



COMMONWEALTH OF VIRGINIA

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August 24, 2009

The Honorable Nancy J. Horn
Roanoke County Commissioner of the Revenue
P.O. Box 20409
Roanoke, Virginia 24018-0513

Dear Ms. Horn:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether a nonprofit charitable organization's exemption from the local business, professional, and occupational license ("BPOL") tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735, also applies to the nonprofit charitable organization's wholly owned, for-profit subsidiary.

Response

It is my opinion that the statutory exemption from the BPOL tax contained in § 58.1-3703(C)(18)(a) applies only to an entity that qualifies as a "nonprofit charitable organization" and would not extend to a wholly owned for-profit subsidiary that fails to meet the statutory definition of a "nonprofit charitable organization."

Background

You indicate that a foundation organized for the purpose of providing housing and medical facilities to those who are elderly or have handicaps in Roanoke, Virginia (the "Foundation"), is exempt from federal income taxation pursuant to § 501(c)(3) of the Internal Revenue Code ("IRC"). Further, you state that the Foundation owns 100% of the stock of a for-profit corporation that provides various support functions to the Foundation, including administrative, human resources, financial, and marketing services. Finally, you note that the Internal Revenue Service requires the for-profit corporation to file annual federal corporate income tax returns, rather than exempt organization returns.

Applicable Law and Discussion

Section 58.1-3703(A) authorizes a local governing body to "levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein with the county, city or town." However, a local governing body's authority to impose such BPOL taxes is subject to certain statutory

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limitations.¹ Among these exemptions are provisions barring the imposition of local BPOL taxes on certain receipts of charitable nonprofit organizations² and on receipts or purchases from members of affiliated entities.³

Section 58.1-3703(C)(18)(a) exempts from BPOL taxation the receipts of “charitable nonprofit organization[s],” that are “described in [IRC] § 501 (c) (3) and to which contributions are deductible by the contributor under [IRC] § 170.”⁴ Assuming that contributions to the Foundation are deductible by contributors pursuant to IRC § 170, this organization constitutes a “charitable nonprofit organization” for purposes of § 58.1-3703(C)(18)(a). Therefore, Roanoke County may not levy BPOL taxes on or measured by the Foundation’s receipts, “except to the extent the organization has receipts from an unrelated trade or business the income of which is taxable under [IRC] § 511 et seq.”⁵

I find no authority to support the proposition that a separate and taxable corporation that is wholly owned by a charitable nonprofit organization is entitled to the same treatment for purposes of BPOL taxes as is its parent organization. “The manifest intention of the legislature, clearly disclosed by its language, must be applied.”⁶ Statutes that provide for tax exemptions and deductions are strictly construed against the taxpayer.⁷ Pursuant to the clear language of § 58.1-3703(C)(18)(a), the exemption applies only to organizations meeting the federal criteria. Based on the facts you present, the subsidiary corporation would not fall within the description of exempt organizations in IRC § 170 or § 501(c)(3) since it is operated “for profit.” This suggests that the Foundation’s for-profit subsidiary would not meet the requirements of federal statutes which mandate that “no part of the net earnings of [the corporation] inures to the benefit of any private shareholder or individual.”⁸ You relate that the IRS treats the subsidiary corporation as a taxable corporation because the subsidiary is required to file annual income tax returns on forms applicable to taxable corporations and not those utilized by tax-exempt organizations. Therefore, I must conclude that the BPOL tax exemption applicable to a charitable nonprofit organization’s receipts may not be imputed to a separately constituted organization that is not itself a charitable nonprofit organization as defined by § 58.1-3703(C)(18)(a).

Despite the inapplicability of the charitable nonprofit organization exemption to the Foundation’s wholly owned subsidiary corporation, all or a portion of the subsidiary’s receipts may be entitled to the

¹ See VA. CODE ANN. § 58.1-3703(C) (Supp. 2008); § 58.1-3706(A) (Supp. 2008).

² Section 58.1-3703(C)(18)(a).

³ Section 58.1-3703(C)(10).

⁴ I note that the definition of “charitable nonprofit organization” in § 58.1-3703(C)(18) is narrower than that of IRC § 501(c)(3) relating to classification of organizations that are exempt from federal income taxation with respect to certain educational organizations. Compare § 58.1-3703(C)(18) with 26 U.S.C.S. § 501(c)(3) (LexisNexis 2009). This limitation is not relevant to the organizations about which you inquire.

⁵ Section 58.1-3703(C)(18)(a).

⁶ Barr v. Town & Country Props., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)), quoted in 2001 Op. Va. Att’y Gen. 179, 180.

⁷ See, e.g., Lynchburg v. English Constr. Co., 277 Va. 574, 582-83, 675 S.E.2d 197, 201 (2009); 2001 Op. Va. Att’y Gen., supra note 6 at 180.

⁸ 26 U.S.C.S. §§ 170(c)(2)(C), 501(c)(3) (LexisNexis 2009).

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exemption contained in § 58.1-3703(C)(10). Section 58.1-3703(C)(10) prohibits local governing bodies from levying BPOL taxes “[o]n or measured by receipts or purchases by an entity which is a member of an affiliated group of entities from other members of the same affiliated group.” If the Foundation and its for-profit subsidiary are part of the same “affiliated group,” as defined by § 58.1-3700.1,⁹ the receipts derived by the subsidiary from its sales of various support services to the Foundation would be exempt from local BPOL taxation. Further, the receipts derived from other members of the affiliated group, if any, also would be exempt. However, § 58.1-3703(C)(10) does not necessarily afford the for-profit subsidiary a blanket exemption from all local BPOL taxes. Absent some other statutory exemption, the for-profit corporation would be subject to taxation on receipts or purchases from entities outside the affiliated group.¹⁰

Conclusion

Accordingly, it is my opinion that the statutory exemption from the BPOL tax contained in § 58.1-3703(C)(18)(a) applies only to an entity that qualifies as a “nonprofit charitable organization” and would not extend to a wholly owned for-profit subsidiary that fails to meet the statutory definition of a “nonprofit charitable organization.”

Thank you for letting me be of service to you.

Sincerely,



William C. Mims

1:1453; 1:941/09-043

⁹See also 23 VA. ADMIN. CODE § 10-500-10 (defining “affiliated group”), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+23VAC10-500-10>; 23 VA. ADMIN. CODE § 10-500-50 (defining and illustrating exemptions for affiliated groups), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+23VAC10-500-50>. The regulations became effective on October 6, 2008. See 24 Va. Reg. Regs. 3250, 3250.

¹⁰See 23 VA. ADMIN. CODE § 10-500-50(B).