TAXATION: LICENSE TAXES.

Department of Taxation has authority to promulgate guideline definition of term "contractor" that clarifies and explains which businesses are included in "contractor" classification for purpose of determining applicable maximum BPOL tax rate, provided language is not inconsistent with Commonwealth’s license tax laws.

The Honorable Christopher B. Saxman
Member, House of Delegates
May 31, 2002

Issue Presented

You ask whether the Department of Taxation has the authority to promulgate, for the purpose of determining the maximum local business, professional and occupational license ("BPOL") tax rate, a definition of the term "contractor" in its Guidelines for Business, Professional and Occupational License Tax\(^1\) ("2000 BPOL Guidelines") that contains language in addition to the statutory definition of the term.

Response

It is my opinion that the Department of Taxation has the authority to promulgate a guideline definition of the term "contractor" that clarifies and explains which businesses are included in the "contractor" classification for the purpose of determining the applicable maximum BPOL tax rate, provided the language is consistent with the license tax laws of this Commonwealth.

Background

From the information you provide, it appears that a commissioner of the revenue is relying on the 2000 BPOL Guidelines to require a business license from a real estate developer and another entity that own lots upon which others build houses for resale to the public. You relate that neither entity is required to obtain a regulatory contractor's license under § 54.1-1117 to transact business.
Applicable Law and Discussion

Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735 of the Code of Virginia, contains Virginia’s laws governing license taxes. Section 58.1-3700 authorizes localities to require a business license and to impose BPOL fees and taxes. An essential predicate to licensure is that the person be engaged in a business. Section 58.1-3700.1 defines "business," for the purposes of license taxation, as "a course of dealing which requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit. It implies a continuous and regular course of dealing, rather than an irregular or isolated transaction."

Whether an organization is required to secure a local business license is a determination of fact that is the responsibility of the commissioner of the revenue.2 I shall assume for the purposes of this opinion that the two entities in question have properly been found by the local commissioner of the revenue to be engaged in business.

The classification of a business for purposes of BPOL taxation is also a determination of fact that is the responsibility of the commissioner of the revenue.3 You relate that the commissioner of the revenue has determined that the entities are to be classified as "contractors" for the purpose of determining the appropriate BPOL tax rate. Section 58.1-3706(A) sets maximum rates that may be assessed on the gross receipts of different classes of businesses. Section 58.1-3706(A)(1) sets the maximum rate of tax "[f]or contracting" at "sixteen cents per $100 of gross receipts." If the licensable business is not engaged in contracting and is not specifically listed in § 58.1-3706(A), the business may be subject to tax at a maximum rate of "thirty-six cents per $100 of gross receipts."4

In determining which classification to apply to the business in question, the local commissioner of the revenue appears to be relying on the definition of "contracting" as set forth in § 5.1.1 of the Department of Taxation's 2000 BPOL Guidelines.5 The Department of Taxation is required by law to "promulgate guidelines for the use of local governments in administering the BPOL taxes."6 Prior opinions of the Attorney General defer to the interpretations of the law by an agency charged with administering the law unless the agency interpretation clearly is wrong.7 The 2000 BPOL Guidelines interpret the relevant license tax laws for the purposes of implementing those provisions at the local level. The 2000 BPOL
The license required under § 58.1-3700 is for revenue, rather than regulatory, purposes. Therefore, it is not relevant for local BPOL tax purposes whether a business is required to obtain a state contractor’s license for regulatory purposes.9 Section 58.1-3714(D) defines "contractor" for the purpose of local license taxation. The guideline in question expressly refers to, and incorporates by reference, the statutory definition of "contractor." The guideline also includes additional language referring to a business that employs "persons constructing for their own account for sale."10 It is this additional language that appears to prompt your inquiry.

The purpose of the questioned guideline is to explain which businesses will be classified as engaged in contracting for purposes of determining the maximum rate allowed by state law. The maximum rates for various classifications are set forth in § 58.1-3706(A), which includes the rate "[f]or contracting, and persons constructing for their own account for sale."11 The first sentence of § 5.1.1 of the 2000 BPOL Guidelines clearly indicates that it is interpreting and applying this provision: "The maximum rate for local license taxes imposed upon a person engaged in contracting and persons constructing for their own account for sale is sixteen cents per one hundred dollars of gross receipts."12

Therefore, for BPOL tax purposes, the Department defines "contractor" in its guideline consistent with § 58.1-3714(D), other provisions of the relevant license tax statutes, and opinions of the Attorney General.13 The guideline in question interprets the relevant license tax statutes as requiring that a business be classified as engaged in contracting for purposes of the classifications described in § 58.1-3706(A) if it either meets the definition of "contractor" in § 58.1-3714(D) or is constructing for its own account for sale.

As noted previously, § 58.1-3701 mandates that the Department of Taxation promulgate guidelines, which must, by their nature, amplify and clarify statutory provisions. The language of § 5.1.1 of the 2000 BPOL Guidelines does not contradict the statutory definition of the term "contractor."

The Supreme Court of Virginia has stated often that courts "are not permitted to add language to a statute. When the legislature has used words of a plain and definite meaning, courts cannot accord those words a meaning that amounts to holding that the legislature did not mean what it actually expressed."14 Section 5.1.1 may not
be invalidated merely because the Department of Taxation chose to promulgate a guideline that repeats or references a statutory definition and includes additional wording obtained from another relevant tax statute. A state agency that adopts regulations under an enabling statute normally is free to select any method that is reasonable and that is not inconsistent with the Constitution or statutes of the Commonwealth. The guideline does not redefine the term "contractor." Instead, § 5.1.1 recognizes an additional situation that is treated as a contractor for BPOL tax purposes. Sections 58.1-3714(D) and 58.1-3706(A)(1) provide a statutory foundation for the guideline definition of "contractor." Thus, no conflict exists where the Department of Taxation has merely amplified, for purposes of clarifying the maximum BPOL tax rate, in its 2000 BPOL Guidelines, the statutory definition of "contractor."

Conclusion

It is my opinion that the Department of Taxation has the authority to promulgate a guideline definition of the term "contractor" that clarifies and explains which businesses are included in the "contractor" classification for the purpose of determining the applicable maximum BPOL tax rate, provided the language is consistent with the license tax laws of this Commonwealth.


5Section 5.1.1 of the 2000 BPOL Guidelines provides: "The maximum rate for local license taxes imposed upon a person engaged in contracting and persons constructing for their own account for sale is sixteen cents per one hundred dollars of gross receipts. In lieu of the tax, a license fee may be charged by the locality. The amount of the fee depends upon the locality’s population. [Citation omitted.]

"A. A person shall be classified as a contractor if he accepts contracts to perform, or regularly performs, or engages others to perform, any of the work described in paragraph B of § 58.1-3714 on buildings, structures or real estate owned by him when the buildings, structures or real estate are sold upon completion of such work; or, if he regularly performs, or engages others to perform, any of the work described in paragraph B of § 58.1-3714 on buildings, structures or real estate owned by others."
"B. Contractors include persons who subdivide and improve real estate, and speculative builders who build houses or other buildings with the intention to offer the subdivided lots or completed buildings for sale. A person who would otherwise be classified as a contractor shall not lose such classification because real estate is temporarily leased until it can be sold, or leased with an option to purchase instead of sold, unless the leasing activity constitutes a separate licensable business. Any gross receipts from such leases shall be considered ancillary to the business of contracting.

"C. The mere subdivision of land into lots, without more, is not contracting. However, a person who installs water or sewer systems, roads, or engages in any other activity described in subsection B of § 58.1-3714 on his own land with the intent to offer the land for sale is a contractor regardless of whether the land is subdivided.

"D. A person shall not be deemed to be engaged in the business of contracting solely because he acts as his own prime contractor to build or improve a building which he intends to occupy as his residence, office or other place of business, or actually so occupied within a reasonable time prior to the sale of the premises."

Note that the reference in above § 5.1.1(A) and (C) to "paragraph B of § 58.1-3714" should be to paragraph D of § 58.1-3714. The 1998 Session of the General Assembly amended and reenacted § 58.1-3714 by replacing subsection B with the subsection D designator and adding a new subsection B. See 1998 Va. Acts ch. 503, at 1229, 1129-30.


8Section 58.1-3701.


102000 BPOL Guidelines § 5.1.1 quoted supra note 5.

11Section 58.1-3706(A)(1) (emphasis added).

122000 BPOL Guidelines § 5.1.1, supra note 5 (emphasis added).

13See comment following § 5.1.1 of 2000 BPOL Guidelines listing two opinions of the Attorney General.


17See id.