

OP. NO. 04-053

TAXATION: CIGARETTE TAX – EXCISE TAX — MISCELLANEOUS TAXES – CIGARETTE TAX.

Fairfax and Arlington Counties may raise respective local cigarette taxes to amount not to exceed greater of 5¢ per pack of cigarettes or amount of state tax levied on cigarettes.

The Honorable Gary A. Reese
Member, House of Delegates
July 22, 2004

Issue Presented

You ask whether the county governing bodies of Fairfax and Arlington may raise their respective local cigarette taxes to the increased amount of the state tax to be levied upon cigarettes effective September 1, 2004.

Response

It is my opinion that, pursuant to § 58.1-3831, the governing bodies of Fairfax and Arlington Counties may raise their respective local cigarette taxes to an amount not to exceed the greater of five cents per pack of cigarettes or the amount of the state tax levied on cigarettes. In enacting a cigarette tax increase at the 2004 Special Session I, I note that the General Assembly did not amend § 58.1-3831, which addresses the imposition of a local cigarette tax by Fairfax and Arlington Counties.

Applicable Law and Discussion

The 2004 Special Session I of the General Assembly increased the state cigarette excise tax to one cent per cigarette sold, stored or received on and after August 1, 2004 (or twenty cents per pack), and authorized a one and one-half cent increase in the state tax levied on each cigarette sold, stored or received on and after July 1, 2005 (or thirty cents per pack).¹ These cigarette excise tax changes will become effective September 1, 2004.²

Section 58.1-3831 specifically authorizes Fairfax and Arlington Counties to impose a local cigarette tax as follows:

Fairfax and Arlington Counties shall have the power to levy tax upon the sale or use of cigarettes. Such tax shall be in such amount and on such terms as the governing body may by ordinances prescribe, not to exceed five cents per pack or the amount levied under state law, whichever is greater. The provisions of § 58.1-3830 shall apply to such counties, mutatis mutandis.

Sections 58.1-3830 and 58.1-3832 set out the general provisions applicable to the imposition of a cigarette tax by localities, including entering into

arrangements with the Department of Taxation for the use of dual stamps³ and delegating by ordinance its administrative and enforcement authority regarding cigarette taxes to an agency or authority pursuant to § 15.2-1300.⁴

From the clear and unambiguous language of § 58.1-3831,⁵ Fairfax and Arlington Counties each have an option to impose a local cigarette tax, the maximum amount of which may not exceed the greater of five cents per pack or the amount of the state excise tax on cigarettes. The respective local tax may be at a rate less than the greater of either of these two amounts, but may not exceed it.

As noted in § 58.1-3831, the terms and conditions of § 58.1-3830, allowing localities to levy a tax on cigarettes, apply *mutatis mutandis*⁶ to Fairfax and Arlington Counties, as their individual conditions and details dictate. Inasmuch as the current state excise tax on cigarettes is two and one-half cents per pack, the rate of five cents granted in § 58.1-3831 to Fairfax and Arlington Counties is greater. Thus, at the present time, five cents is the maximum rate at which the counties may set their respective cigarette taxes. However, on and after September 1, 2004, when the state excise tax increases to twenty cents per pack, the state tax rate will exceed the five-cent per pack rate. Accordingly, as that will be the greater amount, twenty cents per pack would then become the maximum local cigarette tax rate that Fairfax and Arlington may impose. Likewise, on and after July 1, 2005, absent a change in the law, when the state excise tax increases to thirty cents per pack, thirty cents will become the maximum local cigarette tax rate for Fairfax and Arlington Counties. Any amendment to the ordinances in Fairfax and Arlington Counties to raise the cigarette tax, however, is subject to the notice requirements set forth in § 15.2-1427.⁷

Conclusion

Accordingly, it is my opinion that, pursuant to § 58.1-3831, the governing bodies of Fairfax and Arlington Counties may raise their respective local cigarette taxes to an amount not to exceed the greater of five cents per pack of cigarettes or the amount of the state tax levied on cigarettes. In enacting a cigarette tax increase at the 2004 Special Session I, I note that the General Assembly did not amend § 58.1-3831, which addresses the imposition of a local cigarette tax by Fairfax and Arlington Counties.

¹2004 Va. Acts Spec. Sess. I ch. 3 (citing § 58.1-1001).

²"According to Article IV, § 13 of the Constitution of Virginia, all laws enacted during a special session would take effect on the first day of the fourth month following the month of adjournment of the special session. As the 2004 Special Session of the General Assembly adjourned on May 7, 2004, these provisions will not be effective until September 1, 2004." Virginia Department of Taxation Web site, at <http://www.tax.state.va.us/site.cfm?alias=legEffDates>; see also 65:25 St. Tax Rev. (CCH) at 31 (June 22, 2004) ("Effective September 1, 2004, wholesalers may obtain stamps without concurrent payment of the cigarette tax by filing a qualified bond or an irrevocable letter of credit.").

³Va. Code Ann. § 58.1-3830(A) (Michie Repl. Vol. 2000).

⁴Section 58.1-3833(9) (Michie Repl. Vol. 2000). Section 15.2-1300 provides for the joint exercise of powers by political subdivisions.

⁵The Supreme Court of Virginia has stated that, "[w]hen a statute's language is plain and unambiguous, we are bound by the plain meaning of that language. Therefore, when the General Assembly has used words of a plain and definite import, courts cannot assign to them a construction that would be tantamount to holding that the General Assembly intended something other than that which it actually expressed." *Mozley v. Prestwood Bd. of Dirs.*, 264 Va. 549, 554, 570 S.E.2d 817, 820 (2002) (citations omitted); see also 2000 Op. Va. Att'y Gen. 199, 200 (interpreting extent of consumer utilities taxes authorized by § 58.1-3812 and noting that, whenever there is doubt as to meaning or scope of laws imposing tax, such laws are to be construed against government and in favor of citizen).

⁶"*Mutatis mutandis*" is a Latin phrase meaning "[a]ll necessary changes having been made; with the necessary changes." Black's Law Dictionary 1039 (7th ed. 1999); see *County of Dinwiddie v. Holladay*, 208 Va. 410, 414, 158 S.E.2d 117, 120 (1967), cited in 1984-1985 Op. Va. Att'y Gen. 25, 26; see also 1993 Op. Va. Att'y Gen. 2, 6 n.1.

⁷See Va. Code Ann. § 15.2-1427(D)-(F) (LexisNexis Repl. Vol. 2003).

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