



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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October 3, 2014

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The Honorable Ross A. Mugler
Commissioner of the Revenue
Post Office Box 636
Hampton, Virginia 23669

Dear Commissioner Mugler:

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

Issues Presented

Your inquiry relates to the application of the term “fundraising activity” as used in § 58.1-3840(A)(b), which provides an exemption from local excise taxes on meals sold by certain organizations for fundraising activities. You first present two scenarios and ask whether the exemption applies to the meals sold in each. You then ask whether Virginia law follows the definition of “fundraising activity” as set forth by the Internal Revenue Service; and whether availability of the exemption otherwise depends on the activity being open to the public rather than restricted to the organization’s members. You also ask whether there is a difference between “fundraising activity” and activities that occur on a regular and continuous basis when in both instances the gross proceeds are used by the organization for its nonprofit charitable or benevolent purposes.

Background

In your first scenario, a qualifying organization has an ongoing activity that occurs on a regular and continuous basis and is open to the public. The gross proceeds are used by the organization for its nonprofit educational, charitable, benevolent, or religious purposes. This activity occurs at a commercial location and is in competition with nearby for-profit businesses that are required to collect the local meals tax. Your second scenario involves an organization that has an ongoing activity that occurs on a regular and continuous basis and is open only to members of the organization but not to the general public. In both scenarios, the gross proceeds are used by the organization for its nonprofit educational, charitable, benevolent, or religious purposes. You note that the same activity, if engaged in by a for-profit business, would be subject to the collection of the local meals tax. You ask whether the selling of meals in these circumstances constitutes “fundraising activity” under § 58.1-3840(A)(b).

Response

It is my opinion that, in order to qualify for the tax exemption afforded meals sold as part of a fundraising activity, the meals must be sold by the qualifying entity to raise money exclusively for nonprofit educational, charitable, benevolent, or religious purposes. Virginia law does not make competition with private, for-profit businesses a factor to be used in determining tax status, nor does it

differentiate between activities that are open only to members and activities that are open to the public. Also, Virginia law does not limit the frequency of such activities, but it does impose a statutory cap related to frequency. Finally, the IRS definition of “fundraising activity” is not applicable. Whether a particular activity satisfies the requirements for exemption is a factual determination to be made by the commissioner of the revenue or other appropriate tax official.

Applicable Law and Discussion

Section 58.1-3840 of the *Code of Virginia* authorizes localities, subject to certain restrictions, to impose an excise tax on, among other things, meals sold within their jurisdiction. Section 58.1-3840 further provides that no such taxes on meals may be imposed when sold or provided by

volunteer fire departments and rescue squads; nonprofit churches or other religious bodies; or educational, charitable, fraternal, or benevolent organizations, the first three times per calendar year and, beginning with the fourth time, on the first \$100,000 of gross receipts per calendar year from sales of meals (excluding gross receipts from the first three times), *as a fundraising activity*, the gross proceeds of which are to be used by such church, religious body or organization exclusively for nonprofit educational, charitable, benevolent, or religious purposes....^[1]

Your inquiry involves the meaning of the term “fundraising activity” and whether meals sold under particular circumstances constitute such activity.

“Fundraising activity” is not defined in the Virginia Code. “When . . . a statute contains no express definition of a term, the general rule of statutory construction is to infer the legislature’s intent from the plain meaning of the language used.”² “Fundraising” generally means “the organized activity of raising funds (as for an institution or political cause).”³ Thus, in order to qualify as a fundraising activity for purposes of exemption from the local meals tax, the meals must be sold to raise money for the qualifying entity for its use for a qualifying purpose. Whether a particular activity satisfies this condition requires a factual determination by the commissioner of the revenue or other appropriate tax official.⁴ Accordingly, I am unable to provide a definite response to whether the exemption applies in the situations you present. Nonetheless, I note that, in making this determination, a prior Attorney General’s Opinion concluded that Virginia law requires that “[i]f there is any doubt concerning the exemption, [such] doubt must be resolved against the party claiming the exemption.”⁵

In response to your next inquiry, I conclude that “fundraising activity” as used in § 58.1-3840 does not follow the Internal Revenue Service’s application of the term.⁶ While the terms used in Chapter

¹ VA. CODE ANN. § 58.1-3840(A) (2013) (emphasis added).

² *Hubbard v. Henrico Ltd. P’ship*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998) (citing *City of Va. Beach v. Flippen*, 251 Va. 358, 362, 467 S.E.2d 471, 473-74 (1996) and *Marsh v. City of Richmond*, 234 Va. 4, 11, 360 S.E.2d 163, 167 (1987)).

³ MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 473 (10th ed. 1996).

⁴ *See, e.g.*, 2013 Op. Va. Att’y Gen. 308, 309 (citing 2002 Op. Va. Att’y Gen. 338, 340; 1989 Op. Va. Att’y Gen. 338, 339). The Attorney General “refrain[s] from commenting on matters that would require additional facts[.]” 2010 Op. Va. Att’y Gen. 56, 58.

⁵ 2002 Op. Va. Att’y Gen. 331, 335 (citing *Westminster-Canterbury v. City of Va. Beach*, 238 Va. 493, 501, 385 S.E.2d 561, 565 (1989)).

⁶ I note that, although your request refers to an IRS definition of “fundraising activity,” I can find no applicable federal or statutory definition of the term. Rather, the basis of your inquiry appears to come from the guidance IRS

3 of Title 58.1 of the *Code Virginia*, entitled "Income Tax," "shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required,"⁷ no similar conformity provision applies to terms used in § 58.1-3840. Thus, there is no requirement that "fundraising activity," as used in § 58.1-3840, be construed according to IRS standards.

Further, the language of § 58.1-3840(A) makes no distinction between activities that are open to the public and activities that are limited to members of the organization. Nor does the statute, in providing the exemption, refer to the frequency at which qualifying activities may occur. I also note that Virginia law does not make competition between activities of tax-exempt organizations and taxable private businesses a factor to be considered in determining whether particular activities of a tax-exempt organization should be taxed. Thus, provided the gross proceeds are used by the organization for its nonprofit charitable or benevolent purposes, nothing in § 58.1-4800 suggests there is a difference between "fundraising activity" and activities that occur on a regular and continuous basis. Rather, as discussed above, the determining factor is whether or not the activity is raising money for the qualifying entity to be used exclusively for nonprofit educational, charitable, benevolent, or religious purposes.

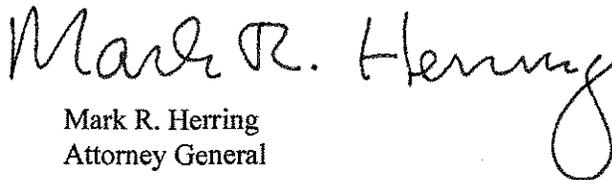
The availability of tax exemptions, however, as this Office expressly has stated in addressing exemptions in other contexts, "rests within the judgment of the commissioner of the revenue, after consideration of all attendant facts."⁸

Conclusion

For the reasons stated, it is my opinion that, in order to qualify for the tax exemption afforded meals sold as part of a fundraising activity, the meals must be sold by the qualifying entity to raise money exclusively for nonprofit educational, charitable, benevolent, or religious purposes. Virginia law does not make competition with private, for-profit businesses a factor to be used in determining tax status, nor does it differentiate between activities that are open only to members and activities that are open to the public. Also, Virginia law does not limit the frequency of such activities, but it does impose a statutory cap related to frequency. Finally, the IRS definition of "fundraising activity" is not applicable. Whether a particular activity satisfies the requirements for exemption is a factual determination to be made by the commissioner of the revenue or other appropriate tax official.

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

provides in its instructions for reporting "fundraising activity" expenses on certain tax returns. See INTERNAL REVENUE SERVICE, 2013 INSTRUCTIONS FOR FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX at 59, available at <http://www.irs.gov/pub/irs-pdf/i990.pdf>.

⁷ Section 58.1-301 (2013).

⁸ 2002 Op. Va. Att'y Gen. 331, 336.