

OP. NO. 03-123

TAXATION: LICENSE TAXES.

Authority for Virginia BPOL licensee to deduct, from its base of taxable gross receipts, gross receipts attributable to business conducted in another state or foreign country, wherein such licensee is liable for or subject to income or other tax based on income.

The Honorable Riley E. Ingram
Member, House of Delegates
January 13, 2004

Issue Presented

You inquire concerning the application of § 58.1-3732(B)(2) in calculating gross receipts pursuant to the business, professional and occupational license ("BPOL") tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735.

Response

It is my opinion that § 58.1-3732(B)(2) permits a Virginia licensee to deduct, from its base of taxable gross receipts, the gross receipts attributable to business conducted in another state or foreign country, wherein such licensee is liable for or subject to income or other tax based on income.

Applicable Law and Discussion

The 1996 Session of the General Assembly enacted legislation requiring uniformity of ordinances governing BPOL taxes.¹ The BPOL tax provisions addressed in the 1996 legislation bring uniformity to BPOL tax administration.² Section 58.1-3701 mandates that the Department of Taxation promulgate guidelines, which, by their nature, must amplify and clarify statutory provisions.³ The Department has issued *Guidelines for Business, Professional and Occupational License Tax*⁴ ("2000 BPOL Guidelines"), which, pursuant to § 58.1-3701, are "accorded the weight of a regulation." Section 58.1-3701 specifically authorizes the Tax Commissioner "to issue advisory written opinions" interpreting the BPOL tax.

Generally, the BPOL tax is imposed against gross receipts. Section 58.1-3700.1 defines "gross receipts" as "the whole, entire, total receipts [of a business], without deduction." The general *situs* or attribution rules in § 58.1-3703.1(A)(3) determine the assignment of gross receipts to a particular locality.⁵ Additionally, § 58.1-3732 mandates certain deductions from gross receipts:

B. The following *shall be deducted* from gross receipts or gross purchases *that would otherwise be taxable*:

....

2. Any receipts attributable to business conducted in another state or foreign country *in which the taxpayer ... is liable for an income or other tax based upon income.* [Emphasis added.]

Section 58.1-3732(B)(2) specifically provides that the measurable base for the BPOL tax must be reduced by the amount of gross receipts attributable to business conducted in another state or foreign country wherein the taxpayer is subject to income or other tax based on income.

The *2000 BPOL Guidelines* confirm that § 58.1-3732(B)(2) does not require that the gross receipts for a business conducted out-of-state be fully or partially taxable. It is sufficient that the *licensee* "is liable for" an income or income-like tax measured on gross receipts.⁶ The BPOL tax statutes do not require that the *gross receipts* be taxed in whole, in part, or even taxed at all by the other state or foreign country.⁷ Thus, the taxpayer may be subject to possible taxation based on income.⁸ Considering the various attribution methodologies and "tax preference" items, such as tax credits or loss carry forwards, it is conceivable that a licensee may be required to pay tax on only a portion, if any, of the gross receipts attributable to other jurisdictions.⁹

Conversely, for the several states that do not impose income or income-like taxes, the gross receipts of a Virginia licensee attributable to business conducted in such nontaxing states would not be deducted from the licensee's gross receipts. Such gross receipts accordingly are subject to the BPOL tax in the appropriate Virginia localities.¹⁰

Construction placed on the law by agencies charged with administrative duties in connection with the law is entitled to great weight, particularly when the agency has been charged by the General Assembly with construing individual statutes that constitute part of a complex statutory scheme.¹¹ The Department of Taxation and the Tax Commissioner, the agency and official charged with promulgating the BPOL tax guidelines and issuing advisory opinions, concur in these conclusions.¹²

Finally, you should note that not all taxes designated as "income taxes" are considered income taxes for Virginia purposes. Likewise, not all taxes designated as another type of tax, such as a franchise tax, may be measured by income in accordance with the requirement of § 58.1-3732(B)(2).¹³ For these reasons, I refer you to the Tax Commissioner who is authorized to issue opinions¹⁴ on questions involving the types of taxes that qualify for the deduction from gross receipts. In addition, the Tax Commissioner has specific information on the allocation and apportionment methods used in other jurisdictions.

Conclusion

Accordingly, it is my opinion that § 58.1-3732(B)(2) permits a Virginia licensee to deduct, from its base of taxable gross receipts, the gross receipts attributable to business conducted in another state or foreign country, wherein such licensee is liable for or subject to income or other tax based on income.

¹See 1996 Va. Acts chs. 715, 720, at 1233, 1238-41, 1247, 1251-55, respectively (adding § 58.1-3703.1).

²See *id.* at 1233, 1247, respectively (amending and reenacting §§ 58.1-3700, 58.1-3701, 58.1-3703, 58.1-3706, 58.1-3708, and 58.1-3732, adding §§ 58.1-3700.1 and 58.1-3703.1, and repealing §§ 58.1-3707 and 58.1-3725, relating to local BPOL taxation).

³See Op. Va. Att'y Gen.: 2002 at 293, 295; *id.* at 297, 298.

⁴Dep't Tax'n, Guidelines for Business, Professional and Occupational License Tax (Jan. 1, 2000) [hereinafter 2000 BPOL Guidelines], *available at* http://www.tax.state.va.us/Web_PDFs/2000bpol-Sect1.pdf.

⁵The BPOL tax applies specific rules to various types of occupations and activities, which inherently are temporary or itinerate in nature. See, e.g., § 58.1-3715(B) (Michie Repl. Vol. 2000) (governing contractors without definite place of business in locality, where contractor's business exceeds or will exceed \$25,000 for license year); § 58.1-3717 (Michie Repl. Vol. 2000) (governing taxation of peddlers and itinerate merchants).

⁶2000 BPOL Guidelines § 2.6, *supra* note 4, (providing that taxpayer qualifies for deduction from gross receipts when taxpayer files return for income or income-like tax in another state or foreign country); see also § 58.1-3732(B)(2) (LexisNexis Supp. 2003).

⁷See 2000 BPOL Guidelines § 2.6, *supra* note 4, ("The Virginia taxpayer, however, need not actually pay any tax to take the deduction.")

⁸A taxpayer is liable for an income or other tax based upon income if the taxpayer files a return for such tax in another state or country. Thus, in order to take the deduction, the taxpayer must be required by the laws of another state or foreign country to file an income tax return or other return for a tax based upon income." Tax Comm'r Priv. Ltr. Rul. PD 97-490 (Dec. 19, 1997) (citation omitted) (interpreting 1997 BPOL Guidelines § 3.3.4), *available at* <http://policylibrary.tax.state.va.us/OTP/Policy.nsf>. Since the Tax Commissioner's ruling, § 3.3.4 has been amended and renumbered as § 2.6. See 2000 BPOL Guidelines § 2.6, *supra* note 4.

⁹See, e.g., Tax Comm'r Priv. Ltr. Rul. PD 94-175 (June 8, 1994) (noting that, although taxpayer had income from Virginia sources and sufficient nexus with Virginia to subject it to corporate income tax, no actual tax payment was due Virginia, because taxpayer had no positive Virginia apportionment factor), *available at* <http://policylibrary.tax.state.va.us/OTP/Policy.nsf>.

¹⁰See *supra* notes 8, 9.

¹¹See *Dep't of Taxation v. Progressive Cmty. Club*, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975); see also *Forst v. Rockingham Poultry Mktg. Coop.*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981). Deference should be given to an administrative interpretation of statutes by the agency charged with the responsibility to carry out legislation. See *County of Henrico v. Mgmt. Rec.*, 221 Va. 1004, 1010, 277 S.E.2d 163, 166-67 (1981) (quoting *Progressive Cmty. Club*, 215 Va. at 739, 213 S.E.2d at 763); *Commonwealth v. Appalach. Elec. Power Co.*, 193 Va. 37, 45-46, 68 S.E.2d 122, 127 (1951).

¹²See *supra* notes 8, 9 and accompanying text.

¹³See Pauley v. Va. Dep't of Taxation, 55 Va. Cir. 215, 217-18 (2001).

¹⁴See, e.g., Op. Va. Att'y Gen.: 2002 at 308, 311; *id.* at 297, 299.

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