TAXATION: LICENSE TAXES.

No conflict between statutory and regulatory definitions of ‘definite place of business’; reliance on both definitions for purposes of administering BPOL tax. Determination whether ‘visit’ becomes ‘definite place of business’ is question of fact for local taxing official. Application of internal consistency test for purposes of apportioning BPOL taxes to businesses located in and out of state. BPOL taxable gross receipts deductions should be fairly apportioned between activity within jurisdiction and outside Commonwealth.

The Honorable Ross A. Mugler
Commissioner of the Revenue for the City of Hampton
December 12, 2002

Issues Presented

You pose several questions regarding the business, professional and occupational license ("BPOL") tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735. First, you ask whether a commissioner of the revenue should rely on the meaning of "definite place of business" as that phrase is defined in § 58.1-3700.1 or as defined in the Guidelines for Business, Professional and Occupational License Tax\(^1\) ("2000 BPOL Guidelines"). Second, you inquire concerning the meaning of "visit" as it relates to "definite place of business." You also inquire whether the criteria for determining "definite place of business" are different if the location is outside the Commonwealth. Finally, you inquire concerning the applicability of § 58.1-3732(B)(2), which requires a locality to deduct from gross receipts income or other taxes, based on income, imposed by jurisdictions outside the Commonwealth.

Response

It is my opinion that there is no conflict between the definitions of "definite place of business" in § 58.1-3700.1 and the 2000 BPOL Guidelines. Accordingly, you, as a commissioner of the revenue, should rely on both definitions when administering the BPOL tax statutes. It is also my opinion that, whether the activity of a business at a particular location is sufficient for it to become a definite place of business, rather than a visit, is a question of fact to be determined by the local taxing official. It is further my opinion that local tax assessments should be administered consistently and
that the criteria for establishing a definite place of business should be the same, whether other taxing jurisdictions are located in or outside the Commonwealth. Lastly, it is my opinion that § 58.1-3732(B)(2) should be applied to businesses outside the Commonwealth so that the assessments are fairly apportioned between the activity within the taxing jurisdiction and the activity outside the Commonwealth.

Applicable Law and Discussion

You first ask whether you should rely on the meaning of "definite place of business" as defined in § 58.1-3700.1 or in the 2000 BPOL Guidelines. The definition of "definite place of business" is identical in § 58.1-3700.1 and in the 2000 BPOL Guidelines, with the exception of the language emphasized below, which appears only in the guidelines:

[A]n office or a location at which occurs a regular and continuous course of dealing where one holds one’s self out or avails one’s self to the public for thirty consecutive days or more, exclusive of holidays and weekends. A definite place of business for a person engaged in business may include a location leased or otherwise obtained from another person on a temporary or seasonal basis and real property leased to another. A person’s residence shall be deemed to be a definite place of business if there is no definite place of business maintained elsewhere and the person is not subject to licensure as a peddler or itinerant merchant. [2] [Emphasis added.]

Section 58.1-3701 mandates that the Department of Taxation promulgate guidelines, which by their nature, must amplify and clarify statutory provisions. The guidelines are subject to the "Administrative Process Act and [are] accorded the weight of a regulation under § 58.1-205." The additional language in the 2000 BPOL Guidelines does not alter the meaning of the statutory definition of "definite place of business." The additional language, "where one holds one’s self out or avails one’s self to the public" and "exclusive of holidays and weekends," simply amplifies and clarifies the meaning of "regular and continuing course of dealing" in the statutory definition by specifying the conduct that will be deemed a definite place of business. Accordingly, you, as a commissioner of the revenue, should rely on both definitions when administering the local BPOL tax statutes.
Section 58.1-3701 also provides that "[t]he Tax Commissioner shall have the authority to issue advisory written opinions in specific cases to interpret the provisions of [Chapter 37] and the guidelines issued pursuant to this section." To the extent you have remaining questions concerning the interplay between the statutory definition and the guideline definition of "definite place of business," I refer you to the Tax Commissioner who is authorized to issue such opinions.

You next ask for a definition of the word "visit" as it relates to "definite place of business." Section 58.1-3703.1(A)(3)(a) provides:

> Whenever the tax imposed by [an] ordinance [levying a local BPOL tax] is measured by gross receipts, the gross receipts included in the taxable measure shall be only those gross receipts attributed to the exercise of a privilege subject to licensure at a definite place of business within this jurisdiction. In the case of activities conducted outside of a definite place of business, such as during a visit to a customer location, the gross receipts shall be attributed to the definite place of business from which such activities are initiated, directed, or controlled.

Section 58.1-3703(A)(3)(a) pertains to the situs of gross receipts for purposes of local BPOL taxation. The statute clearly provides that gross receipts derived from activities conducted outside of a definite place of business, such as during a customer visit, are attributed back to that place of business. The Supreme Court of Virginia has stated that "'[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.'" The word "visit" is not defined in Title 58.1. Absent a statutory definition, words are given their ordinary meaning. The word "visit" means "a journey to and stay or short sojourn at a place for a particular purpose." It would appear, therefore, that a journey to, and stay at, a customer's location is a "visit."

Whether a visit becomes a definite place of business or an additional place of business is a question of fact. This Office historically has declined to render opinions that involve determinations of fact rather than questions of law. Accordingly, I am unable to render an opinion regarding at what point a "visit" becomes a "definite place of business." The local commissioner of the revenue is responsible for making factual determinations in matters of local BPOL taxation.
however, the factors to consider would include the number and frequency, as well as the length and purpose, of the visits. As noted previously, the Tax Commissioner is authorized to issue advisory opinions on the situs of gross receipts, and you may elect to seek additional guidance from him.\(^{15}\)

You also inquire whether the criteria are different for determining a "definite place of business" located outside the Commonwealth. Section 58.1-3703.1(A)(3)(b) provides:

> If the licensee has more than one definite place of business and it is impractical or impossible to determine to which definite place of business gross receipts should be attributed under the general rule,\(^{16}\) the gross receipts of the business shall be apportioned between the definite places of businesses on the basis of payroll. Gross receipts shall not be apportioned to a definite place of business unless some activities under the applicable general rule occurred at, or were controlled from, such definite place of business. Gross receipts attributable to a definite place of business in another jurisdiction shall not be attributed to this jurisdiction solely because the other jurisdiction does not impose a tax on the gross receipts attributable to the definite place of business in such other jurisdiction.

The criteria for determining whether a business located in or outside the Commonwealth constitutes a definite place of business are the same. The importance of this determination is that gross receipts are assigned to a definite place of business either by direct attribution or by apportionment.\(^{17}\) Gross receipts assigned to a definite place of business located in another state may not be taxed by any Virginia locality. The Supreme Court of Virginia has acknowledged that an internal consistency test must be applied to decisions on apportionment.\(^{18}\) "An assessment is internally consistent if applying the text of the taxing statute, and assuming that every other jurisdiction applied the same statute, the taxpayer would not be subjected to a risk of double taxation."\(^{19}\) As such, tax assessments should be internally consistent and, therefore, the criteria for establishing a definite place of business are the same whether the other taxing jurisdictions are located in or outside the Commonwealth.

Finally, you inquire concerning the application of § 58.1-3732(B)(2). Section 58.1-3732(B)(2) requires the deduction of "[a]ny receipts
attributable to business conducted in another state or foreign
country in which the taxpayer … is liable for an income or other tax
based upon income" for purposes of local BPOL taxation. In
considering the application of the BPOL tax to businesses outside
the Commonwealth, assessments should be fairly apportioned,
which initially requires that the assessment be both internally and
externally consistent.20 The internal consistency test requires that
other jurisdictions apply the same tax statutes and precludes
double taxation.21 External consistency requires that an
assessment apply only to the "portion of the revenues from the
interstate activity which reasonably reflects the in-state component
of the activity being taxed."22 Section 58.1-3732(B)(2) should be
applied to businesses outside the Commonwealth so that the
assessments are fairly apportioned between the activity in your
jurisdiction and the activity outside the Commonwealth. For specific
guidance in particular factual situations, I refer you to the Tax
Commissioner for questions regarding apportionment.23

Conclusion

Accordingly, it is my opinion that there is no conflict between the
definitions of "definite place of business" in § 58.1-3700.1 and the
2000 BPOL Guidelines. Thus, you, as a commissioner of the
revenue, should rely on both definitions when administering the
BPOL tax statutes. It is also my opinion that, whether the activity of
a business at a particular location is sufficient for it to become a
definite place of business, rather than a visit, is a question of fact to
be determined by the local taxing official. It is further my opinion
that local tax assessments should be administered consistently and
that the criteria for establishing a definite place of business should
be the same, whether other taxing jurisdictions are located in or
outside the Commonwealth. Lastly, it is my opinion that § 58.1-
3732(B)(2) should be applied to businesses outside the
Commonwealth so that the assessments are fairly apportioned
between the activity within the taxing jurisdiction and the activity
outside the Commonwealth.

1 Dep’t Tax’n, Guidelines for Business, Professional and Occupational License
Tax (Jan. 1, 2000) [hereinafter 2000 BPOL Guidelines], available at
http://www.tax.state.va.us/Web_PDFs/2000bpol-Sect1.pdf. Effective July 1,
2001, the guidelines have the force of regulations. Va. Code Ann. § 58.1-3701

2 2000 BPOL Guidelines ch. 1, supra note 1.

3 Op. no. 02-044 to Hon. Christopher B. Saxman, H. Del. Mbr. (May 1, 2002)


6 2000 BPOL Guidelines ch. 1, supra note 1.

7 The remainder of § 58.1-3701, however, provides that "the Tax Commissioner shall not be required to interpret any local ordinance. The guidelines and opinions issued pursuant to this section shall not be applicable as an interpretation of any other tax law."


14 See op. no. 02-044, supra note 3 (concluding that classification of business for purposes of BPOL taxation is determination of fact for commissioner of revenue).

15 See op. no. 02-033, supra note 8.

16 Section 58.1-3703.1(A)(3)(a) sets forth the general rule for measuring gross receipts.

17 Compare § 58.1-3703(A)(3)(a) and (b) (LexisNexis Supp. 2002).

18 See City of Winchester v. American Woodmark Corp., 252 Va. 98, 102, 471 S.E.2d 495, 497 (1996). The Court also acknowledged the requirement to apply an external consistency test in apportionment decisions. See id. The application of the external consistency test, however, is not pertinent to your inquiry.

19 Id. (citing Goldberg v. Sweet, 488 U.S. 252, 261 (1989)).

20 Id.

21 Id.
22 *Id.* (quoting *Goldberg*, 488 U.S. at 262).