TAXATION: MISCELLANEOUS TAXES – VIDEO PROGRAMMING EXCISE TAX — LICENSE TAXES — REVIEW OF LOCAL TAXES.

Specific statutes relating to the calculation of gross receipts of shareholders in professional corporations and of members in professional limited liability companies control calculation of Business and Professional Occupation License tax over more general statutes authorizing and implementing such tax.

Statutes relating to video programming excise tax, by their own terms, provide for a tax in lieu of the Business and Professional Occupation License tax or exempt the activity from the BPOL tax altogether.

Prior Opinion of the Attorney General determining that the Business and Professional Occupation License tax laws contain no exemption for salaried professionals, and that such professionals are subject to the tax does not conflict with 2000 Business and Professional Occupation License Tax Guidelines promulgated by the Department of Taxation.

Statutes relating to the calculation of gross receipts of shareholders in professional corporations and of members in professional limited liability companies attribute gross receipts only to employees who are also shareholders of the professional corporation or members of the professional limited liability company. Other salaried professional employees who hold state regulatory licenses, but are not shareholders or members, are not subject to local license taxation under those statutes.

The Honorable Ross A. Mugler
Commissioner of the Revenue for the City of Hampton
July 8, 2002

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 pose several questions regarding the implementation of the business, professional and occupational license (“BPOL”) tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735 of the Code of Virginia (“Chapter 37”). First, you ask whether the statutes contained in Chapter 37, authorizing localities to impose a BPOL tax, are superseded by the specific manner of taxation prescribed in §§ 13.1-554 and 13.1-1119, relating respectively to the calculation of gross receipts, respectively, of shareholders in professional corporations and of members in professional limited liability companies, for local BPOL tax purposes. You also ask whether § 58.1-3818.4, which relates to the payment of an excise tax on persons providing video programming or access thereto, and § 58.1-3818.5, which exempts revenues received by common carriers from video programmers for the transport of video programming to end-users, supersedes the BPOL tax requirements of Chapter 37. You note that, effective July 1, 2002, §§ 13.1-554 and 13.1-1119 are repealed, but inquire as to their application to the current tax year and three preceding tax years.
Second, you ask whether a 1976 opinion of the Attorney General conflicts with the 2000 BPOL Guidelines For Business, Professional and Occupational License Tax ("2000 BPOL Guidelines"). Finally, you ask about implementing the separate licensing requirements of §§ 13.1-554 and 13.1-1119. Specifically, you ask how to issue the separate revenue licenses referenced in § 13.1-554. You also ask, whether the phrase "all the licensed employees" contained § 13.1-554 refers to all employees of the company, or only those within the locality levying a revenue license. You also inquire how to apportion gross receipts among employees located in branch offices.

Response

It is my opinion that §§ 13.1-554, 13.1-1119, 58.1-3818.4 and 58.1-3818.5 supersede the general business license taxation requirements of Chapter 37 for the current and preceding three tax years. The 1976 opinion of the Attorney General is not in conflict with the 2000 BPOL Guidelines. Finally, §§ 13.1-554 and 13.1-1119 attribute gross receipts only to employees who are also shareholders of a professional corporation or members of a professional limited liability company. As such, other salaried professional employees who hold state regulatory licenses, but are not corporate shareholders or company members, are not subject to local license taxation under §§ 13.1-554 and 13.1-1119.

Background and Applicable Law

Chapter 37 contains the legislation enabling localities to require a business license and to impose BPOL fees and taxes. The BPOL tax laws are comprehensive in describing the nature and subjects of the tax, the classifications and rates permitted, and certain administrative provisions. In particular, § 58.1-3702 provides that Chapter 37 "shall be the sole authority for counties, cities and towns" to levy BPOL taxes. Nevertheless, the statutes about which you inquire expressly refer to the BPOL tax in mandating a specific procedure or imposing another tax in lieu of the BPOL tax.

"When one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails." Applying this rule of statutory construction, it is apparent that the specific provisions of §§ 13.1-554 and 13.1-1119 supersede the general business license taxation requirements in Chapter 37 for the current and preceding three tax years. Each of the statutes that conflicts with the BPOL tax laws addresses a narrow set of persons or transactions. Specifically, the BPOL tax is to be imposed on shareholders of a professional corporation and not on the professional corporation itself. Similarly, the BPOL tax is to be imposed on members of a professional limited liability company and not on the professional limited liability company itself.

The plain language of § 58.1-3818.4 provides for

[the payment of an excise tax ... in lieu of the payment of taxes or fees pursuant to (i) any local tax authorized under Chapter 37 ... or any other local tax if such tax is imposed solely on the gross receipts of persons providing video programming or access to video programming to subscribers located within the local jurisdiction .... [Emphasis added.]
Similarly, § 58.1-3818.5 provides that "[a]ny revenues received by a common carrier from video programmers for the transport of video programming" to certain end users are "excluded from … (iii) the license tax imposed pursuant to Chapter 37."

Sections 13.1-554 and 13.1-1119 are more specific than the general statutes authorizing and implementing the BPOL tax. Sections 58.1-3818.4 and 58.1-3818.5, by their own terms, provide for a tax in lieu of the BPOL tax or exempt the activity from the BPOL tax altogether. Each of the statutes at issue expressly refers to the BPOL tax laws or tax, clearly indicating that the General Assembly intended that the conflicting statutes would constitute an exception to, and prevail over, the general BPOL tax laws in Chapter 37.

You also ask if a 1976 opinion of the Attorney General, dealing with the application of the BPOL tax to salaried professionals, may be reconciled with provisions in the 2000 BPOL Guidelines. The 1976 opinion determines that the BPOL tax laws contain no exemption for salaried professionals, and that such professionals are subject to the BPOL tax. Please note that the opinion presumes that the city BPOL ordinance imposes a license tax on all professionals, including salaried professionals.

You believe this opinion may conflict with § 2.11 of the 2000 BPOL Guidelines, which provides that "[e]mployees are generally not engaged in a licensable business separate from that of their employer. Therefore, a license obtained by the employer generally covers the activities of any employees." Use of the word "generally" in this context implies the existence of exceptions to the general rule. An appendix to the 2000 BPOL Guidelines refers to an exception for professional employees and provides:

> Employees who practice a profession may be required to obtain their own local license. Prior to the 1982 repeal, § 58-255 required a separate license for every member of a firm practicing a profession "regulated by the laws of this state" and other sections of the code required a state license of "every architect" or "every lawyer," etc.

The language emphasized above demonstrates that the Department of Taxation interprets the BPOL tax laws as authorizing localities, if they so choose, to require a separate license from salaried professionals. As with all BPOL tax issues, the local governing body decides whether to impose the BPOL tax on specific types of businesses, professions and occupations. If the locality chooses to tax professional businesses and occupations, the 1976 opinion merely concludes that there is no state law that exempts salaried professionals from the tax. Therefore, there is no conflict between the 2000 BPOL Guidelines and the 1976 opinion of this Office.

Finally, you ask about implementing the separate licensing requirements of §§ 13.1-554 and 13.1-1119. I assume that your local ordinance does not require salaried professional employees to obtain a license, but does impose a BPOL tax on professions affected by §§ 13.1-554 and 13.1-1119.

Former § 58-255 linked the issuance of a state revenue license to the issuance of certain state regulatory licenses. Since the repeal by the 1982 Session of the General Assembly of § 58-255 and other statutes relating to state revenue
licenses, no link exists between state regulatory licenses and local revenue licenses, except as provided in §§ 13.1-554 and 13.1-1119. Both sections are similarly structured in that they exempt the professional entity and attribute the entity’s gross receipts to corporate shareholders or company members for local taxation. In the context of both sections, the reference to "licensed employees" must refer to employees to whom the statutes attribute the professional entity’s gross receipts for purposes of local license tax, i.e., the local revenue license, and not a state regulatory license. Therefore, the statutes attribute gross receipts only to employees who are also shareholders of the professional corporation or members of the professional limited liability company. Other salaried professional employees who hold state regulatory licenses, but are not shareholders or members, are not subject to local license taxation under §§ 13.1-554 and 13.1-1119.

Your remaining questions relate to the apportionment of gross receipts among employees located in branch offices. With respect to these questions, I note that the Department of Taxation is charged with promulgating guidelines for the taxes at issue, and that the Tax Commissioner is authorized to issue advisory opinions on statutes relating to the situs of gross receipts and apportionment. Therefore, I must defer to the Department of Taxation, as it is the agency responsible for these matters.

Conclusion

Accordingly, it is my opinion that §§ 13.1-554, 13.1-1119, 58.1-3818.4 and 58.1-3818.5 supersede the general business license taxation requirements of Chapter 37 for the current and preceding three tax years. The 1976 opinion of the Attorney General is not in conflict with the 2000 BPOL Guidelines. Finally, §§ 13.1-554 and 13.1-1119 attribute gross receipts only to employees who are also shareholders of a professional corporation or members of a professional limited liability company. As such, other salaried professional employees who hold state regulatory licenses, but are not corporate shareholders or company members, are not subject to local license taxation under §§ 13.1-554 and 13.1-1119.

1Section 13.1-554 provides that the licensing requirements of Chapter 37 are applicable to shareholders of professional corporations, and not to professional corporations as a prerequisite to rendering professional services in the Commonwealth or in any Virginia locality. If a locality requires a revenue license for the privilege of practicing any of the professions permitted by Chapter 7 of Title 13.1, and the license is measured by gross receipts, § 13.1-554 prescribes the method for determining the gross receipts of a corporate shareholder. Section 13.1-1119 is a similar statute, except that it applies to “a member of a professional limited liability company.”

2Sections 58.1-3818.4 and 58.1-3818.5 relate to the video programming excise tax.


142000 BPOL Guidelines app. C, supra note 11, at 74 (emphasis added).

15See Richmond, City of v. Fary, 210 Va. 338, 340, 171 S.E.2d 257, 259 (1969) (recognizing that occupation tax is not exacted as prerequisite to right to engage in business).


181982 Va. Acts ch. 633, at 1064; see id. cl. 2, at 1082.


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