



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

April 1, 2011

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Albert C. Pollard, Jr.
Member, House of Delegates
Post Office Box 508
Lively, Virginia 22507

Dear Delegate Pollard:

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 ask about the impact of Senate Bill 1111 and whether the proposed measure would allow unredeemed tax credits earned before 2006 to be sold, and/or whether the unused tax credits can be carried forward after 2016.

Response

It is my opinion that the effect of Senate Bill 1111 is to establish a sunset date of July 1, 2016 for persons with an economic interest in coal who have received tax credits from an electricity generator to redeem these tax credits. It is further my opinion that if Senate Bill 1111 becomes law, generators of electricity can continue to rely on these tax credits after July 1, 2016.

Applicable Law and Discussion

Section 58.1-400 imposes a tax on corporate income. Section 58.1-400.2 applies this tax to certain electric suppliers, pipeline distribution companies, gas utilities and gas suppliers. Section 58.1-433.1 establishes a "three-dollar-per-ton credit against the tax imposed by § 58.1-400 or § 58.1-400.2 for each ton of coal purchased and consumed by such electricity generator, provided such coal was mined in Virginia as certified by such seller."¹ An electricity generator may allocate this tax credit to a "person with an economic interest in coal."² Section 58.1-433.1(B) currently provides as follows:

¹ VA. CODE ANN. § 58.1-433.1(A) (2009).

² Section 58.1-433.1(B). An economic interest "is the same as the economic ownership interest required by § 611 of the Internal Revenue Code which was in effect on December 31, 1977. A party who only receives an arm's length royalty shall not be considered as having an economic interest in coal mined in the Commonwealth." Section 58.1-439.2(C) (2009).

All credits earned on or after January 1, 2006, which are allocated to persons with an economic interest in coal as provided under this subsection may be used as tax credits by such persons against the tax imposed by § 58.1-400 and any other tax imposed by the Commonwealth. If the credits earned on or after January 1, 2006, and prior to July 1, 2011, exceed the state tax liability for the applicable taxable year of such person with an economic interest in coal, the excess shall be redeemable by the Tax Commissioner as set forth in subsection D of § 58.1-439.2.

The import of this provision is, first, if an electrical supplier allocates the tax credits earned on or after January 1, 2006, to “a person with an interest in coal,” the person with an economic interest in coal can use them as tax credits against any Virginia tax. If the credits exceed the state tax liability for the applicable tax year for the person with an economic interest in coal, the excess is redeemable by the Tax Commissioner as set forth in subsection D of § 58.1-439.2. Subsection D of § 58.1-439.2 provides that

If the credit exceeds the person’s state tax liability for the tax year, the excess shall be redeemable by the Tax Commissioner on behalf of the Commonwealth for ninety percent of the face value within ninety days after filing the return; however, for credit earned in tax years beginning on and after January 1, 2002, such excess shall be redeemable by the Tax Commissioner on behalf of the Commonwealth for eighty-five percent of the face value within ninety days after filing the return. The remaining ten or fifteen percent of the value of the credit being redeemed, as applicable for such tax year, shall be deposited by the Commissioner in a regional economic development fund administered by the Coalfields Economic Development Authority to be used for the Coalfields Economic Development Authority and the Virginia Economic Development Partnership.

Senate Bill 1111 amends § 58.1-433.1(B) by deleting the phrase “and prior to July 1, 2011,” and adding the following:

provided that the ability of persons with an economic interest in coal to redeem with the Tax Commissioner credits received pursuant to an allocation under this section shall expire for credits earned under this section on or after July 1, 2016.

As I read the changes that Senate Bill 1111 makes to the existing statute, a person with an interest in coal who has been allocated a tax credit by a generator of electricity will no longer be able to redeem those tax credits with the Tax Commissioner if the electricity generator earned these credits on or after July 1, 2016. Under the bill, the “ability to redeem” the tax credits “shall expire” for “persons with an economic interest in coal” if the credits are earned “on or after July 1, 2016.” The electricity generator will still be able to claim these tax credits beyond July 1, 2016 with respect to their own tax liability and can continue to carry them over.³

Conclusion

Accordingly, it is my opinion that the effect of Senate Bill 1111 is to establish a sunset date of July 1, 2016 for persons with an economic interest in coal who have received tax credits from an

³ Effectively, the electricity generator will not be able to allocate those credits after July 1, 2016, because the only entity by statute that is eligible for such an allocation under the statute is a person with an economic interest in coal. See § 58.1-433.1(B).

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electricity generator to redeem these tax credits. It is further my opinion that if Senate Bill 1111 becomes law, generators of electricity can continue to rely on these tax credits after July 1, 2016.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C. II". The signature is stylized, with a large "K" and "C" and a Roman numeral "II" at the end.

Kenneth T. Cuccinelli, II
Attorney General