



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

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Ronald S. Hallman, Esquire
City Attorney for the City of Chesapeake
Office of the City Attorney
306 Cedar Road
Chesapeake, Virginia 23322

Dear Mr. Hallman:

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

Issues Presented

You ask whether the City of Virginia Beach has authority to assess a Business Professional and Occupation License (BPOL) Tax on an engineering company with Headquarters in Chesapeake but which carries out business at the Joint Expeditionary Base Little Creek – Fort Story (JEB Little Creek) located in the City of Virginia Beach. Specifically, you ask two questions: 1) whether the United States' exclusive jurisdiction over JEB Little Creek prohibits assessment of a BPOL tax on activities performed at that location; and 2) whether the company, by operating a service trailer on the base, maintains such activities at JEB Little Creek as to constitute a "definite place of business" for purposes of the BPOL tax.

Response

It is my opinion that, although the United States government exercises exclusive jurisdiction over the Naval Base of JEB Little Creek, such jurisdiction does not prohibit the City of Virginia Beach from assessing a BPOL tax on activities carried out by a private company on that land. It further is my opinion that whether the activity of a business at a particular location is sufficient for it to become a "definite place of business" is a question of fact to be determined by the local taxing official, or by a trier of fact if litigated, consistent with the definitions set forth in § 58.1-3700.1 and 23 VA. ADMIN. CODE § 10-500-10.

Background

You indicate that there is an engineering company ("the Company") that maintains an office in Chesapeake, Virginia. The Company renders vessel maintenance, alteration and repair services to the United States Navy, often at the naval facilities, where the vessel in need of repair is located.

The Company for several years has performed its services at JEB Little Creek and maintained a trailer there to support the same. You report the following additional facts to me. This trailer is used for administrative purposes and contains desks and computers so that on-site personnel may interact with, and follow the directions of, the project manager in the Company's Chesapeake office. The trailer does

not have mail service but does have telephone service. The Company does not advertise its presence or its services from the trailer, and the Navy has not granted the Company the authority to conduct commercial solicitation activities on JEB Little Creek. The Company says that a majority of the contract costs result from work performed at its Chesapeake office, including engineering services, costing and scheduling of work, change order processing, personnel management and billing.

The Company has been reporting and paying a BPOL tax on the gross receipts earned on the vessel repair contracts to the City of Chesapeake for several years. Recently, the City of Virginia Beach has assessed a BPOL tax on the same gross receipts.

Applicable Law and Discussion

Your first inquiry is whether Virginia Beach has the authority to assess a BPOL tax on activities conducted at JEB Little Creek, which is the property of the United States government. It is my opinion that Virginia Beach is not prohibited from assessing a BPOL tax on activities conducted there.

The first issue to determine is whether the United States indeed exercises exclusive jurisdiction over JEB Little Creek. Article I, § 8, Clause 17 of the Constitution of the United States authorizes Congress to exercise exclusive jurisdiction "over all places purchased by the consent of the legislature of the state in which the same shall be."

In 1902, the Virginia General Assembly ceded jurisdiction to the United States over land acquired for Federal purposes (subject to the right of the Commonwealth to serve process on said lands).

The 1902 Act provides:

1. Be it enacted by the general assembly of Virginia, That the consent of the State of Virginia is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this State required for sites for custom houses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government.

2. That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.

3. The jurisdiction ceded shall not vest until the United States shall have acquired the title to said lands by purchase, condemnation, or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this State.

4. This act shall take effect and be in force from and after its passage.^[1]

In 1940, the General Assembly established the following conditions under which state jurisdiction may be reasserted:

¹ 1901-02 Va. Acts ch. 482, Item 565-566.

[I]n the event that the said lands or any part thereof shall be sold or leased to any private individual, or any association or corporation, under the terms of which sale or lease the vendee or lessee shall have the right to conduct thereon any private industry or business, then the jurisdiction ceded to the United States over any such lands so sold or leased shall cease and determine, and thereafter the Commonwealth of Virginia shall have all jurisdiction and power she would have had if no jurisdiction or power had been ceded to the United States. This provision, however, shall not apply to post exchanges, officers' clubs, and similar activities on lands acquired by the United States for purposes of National defense.^[2]

Therefore, once the ceded property is sold or leased to a "private" individual, association, or corporation and the terms of the sale or lease provide the buyer or lessee with the right to conduct "any private industry or business" thereon, Virginia would regain exclusive jurisdiction over the property.

JEB Little Creek was created in 1942 and was made a permanent base of the United States Navy in 1946. Based upon the facts provided to me, the United States Navy has never sold or leased this land to a private individual as would restore Virginia's exclusive jurisdiction over the property under the 1940 Act. JEB Little Creek, therefore, is under the exclusive jurisdiction of the United States government.

The analysis, however, does not end there. The issue is now whether or not the federal government's exclusive jurisdiction over JEB Little Creek bars Virginia Beach from assessing a BPOL tax on activities carried out on the property.

The 1902 Act of Assembly, cited above, does exempt all *land* under federal jurisdiction from state and local taxation, as is required by the Supremacy Clause of the Constitution of the United States. Nonetheless, whether state and local governments have authority to tax *activities* carried out on federal property is a different question, one which the Supreme Court of the United States has answered clearly in the affirmative.

The Court has concluded that:

[I]mmunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government. And where a use tax is involved, immunity cannot be conferred simply because the State is levying the tax on the use of federal property in private hands, even if the private entity is using the Government property to provide the United States with goods or services.^[3]

This issue is further defined by 4 U.S.C. §§ 105-110, known as the Buck Act, which provides, in pertinent part:

No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within

² 1940 Va. Acts ch. 422, Item 761-762 (codified at VA. CODE ANN. § 1-401(D) (2008)).

³ United States v. New Mexico, 455 U.S. 720, 734 (1981) (internal citations omitted).

such State to the same extent and with the same effect as though such area was not a Federal area.^[4]

Section 110(c) of the Buck Act defines “income tax” as follows:

The term ‘income tax’ means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.^[5]

Interpreting the Buck Act in *Howard v. Commissioners of Sinking Fund*,⁶ the Supreme Court upheld a Louisville, Kentucky occupational tax or license fee applied to employees of a plant on federal land within the boundaries of the city. The Court held that a tax or license fee imposed by the City of Louisville for the privilege of working within the City, measured by one percent of income earned within the City, was an “income tax” within the meaning of the Buck Act, and was authorized by that Act to be applied to payments received by federal employees for services performed at the plant, even though such tax or fee was not an “income tax” under state law.⁷

This is directly analogous to the case in question. The Virginia Beach BPOL tax is assessed on the gross receipts reported by the company. Thus, based on *Howard*, it must be considered an “income tax,” which a city is authorized to assess even on income earned on federal property.⁸

You next ask whether the company, by operating a service trailer on the base, maintains such activities at JEB Little Creek as to constitute a “definite place of business” for purposes of the BPOL tax.

Section 58.1-3703.1(A)(3)(a) requires that when a license tax is based on gross receipts, the gross receipts shall be “only those gross receipts attributed to the exercise of a privilege subject to licensure at a *definite place of business* within this jurisdiction.”⁹ Section 58.1-3700.1 defines a definite place of business as “an office or a location at which occurs a regular and continuous course of dealing for thirty consecutive days or more.”¹⁰

⁴ 4 U.S.C. § 106(a).

⁵ 4 U.S.C. § 110(c).

⁶ 344 U.S. 624 (1953).

⁷ *Id.* at 627-29.

⁸ A prior opinion of this Office determined that a locality could not assess real property taxes against certain improvements on Fort Story lands owned by the federal government but leased to a limited liability company into which the Army and a private contractor invested for construction of on-post housing and rental of the same to military personnel as part of a military housing privatization initiative. 2004 Op. Va. Att’y Gen. 205, 208-10. That opinion, however, is distinguishable from, and not applicable to, the issue you raise. BPOL taxes are distinct from real property taxes in that they do not levy a tax property itself, but rather they arise from activities conducted on that property.

⁹ 23 VA. ADMIN. CODE § 10-500-150(C) clarifies this language: “Where activities are conducted outside of a definite place of business, such as during a visit to a customer location, gross receipts are attributed to the definite place of business from which such activities are initiated, directed, or controlled”. As for jurisdiction, § 1.400(E) of the Code of Virginia specifically provides that for all purposes of taxation, federal land is deemed to be part of the county or city in which the land is situated; however, this code provision applies only to lands acquired on or after July 1, 1981(VA. CODE ANN. § 1-400(A) (2008)) and, as such, is inapplicable to JEB Little Creek.

¹⁰ 23 VA. ADMIN. CODE § 10-500-10 defines a definite place of business as “an office or a location at which occurs a regular and continuous course of dealing where one holds one’s self out or avails one’s self to the public for 30 consecutive days or more, exclusive of holidays and weekends.” In a 2002 Opinion, this Office determined that

Section 58.1-3703.1(A)(3)(a)(1) further defines a “definite place of business” for contractors:

- (1) The gross receipts of a contractor shall be attributed to the definite place of business at which his services are performed, or if his services are not performed at any definite place of business, then the definite place of business from which his services are directed or controlled.^[11]

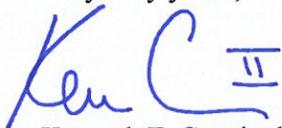
Whether a location constitutes a definite place of business is a question of fact. “This Office historically has declined to render opinions that involve determinations of fact rather than questions of law.”¹² Accordingly, I am unable to render an opinion regarding whether a particular location constitutes a definite place of business. Nevertheless, I note that the following factors might be considered in the determination: “(1) a continuous presence; (2) having an office with a phone; (3) the reception of mail; (4) having employees; (5) record keeping; (6) and advertising or otherwise holding oneself out in as engaging in business at the particular location.”¹³

Conclusion

It is my opinion that, although the United States government exercises exclusive jurisdiction over the Naval Base of JEB Little Creek, this jurisdiction does not prohibit the City of Virginia Beach from assessing a BPOL tax on activities carried out by a private company on that land. It further is my opinion that whether the activity of a business at a particular location is sufficient for it to become a “definite place of business” is a question of fact to be determined by the local taxing official, or by a trier of fact if litigated, consistent with the definitions set forth in § 58.1-3700.1 and 23 VA. ADMIN. CODE § 10-500-10.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

this regulation was to be applied in conjunction with § 58.1-3700.1 of the *Code of Virginia*. See 2002 Op. Va. Att’y Gen. 297, 298.

¹¹ See also 23 VA. ADMIN. CODE § 10-500-200.

¹² 2002 Op. Va. Att’y Gen. 297, 299 (“The local commissioner of the revenue is responsible for making factual determinations in matters of local BPOL taxation”).

¹³ See Tax Comm’r Priv. Ltr. Rul. Pub. Doc. 10-277 (Dec. 21, 2010); Tax Comm’r Priv. Ltr. Rul. Pub. Doc. 10-278 (Dec. 22, 2010), available at <http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf>.