

Rulings of the Tax Commissioner

Document Number: 13-216
Tax Type: BPOL Tax
Brief Description: Itinerant merchants; Recreation center used for-profit and not-for-profit events.
Topics: Exemptions; Local Taxes Discussion; Nonprofits
Date Issued: 12/12/2013

December 12, 2013

Re: Request for Advisory Opinion
Business, Professional & Occupational License (BPOL) Tax

Dear *****:

This will respond to your letter in which the ***** (the "County") request an advisory opinion as to the proper tax treatment of three separate issues identified within your locality for the purpose of the Business, Professional and Occupational License (BPOL) Tax. I apologize for the delay in responding to your request.

The local license fee and tax are imposed and administered by local officials. *Virginia Code* § 58.1-3701 authorizes the Department to issue advisory opinions on local tax license issues. The following opinion has been made subject to the facts presented to the Department summarized below. Any change in these facts or the introduction of new facts may lead to a different result.

The *Code of Virginia* sections and public documents cited are available online at www.tax.virginia.gov in the Laws Rules and Decisions section of the Department's web site.

FACTS

The County presents several questions regarding the application of the BPOL tax and whether the gross receipts from each transaction are excluded because of the entities' federal nonprofit exemption. *Virginia Code* § 58.1-3701 provides that while the Department has the authority to address the BPOL statutes, it is not required to interpret any local ordinance.

OPINION

Question 1

Would a business license tax be imposed on a developer, promoters or vendors involved in an event held at a recreation center on behalf of the developer?

In the scenario presented, a homeowners association owns a recreational facility in the County. The recreation center is used by both for-profit and not-for-profit organizations. The recreation center is controlled by the community's developer and operated by a third party.

The developer is requesting to hold a 5K run with portions of the proceeds going to a nonprofit organization, but the developer is "running the registration fees through his business (*i.e.*, the fees are deposited into the developer's business account) before donating a portion of the fees to the nonprofit organization.

For purposes of this question, the Department will assume the developer is sponsoring the 5K run to help promote it residential neighborhood. The Department will also assume the promoter is the nonprofit organization, which will be receiving a portion of the proceeds. The vendors are food concessionaires and other types of itinerant merchants.

Agency Relationship

Virginia Code § 58.1-3700.1 defines "gross receipts" as the "whole, entire, total receipts, without deduction." According to your letter, the developer would be receiving the fees for the race and then donating a portion of the proceeds to the nonprofit organization. Under this scenario, it appears the developer is generating gross receipts from sponsoring the race. All such gross receipts from this business activity would be subject to BPOL tax.

However, there are specific exemptions, deductions and exclusions that are either provided by statute or affirmed through Virginia Supreme Court decisions, opinions of the Attorney General and rulings by the Department. One such area is that of agency relationships. If the developer is merely acting as an agent on behalf of the nonprofit organization, the registration fees may be exempt from the BPOL tax.

The definition of "agency relationship" has been created through case law and affirmed through both opinions of the Attorney General and rulings by the Department. In *City of Alexandria v Morrison-Williams Associates, Inc.*, 223 Va. 349, 288 S.E.2d 432 (1982), the Virginia Supreme Court established three criteria that must be met if a taxpayer is to establish it has an agency relationship with its clients. These criteria are: (1) contractual relationships exist between the taxpayer and both the client and the contracted third party, and there is a stated relationship between the client and the contracted third party; (2) the taxpayer does not commingle its "agency" funds with other sources; rather it must have a separate accounting system or a fiduciary account where the pass through receipts from its clients are recorded and; (3) the taxpayer does not report these "pass through costs" on its federal income tax returns. See Public Document (P.D.) 01-38

(4/12/2001) and P.D. 06-94 (9/28/2006). The County must determine whether an agency relationship exists between the developer and the nonprofit organization.

Itinerant Merchants

For BPOL tax purposes, an itinerant merchant is defined as "any person who engages in, does, or transacts any temporary or transient business in any county, city or town and who, for the purpose of carrying on such business, occupies any location for a period of less than one year." The BPOL tax may be imposed on such merchants pursuant to local ordinance and may not exceed \$500 per year. See *Va. Code* § 58.13717.

Itinerant merchants do not generally operate in a definite place of business for at least 30 days. Instead, they operate at markets (e.g., flea markets), from carts on sidewalks, from temporary stands along the side of the road, or at events such as fairs, festivals, bazaars and craft shows, which generally only operate for a few days. Even though these merchants do not operate at a definite place of business within a locality, the General Assembly has authorized localities to impose a BPOL tax on these temporary activities. The determination as to whether itinerant merchants are taxed, or the tax rate imposed, provided it does not exceed the rate established under *Va. Code* § 58.1-3717, is a policy decision for localities to decide. See P.D. 03-68 (8/29/2003) and P.D. 13-148 (7/31/2013).

Question 2

Does the transient lodging tax or the business license tax apply to a development community offering accommodation packages to individuals for the purpose of promoting the community?

Virginia Code § 58.1-3703 C 7 prohibits a locality from imposing a license fee or tax on individuals or organizations engaged in the business of renting, unless such property is being operated as a hotel, motel, motor lodge, auto court, tourist court, travel trailer park, lodging house, rooming house or boardinghouse. The description of the accommodation packages appears to be consistent with the types of rental businesses on which a locality may impose a BPOL tax.

Virginia Code § 58.1-3983.1 authorizes the Tax Commissioner to issue advisory opinions of certain local business taxes. The authority does not include the transient occupancy tax. As such, I do not have jurisdiction to issue an advisory opinion or make any determination with respect to the transient occupancy tax. You may contact your County Attorney or in the event of an appeal apply to the circuit court as provided under the provisions of *Va. Code* § 58.1-3984.

Question 3

Does the meals tax or business license tax apply to the sale of meals and

convenient store items sold to employees, guests and residents of a nonprofit organization?

BPOL tax

Virginia Code § 58.1-3703 C 18 a provides an exemption from the BPOL tax for the:

receipts of a charitable nonprofit organization except to the extent the organization has receipts from an unrelated trade or business the income of which is taxable under Internal Revenue Code § 511 *et seq.* For the purpose of this subdivision, 'charitable nonprofit organization' means an organization which is described in Internal Revenue Code § 501(c)(3) and to which contributions are deductible by the contributor under Internal Revenue Code § 170.

In order to be exempt as described in IRC § 501(c)(3), an organization must be organized and operated exclusively for one or more of certain exempt purposes; no part of its net earnings may inure to the benefit of private shareholders or individuals; and it may not devote a substantial part of its endeavors to political or lobbying activities.

Under Title 23 of the Virginia Administrative Code (VAC) 10-500-10 and 10-50040 A 11, the determination as to whether or not an organization is eligible for this exemption for BPOL taxation purposes is based solely by reference to the relevant provisions of the IRC. See also Public Document (P.D.) 01-104 (8/15/2001) and P.D. 08-12 (1/11/2008). If an organization meets these requirements, it is exempt from the imposition of a license fee or gross receipts tax unless it has unrelated business taxable income (UBTI).

An otherwise exempt charitable nonprofit organization may, however, be subject to BPOL tax on receipts resulting from UBTI as determined under IRC § 511, *et seq.* See P.D. 97-157 (04/02/1997) and P.D. 97-192 (4/21/1997) for a discussion of UBTI.

Local Food and Beverage Tax

Virginia Code § 58.1-3983.1 authorizes the Tax Commissioner to issue advisory opinions of certain local business taxes. The authority does not include the local food and beverage tax, commonly known as the meals tax. As such, I do not have jurisdiction to issue an advisory opinion or make any determination with respect to the application of the meals tax.

The *Code of Virginia* sections and public documents cited are available on-line at www.tax.virginia.gov in the Laws, Rules & Decisions section of the Department's

web site. If you have any questions regarding this ruling, you may contact ***** in the Office of Tax Policy, Appeals and Rulings, at *****.

Sincerely,

Craig M. Burns
Tax Commissioner

AR/1-5351824138.D
