PROPERTY AND CONVEYANCES: VIRGINIA REAL ESTATE COOPERATIVE ACT.

2002 amendment providing that any residential cooperative association under Act shall not be considered business for state and local tax purposes and that tangible personal property of association shall be entitled to exemption from personal property tax on household goods is not declaratory of law existing prior to July 1, 2002, effective date of legislation, and is not retroactive in its application.

The Honorable Terrie L. Suit
Member, House of Delegates
August 14, 2002

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

Issue Presented

You pose two questions concerning the status and effect of an amendment to a tax statute. You ask whether the 2002 amendment to § 55-428, changing the tax treatment of residential cooperative associations, is (1) declaratory of the law existing prior to July 1, 2002, and (2) if it is not, whether it is retroactive in its application.

Response

It is my opinion that the 2002 amendment to § 55-428, is not declaratory of the law existing prior to July 1, 2002. Additionally, the 2002 amendment is not retroactive in its application, and the tax exemptions provided therein for residential cooperative associations are applicable as of July 1, 2002, the effective date of the statute.

Facts

Chapter 34 of the 2002 Acts of Assembly amends and reenacts § 55-428 by adding subsections F and G to the statute, relating to taxation of cooperative interests under the Virginia Real Estate Cooperative Act, §§ 55-424 through 55-506.1 Section 55-428(F) provides that any residential cooperative association under the Act shall not be considered a business for purposes of state and local taxation; § 55-428(G) provides that the tangible personal property of a residential cooperative association is entitled to the same exemption from personal property tax on household goods that is available to individuals or families. Residential cooperative associations are real estate cooperatives, residential in nature, where ownership title to the individual units and common areas are held by the association and members of the association are entitled to exclusive possession of a particular unit.2
You inquire whether the 2002 amendment to § 55-428 is declarative of the law existing prior to July 1, 2002, and if it is not, whether it may be applied retroactively. If the amendment to § 55-428 is declarative of the law existing prior to July 1, 2002, or if it is retroactive in its application, then any residential cooperative previously subject to local business, professional and occupational license ("BPOL") tax or local tangible personal property taxes prior July 1, 2002, could seek a refund for taxes paid in prior years or prevail in pending tax contests based solely on the change to § 55-428. Generally, taxpayers assessed with local taxes may protest an assessment (i) within three years of the last day of the tax year for which the assessment is made, (ii) within one year of the date of the assessment, (iii) within one year of the date of the Tax Commissioner’s final determination under § 58.1-3703.1(A)(5), or § 58.1-3983.1(D), or (iv) within one year from the date of the final determination under § 58.1-3981, whichever is later. If it is determined that the 2002 amendment to § 55-428 is retroactive, localities may be subject to refund claims from taxpayers for the previous tax years and may lose certain pending taxpayer protests based solely on the changes to § 55-428.

Applicable Law and Discussion

The 2002 Session of the General Assembly added the following subsections to § 55-428:

F. Any residential cooperative association, the members of which are owners of cooperative interests in a cooperative under [the Virginia Real Estate Cooperative Act], shall not be deemed to be a business for any state and local purposes, including, but not limited to, liability for payment of sales, meals, hotel, motel or gross receipts taxes and business licenses, to the extent that it collects payments from residents of the cooperative.

G. Any tangible personal property owned by a residential cooperative association that would be considered household goods and personal effects if owned and used by an individual or by a family or household incident to maintaining an abode shall be considered household goods and personal effects owned and used by an individual or by a family or household incident to maintaining an abode for purposes of § 58.1-3904 and any local ordinance authorized thereby.

Chapter 34 does not state that it is declaratory of existing law. There are two types of declaratory statutes: "(1) statutes declaratory of the common law, and (2) statutes declaratory of prior statutes and prior legislative intent." The BPOL tax is a creature of statute, not common law. Chapter 34 amends a tax statute. Therefore, if the 2002 amendment to § 55-428 is declaratory of existing law, it may only be declaratory of prior statutes or the legislative intent thereof. Before the enactment of the 2002 amendments to § 55-428, a tax statute exempting residential cooperative associations from the BPOL tax did not exist. In addition, the Tax Commissioner issued rulings indicating that the law prior to the 2002 amendment to § 55-428 was that residential cooperative associations, if engaged in business activity, were subject to BPOL tax. Given the statutory nature of tax law and the absence of any exempting language for residential cooperative associations in any statute prior to the passage of
Chapter 34, the 2002 amendment to § 55-428, therefore, is not declaratory of the law existing prior to July 1, 2002.

Chapter 34 contains no emergency enactment clause and provides no retroactive application within the act itself. Generally, legislation enacted during "a regular session" of the General Assembly becomes effective on July 1 following the session's adjournment. Exceptions to this include appropriation acts, emergency legislation and redistricting laws.

You suggest that the decision of the Supreme Court of Virginia in Sussex Community Services Association v. Virginia Society for Mentally Retarded Children may lend support to interpreting the 2002 amendment to § 55-428 as applying retroactively. In Sussex, the Court determined that the language of a statute implied that it was retroactive in its application. The Supreme Court considered whether legislation providing that certain group homes were to be considered single-family residences "when construing any restrictive covenant" was to be applied retroactively. The proponents of retroactive application relied on the word "any" to include covenants recorded prior to the effective date of the legislation. The opponents of retroactive application argued that there was no clear intent that the legislation was retroactive and, therefore, it was presumed prospective only. The Court determined that the placement of the word "any" before "covenant" indicated a legislative intent that the legislation was retroactive as well as prospective. The Court found that word "any," when used as an "unrestricted modifier[,]" is generally considered to apply without limitation, and that, therefore, the statute applied retroactively to any covenants existing even prior to the enactment of the legislation.

The Supreme Court has recognized, however, that retrospective laws are disfavored, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest. Moreover, subsequent to the Court's decision in Sussex, the General Assembly has made it clear that, where a statute is "reenacted," the changes to the statute will be effective prospectively absent a specific retroactive date. Specifically, § 1-13.39:3 provides:

> Whenever the word "reenacted" is used in the title or enactment of a bill or act of assembly, it shall mean that the changes enacted to a section of the Code of Virginia or an act of assembly are in addition to the existing substantive provisions in that section or act, and are effective prospectively unless the bill expressly provides that such changes are effective retroactively on a specified date. [Second emphasis added.]

Given the mandate of § 1-13.39:3, it is clear that, in order to operate retrospectively, the 2002 amendment to § 55-428 must contain some manifest indication on its face; otherwise, it may only operate prospectively. Neither Chapter 34 nor the amendment in question contains any specific date, as required by § 1-13.39:3, upon which the amendment is to apply retroactively. Therefore, the 2002 amendment to § 55-428, adding subsections F and G, is applicable on and after July 1, 2002.

**Conclusion**

Accordingly, it is my opinion that the 2002 amendment to § 55-428 is not declaratory of the law existing prior to July 1, 2002. Additionally, the 2002
amendment is not retroactive in its application, and the tax exemptions provided therein for residential cooperative associations are applicable as of July 1, 2002, the effective date of the statute.


3 Section 58.1-3703.1(A)(5) pertains to the appeal and ruling of a BPOL tax assessment.

4 Section 58.1-3983.1(D) pertains to appeals and rulings of certain local business tax assessments.

5 Section 58.1-3981 pertains to correction of an erroneous local tax assessment by the commissioner of the revenue.


12 All laws enacted at a regular session … shall take effect on the first day of July following the adjournment of the session of the General Assembly at which it has been enacted …; unless in the case of an emergency (which emergency shall be expressed in the body of the bill) the General Assembly shall specify an earlier date ….” Va. Const. art. IV, § 13.


14 See supra note 12.

15 Va. Const. art. IV, § 13 (appropriation and emergency laws); art. II, § 6 (redistricting laws).


17 Id.

18 Id. at 243, 467 S.E.2d at 469 (quoting § 36-96.6(C)).

19 Id.

20 Id. at 242, 467 S.E.2d 469.

21 Id. at 244, 467 S.E.2d 470.

22 Id. at 243, 467 S.E.2d 469.

23 Id. at 244-45, 467 S.E.2d 470.
