

# Rulings of the Tax Commissioner

**Document Number:** 13-2  
**Tax Type:** Retail Sales and Use Tax  
**Brief Description:** Policy change: The Department will continue to recognize the pollution control exemption administered by the DMME.  
**Topics:** Appropriateness of Audit Methodology; Exemptions; New Procedure(s)  
**Date Issued:** 01/10/2013

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January 10, 2013

Re: § 58.1-1821 Application: Retail Sales and Use Tax

Dear \*\*\*\*\*:

This will reply to your letter in which you seek correction of the retail sales and use tax assessment issued to \*\*\*\*\* (the "Taxpayer") for the period April 2005 through March 2011. I apologize for the delay in responding to your letter.

## FACTS

The Taxpayer drills and operates oil and natural gas wells. The Department audited the Taxpayer and assessed use tax on various equipment and supplies purchased for use in the operation of the business. The Taxpayer disputes the use tax assessed on pit liners and storage tanks. The Taxpayer maintains that the pit liners and storage tanks qualify for the pollution control exemption.

## DETERMINATION

### Pit Liners and Storage Tanks

The Taxpayer has provided a listing of pit liners and storage tanks that was submitted after the audit was completed to the Virginia Department of Mines, Minerals and Energy (DMME) for pollution control certification. *Virginia Code* § 58.1-609.3 9 (ii) provides the following exemption from the sales and use tax:

Effective retroactive to July 1, 1994, and *ending July 1, 2006*, certified pollution control equipment and facilities as defined in § 58.1-3660 and which, in accordance with such section, have been certified by the Department of Mines, Minerals and Energy for coal, oil and gas

production, including gas, natural gas, and coalbed methane gas.  
(Emphasis added.)

*Virginia Code* § 58.1-3660 B defines "[c]ertified pollution control equipment and facilities", in part, as:

any property, including real or personal property, equipment, facilities, or devices, used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth and which the state certifying authority having jurisdiction with respect to such property has certified to the Department of Taxation as having been constructed, reconstructed, erected, or acquired in conformity with the state program or requirements for abatement or control of water or atmospheric pollution or contamination.

*Virginia Code* § 58.1-3660 B then states that the DMME is the "[s]tate certifying authority" for coal, oil and gas production.

The DMME issued a letter to the Department dated February 21, 2012 that certifies the pit liners and storage tanks at issue are primarily used for the abatement or control of water or atmospheric pollution or contamination. Based on the information provided to the Department by the DMME, the exemption in *Va. Code* § 58.1-609.3 9 (ii) applies to the Taxpayer's purchases of pit liners and storage tanks that were certified by the DMME. This exemption expired July 1, 2006, and the exemption statute was not amended by the Virginia General Assembly to extend the exemption. On May 9, 2012, the Department issued Public Document (P.D.) 12-73, which states that the exemption for pollution control equipment and facilities certified by the DMME applies only to those purchases of qualifying property made prior to the July 1, 2006 expiration of the exemption.

### Policy Change

Subsequent to the issuance of P.D. 12-73, the Department has reviewed and reconsidered its policy with respect to the pollution control exemption administered by the DMME. Effective immediately and retroactive to July 1, 2006, the Department will continue to recognize the pollution control exemption administered by the DMME. The Department's determination in P.D. 12-73 relied on the statutory language in *Va. Code* § 58.1-609.3 9 ii which set out the July 1, 2006 expiration date of the exemption. The Department will now follow the statutory language in *Va. Code* § 58.1-609.3 9 i, which provides an exemption for "[c]ertified pollution control equipment and facilities as 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 ...."

Although the exemption in *Va. Code* § 58.1-609.3 9 ii has expired, the DMME remains a state certifying authority for pollution control equipment and facilities under *Va. Code* § 58.1-3660. For this reason, *Va. Code* § 58.1-609.3 9 i can be interpreted to apply to the exemption for pollution control equipment and facilities certified by the DMME for coal, oil and gas production. The Department's determination in P.D. 12-73 with respect to the pollution control exemption administered by the DMME is rescinded in accordance with this determination.

The Taxpayer's audit will be referred to the Department's audit staff for revision of the audit and the assessment. The contested purchases of pit liners and storage tanks will be removed from the September 2010 purchases sample and the sample results will be recomputed for the entire audit period. The audit liability will be recalculated and the assessment will be revised accordingly.

### Post-Amnesty Penalty

Based on the Department's records, the Taxpayer was assessed a post-amnesty penalty on audit bill \*\*\*\*\* which was issued for the uncontested part of the audit. The Department then applied \*\*\*\*\* of the Taxpayer's 2010 corporate income tax refund to the penalty assessment under the provisions of the Virginia Setoff Debt Collection Act set out in Article 21 (§ 58.1-520 *et seq.*) of Chapter 3 of Title 58.1 of the *Code of Virginia*.

In accordance with *Va. Code* § 58.1-1840.1 F 1, an additional 20% penalty may be applied to any tax liability that was eligible for amnesty benefits under the 2009 Virginia Tax Amnesty program and was not paid. The revised 2009 Virginia Tax Amnesty Guidelines, Section VI, number 6, provides for waiver of the amnesty penalty for:

Any assessment generated from a field audit of a business for an amnesty eligible period, provided that the audit is TAX's first audit of the taxpayer, no penalty has been applied to the tax deficiency, any uncontested liability is paid within 30 days from the date of assessment, and payment for any contested liability remaining upon resolution of an appeal under *Va. Code* §§ 58.1-1821 or 58.1-1825 is paid within 30 days from the date of the Tax Commissioner's or the court's final determination.

Based on this guideline, the Taxpayer was erroneously assessed the post amnesty penalty on bill \*\*\*\*\* because the bill was paid within 30 days of the assessment date. The setoff payment of \*\*\*\*\* that was applied to the post amnesty penalty assessment will be refunded to the Taxpayer.

### **CONCLUSION**

The audit will be recalculated to remove the projected sample measure related to purchases of pit liners and storage tanks that qualify for the pollution control exemption. A revised audit report will be mailed to the Taxpayer and contested bill \*\*\*\*\* will be abated in full. As previously noted, a refund of \*\*\*\*\* plus interest from the date of payment, will be issued as soon as practicable.

The *Code of Virginia* sections and public document cited, along with other reference documents, are available on-line at [www.tax.virginia.gov](http://www.tax.virginia.gov) in the Laws, Rules & Decisions section of the Department's web site. If you have any questions concerning this determination, please contact \*\*\*\*\* in the Department's Office of Tax Policy, Appeals and Rulings, at \*\*\*\*\*.

Sincerely,

Craig M. Burns  
Tax Commissioner

AR/1-5030466729.S

**Supersedes PD 12-73**

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**Related Policy Documents:** PD 12-73

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