

**OP. NO. 05-027**

**TAXATION: LICENSE TAXES.**

**Authority for locality to impose greater threshold amount of gross receipts for purposes of BPOL tax than statutory minimum; locality may create subclassification of BPOL business classification and apply different threshold of gross receipts, provided threshold is greater than applicable statutory threshold and reasonable municipal policy exists to justify classifications.**

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**Issues Presented**

You ask whether a locality is permitted to increase the applicable statutory thresholds of gross receipts below which the business, professional and occupational license ("BPOL") tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735, may not be imposed. Additionally, you ask whether within a classification of business, such as retail sales, the locality may create a subclassification of that type of business and further increase the threshold of gross receipts for purposes of the BPOL tax for that subclassification.

**Response**

It is my opinion that a locality may impose a greater threshold amount of gross receipts for purposes of the BPOL tax than the statutory minimum. Further, it is my opinion that the locality may create a subclassification of a BPOL business classification and apply a different threshold of gross receipts, provided that the threshold applicable to such subcategory is greater than the applicable statutory threshold, and a reasonable municipal policy exists to justify the classifications.

**Background**

You relate that the Board of Supervisors of Amherst County (the "county") is considering adopting a BPOL tax for businesses and professions within the county pursuant to Chapter 37. You state that for purposes of the threshold delineations contained in § 58.1-3706(A), the population of the county is between 25,000 and 50,000.

You note<sup>1</sup> that § 58.1-3706(A) prohibits the county from imposing the BPOL tax on businesses and professions having less than \$50,000 in gross receipts. You state that the county's governing board is considering whether to increase the threshold of gross receipts. As part of that consideration, you note that the local governing body is concerned about imposing the BPOL tax upon gasoline stations<sup>2</sup> that generate a high-dollar, volume business, but have a low profit margin and derive the bulk of their net income from sales of incidental items.<sup>3</sup>

**Applicable Law and Discussion**

Section 58.1-3706(A) sets forth the applicable limitations on both the rates of license taxes and the minimum gross receipts thresholds required for imposition of the BPOL tax. These thresholds are tiered by locality population. As applied to the county, § 58.1-3706(A) reads, in pertinent part, as follows:

Except as specifically provided in this section and except for the fee authorized in § 58.1-3703, no local license tax imposed pursuant to the provisions of [Chapter 37], ..., or any other provision of [Title 58.1] or any charter, shall be imposed on any person whose gross receipts from a business, profession or occupation subject to licensure are *less than: ... (ii) \$50,000 in any locality with a population of 25,000 but no more than 50,000.* Any business with gross receipts of more than \$100,000, or \$50,000, as applicable, may be subject to the tax at a rate not to exceed the rate set forth below for the class of enterprise listed[.] [Emphasis added.]

Section 58.1-3705 provides for "uniformity" of taxation stating that "[w]hensoever any county, city or town levies a license tax, the basis for such tax, whether it be gross receipts or otherwise, shall be the same for all persons engaged in the same business, trade, occupation or calling." It is significant that this language references "the same business, trade, occupation or calling," rather than "classification." Therefore, a "distinct" business within a classification may be taxed on a different basis than other types of businesses within that classification.<sup>4</sup>

Section 58.1-3701 mandates that the Department of Taxation promulgate "guidelines for the use of local governments," which by their nature must amplify and clarify statutory provisions.<sup>5</sup> The Department has issued *Guidelines for Business, Professional and Occupational License Tax*<sup>6</sup> ("2000 BPOL Guidelines"), which pursuant to § 58.1-3701, are "accorded the weight of a regulation." Section 58.1-3701 specifically authorizes the Tax Commissioner "to issue advisory written opinions" interpreting the BPOL tax and the *2000 BPOL Guidelines*. A regulation issued by the Department "shall be sustained unless unreasonable or plainly inconsistent with applicable provisions of law."<sup>7</sup> Furthermore, "the Department's interpretation of a tax statute is entitled to great weight."<sup>8</sup> This Office consistently has deferred to the interpretation of the tax laws by the Tax Commissioner.<sup>9</sup>

You first ask whether a locality is permitted to increase the applicable statutory thresholds of gross receipts below which the BPOL tax may not be imposed. The *2000 BPOL Guidelines* address this situation, and § 2.1 specifically provides that:

While localities must follow the exemptions, rates, classifications *and thresholds* as set forth in Chapter 37 (§ 58.1-3700 et seq.) of Title 58.1 of the *Code of Virginia*, their local ordinances may:

A. Set tax rates at levels lower than those authorized by state law, or select the classifications to tax or not tax;

B. *Establish subclassifications within the classifications set out in state law and provide for different rates or exemptions for such subclassifications, as long as no rate exceeds the maximum permitted by state law;*

C. Establish graduated tax rates for any classification or subclassification so that the rate increases or decreases with volume, as long as no rate exceeds the statutory maximum for the classification under state law; and

D. *Establish a threshold amount of gross receipts below which no tax will be imposed, or a maximum tax for any classification.*

*Localities may establish classifications and subclassifications based upon reasonable distinctions in municipal policy, and through the establishment of classifications and subclassifications, localities may choose to exempt certain categories of taxpayers.* [Emphases added.]

Section 2.1(D) of the 2000 BPOL Guidelines clearly permits a locality to "[e]stablish a threshold amount of gross receipts below which no tax will be imposed, or a maximum tax for any classification." A locality may set a threshold limit which is higher than the minimum set forth in § 58.1-3706(A),<sup>10</sup> but may not impose the BPOL tax where gross receipts are less than the threshold amount applicable to that locality.<sup>11</sup> The Tax Commissioner has ruled that:

§ 3.1.1 of the 1997 BPOL Guidelines states that a locality may establish a threshold amount of gross receipts below which no tax will be imposed, a maximum tax for any classification and/or graduated tax rates for any classification so long as no rate exceeds the statutory maximum.<sup>[12]</sup>

Indeed, a locality could completely exempt a business from BPOL tax or even exclude certain categories of revenues from taxation.<sup>13</sup> Thus, both § 58.1-3706(A) and the 2000 BPOL Guidelines permit a locality to increase the threshold amounts of gross receipts triggering the BPOL tax in the locality above the minimum threshold amounts shown in § 58.1-3706(A).

You next ask whether a locality may create a business subclassification, i.e., within retail sales, and increase the threshold of gross receipts for purposes of the BPOL tax for that subclassification.<sup>14</sup> Section 2.1(B) of the 2000 BPOL Guidelines clearly contemplates the creation of "subclassifications within the classifications set out in state law." Additionally, § 2.1(B) states that the locality may "provide for different rates *or exemptions* for such subclassifications." (Emphasis added.) In appropriate circumstances, a locality may exempt a particular type of business from the BPOL tax or may exempt some category of the business's revenue.<sup>15</sup>

There is, however, an important caveat on a locality's discretion to exempt a subclassification of business or some category of its revenues. In considering this issue, the Attorney General previously has concluded:

Although a locality has the legal authority to subclassify and exempt businesses from the gross receipts license tax, such discrimination in favor of a certain class must not be arbitrary. Discrimination must be based upon a reasonable distinction in municipal policy. Historically, local governments have been accorded wide latitude in making taxing classifications which in their judgment produce reasonable systems of taxation.

Determination by a court of whether a classification creates an arbitrary separation requires a case-by-case analysis which depends upon the purpose and subject of the particular ordinance creating the class and the circumstances and conditions surrounding its passage. The governing body must consider the facts and determine that reasonable municipal policy justifies action favoring one subclassification of business over another.<sup>[16]</sup>

Therefore, a locality may, within a BPOL tax classification, create a subclassification of that type of business and apply a different threshold of gross receipts, provided the threshold is greater than the applicable threshold in § 58.1-3706(A) and "that such discriminatory treatment is justified by reasonable municipal policies formulated to apply to all the subclassifications of businesses to which the policy of the governing body is applicable."<sup>17</sup> This, of course, is a factual determination to be made by the local governing body on a case-by-case basis in light of the surrounding circumstances.<sup>18</sup>

### **Conclusion**

Accordingly, it is my opinion that a locality may impose a greater threshold amount of gross receipts for purposes of the BPOL tax than the statutory minimum. Further, it is my opinion that the locality may create a subclassification of a BPOL business classification and apply a different threshold of gross receipts, provided that the threshold applicable to such subcategory is greater than the applicable statutory threshold, and a reasonable municipal policy exists to justify the classifications.

<sup>1</sup>A request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Va. Code Ann. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

<sup>2</sup>For purposes of this opinion, I assume that you mean the term, "gasoline station," to include the retail sale of gasoline to consumers, including those that sell non-automotive items usually associated with convenience stores, such as food and sundries. I further assume that these vendors will not be engaged in more than one distinct type of business, which would be taxable under separate local BPOL classifications or subclassifications. I note that multiple businesses conducted by a person at a single location generally are required to obtain a separate license for each business, unless the locality's ordinance permits the taxpayer to elect otherwise. See Va. Code Ann. § 58.1-3703.1(A)(1) (LexisNexis Supp. 2004); Dep't Tax'n, 2000 Guidelines for Business, Professional and Occupational License Tax (Jan. 1, 2000), § 2.9 and examples shown therein, available at <http://www.tax.virginia.gov/site.cfm?alias=Publications> [hereinafter "2000 BPOL Guidelines"].

<sup>3</sup>You indicate that the incidental items include the sales of food from their "convenience stores."

<sup>4</sup>See 1984-1985 Op. Va. Att'y Gen. 351, 352 n.1 (noting that research and development company was "distinct" business from other businesses within its classification).

<sup>5</sup>See Op. Va. Att'y Gen.: 2004 at 187, 187; 2002 at 293, 295; *id.* at 297, 298.

<sup>6</sup>See 2000 BPOL Guidelines, *supra* note 2.

<sup>7</sup>See § 58.1-205(2) (LexisNexis Repl. Vol. 2004).

<sup>8</sup>See LZW, Inc. v. Va. Dep't of Taxation, 269 Va. 105, 109, 606 S.E.2d 797, 799 (2005) (noting that interpretation of Department of Taxation, which is charged with responsibility of administering and enforcing tax laws, is entitled to great weight).

<sup>9</sup>See, e.g., 2002 Op. Va. Att'y Gen. 293, 294 and opinions cited therein (noting that Attorneys General defer to interpretations of agency charged with administering law unless agency's interpretation clearly is wrong). The 2000 BPOL Guidelines interpret the relevant license tax laws for the purposes of implementing those provisions at the local level. *Id.*

<sup>10</sup>See Tax Comm'r Priv. Ltr. Rul.: PD 97-277 (June 19, 1997), *available at* <http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf>; PD 97-2 (Jan. 13, 1997) (interpreting § 3.1.1 of the 1997 BPOL Guidelines), *available at* <http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf>. Since the Tax Commissioner's ruling, § 3.1.1 has been amended and renumbered as § 2.1. See 2000 BPOL Guidelines, § 2.1, *supra* note 2.

<sup>11</sup>See Tax Comm'r Priv. Ltr. Rul. PD 97-118 (Mar. 7, 1997) (ruling that under § 58.1-3706(A), locality may not levy license tax on licensable businesses whose gross receipts fall below applicable thresholds for locality), *available at* <http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf>.

<sup>12</sup>See Tax Comm'r Priv. Ltr. Rul. PD 97-2 (interpreting § 3.1.1, predecessor to § 2.1), *supra* note 10.

<sup>13</sup>See 1984-1985 Op. Va. Att'y Gen., *supra* note 4, at 352; see also 1989 Op. Va. Att'y Gen. 308, 309 (noting that imposition of license tax is permissive; no statute requires that particular business activity be taxed).

<sup>14</sup>There is no distinct or special treatment for BPOL tax purposes of "gasoline stations" in the *Code* or in the 2000 BPOL Guidelines. For example, the Tax Commissioner has ruled: "[a]ssuming that a local ordinance provides for the levying of a license tax upon a service station and the service station's gross receipts equal or exceed the applicable thresholds, the service station must report its whole, entire, total receipts derived from the privilege of engaging in that activity for purposes of BPOL tax assessments. As a result, the service station may not deduct the cost of gasoline from its gross receipts when filing a BPOL tax return. Expenses and other costs of doing business are not deductible for purposes of the BPOL tax." Tax Comm'r Priv. Ltr. Rul. PD 97-118, *supra* note 11. Of course, under permissible circumstances, the county could choose not to subject "service stations" or "filling stations" to BPOL taxation or may even exempt their gasoline sales receipts. See 1984-1985 Op. Va. Att'y Gen., *supra* note 4, at 352.

<sup>15</sup>See *id.*

<sup>16</sup> *Id.* (citations omitted) (emphasis in original); see also *Chesterfield Cablevision, Inc. v. County of Chesterfield*, 241 Va. 252, 255-56, 401 S.E.2d 678, 680 (1991) (noting that legislature may, constitutionally, treat different subjects differently for taxation purposes if difference is real, if distinction has some relevance to legislative purpose, and treatment is not so disparate to be arbitrary).

<sup>17</sup> See 1984-1985 Op. Va. Att'y Gen., *supra* note 4, at 352.

<sup>18</sup> *Id.* (noting that governing body must consider facts and determine whether municipal policy justifies action favoring one subclassification of business over another).

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