COUNTIES, CITIES AND TOWNS: TOURISM DEVELOPMENT AUTHORITY.

TAXATION: RETAIL SALES AND USE TAX.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

Authority will be exempt from state sales and use taxes in some situations and subject to taxes in others, depending on whether particular acquisition or use falls within specific tax-exempt category. Authority is not "political subdivision" for purposes of federal tax law; it does not possess powers of taxation or eminent domain, nor has it been delegated police power. Authority is separate entity with its own board of directors. Gross income of Authority that derives from performing essential governmental function and that accrues to proper governmental entity is excluded from federal taxation. Exemption from federal income tax means Authority has no adjustable gross income subject to state income tax. Authority is public body required to comply with competitive bidding procedures of Virginia Public Procurement Act.

The Honorable Clarence E. Phillips

Member, House of Delegates

January 11, 1996

You ask several questions regarding the Tourism Development Authority for the LENOWISCO and Cumberland Plateau Planning District Commissions (the "Authority").

The Authority is a "political subdivision, a body politic and corporate, created, organized and operated pursuant to the provisions of" Chapter 33.3 of Title 15.1, §§ 15.11399.18 through 15.1-1399.25 of the Code of Virginia. The purpose of the Authority is to promote, expand and develop the tourism industries of the coal-producing localities that comprise the Authority. Each of the localities in the two planning district commissions of the Authority is to establish a local Tourism Development Committee to promote tourism, participate and assist in the planning of the Authority, and develop a tourism development plan for its municipality. The local governing body is to appoint five members to its Committee, which shall elect a chairman from its membership; the chairman shall represent the locality on the Authority. The Authority is governed by a board of directors composed of the eight chairmen of the local Committees.

Among other powers granted the Authority is the power to sue and be sued, to adopt and use a corporate seal, to contract and be contracted with, to employ and pay compensation to employees, to exercise those powers granted by the governing bodies of the municipalities that established the Authority, and to borrow money and accept contributions.

You first ask whether the Authority is exempt from the payment of state sales and use taxes. For purposes of imposition of the sales and use tax, the term "person" is defined as "any … group or combination acting as a unit, body politic or political subdivision, whether public or private, or quasi-public." Sales tax is imposed on every person who sells at retail or distributes tangible personal property in the Commonwealth. Use tax is imposed on the use or consumption of tangible personal property in the Commonwealth; provided, however, that transactions taxed under § 58.1603 are not also subject to the use tax.
The sales and use taxes are not applicable to certain types of property or transactions, as specifically provided in §§ 58.1609.1 through 58.1609.10, and in § 58.1609.13. Under certain circumstances, however, I am of the opinion that several of the exemptions created by the General Assembly may be applicable to the Authority. For example, § 58.1609.1 contains a variety of governmental and commodities exemptions, including an exemption for "[t]angible personal property for use or consumption by the Commonwealth, any political subdivision of the Commonwealth, or the United States." The rule of strict construction is applied to decisions involving the interpretation of § 58.1609.1. Accordingly, the Authority will be exempt from the sales and use taxes in some situations and subject to the taxes in other situations. The determining factor regarding applicability to such taxes will be whether a particular acquisition or use falls within one of the specific exemptions created by the General Assembly.

You next ask whether the Authority is exempt from the payment of federal and state income taxes. Federal law provides that gross income does not include "income derived from ... the exercise of any essential governmental function and accruing to a State or any political subdivision thereof." Section 115 of the Internal Revenue Code applies to organizations and arrangements that are separate entities and not integral parts of the government of a state or "political subdivision." Section 115, therefore, is not applicable to states and "political subdivisions." The term "political subdivision" is not defined in the Internal Revenue Code. The fact that the Authority was created by the General Assembly as a "political subdivision" is not dispositive of the issue for federal income tax purposes. Federal regulations interpret the term "political subdivision" as "any division of any state or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit." For an entity to be considered a "political subdivision," it must possess or be delegated a substantial amount of any or all of the following sovereign powers: (1) the power of taxation, (2) the power of eminent domain, and (3) the police power.

In view of the definition of what constitutes a "political subdivision," the Authority is not a "political subdivision" under the provisions of the Internal Revenue Code, because there has been no delegation of any of the three sovereign powers. The Authority is not an integral part of the State or a "political subdivision," because it is not under the direct control of a state agency or political subdivision. The Authority is formed as a separate entity with its own board of directors. Therefore, income of the Authority will be excluded from gross income for federal income tax purposes if such income (1) is derived from performing an essential governmental function and (2) accrues to the State or a "political subdivision." In carrying out its statutory mandate, it is my opinion that the Authority satisfies the first test by performing an essential governmental purpose. To meet the second test, income of the Authority may not accrue to any private person or entity, and, in the event of dissolution, the assets of the Authority must be distributed to the State or "political subdivision(s)." If all income accrues to a governmental entity, the income received by the Authority should be exempt under § 115.

Although no explicit exemption from state income taxes exists respecting the status of the Authority, the fact that the Authority is exempt under federal law from federal income taxation is controlling, because the starting point for the imposition of state income taxes is the federal adjusted gross income for income tax purposes. Since the Authority will not be subject to federal income tax, I am of the opinion that it will not have an adjusted gross income and will not be subject to state income tax.

Your last inquiry is whether the Authority must conform to the provisions of the Virginia Procurement Act (the "Act"). The Act requires that all public contracts with nongovernmental contractors be awarded pursuant to the competitive procedures under the Act, "unless otherwise
The requirements of the Act are applicable to "public bodies." The term "public body" is defined as "any legislative, executive or judicial body, agency … or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in" the Act. The Authority is a political subdivision for purposes of the Act. Prior opinions of the Attorney General consistently conclude that political subdivisions are public bodies within the meaning of § 1137 and are required to comply with the Act. It is my opinion that the Authority is a "public body" for purposes of the Act and, therefore, is required to conform to the provisions of the Act.

1Section 15.11399.18 (defining "Authority").

2Section 15.11399.19(A).

3Section 15.11399.19(B).

4§ 15.1-1399.19(B)Id.

5Section 15.11399.20.

6Section 15.11399.21(1)(6).

7Section 58.1602 (defining "person").

8Section 58.1603.

9Section 58.1604.

10Section 58.1604(3).

11Section 58.1609.1(4).


13You provide no facts upon which to make a specific determination in this regard. Consequently, I am unable to reach a definitive conclusion regarding whether the Authority is exempt from the payment of state sales and use taxes.

14I.R.C. § 115(1) (West 1988) (emphasis added). Because this inquiry pertains to federal law, I shall treat this as a legal opinion based on available authorities. For certainty as to the federal tax treatment of the Authority, a private letter ruling from the Internal Revenue Service must be sought by the Authority to the effect that income was excluded under § 115, and that contributions to the Authority are deductible pursuant to § 170(c) of the Internal Revenue Code.
Income earned by a state or political subdivision generally is not taxable in the absence of specific authorization for taxing such income. See Rev. Rul. 71131, 19711 C.B. 28; Rev. Rul. 71132, 19711 C.B. 29 (holding that income derived from operation of liquor stores by state is not subject to federal income tax).

26 C.F.R. § 1.1031(b) (1995).

Shamberg v. Commissioner, 3 T.C. 131, 143, acq. 1945 C.B. 6, aff'd, 144 F.2d 998 (2d Cir.), cert. denied, 323 U.S. 792 (1944); see also Rev. Rul. 77164, 19771 C.B. 20.

I note that the bylaws you submit for the Authority do not address the issue of distribution of assets upon the dissolution of the Authority. I assume for purposes of this opinion that such distribution will be restricted to proper governmental entities, so that all income will accrue to the Commonwealth or to political subdivisions of the Commonwealth.

Although you do not ask whether contributions to the Authority will be deductible from gross income under the Internal Revenue Code, the Authority's bylaws provide for gifts to be treated as charitable contributions in the same manner as if the Authority were a § 501(c)(3) nonprofit corporation. Such a conclusion must be based on an interpretation of § 170(c) of the Internal Revenue Code, which defines "charitable contribution" as a "gift to or for the use of … [a] State … or any political subdivision." I.R.C. § 170(c)(1) (West Supp. 1995) (emphasis added). As discussed above, the Authority is not a "political subdivision" for purposes of federal tax law; however, as all income accrues to the State or its political subdivisions, gifts to the Authority should be considered gifts for the use of the State or any of its political subdivisions, which would be deductible. As mentioned above, such a determination from the Internal Revenue Service may be obtained by requesting a private letter ruling.


Sections 1135 to 1180.

Section 1141(A).