assessment, and the taxpayer appealed. The Tax Commissioner noted that Va. Code § 58.1-609.5(2) provides an exception from retail sales tax if the charge for labor or services rendered in installing property sold is separately stated on the customer's invoice. When the charges are not separately stated, the entire amount is taxable.
23. Use Tax: Real Property vs. Tangible Personal Property. [PD 23-81](#) (July 6, 2023). The taxpayer operated a marine cargo terminal at the Port of Virginia. The Department assessed the taxpayer and assessed use taxes on the cost price of cranes installed by third parties and used by the taxpayer in handling crates at the Port. In PD 21-36, the Department rejected the taxpayer's alternative arguments that the sale was not taxable because it was an occasional sale, was a gift, or occurred outside the statute of limitations. The taxpayer requested reconsideration and asserted that the use tax cannot apply after the installation because the cranes had become affixed to real property. Applying the three-part test to determine real vs. tangible property provided by the Virginia Supreme Court in *Danville Holding Corp. v. Clement*, 178 Va. 223 (1941), the Tax Commissioner determined that the cranes became real property upon their installation. Furthermore, because the contractor who installed the cranes is treated as the consumer for use tax purposes, the Commissioner ruled the taxpayer was not liable for the tax.
24. Exemption – Non-Profit Schools / Book Fairs. [PD 23-87](#) (July 14, 2023). The taxpayer made retail sales of books at a fundraiser at Virginia schools and requested a ruling whether sales tax should be charged on the

transactions. The Tax Commissioner ruled that Va. Code § 58.1-609.4(8) provided an exemption for non-profit secondary schools for fundraising, but the exemption was repealed in 2003. Va. Code § 58.1-609.11 grandfathered the repealed exemptions. After July 1, 2007, entities qualifying for the exemption under Va. Code § 58.1-609.4(8) had to renew their exemption. The Department has a long-standing policy of granting exemptions to non-profit secondary schools. Accordingly, the Tax Commissioner ruled that the transaction was not subject to sales tax, as long as the school received the commission or net proceeds from the sale.

25. Direct Pay Permit. [PD 23-59](#) (May 24, 2023). The taxpayer, a supplier of industrial, medical, and specialty gases along with welding equipment was audited and assessed by the Department. The taxpayer appealed, contending it received documentation (a direct pay permit) supporting an exemption after the audit was closed. When a direct pay permit is used, the customer is to pay the sales taxes directly to the Department instead of the vendor. The Tax Commissioner referred the additional documentation to the field audit staff for review and any adjustment.
26. Refund Application. [PD 23-89](#) (August 3, 2023). The taxpayer, a Virginia-based subsidiary of a coal company, utilized a direct pay and front-end agreement to accrue and pay use taxes. Under the direct pay agreement, which is authorized by Va. Code § 58.1-624 and Va. Admin. Code § 10-210-920(F), taxpayers may pay Virginia sales and use taxes directly to the Department when it is not known at the time of the transaction how the item will be used. Under a front-end agreement signed by the Department, a taxpayer may pay tax based on an error factor on certain accounts payable for which taxability cannot be determined at the time of purchase. Front-end agreements are not provided by statute but have been respected and utilized by the Department. In this case, however, the taxpayer was using an error factor calculated in the late 1990s. Accordingly, while the refund claim was timely filed, the Tax Commissioner ordered a new audit to determine the correct error factor. *See also* [PD 23-90](#) (August 3, 2023).
27. Failure to Retain Records. [PD 23-96](#) (August 9, 2023). The Taxpayer, a moving business, was assessed use tax on purchases for which it could not provide documentation that sales tax had been paid to vendors or that the Taxpayer had accrued and remitted the use tax. The Department issued an assessment based on the information it had. On appeal, the Tax Commissioner noted that pursuant to Va. Code § 58.1-102, taxpayers are required to maintain records substantiating its tax liability for three years following the required date for filing the return. Va. Code § 58.1-103 further provides that such records shall be available during regular business hours for inspection by the Tax Commissioner or his agents. Also Va. Code § 58.1-205(1) provides that the taxpayer has the burden of proof to prove

an assessment is incorrect. As the taxpayer did not meet its burden, the Tax Commissioner ruled the assessment was correct.

28. Erroneously Collected Tax. [PD 23-100](#) (August 17, 2023). The taxpayer, a restaurant equipment maintenance provider, was audited and assessed for sales and use taxes it failed to remit to the Department. On appeal, the taxpayer argued that some of the items were not taxable. The Tax Commissioner rejected this argument as Va. Code § 58.1-625(C) requires that taxpayers remit to the Department all sales and uses taxes they collect. The Tax Commissioner also refused to waive penalties. Although penalties are generally waived on a first-generation audit, Va. Admin. Code § 10-210-2032(B)(3) provides penalties are not waived if the taxpayer collects sales taxes and fails to remit them to the Department.
29. Sample Methodology. [PD 23-101](#) (August 24, 2023). The taxpayer was an electrical contractor with headquarters and operations in Virginia. In a second generation audit, the Department found that the taxpayer did not pay sales tax on various transactions and assessed tax, penalties, and interest. On appeal, the taxpayer agreed with the items in the exceptions list but disagreed with the sample because it included atypical transactions. The Tax Commissioner stated the Department's policy is that a transaction will not be removed from an audit sample unless the taxpayer establishes that the transaction is an isolated event and not part of its normal operations. Because the taxpayer regularly made similar purchases from other vendors, the Tax Commissioner declined to remove them from the audit. Regarding penalties, the Tax Commissioner noted that in a second generation audit, penalties will only be waived unless the taxpayer's compliance ratios meet or exceed 85% for sales tax and 60% for use tax. The Commissioner instructed the taxpayer to calculate its compliance ratio and provide supporting documentation to determine if the alternative method was met.
30. Agricultural Exemption. [PD 23-102](#) (August 24, 2023). That taxpayer, a Virginia farm that produces apples and grapes for market, requested a ruling on whether its purchase of salt-treated wood, used as support posts, qualified for the agriculture exemption from retail sales and use tax. Va. Code § 58.1-609.2(1) provides an exemption from tangible personal property, except structural construction materials affixed to real property owned or leased by a farmer, necessary for use in agricultural production for market and sold to or purchased by a farmer or contractor. Pursuant to additional analysis in the ruling, the Tax Commissioner determined that support posts qualified for the exemption.
31. Direct-Pay Permits / Front-End Agreements. [PD 23-108](#) (October 5, 2023). The taxpayer, a Virginia based subsidiary of a coal company that manufactures products derived from coal, filed amended returns for the periods at issue. The taxpayer claims it overpaid its use tax pursuant to its



direct pay permit and front-end agreement that it inherited from its predecessor. The taxpayer believed that the error ratio in the front-end agreement was overstated. The Department agreed that the error ratio was likely incorrect due to the passage of time and stated that an audit was necessary to confirm its accuracy. Accordingly, the Tax Commissioner ordered an audit, which he said should be completed in 3-year cycles.

32. Exemption for Bullion. [PD 23-117](#) (October 19, 2023). The taxpayer purchased sterling silver flatware and requested a ruling to determine if it met the criteria for the exemption. The Tax Commissioner noted that Va. Code § 58.1-609.1(19) provides an exemption from sales and use tax for gold, silver, or platinum or legal tender coins whose sales price exceeds \$1,000. In evaluating the requirements for the exemption, the Tax Commissioner found it was questionable that the items contained at least 90% gold, silver, platinum or some combination thereof. Also, looking at another requirement, the Tax Commissioner found that the seller did not appear to limit the sales price to fluctuation based on the price of the underlying metal.
33. Manufacturing Exemption. [PD 23-118](#) (October 26, 2023). The taxpayer was a manufacturer of hardwoods that it sold to vendors who produce furniture, flooring, and other like items. The auditor determined that certain items of tangible personal property purchased without paying sales or use tax were not directly used in manufacturing or processing. The taxpayer appealed, contending that including two items, kiln decking and a picture tally system, should qualified for the exemption. The Tax Commissioner, noted that Va. Code § 58.1-609.3(2)(iii) provides an exemption for machinery and repair parts used directly in processing, mining, or converting products for sale or resale. Regarding the kiln decking, which was used to regulate airflow inside of a kiln chamber that holds wood, the Tax Commissioner ruled that was not directly used in the production process or an immediate part of the production process. Instead, it merely aided the drying of raw wood before it was put into production. As to the tally system, the Tax Commissioner found that it was primarily used as a way of tracking and managing inventory after the raw wood had been processed into usable lumber. Accordingly, the Tax Commissioner ruled that it did not qualify for exemption.
34. Failure to File Returns. [PD 23-119](#) (October 26, 2023). The taxpayer failed to file returns for the periods at issue, so the Department issued a substitute return and assessed the taxpayer. On appeal, the Tax Commissioner instructed the taxpayer to file original returns within 60 days and consider making adjustments based on the new information provided. The Tax Commissioner noted that if the taxpayer did not submit the original returns within 60 days, the Department's estimated assessment will be considered correct and collection action may resume.

## V. TAX CREDITS

### A. 2023 Legislation

1. Land Preservation Tax Credits. [House Bill 1834](#) amends Va. Code § 58.1-512 by extending the deadline for filing a complete application for the land preservation tax credit for conveyances made on or after January 1, 2017. The deadline is extended for any number of days exceeding 90 during which the application is being reviewed for verification of conservation value by the Department of Conservation and Recreation, provided that such application is otherwise complete at the time of the original filing deadline. This legislation is effective July 1, 2023.
2. Livable Home Tax Credit. [House Bill 2099](#) amends Va. Code § 58.1-339.7 by increasing the aggregate cap of the Livable Home Tax Credit from \$1 million to \$2 million per fiscal year, as well as increase the maximum amount of Livable Home Tax Credits a taxpayer may claim per year from \$5,000 to \$6,500. The provisions regarding the changes in the amount of the Livable Home Tax Credit a taxpayer may claim per year apply to taxable years beginning on and after January 1, 2023. This legislation is effective July 1, 2023.
3. Firearm Safety Device Tax Credit. [House Bill 2099](#) amends Va. Code § 58.1-339.7 by increasing the aggregate cap of the Livable Home Tax Credit from \$1 million to \$2 million per fiscal year, as well as increase the maximum amount of Livable Home Tax Credits a taxpayer may claim per year from \$5,000 to \$6,500. The provisions regarding the changes in the amount of the Livable Home Tax Credit a taxpayer may claim per year apply to taxable years beginning on and after January 1, 2023. This legislation is effective July 1, 2023.
4. Virginia Port Authority; Tax Credits and Grants. [House Bill 1832](#) and [Senate Bill 1345](#) amend Va. Code § 62.1-132.3:2 by converting tax credits to grant programs, including the Barge and Rail Usage Tax Credit and the Virginia Port Volume Increase Tax Credit when they expire on January 1, 2025. The legislation also converts the Port of Virginia Economic Development Grant Program to consist of two component programs: The Economic and Infrastructure Development Grant Program and the International Trade Facility Grant Program in replacement of the International Trade Facility Tax Credit. The bill also moves the sunset date of the existing Port of Virginia Economic and Infrastructure Development Grant Fund and Program from June 30, 2025, to December 31, 2024.

5. Wholesome Food Donation Tax Credit. [House Bill 2445](#) and [Senate Bill 1525](#) amend Va. Code § 58.1-439.12:12 and renew the Wholesome Food Donation Tax Credit for taxable years beginning on or after January 1, 2023 but before January 1, 2028. The legislation allows any person engaged in the business of farming that donates food crops or wholesome food, defined in the bill, produced by the person in the Commonwealth and donated to a nonprofit food bank to claim a tax credit for the taxable year of the donation in the amount of 50 percent (up from 30 percent under current law) of the fair market value of such donation, not to exceed \$10,000 for all such donations made by the person during such year. "Wholesome food" is defined as food that meets all quality and labeling standards imposed by federal, state, and local laws or regulations, including food that may not be readily marketable due to appearance, age, freshness, grade, surplus, or other condition. This legislation is effective July 1, 2023.

**B. Court Decisions:** None

**C. Docketed Court Cases:** None

**D. Administrative Rulings**

1. Farm Wineries and Vineyards Tax Credit. [PD 23-23](#) (March 1, 2023). Va. Code § 58.1-339.12 allows a credit equal to 25% of the cost of all qualified capital expenditures made in connection with the establishment of new Virginia wineries and vineyard or capital improvements to existing Virginia wineries and vineyards. The aggregate amount of the credit for all taxpayers is limited to \$250,000 each year. In this case, the taxpayer submitted its application credit after the April 1 deadline. The application had been mailed earlier with a March 31 postmark, but it was returned for not having sufficient postage. The Tax Commissioner ruled that the April 1 deadline must be strictly enforced and denied relief. *See also* [PD 23-7](#).
2. Research and Development Credit. [PD 23-10](#) (January 18, 2023). The Department received the taxpayer's Form RDC, Application for Research and Development Expenses Tax Credit for the 2021 tax year on September 8, 2022. The application did not bear a postmark. The Department denied the application, and the taxpayer appealed. Va. Code § 58.1-439.12:08(E) provides that applications for the credit "must be received by the Department no later than September 1 of the calendar year following the close of the taxable year in which the expenses were paid or incurred." Because the credit is subject to an annual cap, the Tax Commissioner noted that the Department must have a deadline for tax credit applications. Accordingly, the Tax Commissioner denied the taxpayer's request.
3. Qualified Equity and Subordinated Debt Credit. [PD 23-33](#) (March 29, 2023). The taxpayer filed an application after the April 1 deadline for

claiming the credit because his accountant forgot to file the form on time. Pursuant to 23 Va. Admin. Code § 10-110-288, the application must be filed no later than April 1 of the year following the investment. The Tax Commissioner ruled that this hard deadline applies without regard to a taxpayer's reliance on a third party to file the application.

## VI. MISCELLANEOUS TAXES

### A. 2023 Legislation

1. Electronic Filing of Bank Franchise Tax. [House Bill 1896](#) and [Senate Bill 1182](#) amend Va. Code §§ 58.1-1206, 58.1-1207, and 58.1-1212 by requiring banks to file their annual bank franchise tax returns electronically through a secure online portal maintained by the Department of Taxation (“the Department”). Any bank is permitted, in accordance with procedures established by the Tax Commissioner, to elect a 60-day filing extension for the return and schedules. In addition, the legislation provides that all localities imposing a local bank franchise tax must provide electronic processes for banks to access real estate assessment records. This legislation is effective January 1, 2025.
2. Transient Occupancy Tax. [House Bill 1442](#) adds Va. Code §§ 58.1-210.1 and 58.1-3827 and requires the Department of Taxation to annually publish on its website the current transient occupancy tax rates imposed in each locality. The legislation also (i) requires the tax-assessing officer of a locality to administer and enforce the assessment and collection of transient occupancy taxes from accommodations intermediaries, and (ii) specifies certain return filing requirements for accommodations intermediaries. This legislation is effective July 1, 2023.
3. Coal and Gas Improvement Funds Eligible for Flood Mitigation Use. [HB 2401](#) amends Va. Code § 58.1-3713 by providing that funds in the Coal and Gas Road Improvement Fund may be used to construct flood mitigation measures that would reduce or prevent flooding of allowable infrastructure. The legislation also extends the sunset date for the expiration of the local gas road improvement and Virginia Coalfield Economic Development Authority (“VCEDA”) tax from January 1, 2024, to January 1, 2026. The legislation is effective July 1, 2023.

### B. Court Decisions

1. *Amazon Logistics, Inc. v. Virginia Employment Commission*, 78 Va. App 521 (2023). Amazon utilizes a “Flex” driver program that is an Uber-like system of independent drivers who deliver Amazon packages. One of the drivers, Ronald Diggs, filed an unemployment claim with the Virginia

Employment Commission (“VEC”), which determined that Diggs was an employee under the Virginia Unemployment Act. Amazon appealed to circuit court, which affirmed the VEC’s determination. Amazon then appealed to the Virginia Court of Appeals, which noted that the burden is on the employer to show that the service rendered to it does not constitute “employment.” The Court of Appeals then applied the facts to the 20-factor test set forth under IRS Rev. Rul 87-41 and determined that Diggs was an employee for unemployment purposes.

**C. Docketed Court Cases:** None

**D. Administrative Rulings**

1. Guidelines for the Classification of Workers. [PD 23-88](#) (July 31, 2023). The Tax Commissioner issued guidelines for the classification of workers. The ruling notes the presumption that any individual who performs services for another person or entity is considered an employee. It also outlines the penalties and other consequences for misclassifying employees.
2. Aircraft Sales and Use Tax. [PD 23-53](#) (May 17, 2023). The taxpayer was an air carrier authorized by the Federal Aviation Administration to operate as an air carrier in Virginia. The aircraft at issue is operating under Federal Aviation Regulation Part 135. Va. Code § 58.1-1505 provides an exemption to the aircraft sales and use tax for, “any air carrier operating in intrastate, interstate . . . providing scheduled air service as defined in § 58.1-1501.” Va. Code § 58.1-1501 defines scheduled air service as “any scheduled service provided by an air carrier or foreign air carrier operating pursuant to . . . Federal Aviation Regulations, Parts 121, 129, or 135.” Under Part 135, an aircraft can operate as a common carrier providing scheduled air service, or as an on-demand operator offering chartered flights. The Tax Commissioner found that the aircraft has been providing on-demand air services and therefore did not qualify for exemption. *See also* [PD 23-54](#) (May 17, 2023).
3. Transient Occupancy Tax – Lack of Jurisdiction. [PD 23-60](#) (May 24, 2023). The Tax Commissioner ruled that he did not have jurisdiction to review an assessment of a local transient occupancy tax and related penalty. Va. Code § 58.1-3983.1(D) provides that the Department’s jurisdiction is limited to appeals from final local determinations concerning local business and mobile property tax assessments. The local occupancy tax is not a “local business” or “mobile property tax,” as defined under the statute.
4. Disposable Plastic Bag Tax. [PD 23-78](#) (July 6, 2023). The taxpayer, a non-profit corporation, requested a ruling as to whether it was subject to Virginia’s plastic bag tax, at its operations at Fort Belvoir, a U.S. Army base, in Fairfax County, Virginia. Va. Code § 58.1-1 permits any county or

city in Virginia to adopt an ordinance imposing a 5-cent tax for each disposable plastic bag provided to a consumer in grocery stores, convenience stores, or drugstores. Title 4 U.S.C. § 1(D)(5) permits a state to levy sales and use tax within a federal area. Fairfax adopted an ordinance imposing the plastic bag tax. Accordingly, the Tax Commissioner ruled that if the taxpayer is a grocery store, convenience store, or drug store, it is subject to the County's plastic bag tax.

5. Withholding Taxes. [PD 23-3](#) (January 6, 2023). ). The Tax Department issued assessments for withholding tax due. The Taxpayer, a nonprofit organization, appealed, contending the workers in question were independent contractors. The Department's regulations require an evaluation of an employer's records to determine if its workers are employees or independent contractors pursuant to the factors enumerated in Treas. Reg. § 31.3121(d)-1, Rev. Rul. 87-41, and IRS Publication 15-A. Because audit staff failed to evaluate the Taxpayer's records to determine whether certain of its sales staff were employees or independent contractors, the case was returned to the audit staff to conduct a complete examination.

## VII. PROCEDURAL / COLLECTIONS

### A. 2023 Legislation

1. Period of Limitations on Collection. [House Bill 1625](#) amends Va. Code § 58.1-1802.1 by suspending the statute of limitations on state tax collections actions while any administrative or judicial proceedings contesting the assessment are pending. The legislation also repeals a provision suspending the statute of limitations while the taxpayer is outside of the Commonwealth. Under current law, collection actions must cease after 7 years from the date of assessment. The running of the 7-year statute of limitations is suspended while the taxpayer is in bankruptcy, is located outside of Virginia for more than 6 months, or has entered into an installment agreement. This legislation is effective July 1, 2023.
2. Work Group. [House Bill 1368](#) requires the Department of Taxation to convene a work group to study its current policies and procedures in order to determine options for a mechanism for tax practitioners to provide feedback to the Department on an ongoing basis. The work group must include members selected by the Tax Section of the Virginia State Bar Association, the Virginia Society of Certified Public Accounts, and the Virginia Society of Enrolled Agents. The work group will complete its meetings by November 1, 2023, and the Department must submit a report of its findings and recommendations to the Chairmen of the House Committee on Finance, the House Committee on Appropriations and the Senate Committee on Finance and Appropriations by December 1, 2023.
3. Filing of Tax Returns or Payment of Taxes by Mail. [House Bill 1927](#) amends Va. Code §§ 58.1-9 and 58.1-3916 by allowing a tax return or a tax payment to be deemed to have been timely received if, through no fault of the taxpayer, no postmark is affixed, or if the postmark affixed by the U.S. Postal Service is illegible or bears no date and such tax return or payment is received within five days of the due date. The legislation also provides that no penalty or interest will be imposed if a taxpayer provides evidence that a return filing or payment was timely processed by producing a U.S. Post Service Certificate of Mailing, or other proof of mailing, showing such return or payment was made on time, or if a taxpayer's failure to file a return or make a payment to a locality was the fault of the U.S. Postal Service. This legislation is effective July 1, 2023.
4. Litter Tax. [House Bill 1645](#) and [Senate Bill 996](#) amend Va. Code § 58.1-1709 by limiting the Department of Taxation's ability to impose penalty and interest for failure to pay the litter tax in full without notifying the taxpayer 30 days prior to the return due date that a return is required. Under current law, penalty and interest is generally applied to delinquent litter taxes, and

there is no requirement for the Department to provide notice that a return is required or the due date. This legislation is effective July 1, 2023.

**B. Court Decisions:** None

**C. Docketed Court Cases:** None

**D. Administrative Rulings**

1. Statute of Limitations to File Refund Claim. [PD 23-70](#) (June 7, 2023). The Tax Commissioner denied a taxpayer's refund claim for individual income taxes because it was not filed within three years from the last day prescribed by law for timely filing of the return, as required by Va. Code § 58.1-499(D).
2. Statute of Limitations on Collections. [PD 23-27](#) (March 15, 2023). The taxpayer did not file individual income tax returns for the taxable years 1987 through 1993. As a result, the Department issued assessments. Liens were filed with multiple banks in 2004, which was within 20 years of when the assessments were issued between 1994 and 1996. Another lien was filed in 2021. The taxpayer asserted that all liens placed on his account should be released because the 7-year statute of limitations had expired. The Tax Commissioner noted that although Va. Code § 58.1-1802.1 currently limits the Department's collections actions to 7 years from the date of assessment, even if collections efforts were initiated during the seven-year period, this law only applies to assessments made on or after July 1, 2016. The limitations period on collections when the assessments were made was 20 years, and it was the Department's policy that so long as any collection action was initiated or made before the end of the limitations period, collections could continue to be made until the assessment was satisfied. Accordingly, the Tax Commissioner ruled that the taxpayer's liabilities from 1987 through 1993 remained collectable.
3. Reconsideration of Tax Commissioner's Ruling. [PD 23-28](#) (March 15, 2023). In PD 22-53, the Department found that the taxpayer was a domiciliary resident of Virginia. The taxpayer contended that her facts were very similar to those in PD 00-151, in which the taxpayer was found to abandon his Virginia domicile. 23 Va. Admin. Code § 10-20-165(F) provides the procedure to request reconsideration of determination. Among other requirements, the request must be received by the Department no later than 45 days after the determination letter and provide a substantive reason for requesting reconsideration: "Mere disagreements about the conclusion do not satisfy any of the reconsideration criteria." Because none of these criteria were satisfied, the Tax Commissioner ruled that request was not correctly filed. Also, looking at the underlying facts, the Tax Commissioner found no reason to change his original determination.



4. Reconsideration of Tax Commissioner’s Ruling Denied. [PD 23-13](#) (January 18, 2023). The taxpayer sought reconsideration of the Tax Commissioner’s determination in PD 20-80 relating to sales and use taxes for various reasons. 23 Va. Admin. Code § 10-20-165(F) permits taxpayers to request reconsideration of a determination issued under Va. Code § 58.1-1821 if there the Tax Commissioner misstated the material facts in its determination, there has been a change in law, the Department’s policy has been misapplied, or the taxpayer has discovered additional evidence that would have changed the outcome and that was not available when the original appeal was filed. Because the taxpayer’s request for reconsideration did not satisfy any of these criteria, the Tax Commissioner denied the taxpayer’s request.
5. Administrative Appeal Not Timely Filed. [PD 23-35](#) (April 5, 2023). The Department audited two taxpayers, a married couple, and found they were Virginia residents for the applicable tax years. Pursuant to Va. Code § 58.1-1821, the taxpayers had 90 days from the date of the assessment to file their administrative appeals. The assessments were issued on March 12, 2021, and the taxpayers did not file their appeal until March 22, 2022. Because this was outside the 90-day period, the Tax Commissioner held that their appeal was barred by the statute of limitations.
6. Request for Reconsideration Not Timely Filed. [PD 23-111](#) (October 19, 2023). In PD 23-35, the Tax Commissioner ruled that the taxpayer’s administrative appeal was not timely filed. In PD 23-111, the Tax Commissioner ruled that the taxpayer’s request for reconsideration of his determination was not timely filed within the 45-day period required under Va. Admin. Code § 10-20-165(F). The Tax Commissioner also rejected the taxpayer’s claim that it did not receive the assessment because it was sent to the taxpayer’s last-known address. Consequently, the Department had satisfied its statutory obligation under Va. Code § 58.1-1820.
7. Statute of Limitations / Authority to Tax. [PD 23-37](#) (April 5, 2023). The taxpayer filed an appeal contending the assessments for individual income taxes should be abated because he was not a United States citizen, did not contract to pay income taxes to Virginia, and various other frivolous claims. The ruling provides an excellent overview of the deadline for filing appeals and protective claims, the statute of limitations for requesting a refund, and the authority of the Department to tax.
8. Local Appeals – Jurisdiction. [PD 23-42](#) (April 12, 2023). The taxpayer, an amusement park operator, submitted a refund claim to County A for business personal property taxes. In response, the County issued a “Final Determination Letter,” and the taxpayer filed an appeal to the Department.

The Tax Commissioner ruled that until the local appeals process is completed, the Department does not have jurisdiction to decide the taxpayer's appeal on the merits. Here, no local appeal took place. If the County issues a final determination and the taxpayer disagrees with the outcome, it may file an administrative appeal with the Department under § 58.1-3983.1 or the local circuit court under § 58.1-3980.

9. Assessment – Federal Information Statute of Limitations. [PD 23-44](#) (April 19, 2023). The taxpayer failed to notify the Department of the adjustments to her federal gross adjusted income following an audit by the Internal Revenue Service for tax years 2017, 2018, and 2019. Because the taxpayer did not file amended Virginia returns, the Department issued an assessment. The taxpayer appealed. Va. Code § 58.1-311, any individual to report a change or correction in federal taxable income within one year of the final determination of such change or correction by filing an amended return with the Department. If the taxpayer fails to file an amended return, the Department may assess the appropriate tax at any time. Accordingly, the Tax Commissioner denied the taxpayer's appeal.
10. Assessment – Lien on Joint Account. [PD 23-63](#) (May 24, 2023). The Taxpayers, a husband and wife, were married in April 2018. In March 2022, the Department levied the couple's joint account to satisfy an income tax liability that husband brought to the marriage and did not involve the wife. Va. Code § 6.2-606(A) provides that a husband and wife are presumed to own the funds in a joint account equally. This creates a presumption that each spouse owns one-half of the funds. Accordingly, the Tax Commissioner ordered a refund to reflect this determination.
11. Audit Period. [PD 23-73](#) (June 23, 2023). In a sales and use tax audit, the Extension of Time Limitation Agreement signed by the taxpayer indicated a six-year audit period from October 2013 through September 2019. The taxpayer stated that the audit period should be limited to the period indicated on the waiver, but the auditor brought the audit forward to include 2020 and 2021. On appeal, the Tax Commissioner ruled that absent evidence that the taxpayer and the auditor mutually agreed to bring the audit period current, the audit must be limited to only include the six-year period agreed upon in the waiver.
12. No Jurisdiction without Local Determination. [PD 23-34](#) (March 29, 2023). The Taxpayer received an assessment of BTPP tax for 2022 that was more than 50% greater than the prior tax year. The Taxpayer filed an appeal with the Tax Department, contending that the property at issue was overvalued by the City. Because no local business tax appeal was filed, the Taxpayer must first file an appeal to the City pursuant to Va. Code § 58.1-3983.1. Once a final local determination is issued by the City, the Taxpayer would

have 90 days to file an appeal with the Department if it disagrees with the outcome.

## VIII. REAL PROPERTY TAXES

### A. 2023 Legislation

1. Data Centers. [Item 3-5.29](#) of the 2023 Appropriations Act (House Bill 6001, Special Session I) clarifies Va. Code § 58.1-3295.3 by stating that when fixtures in a data center are classified as real estate and valued by a locality based on the cost approach (cost less depreciation) rather than the income generated, they must be assessed at 100% of fair market value as determined by the cost approach and consistent with state law.
2. Notice of Rate and Assessment Changes. [House Bill 1942](#) amends Va. Code § 58.1-3330(B) by requiring that, in any county, city, or town that conducts an annual or biennial reassessment of real estate or in which the reassessment of real estate is conducted primarily by employees of the locality under direction of the commissioner of the revenue, if the proposed real estate tax rate exceeds the “lowered tax rate” under Va. Code § 58.1-3221 that would result in the locality collecting no greater than 101 percent of the previous year’s real property taxes, the notice shall set out the effective tax rate increase. This legislation is effective July 1, 2023.
3. Installment Agreement for Delinquent Tax Lands. [House Bill 2110](#) amends Va. Code § 58.1-3965 by extending to 72 months the time period for which a local tax official may suspend an action for the sale of tax delinquent property upon entering into an agreement with the owner of the property for the full payment of the delinquent amounts in installments within that period. Under current law, local tax officials may suspend an action for the sale of tax delinquent property for up to 60 months if the taxpayer enters into an agreement to pay the delinquent taxes in installments within those 60 months. This legislation is effective July 1, 2023.
4. Exemption for Disabled Veterans. [House Bill 2414](#) amends Va. Code § 58.1-3219.6 by providing that, for purposes of the real property tax exemption for disabled veterans, the veteran or surviving spouse may claim the exemption prior to purchasing the qualifying dwelling by filing any required documentation, including valid documentation of the purchase agreement for the qualifying dwelling. The commissioner of the revenue of the must, within 20 business days following receipt of such documentation, process the application and send the veteran a letter stating whether the application is approved or denied. If the application is approved, the letter must also include the amount of the tax exemption for the qualifying property the veteran intends to purchase. However, the exemption described in such a letter will become effective only after the veteran becomes the owner of the property. This legislation is effective July 1, 2023.

5. Deed Recordation; Address Transfer for Taxation. [Senate Bill 1389](#) amends Va. Code § 58.1-3303 by requiring that the local commissioner of revenue must, upon receipt and review of the recordation receipt from the clerk of the circuit court of his jurisdiction, ensure that the land book is updated to reflect each grantee and property address or any other such address as may be specified in writing by the grantee for the delivery of future tax bills.
  
6. Land Use Classifications; Property Qualifications. [Senate Bill 1511](#) amends Va. Code §§ 58.1-3230 and 58.1-3234 by allowing a property that formerly participated in and continues to meet the qualifications of a state or federal soil and water conservation program but is no longer receiving payments or other compensation as a result of such program to continue to be eligible for designation as real estate devoted to agricultural use and real estate devoted to horticultural use. The legislation further provides that the presence of noxious weeds or woody growth shall not be the sole basis for denial of a property's designation as real estate devoted to agricultural use. Further, the bill requires that the application form for taxation on the basis of a use assessment allow a landowner who received payments or compensation as a result of the former participation of his property in a state or federal soil and water conservation program, and whose property continues to meet the qualifications of such program but is no longer receiving such payments or compensation, to certify that the land continues to meet the requirements of such program for the purposes of classification. The legislation is effective July 1, 2023.

## **B. Court Decisions**

1. *Mekeithen vs. City of Richmond*, Dkt. No. 210389 (Va. October 19, 2023). At the time of his death in 2006, Charles H. Davis, Sr. owned a parcel of property in Richmond, Virginia. Payment of the local property taxes ceased after his death. The City filed an action in 2017 seeking a judicial sale of the property to satisfy its statutory lien for 10 years of unpaid taxes. Two prior liens had been recorded. The earliest lien, a deed of trust recorded in 2001, had been filed by Dixie Jones, who subsequently died, but the lien remained subject to the claim of her unknown heirs. The later lien, recorded in 2012, existed in favor of the Caldwell Trust and its unsecured debt of \$100,000.

After proper notice was given, the property was sold at auction. Under Va. Code § 58.1-3340, the City's tax lien took property over all prior liens on the property. The City was paid in full, along with attorneys' fees. The remaining funds (about \$21,000) were set aside for the unknown Jones heirs (\$14,000) and the Caldwell Trust (\$7,000). When the unknown Jones heirs did not come forward within the 2 years provided under law to claim their share, the Caldwell Trust asserted that the remaining \$14,000 should be

distributed to the Trust and applied against the decedent's unsecured \$100,000 debt. The City balked, asserting that the unclaimed funds were escheated to the City under Va. Code § 58.1-3967. The circuit court agreed with the City.

On appeal, the Supreme Court of Virginia ruled that the circuit court's interpretation of Va. Code § 58.1-3967 was correct. The \$14,000 unclaimed by the Jones escheated to the City and could not be distributed to the Caldwell Trust. However, the Court also ruled that it involved an unconstitutional "taking" that violated Art. I, Sect. 11 of the Constitution of Virginia. The Court then remanded the case back to the circuit court.

**C. Docketed Court Cases:** None

**D. Administrative Rulings**

1. Recordation Tax. [PD 23-49](#) (April 26, 2023). An individual acquired four condominium units between 2000 and 2004. Each unit was encumbered by a different deed of trust with different lenders. The four units were transferred to the taxpayer, a single member limited liability company owned by an individual. The taxpayer negotiated with a bank to issue a single loan secured by a deed of trust to pay off the four existing loans. The new deed of trust provided that the bank had made a commercial loan mortgage loan to the taxpayer to refinance the four units. The County assessed the general rate for recording a deed of trust or mortgage, and the taxpayer contended that the lower rate for refinancing applied. On appeal, the Tax Commissioner noted that the terms "refinance" or "refinancing" are not defined by the Virginia Code and that the determination must be based on all facts and circumstances. The Tax Commissioner also noted that Va. Code § 58.1-320 provides that "every deed of trust . . . is in the nature of a contract and shall be construed according to its terms to the extent not in conflict with the requirements of law." Because the sole member of the taxpayer was the original borrower and the deed stated that it was intended to be a refinance, the Tax Commissioner ruled that the rate for refinancing the deed should have been applied and ordered a refund.

## **IX. TANGIBLE PERSONAL PROPERTY TAXES / MACHINERY & TOOLS TAXES**

### **A. 2023 Legislation**

1. **Farm Machinery and Farm Implements.** [House Bill 1486](#) amends Va. Code § 58.1-3505 by expanding the list of farm machinery and farm implements that a locality may exempt from personal property taxes to include (i) motor vehicles used primarily for agricultural purposes, (ii) privately owned trailers primarily used by farmers in their farming operations, and (iii) season-extending vegetable hoop houses used for in-field production of produce. The legislation states that a locality that exempts motor vehicles or privately owned trailers pursuant to these provisions shall not collect any unpaid tangible personal property taxes, including interest or penalties, which are owed to the locality as of July 1, 2023. Any such unpaid taxes shall be stricken from the books of the treasurer. This legislation is effective July 1, 2023.

### **B. Court Decisions: None**

### **C. Docketed Court Cases: None**

### **D. Administrative Rulings**

1. **Appeals Procedure.** [P.D. 23-34](#) (March 29, 2023). The taxpayer received an assessment of business tangible personal property taxes from the locality and filed an appeal with the Department claiming that the subject property was overvalued. The Tax Commissioner declined to intervene, citing lack of jurisdiction. Pursuant to Va. Code § 58.1-3983.1, taxpayers who wish to appeal an assessment from a locality must first file an administrative appeal with the locality. Only when the locality has issued a final determination can a taxpayer file an administrative appeal with the Department.
2. **BTTP Tax – Classification.** [PD 23-43](#) (April 12, 2023). The taxpayer operated a business that extracts limestone from open pit quarries in the County. The County audited the taxpayer and determined that it was subject to M&T tax on all of its equipment as a processor resulting in an assessment for 2020 and 2021. The taxpayer appealed to the County contending that it was only subject to tax on M&T used in its mining operations and that all other assets were exempt from tax. The County issued a final local determination concluding that the taxpayer was engaged in quarrying, not mining, and therefore, all of its equipment not used in mining was subject to M&T tax. On appeal to the Department of Taxation, the Tax Commissioner first shot down the County's contention that the taxpayer was barred from appealing the County's classification because it had not appealed such classification in prior tax years. According to the Tax Commissioner, there is nothing in the statutes or regulations prohibiting a

taxpayer from appealing an assessment or amending a prior year return simply because the issue was not asserted in prior years. Second, addressing the County’s substantive argument, the Tax Commissioner found that under Va. Code § 58.1-1101, “mining” is specifically listed as personal property that is intangible and reserved for state taxation only. The Tax Commissioner also found that the taxpayer’s activities constituted “mining” under the definition provided by NAICS and Virginia’s regulatory regime for mine safety. Accordingly, any of taxpayer’s machinery and tools used in the mining process would be subject to M&T tax, and any property not used in such mining process would be exempt. The Tax Commissioner remanded the case to the locality for a determination as to what property was used in the mining operations.

## **X. BUSINESS LICENSE TAXES**

### **A. 2023 Legislation**

1. **Penalties.** [House Bill 1685](#) amends Va. Code §§ 58.1-3703.1 and 58.1-3916 by requiring that applications for local business licenses clearly state the due date for the application and the amount of the penalty charged for late application filing, the underpayment of estimated tax, and the late payment of tax. The legislation also requires that any bill and communication separately state the total amount of tax owed, the amount of any interest assessed, and the amount of the penalty imposed. Similarly, any bill issued by the treasurer imposing a penalty or interest for a local machinery and tools tax or business tangible personal property tax must separately state the total amount of tax, interest, and penalties owed. This legislation is effective July 1, 2023.

### **B. Court Decisions: None**

### **C. Docketed Court Cases: None**

### **D. Administrative Rulings**

1. **Assessment Procedure.** [PD 23-29](#) (March 16, 2023). The taxpayer filed his federal income tax (Form 1040) and used Schedule C to report income from his truck-driving activities. This information was reported to the County, which concluded that the taxpayer was operating a business from his home address. The taxpayer asserted they were wages, not business income. Tax Commissioner noted that reporting income on Schedule C creates a rebuttable presumption that a business is being operated. The Tax Commissioner returned the case to the County’s Commissioner of Revenue to issue a valid final determination after finding flaws in the original determination issued to the taxpayer.



2. Situs: Apportionment – Payroll. [PD 23-36](#) (April 5, 2023). The taxpayer provided counseling services at definite places of business in City A and City B. The taxpayer divided its Virginia offices into regions. The activities for City A and City B were reported in the same profit & loss statement. The taxpayer was audited by City A, which attributed all of that region’s gross receipts to City A, resulting in an assessment. The taxpayer filed an appeal. In determining the situs of gross receipts, Va. Code § 58.1-3703.1 states that receipts from services are to be taxed based on (in order): (i) the definite place of business where the service is performed, or if not performed at any definite place of business, (ii) the place from which the services is directed or controlled; or as a last resort (iii) by payroll apportionment between the two businesses. Based on the available information, the Tax Commissioner ruled that it was questionable whether all gross receipts from that region should have been waived. Accordingly, the Tax Commissioner remanded the case to City A. The Commissioner also observed that unlike a penalty, interest assessed for the underpayment of BPOL cannot be waived. [Va. Admin. Code § 10-500-570].
3. Reimbursed Travel Expenses. [PD 23-80](#) (July 6, 2023). The taxpayer negotiated a consulting agreement to provide services to a single corporate client. Pursuant to the agreement, the client reimbursed the taxpayer for travel expenses. The County audited the taxpayer and determined that the reimbursements for travel expenses should have been included in gross receipts for BPOL tax purposes. On appeal, the Tax Commissioner agreed, finding that the travel expenses were “gross receipts” and therefore subject to BPOL.
4. Situs. [PD 23-98](#) (August 17, 2023). The taxpayer was a corporation that provided linguistic services and performed software development. It leased a virtual office from Company, which also provided administrative services to the taxpayer in the City. The taxpayer’s mail was delivered to the Company. The Company’s location in the City was listed as the taxpayer’s principal office in Virginia. The taxpayer maintains no employees, officers, or directors in the City. The taxpayer requested an advisory opinion on whether it was subject to BPOL in the City. That Tax Commissioner ruled that the taxpayer would be classified as providing “other services” under Va. Admin. Code § 10-500-480 and the City’s Code. It also would be treated as having a definite place of business in the City under Va. Code § 58.1-3700. Pursuant to Va. Code § 58.1-3703.1, the Tax Commissioner ruled that unless the taxpayer had a definite place of business in another jurisdiction, all of the taxpayer’s gross receipts would be attributed to its definite place of business in the City.
5. Sales by an Affiliate Entity. [PD 23-112](#) (October 19, 2023). Taxpayer operated retail stores throughout the country. The taxpayer reported its

gross retail sales at these locations to the City as its BPOL tax base. The taxpayer was a wholly-owned subsidiary of Parent. The Parent also owned an affiliate (the “Affiliate”), which was responsible for the Parent's online sales. The taxpayer and the Affiliate were separate legal entities. The Affiliate's retail-to-customer (RTC) sales were facilitated by the taxpayer's employees at its retail locations using the local stores' computers. Such sales were made using the Affiliate's online billing system, rather than the taxpayer's point of sale system, and were fulfilled and warranted by the Affiliate. The taxpayer filed an appeal with the Department, contending that it properly reported all retail sales from its locations within the City, and that the RTC sales legally belonged to the Affiliate and could not be attributed to the Taxpayer. On appeal, the Tax Commissioner ruled that the Affiliate likely had a definite place of business under Va. Code § 58.1-3700.1 and that the situs of gross receipts from the Affiliate's sales were sourced to such definite place of business under Va. Code § 58.1-3703.1. The Tax Commissioner ordered the Affiliate to obtain a BPOL license and pay related taxes. If it did not, the Tax Commissioner determined that the assessment against taxpayer would be deemed correct.

6. Office at Residence / Apportionment / Out of State Deduction. [PD 23-113](#) (October 19, 2023). The taxpayer, a business that collected and distributed data for a specific industry, had a definite place of business in the County. It appears that the taxpayer had several employees working outside of Virginia and the United States. The taxpayer filed amended BPOL tax returns for the 2016 through 2019 tax years requesting refunds for tax previously paid. The amended returns sited gross receipts using payroll apportionment and claimed the out-of-state deduction for gross receipts attributable to business conducted in other states or countries in which it filed income tax returns. The County determined that the taxpayer only had one definite place of business and denied the out-of-state deduction on the basis that the taxpayer either lacked nexus or did not attribute any income to those particular states. On appeal, the Tax Commissioner ruled as follows: (1) the determination of whether as to whether a home office is a definite place of business must be made by the locality in which the home office is located; (2) the taxpayer had provided income tax returns in other states and countries reporting payroll taxes there, which may indicate a definite place of business there; (3) the fact that a virtual office is not a traditional lease does not disqualify it as a definite place of business; (4) siting the taxpayer's gross receipts based on where the services were performed would be difficult if not impossible (thus payroll tax apportionment may be appropriate); and that an out-of-state deduction is only permitted if the taxpayer is required to file a tax return in another state, even if no income tax is owed. The Tax Commissioner remanded the case back to the locality with instructions on how to recalculate the taxpayer's BPOL taxes for the applicable period.

## **XI. LEGISLATIVE STUDIES / REPORTS**

### **A. 2023 Legislation**

1. Tax Practitioners Work Group. [House Bill 1368](#) requires the Department to convene a work group to study the Department's current policies and procedures in order to determine options for a mechanism for tax practitioners to provide feedback to the Department on an ongoing basis. The work group must include members selected by the Tax Section of the Virginia Bar Association, the Virginia Society of Certified Public Accountants and the Virginia Society of Enrolled Agents and may include members selected by the Commissioners of the Revenue Association of Virginia and representatives from the Low Income Taxpayer Clinics Program. Meetings must be completed by November 1, 2023, and a report of the Department's findings must be submitted to the Chairmen of the House Committee on Finance, the House Committee on Appropriations, and the Senate Committee on Finance and Appropriations by December 1, 2023.
2. Study to Align State and Federal Policies Regarding Installment Agreements. [House Bill 1369](#) requires the Department to establish a work group to study current federal and state policies concerning installment agreements and make recommendations regarding how the Department policies could better align with installment agreement policies adopted by the Internal Revenue Service. The work group is required to include two members selected by the Tax Section of the Virginia Bar Association, the Virginia Society of Certified Public Accountants and the Virginia Society of Enrolled Agents. The Department is required to prepare and submit a report of the work group's findings and recommendations to the Chairmen of the House Committee on Finance, the House Committee on Appropriations, and the Senate Committee on Finance and Appropriations by November 15, 2023.
3. Bank Franchise Tax Workgroup. [House Bill 1896](#) and [Senate Bill 1182](#) require the Department to convene a work group to develop potential alternative methods for filing and allocation of bank franchise revenue for consideration in the 2024 General Assembly Session.

**B. Court Decisions:** None

**C. Docketed Court Cases:** None

**D. Administrative Rulings:** None

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