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**CHAPTER 1: DEFINITIONS.**

Unless otherwise required by the context, the following words and terms shall have the following meanings:

**"Affiliated group"** means a group of two or more corporations or chains of corporations. (See Appendix A for discussion and examples of Affiliated Groups.)

**"Ancillary"** means subordinate to, subservient to, auxiliary to, or in aid of, that which is principal and primary.

"Unlike a business that is engaged in two separate trades, one of which is exempt and one of which is not, . . . [the] non-manufacturing activities are ancillary to its primary business of manufacturing" and exempt from tax. County of Chesterfield v. BBC Brown Boveri, 238 Va. 64 (1989.) The court in BBC Brown Boveri implied that an "ancillary" activity would be one that is an integral part of another activity. 238 Va. 64, 70. "Subordinate, subservient, auxiliary or in aid of" indicate that an ancillary activity would be one that is at least in some way related to, but not independent of, the primary activity.

1994 Op. Va. Att'y Gen. 99 (If company's engineering services are ancillary and subordinate to other nonprofessional business services, and, further, if the latter are a substantial component of its business, the commissioner should disregard the professional services and tax the entire gross receipts at the lower rate.)

**"Apportionment"** means the division of the volume of business done between taxing jurisdictions within which the business' income or purchases are generated.

**"Assessment"** means a determination as to the proper rate of tax, the measure to which the tax rate is applied, and ultimately the amount of tax, including additional or omitted tax, that is due. An assessment shall include a written assessment made pursuant to notice by the assessing official or a self-assessment made by a taxpayer upon the filing of a return. (For a more complete description, please see Chapter 6 where assessments are discussed.)

**"Audit"** means an examination of records, financial statements, books of accounts and other information to determine the correctness of a local license tax. (See Chapter 7 for a more detailed description of what does and does not constitute an audit.

**"Base year"** means the calendar year preceding the license year, except for contractors subject to the provisions of § 58.1-37.15. The local ordinance may provide for a different period for measuring the gross receipts of a business in the following situations: 1) for beginning businesses; or 2) to allow an option to use the same fiscal year as for federal income tax purposes.

**"Business"** means a course of dealing which requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit. It implies a continuous and regular course of dealing, rather than an irregular or isolated transaction. A person may be engaged in more than one business. If a person 1) advertises or otherwise holds himself

out to the public as being engaged in a particular business; or 2) files tax returns, schedules and documents that are required only of persons engaged in a trade or business, he is presumed to be engaged in business. However, a person may present evidence to overcome this presumption.

**"Definite place of business"** means an 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.

**"Financial services"** means the buying, selling, handling, managing, and investing money, credit, securities, or other investments for others, as well as providing advice to others on such matters.

**"Gross receipts"** means the whole, entire, total receipts, of money or other consideration received by the taxpayer as a result of transactions with others besides himself and which are derived from the exercise of the licensed privilege to engage in a business or profession in the ordinary course of business, without deduction or exclusion except as provided by law. See §§ 2.5 and 2.7 for examples of items excluded from the definition of gross receipts.

Comment: Source: Derived from the new Uniform Ordinance provisions definition of "gross receipts," which is limited to those receipts received from the exercise of the licensed privilege in the ordinary course of business. There are restrictions on taxing specific types of gross receipts, e.g., sales between affiliated corporations pursuant to § 58.1-3703(C)(10). See also exclusions from gross receipts listed in §§ 58.1-3732, 58.1-3732.1, 58.1-3732.2, and 58.1-3734.1.

Alexandria v. Morrison-Williams, 223 Va. 349 (1982) (An advertising agency which charged its clients a commission on media charges was taxable on total receipts from clients without deduction for the media charges.)

Savage v. Commonwealth, 186 Va. 1012 (1947) (Gross receipts mean the whole, entire total receipts.)

1992 Op. Va. Att'y Gen. 162 ("gross receipts" typically include the total amount of money or the value of other consideration received from selling property or from performing services; proceeds from insurance policy on the life of a deceased executive are not taxable gross receipts because they are not attributable to the operation of a business.)

1984-1985 Op. Va. Att'y Gen. 346 (fees for corporate directorship not taxable unless it is the person's business, trade, profession, occupation or calling.)

**"License year"** means the calendar year for which a license is issued for the privilege of engaging in business.

**"Professional services"** means services performed by those practicing the professions as listed in Chapter 5, § 5.4. The word "profession" implies attainments in professional knowledge as distinguished from mere skill, and the application of knowledge to uses for others rather than for personal profit.

**"Purchases"** means all goods, wares and merchandise received for sale at each definite place of business of a wholesale merchant. (See Chapter 5 for the application of purchases to the classification of wholesale merchants.)

**"Real estate services"** means providing a service for others with respect to the purchase, sale, lease, rental, or appraisal of real property.

**"Retail sale"** means a sale of goods, wares and merchandise for use or consumption by the purchaser or for any purpose other than resale by the purchaser, but does not include sales at wholesale to institutional, commercial, industrial, and governmental users which are classified as wholesale sales.

**"Sales solicitation"** is the act or acts directly related to selling particular items or goods to a particular person. See § 3.3 for a discussion of situs of gross receipts of retailers and wholesalers (for wholesalers taxable on purchases, see § 3.4). Sales solicitation does not include non-solicitation activities prior or subsequent to sales solicitation activities.

**"Services"** mean things purchased by a customer which do not have physical characteristics, or which are not goods, wares, or merchandise. Specific types of services are defined further in the BPOL law. See, for example, the definitions of "financial services" and "professional services" in § 58.1-3700.1.

**"Situs of gross receipts"** means the definite place of business that generated taxable gross receipts. If activities are conducted outside a definite place of business, gross receipts are taxable at the definite place of business where these activities are initiated, controlled or directed. (See Chapter 3 for detailed explanation.)

**"Tax Year"** means the same as license year, or the calendar year in which a license is issued.

**"Wholesale sale"** means a sale of goods, wares and merchandise for resale by the purchaser, including sales when the goods, wares and merchandise will be incorporated into goods for sale, and also includes sales to institutional, commercial, industrial, and governmental users which because of the facts and circumstances surrounding the sales, such as the quantity, price, or other terms, indicate that they are consistent with sales at wholesale.

## CHAPTER 2: STRUCTURE OF THE TAX

### § 2.1. AUTHORITY TO IMPOSE LICENSE TAX.

*Code of Virginia* § 58.1-3703 authorizes localities to enact an ordinance levying a local license (BPOL) tax and/or a fee for issuing a license. Every ordinance adopted or maintained by a locality which levies a license tax is required to be substantially similar to the provisions in § 58.1-3703.1. Further, §§ 58.1-3703 and 58.1-3706 set statutory maximums for license rates and fees. Localities may choose not to require a license or impose fees, or localities may assess rates and fees which are less than the maximums stated in the statute.<sup>1</sup> Localities may levy license taxes at rates above the statutory maximum only if subject to the “rollback” provisions of § 58.1-3706 B.<sup>2</sup> 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.

Chesterfield Cablevision v. Chesterfield County, 241 Va. 252 (1991) (Unless “suspect classification” involved, a locality may constitutionally treat different subjects differently for tax purposes if 1) the difference is real, 2) the distinction has some relevance to the local governing purpose, and 3) the differing treatments are not so disparate, relative to the difference in classification, as to be wholly arbitrary.)

See, also: 1987-1988 Op. Va. Att’y Gen. 515 (A locality may set lower rate for itinerant merchant participants in a sponsored community event, and establish a classification permitting a sponsor of a community event to obtain one “umbrella” license on behalf of all the itinerant merchant participants.)

<sup>1</sup> *Code of Virginia* § 58.1-3704 provides that no locality shall be required to impose either a license tax on merchants or a tax on the capital of merchants.

<sup>2</sup> See Appendix D for a discussion of these localities.

1989 Op. Va. Att'y Gen. 308 (A locality may exempt purchase of farm products for resale, but exemption of purchasers or sellers may not be based on residence.)

1984-1985 Op. Va. Att'y Gen. 351 (A locality may establish subclassifications and tax them at different rates, exempt them, or exempt specified types of gross receipts provided that the discrimination is based on a reasonable municipal policy and not arbitrary.)

1981-1982 Op. Va. Att'y Gen. 366 (A town may enact ordinance with single rate as long as it is below the lowest rate for any class, and sufficiently certain, clear and unambiguous as to the types of businesses taxed.)

## § 2.2. ACTIVITIES SUBJECT TO LICENSE TAXATION

Where a Virginia locality has adopted a BPOL ordinance which requires a license, every person engaged in a licensable activity at a definite place of business in such locality must apply for a license.<sup>3</sup> Whether or not a particular activity is in fact subject to license taxation depends upon the local ordinance. What constitutes a definite place of business is discussed in Chapter 1: Definitions, above. See Uniform Ordinance provisions, *Code of Virginia* § 58.1-3703.1.

## § 2.3. EXEMPTIONS FROM THE BPOL TAX.

Code of Virginia § 58.1-3703(C) prohibits local taxation of certain privileges which would otherwise be taxable. Those privileges are detailed in § 58.1-3703(C). Localities may not impose a license tax or fee on certain persons and privileges which include, but are not limited to, the following:<sup>4</sup>

- certain public service corporations and motor carriers, common carriers, and other carriers of passengers or property formerly certified by the Interstate Commerce Commission or presently registered for insurance purposes with the Surface Transportation Board of the United States Department of Transportation, Federal Highway Administration;
- the privilege of selling farm or domestic products or nursery products, or the planting of nursery products, as an incident to the sale thereof, outside of the regular market houses and sheds of such county, city or town, provided such products are grown or produced by the person offering them for sale;

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<sup>3</sup> Where a locality has adopted a BPOL ordinance requiring a license, a license is also required if a person has no definite place of business in a particular locality in Virginia but the person operates amusement machines in a locality or is classified as an itinerant merchant, peddler, carnival, circus, contractor subject to § 58.1-3715, or a public service corporation as defined in § 58.1-3731.

<sup>4</sup> See also, e.g., *Code of Virginia* §§ 58.1-3703 B, 58.1-3712 through 58.1-3713.4, 58.1-3717 through 58.1-3721, and 58.1-3724 through 58.1-3730, which discuss specific types of businesses which are exempt from the local license tax. See also §§ 58.1-3714, 58.1-3715, and 58.1-3716. Also § 58.1-3731 discusses BPOL taxes on specific types of public service companies.

- the privilege of printing or publishing any newspaper, magazine, newsletter or other publication issued daily or regularly at average intervals not exceeding three months, provided the publication's subscription sales are exempt from state sales tax, or the privilege or right of operating or conducting any radio or television broadcasting station or service;
- manufacturers for the privilege of manufacturing and selling goods, wares and merchandise at wholesale at the place of manufacture;
- persons severing minerals from the earth for the privilege of selling the severed mineral at wholesale at the place of severance, except as provided in §§ 58.1-3712 and 58.1-3713;
- a wholesaler for the privilege of selling goods, wares and merchandise to other persons for resale unless such wholesaler has a definite place of business or store in such county, city or town;
- the privilege of renting, as the owner of such property, real property (except in certain grandfathered localities) other than hotels, motels, motor lodges, auto courts, tourist courts, travel trailer parks, lodging houses, rooming houses and boardinghouses;
- certain transactions of a corporation which is a member of an affiliated group of corporations with other members of the same affiliated group (See Appendix A);
- any insurance company subject to taxation under § 58.1-2500 *et seq.* or on any agent of such company;
- any bank or trust company subject to taxation under §58.1-1200 *et seq.*;
- certain nonprofit organizations; (See Appendix D for a discussion of nonprofit organizations); and
- any venture capital fund or other investment fund, except commissions and fees of such funds.

## § 2.4. GROSS RECEIPTS

The definition of “gross receipts” is discussed above in Chapter 1. Definitions. Income that is not derived from the exercise of the privilege for which the taxpayer is licensed by the locality do not constitute gross receipts for purposes of BPOL taxation. Activities of a taxpayer which serve only the taxpayer's interest, and no other, do not give rise to gross receipts. Other exclusions and deductions from gross receipts are discussed below.

## § 2.5. EXCLUSIONS FROM GROSS RECEIPTS.

Generally, gross receipts for license tax purposes exclude any amount not derived from the exercise of the licensed privilege to engage in a business or profession in the ordinary course of business.<sup>5</sup> The following is a partial list for illustrative purposes:

- amounts received and paid to the United States, the Commonwealth or any county, city or town for the Virginia retail sales or use tax, for any local sales tax or any local excise tax on cigarettes, for any federal or state excise taxes on motor fuels;
- amounts representing the liquidation of debt or the sale of a capital asset;
- amounts allowed by a business to its customers for returns and allowances;
- receipt of loan proceeds by a licensee where it is the obligor;
- return of principal either on a loan to a licensee-creditor or where a licensee sells a capital asset;
- rebates or discounts taken or received on account of purchases by the licensee;
- certain withdrawals from inventory; or,
- investment income not directly related to an entity's exercise of its licensed privilege, unless the entity's licensable activity is that of financial services.

Examples:

1. A lawyer is advanced funds by his client to pay court filing fees and the cost of a court reporter. He also receives payment from City A on account of a refund of excess taxes paid by his client. With his client's permission, lawyer deducts from the tax refund the cost of his services for handling the tax case, including telephone tolls, meals, copying and certain other charges the client has agreed to reimburse. The lawyer is taxable on the amount of his fee including any amount separately billed to the client. Amounts advanced to pay expenses on the client's behalf are not gross receipts, nor is the amount of the tax refund because it is received by the lawyer as the client's agent. "Trust fund" receipts, technically speaking, are not derived from the exercise of a licensable privilege; therefore, "trust fund" receipts do not constitute gross receipts.
2. A lawyer handles a real estate closing for a real estate developer and receives the sale proceeds, net after costs withheld by the purchaser's attorney. He mails the proceeds, net of his fee, to the real estate developer. The lawyer is taxable only on his fee, and not on the full sales proceeds of the transaction. The developer is taxable on the whole of the proceeds of the transaction, including the fee withheld by the attorney.

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<sup>5</sup> *Code of Virginia* § 58.1-3732.3 provides an exclusion for certain gross receipts of providers of funeral services. *Code of Virginia* § 58.1-3732.3 provides an exclusion for certain gross receipts of certain staffing firms.

3. Corp. C, in County D, Virginia purchases a portfolio of loans for its own account. So long as the corporation's activities in the locality are limited to purchasing and holding portfolios for its own account, there is no tax.
4. Same facts as above except that Corp. C sells interests in its investment pools through public offerings. There is no tax. Proceeds attributable to capital transactions in the nature of raising capital in the equity markets are not subject to BPOL tax.

## § 2.6. DEDUCTIONS FROM GROSS RECEIPTS.

The following shall be deducted from gross receipts:

- any amount paid for computer hardware or software sold to the U.S. or a state government provided certain holding and contractual requirements are met; and,
- any receipts attributable to a business conducted in another state or foreign country in which the taxpayer is liable for an income or other tax based upon income. A Virginia taxpayer is liable for an income or other tax based upon income if the taxpayer files a return for an income or income-like tax in that state or foreign country. The Virginia taxpayer, however, need not actually pay any tax to take the deduction.

Examples:

1. Merchant sells goods to a North Carolina resident and ships the goods to him in that state. Gross receipts from the sale of the goods are attributable to a definite place of business in Virginia. North Carolina imposes an income tax and Merchant files a North Carolina income tax return. Merchant reports sales delivered to customers in North Carolina in the numerator of its sales factor for North Carolina income tax apportionment purposes. Gross receipts from sales delivered in North Carolina are deductible from Merchant's Virginia BPOL taxable gross receipts (or the cost of the purchases are deductible from the tax base if the merchant is taxable on purchases.)
2. Same facts as above except that sales are delivered to a customer in Ohio. In Ohio, Merchant pays either a tax based on income or based on net worth, whichever is greater. Merchant files the appropriate Ohio tax return. Gross receipts (or the cost of purchases if Merchant is taxable on purchases) from sales delivered in Ohio are deductible from Merchant's Virginia BPOL taxable gross receipts. Receipts attributed to business conducted in another state or foreign country in which the taxpayer is liable for an income or an income based tax are deductible from Virginia BPOL taxable gross receipts, if such receipts are also attributable to a definite place of business in Virginia.
3. Same facts as above except that sales are made to a customer in Nevada. Nevada imposes no income tax or other tax based upon income. Merchant does not file a return or perform any other actions to pay an income or income-based tax. For gross receipts relating to business conducted in another state or foreign country to be

deductible from Merchant's Virginia BPOL taxable gross receipts, Merchant must be liable for an income or other tax based upon income. To be liable for an income or income-like tax, Merchant must file a tax return for an income or income like tax in the state or foreign country. Merchant is not entitled to a deduction as it did not file a return for an income or income based tax in Nevada.

Derived from amendment to the Uniform Ordinance provisions at § 58.1-3732, limiting receipts to those derived from the exercise of the licensed privilege in the ordinary course of business and providing a deduction from gross receipts for certain amounts paid for computer hardware or software and also in certain instances where taxpayer required to pay income tax to another jurisdiction on gross receipts attributable there.

Monument Associates v. Arlington County Board, 242 Va. 145 (1991). (A taxpayer who used accrual method for federal income tax must also use accrual method for BPOL receipts when ordinance required that same method be used for both).

Alexandria v. Morrison-Williams, 223 Va. 349 (1982). (An advertising agency which charged its clients a commission on media charges, was taxable on total receipts from clients without deduction for the media charges.)

1992 Op. Va. Att'y Gen. 162 ("Gross receipts" typically include the total amount of money or the value of other consideration received from selling property or from performing services; proceeds from insurance policy on the life of a deceased executive are not taxable gross receipts because they are not attributable to the operation of a business.)

1984-1985 Op. Va. Att'y Gen. 346 (Fees for corporate directorship are not taxable unless it is the person's business, trade, profession, occupation or calling.)

## § 2.7. OTHER EXCLUSIONS AND DEDUCTIONS FROM GROSS RECEIPTS.

Examples of items deemed not to be receipts derived from the licensable business include, but are not limited to, the following:

- A. Certain adjustments which may be required by reason of the accounting method or system or otherwise to reflect events subsequent to the sale, such as the return of merchandise for credit or refund. If the local ordinance requires gross receipts to be reported using the same method of accounting as used for federal income tax purposes, and the accrual method is used, sales will often be accrued, reported and taxed before actual payment is received. Adjustments may then be required to prevent the taxation of items accrued but never received.

For example:

1. A business may record a customer's exchange of merchandise as a refund and new sale. If so, the refund of the previously taxed sale would be deductible

because there would have been only one sale -- the first sale would have been rescinded when the refund/exchange was made.

2. A business that offers customers a discount for volume purchases, prompt payment, or other reason, may record the sale at full value and deduct the discount at the time of payment. If so, the discount from the previously taxed full sales price would be deductible from gross receipts since the amount was not and never will be received.
  3. A business that makes sales on credit may accrue the full sales price and set up a receivable account for the installment payment or revolving charge account agreement. If the business subsequently determines that all or a portion of the receivable is worthless, entitling the business to a bad debt deduction for federal income tax purposes, the portion of the previously taxed sale which is determined to be worthless would be deductible because it was not received. The subsequent collection of a debt deducted from gross receipts as worthless would be includible in gross receipts when received, and considered ancillary to the business activity that created the debt.
  4. A business that reports its receipts on the cash method of accounting would include all customer payments on installment contracts and revolving charge accounts when received since none of the receipts would be attributable to previously taxed sales.
- B. The borrower's receipt of the proceeds of a loan transaction are not gross receipts arising from the exercise of a licensable privilege in the ordinary course of business even if the business regularly obtains money, goods or services on credit.
- C. A business which lends money in the regular course of business may receive interest, points, origination fees, and other fees in connection with the loan transaction, all of which would be gross receipts derived from the licensable business. Customer payments to a lender which represent the return of principal on a loan are not gross receipts arising from the exercise of a licensable privilege in the ordinary course of a money lending business. As described in paragraph A above, the treatment of return of principal on the loans, installment contracts and the accounts receivable of other types of businesses may depend on the nature of the transaction in which the debt was created and the method of accounting used.
- D. Patronage dividends, to the extent they represent a reduction in purchase price to a co-operative member.

## § 2.8. RATES AND FEES.

The Uniform Ordinance provisions establish two thresholds; one for license fees and another for license taxes. The following chart gives an overview of the thresholds' application

to the exemption based on gross receipts and the limitation on the license fee based on a locality's population:

<b>Population</b>	<b>Maximum License Fee amount</b>	<b>Gross receipts threshold amounts<sup>6</sup></b>
0-24,999	\$30	No dollar threshold amount
25,000-50,000	\$50	\$50,000
50,001+	\$50 <sup>7 8</sup>	\$100,000

The thresholds indicate that, except as specifically provided in § 58.1-3706 and except for the fee authorized in § 58.1-3703, no local license tax imposed pursuant to the provisions of Chapter 37 of Title 58.1 of the *Code of Virginia*, except those specified in §§ 58.1-3712, 58.1-3712.1 and 58.1-3713, 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:

- (i) \$100,000 in any locality with a population greater than 50,000; or,
- (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 classifications listed:

1. For contracting, and persons constructing for their own account for sale, sixteen cents per \$100 of gross receipts;
2. For retail sales, twenty cents per \$100 of gross receipts;
3. For financial, real estate and professional services, fifty-eight cents per \$100 of gross receipts; and

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<sup>6</sup> License tax = \$0 if threshold is not met. Some localities may be grand fathered with respect to applicable license tax rates once thresholds have been met. See Appendix D.

<sup>7</sup> Formerly \$100, fee to be reduced not to exceed \$50 by January 1, 2000.

<sup>8</sup> Additionally, *Code of Virginia* § 58.1-3703.1 (A)(1) provides that any locality with a population greater than 50,000 may waive the license requirements provided for in that section for businesses with gross receipts of less than \$100,000.00.

4. For repair, personal and business services, and all other businesses and occupations not specifically listed or excepted in § 58.1-3706, thirty-six cents per \$100 of gross receipts.<sup>9</sup>

**Additionally, Code of Virginia § 58.1-3703 (A) provides that no license tax may be assessed on any amount of gross receipts of a business upon which a license fee is charged.**

The above tax rates and rate thresholds for license taxes as indicated in § 58.1-3706 do not apply to those items regarding taxation on the severance of coal, gas or oil as specified in

§§ 58.1-3712, 58.1-3712.1 and 58.1-3713, or any other provision in Chapter 37 of Title 58.1 where a special taxing provision exists; for example, those taxes assessed upon the following taxpayers: (i) wholesalers, governed by § 58.1-3716; (ii) public service companies, which shall be governed by § 58.1-3731; (iii) carnivals, circuses and speedways, which shall be governed by § 58.1-3728; (iv) fortune-tellers, which shall be governed by § 58.1-3726; (v) massage parlors; (vi) itinerant merchants or peddlers, which shall be governed by § 58.1-3717; (vii) permanent coliseums, arenas, or auditoriums having a maximum capacity in excess of 10,000 persons and open to the public, which shall be governed by § 58.1-3729; (viii) savings institutions, and credit unions, which shall be governed by § 58.1-3730; (ix) photographers, which shall be governed by § 58.1-3727; and (x) direct sellers, which shall be governed by § 58.1-3719.1.

The above rate limitations and thresholds regarding license taxes do not apply to the license fee, authorized in § 58.1-3703. The license fee is subject to separate thresholds, as follows: localities with populations of less than 25,000 may assess businesses a license fee not to exceed \$30.00. Localities with populations of 25,000, but less than 50,000 persons may assess businesses a license fee not to exceed \$50.00. Localities with populations of more than 50,000 persons may assess businesses a license fee not to exceed \$100.00. Localities with populations greater than 50,000 persons must reduce license fee to \$50.00 by January 1, 2000. A locality may impose a fee for issuing a BPOL license upon all businesses for each licensable privilege in which they engage. Businesses paying a BPOL tax on other than a gross receipts basis or paying a flat BPOL tax are also subject to the license fee.

## **§ 2.9. MULTIPLE BUSINESSES.**

Multiple businesses conducted by a person at a single location are required to obtain a separate license for each business. If an entity has multiple businesses at one location with each separate business licensed, it would then count each separate licensed business for purposes of the threshold in order to trigger the BPOL tax under § 58.1-3706. For purposes of the license fee imposed under § 58.1-3703, it is within the locality's discretion whether or not to assess multiple fees for the issuance of multiple licenses where one entity exercises several

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<sup>9</sup> It is within the discretion of localities to impose flat license taxes, in addition to or in lieu of the license fee, however, a locality cannot fashion a flat tax which violates the threshold or the rate caps set in Code of Virginia § 58.1-3706.

licensable privileges at one location; however, every license issued carries with it a separate rate threshold. Examples:

1. XYZ Co. operates a business at one location in City A at which automobiles are repaired and auto parts are sold. City A requires XYZ to obtain a retail business license and also a repair services license, charging a \$100 fee for each license. XYZ Co. has two thresholds for purposes of establishing gross receipts for the applicability of the BPOL tax, one for the repair business and one for the retail business.
  2. Same facts as above, except that XYZ Co. operates several business locations in City A at which automobiles are repaired and auto parts are sold. XYZ will be required to obtain two licenses for each location in City A and each licensable business will have a separate threshold for purposes of establishing gross receipts for the applicability of the BPOL tax.
  3. Same facts as in Example 1 above, except that the locality chooses to charge the business only one fee for the issuance of two licenses. As above, XYZ Co. would have two thresholds for purposes of establishing gross receipts for the applicability of the BPOL tax, one for the repair business and one for the retail business.
- A. Each such business must be clearly identifiable as a separate business and not merely activities ancillary to the primary business. An activity for which no separate charge is made is presumed to be ancillary to the activity for which a charge is made, but separately stating charges for different activities does not create a presumption that each such activity is a separate business. Gross receipts attributable to any ancillary activities are taxable as part of the primary licensable business. Gross receipts which are not ancillary to a licensable business must rise to the level of a separate business to be taxable. The following are examples of activities which may be ancillary or *de minimis*:
1. A merchant (retail or wholesale) offers an extended warranty with the merchandise it sells. The warranty covers parts and labor, and may include replacement of defective merchandise. Although a separate charge is made for the warranty, at the time of sale it is impossible to determine how much of the charge will be used (if any) for labor, parts, or replacement merchandise. The charge for an extended warranty is ancillary to the sale of the merchandise.
  2. A retail merchant offers to deliver the merchandise it sells for a fee. The merchant has its own delivery trucks, but also contracts with third parties to make some of the deliveries. The fee charged to the customer varies with distance, but does not depend on whether the merchandise is delivered by the merchant or a third party. Because the delivery service is only offered with respect to merchandise sold by the merchant, the delivery charge is ancillary to the merchandising business.

3. A repair service must occasionally replace small, inexpensive parts. It does not separately charge for the parts. The provision of parts is ancillary to the repair service.
  4. A firm offers repair service at numerous offices in several states. At its headquarters the firm employs lawyers and certified public accountants to assist in managing its operations. The firm also employs a real estate professional, engineer and architect to find and develop locations for new offices. None of these employees offer their services to anyone other than the firm, and the firm does not separately charge anyone for the activities of its professional employees. The activities of these employees are ancillary to the firm's repair business and do not generate gross receipts.
  5. A retail merchant offers installment contracts in conjunction with the sale of its merchandise. Each contract provides for the payment of interest and collection costs, including attorneys fees of 20% of any delinquent amount collected by legal action.
    - (a) Interest received pursuant to the installment sales contract is ancillary to the retail sale of the merchandise.
    - (b) If the merchant employs a salaried staff attorney to collect delinquencies under the installment sales contract, any amounts collected would be ancillary to the retail sale of merchandise. (But, see § 2.7. for the impact of the cash or accrual method of accounting.)
- B. Localities may permit, but may not require, a taxpayer to elect any of the following:
1. Multiple businesses conducted at a single location may be taxed under a single license if all are taxable at the same rate; or
  2. Multiple businesses conducted at a single location may be taxed at the highest rate if the businesses are subject to tax at different rates; or
  3. A single business may be issued separate licenses for its primary business and one or more ancillary activities which would be taxed at a different rate if the ancillary activities constitute a separate business.
- C. The following are examples of multiple businesses that may be required to obtain multiple licenses:
1. When a merchant conducts both a wholesale and a retail business, the merchant is subject to the retail license tax on the retail portion of the business and subject to the wholesale license tax on the wholesale portion of the business. However, the locality may permit but not require the merchant to pay the license tax as a retailer on both the retail and wholesale portions of the business.

2. Any person engaged in repair service who sells parts as part of the repair service is engaged in a licensable service business. If the person sells parts in addition to the repair service, he is engaged in retail or wholesale sales as to the sales of the repair parts.
3. Any boardinghouse or lodging house which also furnishes or sells food or merchandise for compensation may be engaged in retail sales as to the sale of the food or merchandise.
4. An optometrist who also fills prescriptions for or fits corrective lenses and eyeglass frames in a regular course of dealing is engaged in two licensable businesses. The optometrist is rendering a professional service when examining eyes and is conducting business as a retail merchant when filling prescriptions and fitting corrective lenses and eyeglass frames.
5. Any practitioner of a profession who sells goods, wares or merchandise in connection with the practice of the profession may be engaged in making retail sales depending on the nature of the products sold and the service performed.
6. A medical doctor who engages in the sale of drugs or other merchandise as well as the practice of medicine is a merchant as to those sales. However, a medical doctor is not a merchant as to the drugs used in giving an immunization to a patient.
7. A chiropodist who sells shoes in connection with his practice is a retail merchant as to such sales.
8. An attorney practices law in Town A, Virginia, and has receipts from clients for trying cases, providing advice, lobbying, periodically teaching law at Town A Law School, the sale of stock received as a fee for incorporating a business, interest from the bank on his business accounts, and from gambling during a client-sponsored trip. Receipts from clients for trial work, legal advice, lobbying, the value of stock received as a fee in the year received are all taxable as gross receipts. Teaching law, the sale of stock as a fee, interest earned from the business accounts at the bank and gambling winnings are not taxable because the lawyer is not regularly engaged in these activities as a business and these activities are not ancillary to the practice of law. However, if some of the non-taxable activities were conducted on a regular basis as defined in the statute, they might constitute the conduct of business and be subject to separate licensure.

County of Chesterfield v. BBC Brown Boveri, 238 Va. 64 (1989).

Caffee v. City of Portsmouth, 203 Va. 928 (1962) (Bakery was held to be a manufacturer, but was subject to tax on gross receipts from retail sales showroom in front of building.)

1994 Op. Va. Att'y Gen. 99. (Separate business activities that could each be performed independently of the other suggest separate taxable businesses; activities so integrated as to comprise a single business are properly taxable at a single rate based on whichever constitutes the "substantial" activity, not the ancillary activities.)

1991 Op. Va. Att'y Gen. 258. (Contractor taxable on all receipts for a "design-build" contract even though some services, standing alone, would not be classified as contracting.)

1984-1985 Op. Va. Att'y Gen. 346. (Fees for corporate directorship not taxable unless it is the person's business, trade, profession, occupation or calling.)

## § 2.10. MULTIPLE LOCATIONS.

The classification of a business generally depends on the nature of the goods or services offered to the customers of the business for consideration. In the case of a business which conducts different activities at multiple locations, proper classification of the business may require consideration of its activities at locations in addition to the licensed location, *i.e.*, the overall nature of the business. For example:

- A. A complex product is manufactured in stages at different locations. It is undisputed that the overall process is manufacturing. However, final assembly and processing occur at a separate location and, viewed in isolation, the activities at this location may not cause sufficient transformation to be considered manufacturing. The location will be considered a "place of manufacture" for purposes of classifying the gross receipts or purchases as arising from sales at wholesale at the place of manufacture.
- B. A contractor maintains a staff of architects and engineers and bids on "design-build" contracts. The bids are for a lump sum and do not segregate design costs from building costs. The entire gross receipts are subject to license tax as a contractor in the locality in which the building is constructed. The design activities are ancillary to the contracting activities and the contractor will not be required to obtain a professional license for the architects and engineers.

Because the public policy of Virginia is to encourage manufacturing in Virginia, and the definition of manufacturing is applied liberally, County of Chesterfield v. BBC Brown Boveri, 238 Va. 64 (1989), the manufacturing exemption cannot be limited to situations in which the entire manufacturing process occurs at one location.

1990 Op. Va. Att'y Gen. 220. (Out-of-state manufacturer with a sales office in Virginia taxable as a wholesale merchant with respect to sales made at Virginia office since no manufacturing took place there.)

1991 Op. Va. Att'y Gen. 257. (A contractor is taxable on all receipts for a "design-build" contract even though some services, standing alone, would not be classified as contracting.)

Appeal of Titzel Engineering, Inc., 205 A. 2d. 700 (Pa. 1964). (The manufacturing process consisted of work subcontracted out but under the taxpayer's control at all times, work in the taxpayer's shop, and work by the taxpayer's employees at the customer's location.)

## § 2.11. EMPLOYEES.

Employees are generally not engaged in a licensable business separate from that of their employer. Therefore, a license obtained by the employer generally covers the activities of any employees.

## § 2.12. INDEPENDENT CONTRACTORS.

An independent contractor is engaged in a business separate from that of the person who contracts for the independent contractor's services.

- A. Therefore, if one licensable business subcontracts some of its business to an independent contractor, the primary business may not deduct from its taxable gross receipts any payments to an independent contractor even though the independent contractor or subcontractor is also taxable on its gross receipts.
- B. The determination as to whether a person is an employee or an independent contractor is based on common law principles and is affected by factors such as control, who furnishes materials, and other factors.
- C. Localities are entitled to rely upon the classification of a person as an employee or independent contractor for federal payroll tax purposes unless the taxpayer demonstrates that the classification for federal payroll tax purposes is erroneous or inapplicable.

## § 2.13. NAICS CODES.

The federal government publishes a manual of North American Industry Classification System (NAICS) codes. A locality may use the NAICS codes in the course of classifying a business for BPOL tax purposes; however, the NAICS code of a business does not control, or even create a presumption, as to the correct classification for BPOL purposes for the following reasons:

- A. The NAICS codes group manufacturers and processors together, while processors are generally excluded when using the term manufacturer for BPOL tax purposes.
- B. Only one NAICS code is assigned to an enterprise or establishment, while a separate BPOL license may be required for each identifiable business.
- C. A classification, exemption, or deduction under state law or local ordinance may require consideration of factors not relevant to NAICS code selection.

1983-1984 Op. Va. Att'y Gen. 372. (The use of SIC codes for retail sales tax purposes is not applicable to the determination of the meaning of "manufacturer" as used in BPOL tax law.)
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## CHAPTER 3: SITUS RULES

### § 3.1. SITUS OF GROSS RECEIPTS.

Except as otherwise provided by law, situs refers to the locality in which a person subject to local license taxation for any business, profession, trade, occupation or calling has a definite place of business. If the person has a definite place of business in any other locality, then the other locality may impose a license tax on him, provided such other locality is otherwise authorized to impose a local license tax upon his business.<sup>10</sup>

When a BPOL tax is measured by gross receipts, the gross receipts included in the taxable measure are only those gross receipts attributed to the exercise of a privilege subject to licensure at a definite place of business within Virginia. Where activities are conducted outside of a definite place of business, such as during a visit to a customer location, gross receipts are attributed to the definite place of business from which such activities are initiated, directed, or controlled. The situs of gross receipts for different classifications of business are attributed to one or more definite places of business or offices as follows:

### § 3.2. SITUS OF GROSS RECEIPTS FOR A CONTRACTOR.

Generally, under § 58.1-3703.1(A)(3)(1), the gross receipts of a contractor are attributed to the definite place of business where its services are performed. If a contractor performs services in a locality in which it does not maintain a definite place of business, then gross receipts from such services are attributed to the definite place of business where its services are initiated, controlled or directed, unless the contractor is subject to § 58.1-3715.<sup>11</sup>

A contractor is subject to § 58.1-3715 when it derives gross receipts in excess of \$25,000 in one year from a Virginia locality in which it does not maintain a definite place of business. This locality may require the contractor to pay a license fee or tax. If the contractor maintains a definite place of business in a Virginia locality, the contractor may deduct the amount of business done in the locality in which it does not maintain a definite place of business from the gross revenue reported to the locality where its definite place of business is located. If gross receipts derived from the locality in which the contractor does not maintain a definite place of business do not exceed \$25,000, then those receipts are attributable to the locality in which the contractor's definite place of business is located.

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<sup>10</sup> If a local license tax imposed by any locality is measured by volume, the volume on which the tax may be computed will be the volume attributable to all definite places of business of the business, profession, trade, occupation or calling in such locality. All volume attributable to any definite places of business of the business, profession, trade, occupation or calling in any other locality will be deductible from the base in computing any local license tax measured by volume imposed on the taxpayer by the locality in which the first-mentioned definite place is located. "Volume" means gross receipts, sales, purchases, or other base for measuring a license tax which is related to the amount of business done. The above may not be construed as prohibiting any locality from requiring a separate license for each definite place of business located in such locality. *Code of Virginia* § 58.1-3708.

<sup>11</sup> Prior to July 1, 1999, the provisions of Code of Virginia § 58.1-3715 did not apply to contractors with no definite place of business in Virginia.

For example:

1. A painter is located and properly licensed in B County in Virginia. The painter is contracted to paint a large warehouse located in Town A in Virginia. The painter will receive gross receipts in excess of \$25,000 for this job. The painter is subject to a license tax in Town A pursuant to § 58.1-3715. The gross receipts taxable in Town A are deductible from the gross receipts which the painter reports to County B.
2. A plumber residing in City A performs plumbing work in City A, County B and Town C. The gross receipts attributable to County B and Town C are each less than \$25,000 a year. The plumber keeps all tools and parts in his truck but maintains his records and business phone line in his house. The situs of gross receipts would be City A because the location of his phone line and records means that he controls his business from this locality.
3. DEF, Inc., a company engaged in the business of contracting, has its principal office in City A (population 115,000), and provides contracting services in City A as well as County B (population 235,000) and Town C (population 15,000). DEF's gross receipts in City A in a year equal \$125,000 and its gross receipts in County B equal \$15,000 in that same year. DEF's gross receipts from Town C equal \$35,000 in that same year, also. All localities herein require a license of, and also assess a BPOL tax on, contractors. DEF pays a license fee of \$100 per year in City A and also pays a license fee of \$30 per year in Town C.

Here, DEF would report gross receipts of \$175,000 to City A. However, since Town C could assess a BPOL tax on the \$35,000 in gross receipts DEF generated in its locale, and if in fact it did levy such a tax upon DEF, then DEF would receive a deduction from the gross receipts it reports to City A for its BPOL tax in the amount of the business done in Town C. However, DEF would not receive a deduction in the calculation of its City A BPOL tax for any license fee paid to Town C. For the reasons stated above, since DEF's gross receipts from County B do not exceed \$25,000, those receipts are attributable to City A, where DEF's principal office is located. Accordingly, DEF's gross receipts would be attributed as follows: \$140,000 to City A and \$35,000 to Town C.

### **§ 3.3. SITUS OF GROSS RECEIPTS FOR A RETAILER (OR WHOLESALER SUBJECT TO LICENSE TAXATION BASED ON GROSS RECEIPTS.)**

The gross receipts of a retailer are attributed to the definite place of business where sales solicitation activities occur. If sales solicitation activities are not performed in any one locality, then they are attributed to the definite place of business from which the sales solicitation activities are initiated, directed or controlled. Unless a wholesaler is subject to a license tax measured by purchases (See § 3.4), its gross receipts are also attributed to the definite place of business where sales solicitation activities occur, or, if sales solicitation activities are not performed in any one locality, then they are attributed to the definite place of business from which the sales solicitation activities are initiated, directed or controlled. For example:

1. A national retailer who sells clothing through a catalog has a sales office in A County where its sales staff receives telephone purchase orders and relays the orders to its warehouse which is located in Pennsylvania. Retailer's sales office is a definite place

- of business since sales solicitations are directed there. Gross receipts are sourced to A County.
2. A national retailer's corporate headquarters are located in B City, Virginia. The retailer has stores throughout Virginia and the entire southeast. Each store maintains its own sales staff; however all accounting and operations management are performed at the corporate headquarters. Sales solicitation occurs at each store; therefore, the gross receipts from each store are sited to the localities in Virginia where each store is located.
  3. A wholesaler, whose BPOL tax is based upon gross receipts, has a warehouse in County A. Solicitations for the sale of goods stored at the warehouse are made from City B. The situs of these gross receipts is City B.
  4. A retailer sells goods over the Internet to customers who place their orders from home computers. The store, server, web page and customers are all in different localities in Virginia. The gross receipts of a retailer are attributed to the definite place of business where the sales solicitation activities occur. If sales solicitation activities are not performed in any one locality, then gross receipts are attributed to the definite place of business from which the sales solicitations are initiated, directed or controlled. The Internet page is not a definite place of business. Orders are filled at the retailer's store, and thus, under these facts, the sales solicitations are controlled at the store.
  5. Corp. A maintains a "back-shop" processing office in County B, Virginia where document specialists process requests for purchase proposals submitted to the office from sales representatives located throughout Virginia, including some in County B. An out-of-state office of Corp. A determines whether to submit a bid on the proposal, handles all aspects of the contract negotiation process, and has all authority to bind Corp. A by accepting proposals. The "back-shop" processing office in County B, Virginia has no authority to bind Corp. A and cannot accept any proposals. Gross receipts of a retailer, or a wholesaler which is taxed based upon gross receipts, are attributed to the definite place of business where sales solicitation occurs. If sales solicitation activities are not performed in any one locality, then they are attributed to the definite place of business from which the sales solicitation activities are initiated, directed or controlled. Sales solicitation relates to selling a particular product to a particular person. Generally, it does not include activities prior or subsequent to such activities. Whether sales solicitation takes place at one place or more is often a facts and circumstances test. In situations where multiple locations are involved, one such factor is which location had the authority to bind the seller in the transaction. In this example, the sales solicitation activity is under the full and sole control of Corp. A's out-of-state location; therefore, under these facts, gross receipts would not be attributed to County B, Virginia.

#### **§ 3.4. SITUS OF PURCHASES FOR WHOLESALER SUBJECT TO TAX BASED ON PURCHASES.**

The gross receipts of a wholesaler or distribution house subject to the tax based on purchases are attributed to the definite place of business from where the goods are physically delivered to customers or at the shipping point to customers. Any wholesaler who is subject to

a BPOL tax in two or more localities with different bases or measures may apply to the Tax Commissioner for the proper measure of purchases and gross receipts subject to tax in each locality.<sup>12</sup> "Purchases" means all goods, wares and merchandise received for sale at each definite place of business of a wholesale merchant. The term shall also include the cost of manufacture of all goods, wares and merchandise manufactured by any wholesale merchant and sold or offered for sale. A wholesale merchant may elect to report the gross receipts from the sale of manufactured goods, wares and merchandise if it cannot determine the cost of manufacture or chooses not to disclose the cost of manufacture.

1. A wholesaler has its sales office in B Town and maintains a warehouse in C County from which it ships goods by truck to customers in Virginia. Wholesaler is subject to license tax measured by purchases. Wholesaler's warehouse is a definite place of business subject to taxation in C County.
2. A wholesaler has facilities in North Carolina and has a distribution center in A Town, Virginia, which assesses a BPOL tax on wholesalers based upon purchases. Merchandise shipped from the wholesaler in Town A is subject to the license tax measured by purchases and the situs of the wholesaler's purchases, of goods shipped from Town A is Town A because it is the shipping point from the distribution center.
3. A wholesaler, whose BPOL tax is measured based upon purchases, has a warehouse in County A from where it delivers goods to customers. The situs of its purchases is County A.
4. Company A manufactures equipment for industrial, governmental and commercial use at its plant outside Virginia. It has an office in City B, Virginia where sales solicitations take place. Company A's sales office is taxable as a wholesale merchant based on purchases. The purchases of a wholesaler subject to the tax on purchases are attributed to the definite place of business where the goods are physically delivered to customers or at the shipping point to customers. Company A has no taxable purchases in City B since the goods are not delivered or shipped from the sales office in that locality.
5. Company A sells petroleum products at retail in its own retail stores. It also sells petroleum products at wholesale to retail dealers at City A in Virginia. Company A exchanges a shipload of petroleum products for a shipload of oil with Company A. The exchange occurs outside of Virginia. The exchange is not taxable. The sale is not a retail sale nor attributable to the exercise of the privilege of selling at retail at Company A's retail stores. There is no purchase at any place of business in Virginia that is subject to a wholesale merchant's tax in Virginia because delivery occurred outside Virginia.

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<sup>12</sup> Some localities are grand fathered to assess a BPOL tax upon wholesalers based upon gross receipts.

**§ 3.5. SITUS OF A BUSINESS RENTING TANGIBLE PERSONAL PROPERTY.**

The gross receipts of a business renting tangible personal property are attributed to the definite place of business where the property is rented, or if there is no definite rental place, then to the locality where the rental of the property is managed.

For example:

1. A car rental agency located in County B, stores its cars in a lot in Town C. The car rental contract is signed in the main office in County B and then an employee drives the customer out to the lot to pick up the car. The situs of gross receipts is County B since that is the locality where the rental took place.
2. A business located in City A rents home electronics. Orders are placed by phone to the main warehouse in City A where the goods are then transported by truck to customers' homes in various localities. The rental contract is filled out by a customer at her home and given to the driver at which time the goods are released. Situs of gross receipts is City A. Although the place of rental is in a number of localities, the rental is managed in City A.

**§ 3.6. SITUS OF A BUSINESS PERFORMING SERVICES.**

The gross receipts from the performance of services are attributed to the definite place of business where the services are performed, or if not performed at any definite place, then they are attributed to the definite place of business where the services are directed or controlled.

1. A law firm has an office in City A where all management decisions are made. Attorneys travel to all surrounding city and county court houses to perform legal services. The proper situs would be City A since management decisions are made from this location.
2. A real estate management company is headquartered in B County. Properties managed by the company are located in other Virginia localities as well as other states. Each rental property has an on-site office where rental, repair and management decisions may be made. Since each definite place of business is at the on-site rental office, gross receipts would be sourced to the localities where the rental offices are located. Further, if a locality in which any on-site office is located does not assess a BPOL tax, the gross receipts from such office would not be attributed back to County B where the company's headquarters are located.
3. Same facts as above, except that there are no on-site management offices. All rental, repair and management decisions are directed and controlled at the company headquarters. Gross receipts will be sourced to B County since it is the definite place of business where the rental activity is directed and controlled.
4. An individual works as a marketing consultant. This individual travels constantly throughout various cities and counties in the Commonwealth. She has no office, but keeps a cellular phone and her business records in her car. Her home is located in C County. Consulting income will be sourced to C County. Although she runs her

business out of her car, a person's residence is deemed to be a definite place of business if there is no definite place of business maintained elsewhere. (See § 58.1-3700.1 (2)(b)).

5. Company XYZ has one truck which operates out of City A in southwest Virginia. Company XYZ picks up and delivers wares, loads and other goods for customers to and from locations in and outside of Virginia. Company XYZ has a telephone, desk, files and operating log books at its office in City A and controls, directs and conducts business out of this location. It has no other locations outside of this office in City A. Company XYZ has one truck which operates out of City A, with maintenance on the truck being performed at this location. Company XYZ is a service provider. Gross receipts from business services are attributed to the definite place of business where services are performed, or if not performed at any definite place of business, then to the definite place of business from which the services are directed or controlled. *Code of Virginia* § 58.1-3703.1(A)(3)(a)(4). Here, services are performed across a broad geographic range. Since services are not performed at any definite place of business, gross receipts are attributed to Company XYZ's office in City A where the services are directed or controlled.
6. Acme Pest Co., a pest control and extermination business, has its principal offices in City C, Virginia. Most of Acme's customers are located in City C; however, Acme has some customers in localities which surround City C. Acme provides its service by making on-site visits and performing inspections and pest control spraying and eradication at its customers' residences or places of business. Acme has on-going contracts with some of its customers under which it makes bi-annual visits to their residences or places of business. Other service visits are made on an intermittent, as-ordered basis. Acme leaves no equipment at its regular customers' locations, with the exception of the placement of an occasional mouse trap. Gross receipts from business services are attributed to the definite place of business where services are performed, or if not performed at any definite place of business, then to the definite place of business from which the services are directed or controlled. *Code of Virginia* § 58.1-3703.1(A)(3)(a)(4). A definite place of business means an office or location at which occurs a regular and continuous course of dealing. *Code of Virginia* § 58.1-3700.1. Service is performed by Acme at each location on a regular but non-continuous basis. Acme does not maintain a permanent presence at its customers' locations. Thus, Acme does not have a definite place of business at those locations, and its gross receipts from each place where service is rendered are attributed to City C where Acme has its principal office.
7. ABC CPA's, LLP a CPA firm, has its principal offices in City C, Virginia. Although most of ABC's customers are located in City C, it has some customers in localities which surround City C. ABC provides some of its service by making on-site visits and performing inspections, audits, consulting, tax and business advice at its customers' places of business. ABC also has engagements with some of its customers under which it makes bi-annual visits to their places of business. Other services are also performed at ABC's principal offices on an on-going as well as intermittent, as ordered, basis. ABC has no equipment at its regular customers' locations. Gross receipts from business services are attributed to the definite place of business where services are performed, or if not performed at any definite place of business, then to the definite place of business from which the services are directed or controlled. *Code of Virginia* §

58.1-3703.1(A) (3)(a)(4). A definite place of business means an office or location at which occurs a regular and continuous course of dealing. *Code of Virginia* § 58.1-3700.1. Where a professional service provider performs services at other locations away from an established or principal office where its phone and mailing address is located and does not maintain a continuous presence for more than 30 consecutive days at these other locations, the location of its definite place of business remains its established or principal office. In this example, service is performed by ABC at each customer location on a regular but non-continuous basis. Thus, ABC does not have a definite place of business at those customer locations, and its gross receipts from each place where service is rendered are attributed to City C where ABC has its principal office.

8. Corp. A is a financial services corporation headquartered in Town B, Virginia. Corp. A maintains a loan servicing office in State C and a portfolio maintenance office in State D. Receipts attributable to loan servicing activities and portfolio maintenance are not taxable in Town B.

See *Short Brothers, Inc. v. Arlington County*, 244 Va. 520 (1992). If a business has only one definite place of business then all gross receipts are properly attributable there). Purchases, on the other hand, are sited to the definite place of business where the goods are physically delivered to customers or placed on trucks for delivery to customers.

## CHAPTER 4: APPORTIONMENT

### § 4.1. APPORTIONMENT.

If the taxpayer has more than one definite place of business and it is not possible or practical to determine at which definite place of business gross receipts should be taxed, gross receipts must be divided between the definite places of businesses by payroll. Some activity must occur or be controlled from a definite place of business for gross receipts to be taxed by the locality of the definite place of business. If an entity's definite place of business is in a locality which does not tax gross receipts, a different locality may not tax these gross receipts simply because the first locality does not have a licence tax.

1. A large electronics retailer has its main sales office in City A and maintains a satellite office with its own management in the distant County B. Sales staff from City A make the initial sales contact in County B and process all sales related paperwork. Sales staff in County B make all personal and follow up sales contacts in County B. The definite place of business is in both City A and County B since each sales office is equally responsible for sales solicitations. If it were not possible or practical to determine which definite place of business gross receipts should be attributed to, gross receipts must be apportioned between the definite places of business on the basis of the payroll of the sales staff at each respective place of business.
2. A group medical practice has offices in County A and City B. County A does not tax gross receipts. Patient visits and record keeping functions occur in County A, but physicians see patients in the City B offices on a regular basis. City B may tax the gross receipts generated from services performed at offices located within its boundaries. However, City B may not tax the practice's gross receipts generated from County A simply because the county does not have a license tax.

### § 4.2 AGREEMENT TO APPORTION AMONG LOCALITIES.

Local assessors may enter into agreements with each other regarding the manner in which gross receipts shall be apportioned among definite places of business. The sum of the gross receipts apportioned by the agreement shall not exceed the total gross receipts attributable to all definite places of business affected by the agreement. Upon notification from a taxpayer that a method attributing gross receipts is inconsistent with the method of one or more other localities in which the taxpayer is licensed, and that the difference has, or is likely to, result in taxes on more than 100 percent of its gross receipts from all locations in which the taxpayer is licensed, the assessor shall make a good faith effort to reach an apportionment agreement with the other localities involved. If an agreement cannot be reached, either the assessor or taxpayer may seek an advisory opinion from the Department of Taxation pursuant to § 58.1-3701. Notice of the request must be given to the other party.

Notwithstanding the provisions of § 58.1-3993, when a taxpayer has demonstrated to a court that two or more political subdivisions of Virginia have assessed taxes on gross receipts

that may create a double assessment within the meaning of § 58.1-3986, the court may enter such orders pending resolution of the litigation as may be necessary to ensure that the taxpayer is not required to pay multiple assessments even though it is not then known which assessment is correct and which is erroneous.

## CHAPTER 5: CLASSIFICATION ISSUES

### § 5.1. CONTRACTORS

#### § 5.1.1. Maximum rate.

The maximum rate for local license taxes imposed upon a person engaged in contracting and persons constructing for their own account for sale is sixteen cents per one hundred dollars of gross receipts. In lieu of the tax, a license fee may be charged by the locality. The amount of the fee depends upon the locality's population. See § 2.8.

- A. A person shall be classified as a contractor if he accepts contracts to perform, or regularly performs, or engages others to perform, any of the work described in paragraph B of § 58.1-3714 on buildings, structures or real estate owned by him when the buildings, structures or real estate are sold upon completion of such work; or, if he regularly performs, or engages others to perform, any of the work described in paragraph B of § 58.1-3714 on buildings, structures or real estate owned by others.
- B. Contractors include persons who subdivide and improve real estate, and speculative builders who build houses or other buildings with the intention to offer the subdivided lots or completed buildings for sale. A person who would otherwise be classified as a contractor shall not lose such classification because real estate is temporarily leased until it can be sold, or leased with an option to purchase instead of sold, unless the leasing activity constitutes a separate licensable business. Any gross receipts from such leases shall be considered ancillary to the business of contracting.
- C. The mere subdivision of land into lots, without more, is not contracting. However, a person who installs water or sewer systems, roads, or engages in any other activity described in subsection B of § 58.1-3714 on his own land with the intent to offer the land for sale is a contractor regardless of whether the land is subdivided.
- D. A person shall not be deemed to be engaged in the business of contracting solely because he acts as his own prime contractor to build or improve a building which he intends to occupy as his residence, office or other place of business, or actually so occupied within a reasonable time prior to the sale of the premises.

Subsection B includes a reference to leasing that must be coordinated with the provisions of § 58.1-3703 B 7; *i.e.*: (i) Leasing activities that are deemed ancillary to the contracting business would be taxable by every locality imposing a BPOL tax on contractors; or (ii) Leasing activities that constitute a separate business would be taxable only in a locality that imposed a BPOL tax on real estate rental businesses before January 1, 1974. Subsection D is intended to exempt owner occupied real estate which requires "fix up" work prior to sale. Notwithstanding § 58.1-3703 B 7, some localities are grand fathered to assess a BPOL tax upon the business of renting, as the owner, real property.

1994 Op. Va. Att'y Gen. 114. (Contractor's licenses for regulatory purposes under § 54.1-1117 serve different purposes from license for tax purposes under § 58.1-3714, and different definitions apply).

1987-1988 Op. Va. Att'y Gen. 578, at 584. (A person making repairs to his own home is not a contractor.)

**§ 5.1.2. List of occupations.**

Contracting generally includes, but is not limited to, persons engaged in the following occupations, businesses or trades:

Air-conditioning	Plumbing, heating, steam fitting
Brick contracting and other masonry	Refrigeration
Building	Road, street, bridge, tunnel, sidewalk or curb and gutter construction
Cementing	Roofing and tinning
Dredging	Sewer drilling and well digging
Electrical contracting	Sign painting
Elevator installation	Structural metal work
Erecting signs which are assessed as realty	Tile, glass, flooring and floor covering installation
Floor scraping or finishing	Wrecking, moving or excavating
Foundations	
House moving	
Paint and paper decorating	
Plastering	

**§ 5.1.3. Installation by merchant.**

An installation by a merchant is not considered contracting where he delivers and installs an appliance or other merchandise he sells when the installation uses existing openings and connections. If, however, the installation requires making openings in a wall, running ductwork, wires or plumbing, or any other work described in paragraph D of § 58.1-3714, then the installation work may be deemed contracting. This factor may turn upon the difficulty involved in making way for the goods to be installed. Other factors which may be considered in making the determination of whether or not a merchant's installation of goods constitutes contracting are as follows: (i) whether the installation is merely ancillary to the retail sales of a merchant, as opposed to constituting a substantial portion of what is sold in the transaction; (ii) does the merchant hold himself out as able to perform contractor's activities; and (iii) does the merchant install his own merchandise only, or does he also install the goods of others. Ultimately, however, the determination of whether or not a merchant's installation of goods constitutes contracting for purposes of the BPOL tax will depend upon the facts and circumstances in each case.

- A. A merchant engaged in the business of selling and erecting, or erecting, tombstones is not a contractor solely because he places or erects the tombstone on a gravesite, but is engaged in either retail or wholesale sales.
- B. While a person engaged in the business of wrecking or demolishing a building is a contractor, the subsequent sale of the materials after they have been separated, cleaned, graded, etc., may be classified as either retail or wholesale sales. However, bulk sales of such material from the demolition site may be classified as ancillary to the demolition contract.

- C. A person who merely sells a prefabricated building or structure is not a contractor, but if the person or a subcontractor for that person erects the building or structure, then the seller is a contractor.
- D. If a merchant sells floor coverings (whether the covering be carpet, linoleum, tile or other covering) and installs the floor covering as part of or incidental to the sale, the transaction is not contracting but a retail or wholesale sale. The fact that the purchaser is a general contractor or other institutional, commercial or industrial entity, coupled with the quantity sold and other terms, may affect the classification of the sale as a wholesale rather than retail sale. A person other than a merchant who enters into a contract to install floor coverings would be classified as a contractor, whether the contract is for installation only or sale and installation.
- E. The mere hauling of sand, gravel and dirt excavated by another is not contracting but is a business service.
- F. Soliciting business for a contractor is not contracting but is a business service.

## § 5.2. RETAIL SALES.

### § 5.2.1. Maximum rate.

The maximum rate for local license taxes imposed on a person engaged in retail sales is twenty cents per one hundred dollars of gross receipts. In lieu of a tax, a license fee may be charged by the locality. The amount of the fee depends upon the locality's population. See § 2.8.

1984-1985 Op. Va. Att'y Gen. 354. (A person who sells seafood from a truck one day a week is a peddler not a merchant because he does not keep a regular place of business open at all times during regular business hours.)

### § 5.2.2. Retail and Wholesale Distinguished.

The sales price alone is not determinative of whether the sale is at retail or wholesale. The fact that a person sells goods, wares or merchandise at wholesale prices, at cost, or at less than cost does not prevent the person from being classified as a retail merchant if the sales fall within the definition of a retail sale. See § 5.3.

1990 Op. Va. Att'y Gen. 220. (Sales to commercial or industrial users may be retail sales if made at a price or for a purpose that does not constitute a wholesale sale.)

### § 5.2.3. Banks.

Banks are generally exempt from local license tax, but § 58.1-1202 specifically authorizes localities to subject banks to local license tax on the sale of blank checks, repossessed automobiles, and any other tangible personal property sold by banks in connection with promotions or otherwise.<sup>13</sup> In connection with the sale of blank checks:

- A. A bank is not engaged in retail sales if the customer places an order for the checks directly with the printer and authorizes the bank to collect for the printer by charging his account, and the bank is not obligated to pay for the checks except insofar as it honors the customer's authorization.
- B. A bank is engaged in retail sales if the customer places his order with the bank, and the bank contracts with the printer and is liable to the printer, whether or not the bank actually collects from the customer.

1990 Op. Va. Att'y Gen. 227. (A bank is liable for tax on sales of repossessed automobiles.)
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### § 5.2.4. Solicitation.

A person is not subject to a local license tax if his business in this state is limited solely to the solicitation of orders by catalogs mailed from outside this state to mail-order buyers in this state and who fills orders from outside this state. However, if the catalogs are distributed by a Virginia resident by mail or in person or if the person engaged in the mail-order business has a definite place of business in this state at which mail orders are received or filled, the mail order business may be treated the same as any other retail or wholesale business for purposes of local license taxes.

### § 5.2.5. Retail sales through a commission merchant.

Any person who sells goods at retail through a commission merchant, as defined in § 58.1-3733, may be held liable for a local license tax as to such sales even though the commission merchant may also be taxable with respect to a commission on such sales.

### § 5.2.6. Non-mercantile businesses.

A job printer is a manufacturer and is engaged in either retail or wholesale sales as to the sales of the items printed. The term "job printer" does not lend itself to rigid definition.

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<sup>13</sup> *Code of Virginia* § 58.1-1202 does not authorize the imposition of a BPOL tax on banks. It merely indicates that banks are not exempt as to the sale of tangible personal property. A BPOL tax can be imposed on such sales by a bank when authorized by § 58.1-3703. In other words, such sales must be a separate business. If they are ancillary to the banking business, and classified as financial services, they would be exempt from the BPOL tax.

In general, a job printer is one who engages in "commercial printing, on order, and the production of business forms, books, blank books, pamphlets, advertising, calendars, bill heads, periodicals, etc.," which is generally considered manufacturing. *Heidleberg Central, Inc. V Director of Department of the Revenue of the State of Missouri*, 476 S.W. 2d 502 (1972), cited in Public Document (P.D.) 99-239 (August 23, 1999).

### § 5.2.7. Motor vehicle dealers.

Any locality imposing a license tax on motor vehicle dealers may, by ordinance, require any dealer who separately states the amount of local license tax applicable to a sale and collects it from the customer to treat such taxes collected as held in trust for the locality and require that all such sums collected be paid over to the locality quarterly during the license year. Gross receipts on which the tax has been separately stated, collected and paid over shall be excluded from other taxable gross receipts when the annual license is obtained. During the three year period following over-assessments on the part of the motor vehicle dealers, the locality will refund the amounts due to the purchasers who produce verification that the over-payments were made.

**COMMENT:** Source: *Code of Virginia* § 58.1-3734.

1984-1985 Op. Va. Att'y Gen. 348. (A farm equipment dealer licensed as a "motor vehicle dealer" by the Department of Motor Vehicles may separately state license tax.)

## § 5.3. WHOLESALE SALES.

### § 5.3.1. Maximum rate.

In general, the maximum rate for local license taxes imposed on a person engaged in wholesale selling is five cents per one hundred dollars of purchases of goods for sale. In lieu of a tax, a license fee also be charged by the locality. The amount of the fee depends upon the locality's population. See § 2.8. Some localities are grand fathered to assess a BPOL tax on wholesalers based upon gross receipts.

### § 5.3.2. The licensable privilege of wholesale selling.

Whether or not a sale of tangible personal property is properly classified as wholesale selling depends on the facts and circumstances of the particular transaction under consideration. Wholesale trade is generally recognized as the selling at such prices and in such quantities to others who will then resell such goods either to ultimate consumers or further down the normal distribution chain. Wholesale trade may also include sales to industrial, commercial, or governmental users where goods sold will be used by the buyer in its productive processes. Although no single factor such as price, purpose, or place of sale may

always distinguish between wholesale and other types of sales, the following inquiries may be helpful:

- Is the sale to an individual consumer for the consumer's own personal use? This type of transaction is never considered a wholesale sale for BPOL purposes regardless of whether the taxpayer sells the item at a purported "wholesale price" or sells the item from a business facility that appears to be a wholesale establishment.
- Is the sale to another merchant for resale? Transactions in which the taxpayer is selling new "in the box" items to a merchant for retail or distribution to other retailers or wholesalers are wholesale sales for BPOL purposes. Sales of used goods for resale may be wholesale depending upon the facts and circumstances of the transaction.
- Taxpayers engaged in the business of selling goods to a government, institutional, business, or industrial entity for consumption, use or incorporation in an assembly, manufacturing or processing operation are typically subject to the BPOL tax on wholesalers. Examples of these wholesale activities include: bulk quantity sales of goods for maintenance of facilities or equipment; sales of materials or components for incorporation into a product; or the supplying of machinery, fixtures or furnishings. "Wholesale price" can be an important factor in classifying this type of sales activity, especially when the transaction in question involves goods which are simultaneously offered to individual consumers at a higher price.

**FACTORS THAT HELP DISTINGUISH BETWEEN  
WHOLESALE AND RETAIL SELLING**

<b><u>RETAIL</u></b>	<b><u>WHOLESALE</u></b>
<ul style="list-style-type: none"> <li>• Personal use by individual consumers</li> <li>• Retail price offered to consumers</li> </ul>	<ul style="list-style-type: none"> <li>• Sale for resale</li> <li>• Volume</li> <li>• Sale to government, institutional, or industrial entity for input into productive process</li> <li>• Sales by the original manufacturer</li> </ul>

**§ 5.3.3. Wholesale activities ancillary to manufacturing.**

In bringing their goods to market most manufacturers engage in a wholesale function. So long as this function is ancillary to the manufacturing function, *i.e.* it does not rise to the level of becoming a separate business activity, the manufacturer is not licensable as a wholesaler or subject to the wholesaler BPOL tax. The following wholesale functions are ancillary to a manufacturer's privilege of manufacturing and selling goods at wholesale at the place of manufacture and not subject to BPOL tax:

**All facilities of manufacturer at same location.**

In this case, the wholesale function and the related sales personnel are located at the place of manufacture. The wholesale function is ancillary to the principal business of manufacturing and thus not licensable or taxable as a wholesale operation for BPOL purposes.

**Manufactured goods distributed from place of manufacture - sales function performed in several separate jurisdictions.**

Even though in this case sales activity is taking place in other jurisdictions, the activity does not rise to the level of a separate wholesale business because the goods to be sold remain at the place of manufacture. All sales activity is directed towards delivery of the goods from the place of manufacture to the customer and thus within the statutory exemption for manufacturing.

**All facilities of manufacturer at same location except completed goods warehoused in separate jurisdiction.**

The result in this example is the same as in the previous two. Assuming the warehouse is a storage facility which conducts no other business functions, its existence in another jurisdiction does not provide this other jurisdiction with grounds to levy a license tax on the facility. Mere storage of completed goods is ancillary to manufacturing regardless of where the storage takes place.

Examples of Wholesale Activities:

1. Company C manufactures parts for automobiles outside Virginia. Some of its production is sold directly to governmental, institutional, business, and industrial entities, and some of its production is sold through a store in City D, Virginia. Customers of that store include individuals purchasing at established retail prices, businesses purchasing at the same prices, and other businesses purchasing on a fleet basis at a discount. Sales by Company C directly to government, institutional, business, and industrial entities from the factory are wholesale sales provided that the purpose of the customer in buying such goods is to resell them in one form or another or to use them for business needs as supplies or equipment. Sales made at Company C's store in City D are wholesale to the extent made to businesses on a fleet basis at discount. Its sales made to other businesses not on a fleet and discounted basis are retail sales.
2. Corp. A, from its facility in City C, manufactures widgets which are installed in commercial, industrial, and governmental customer locations. Components are not for sale separately, nor can customers purchase unmade widgets. There is no tax. The company is a manufacturer selling at wholesale at the place of manufacture.

**§ 5.4. FINANCIAL, REAL ESTATE AND PROFESSIONAL SERVICES.**

### § 5.4.1. Maximum rate.

The maximum rate for local license taxes imposed on a person engaged in a financial, real estate or professional service is fifty-eight cents per one hundred dollars of gross receipts. In lieu of a tax, a locality may charge a license fee. The amount of the fee depends upon the locality's population. See § 2.8.

### § 5.4.2. Financial services.

#### § 5.4.2.1. Definitions.

Any person rendering a service for compensation in the form of a credit agency, an investment company, a broker or dealer in securities and commodities, or a security or commodity exchange is providing a financial service, unless such service is specifically provided for under another section of these *Guidelines*. For purposes of this classification, the term:

- **"Broker"** means an agent of a buyer or a seller who buys or sells stocks, bonds, commodities, or services, usually on a commission basis.
- **"Commodity"** means staples such as wool, cotton, etc. which are traded on a commodity exchange and on which there is trading in futures.
- **"Dealer"** means any person engaged in the business of buying and selling securities for his own account, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as part of a regular business.
- **"Security"** shall have the same meaning as in the Securities Act (§ 13.1-501 et seq.) of the *Code of Virginia*, or in similar laws of the United States regulating the sale of securities.

#### § 5.4.2.2. List of occupations.

Those engaged in rendering financial services include, but are not limited to, the following:

- Buying installment receivables
- Chattel mortgage financing
- Consumer financing
- Credit card services
- Factors
- Financing accounts receivable
- Industrial loan companies
- Installment financing
- Inventory financing
- Loan or mortgage brokers

Loan or mortgage companies  
Safety deposit box companies  
Security and commodity brokers and services  
Stockbroker<sup>14</sup>  
Working capital financing  
Security and commodity brokers and services  
Stockbroker<sup>15</sup>  
Working Capital Financing

**§ 5.4.2.3. Buying for another.**

Any person other than a national bank or bank or trust company organized under the laws of this state, or a duly licensed or practicing attorney-at-law, that engages in the business of buying or selling for others on commission or for other compensation, shares in any corporation, bonds, notes or other evidences of debt is a stockbroker. The fact that orders are taken subject to approval by a main office does not relieve the broker from local license taxation.

**§ 5.4.2.4. Banks.**

Although they render financial services:

- A. banks and trust companies subject to the Virginia bank franchise tax are exempt from local license tax by § 58.1-1202, except as to sales of tangible personal property;
- B. savings institutions (including those whose name includes "savings bank") and state chartered credit unions are limited to a local license tax of \$50 by § 58.1-3730; and
- C. federal credit unions are exempt under the Federal Credit Union Act, 12 U.S.C.A. § 1768.

1984-1985 Op. Va. Att'y Gen. 327. (A federal credit union exempt; however, a state-chartered credit union is not exemp, as the license tax is not a franchise tax.)
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**§ 5.4.3. Real estate services.**

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<sup>14</sup> Some localities may be grand fathered for purposes of the BPOL tax to apply a rate higher than that specified by state statute to stockbrokers.

<sup>15</sup> Some localities may be grand fathered for purposes of the BPOL tax to apply a rate higher than that specified by state statute to stockbrokers.

**§ 5.4.3.1. Defined.**

Any person rendering a service for compensation as lessor, buyer, seller, agent or broker is providing a real estate service, unless the service is specifically provided for under another section of these *Guidelines*.

**§ 5.4.3.2. List of occupations.**

Those rendering real estate services include, but are not limited to, the following:

- Appraisers of real estate
- Escrow agents, real estate
- Fiduciaries, real estate
- Lessors of real property
- Real estate agents, brokers and managers
- Real estate selling agents
- Rental agents for real estate

**§ 5.4.4. Professional services.**

The BPOL tax applies to the rendering of professional services for a fee and does not apply to professional classifications, *per se*. For example, lawyers or accountants employed by a corporation and compensated in wages as employees are not subject to the BPOL tax as professionals.

The Uniform Ordinance provisions state that the Department of Taxation may list as professionals other occupations in addition to those named below, but that those not listed will not be deemed to be "professionals." See *Code of Virginia* § 58.1-3700.1.

**§ 5.4.4.1. List of occupations.**

The BPOL statute requires the Department of Taxation to list those occupations which may be classified as "professionals" by the localities. The BPOL statute limits the term "professional" to those occupations or vocations in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study, is used in its practical application to the affairs of others, either advising, guiding, or teaching others, and serving their interests or welfare in the practice of an art or a science founded upon it. The statute also states that the word "profession" implies attainments in professional knowledge as distinguished from mere skill, and the application of knowledge to uses for others rather than for personal profit. The following is an all encompassing list.

A "professional" means a person rendering services as:

Architects

Attorneys-at-law  
Certified public accountants  
Dentists  
Engineers  
Land surveyors  
Surgeons  
Veterinarians  
Practitioners of the healing arts (the arts and sciences dealing with the prevention, diagnosis, treatment and cure or alleviation of human physical or mental ailments, conditions, diseases, pain or infirmities), including pharmacists and occupational and physical therapists; chiropractors; dieticians; and such occupations as listed herein, and no others.<sup>16</sup>

In addition to the above list, the following occupational titles would fall within the above definition of "professional," as well:

Anatomists	Historians
Archeologist	Mathematicians
Biologists	Metallurgists
Botanists	Meteorologists
Chemists	Morticians
Economists	Physicists
Geologists	Zoologists

#### § 5.4.4.2. Consulting.

The terms "consultants" and "consulting" imply that the person possesses education, experience, and expertise in the subject matter of the service offered. However, whether a consultant renders a professional service also depends on the nature of the service offered. While consulting involves the rendering of an expert opinion, as opposed to the mere conveyance of data or the giving of general advice, the activity of consulting will not fall into the definition of "professional services" unless some professional service is rendered with the consulting advice and the rendering of such professional service is listed on the list contained in § 5.4.4.2. above. For example:

- A. An inexperienced lawyer offering legal services to the public is classified as a professional because qualifying as a lawyer requires a prolonged course of specialized instruction and study, and legal services are generally considered professional services.

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<sup>16</sup> Unless otherwise specifically excluded, all professional titles listed include the specialities and sub-specialities included within that title in the U.S. Department of Labor's Dictionary of Occupational titles. For instance, "dentist" includes orthodontist, periodontist, oral pathologist, endodontist, oral surgeon, and prosthodontist. Further, the term "engineer" includes, petroleum engineer, mechanical engineer, chemical engineer, civil engineer, industrial engineer, electrical engineer, nuclear engineer, and agricultural engineer.

- B. A "professional exterminator" is classified as personal and other services because he is offering an exterminating service even though he may be very experienced, expert and knowledgeable in the subject. On the other hand, a biologist or sanitarian who does not provide extermination services but advises as to procedures (among which may be extermination services), equipment, and other measures to avoid contamination by viruses, bacteria, chemicals, insects, rodents, and the like may be considered a professional.
- C. Services which are not considered professional services may be offered in connection with professional services and be considered ancillary. For example, tax preparation services generally are not professional services, while rendering advice concerning the tax consequences of completed or contemplated transactions would be a professional service. Professionals who specialize in tax matters may prepare returns as well as render advice, and the tax preparation service would be ancillary to the professional service.
- D. The term "management consulting" does not convey enough information about the service offered to determine the proper classification. Services which assist the business in the conduct of its day-to-day operations would generally not be considered professional. For example, payroll services, marketing surveys, and cash management, are all services that would not properly be classified as professional services.

1994 Op. Va. Att'y Gen. 99. (Hourly rates may be of some assistance in determining the proper classification - if a substantial portion of the hourly rates billed is equivalent to those prevailing for comparable professionals in the locality, the commissioner may conclude that the business renders professional services.)

#### § 5.4.4.3. Services for compensation.

- A. Certification as a professional by itself is not sufficient to establish liability for local license taxation because many individuals may maintain their professional certification even though they are not practicing their profession. The business may not be classified as professional unless it is offering professional services to the public for compensation.
- B. Gross receipts for purposes of local license taxation as a professional include only those gross receipts obtained from the practice of that profession as a business (including any ancillary receipts), whether the practice be on a full or part-time basis, and without regard to the legal form of the business entity.

1994 Op. Va. Att'y Gen. 99. (It is not necessary for an engineer to have been issued a regulatory license by the state in order to be classified as a professional for BPOL purposes.)

#### § 5.5. REPAIR, PERSONAL, BUSINESS AND OTHER SERVICES; OTHER BUSINESSES.

Other services not clearly identified as financial, real estate or professional are classified as "repair, personal, business and other services" under § 5.5.

**§ 5.5.1. Maximum rate.**

The maximum rate for local license taxes imposed upon a person engaged in providing for compensation any repair, personal, business or other services not specifically otherwise classified in these *Guidelines* or exempted from local license tax is thirty-six cents per one hundred dollars of gross receipts. In lieu of a tax, a locality may impose a license fee upon the service. The amount of the fee charged is limited by the locality's population. See § 2.8. Definitions of repair service, personal service, and business service have been omitted since this classification applies to **all** services not classified as financial, real estate or professional.

**§ 5.5.2. List of occupations.**

Those rendering a repair, personal or business service or other service as provided for in § 5.5. include, but are not limited to, the following:

- |   |   |
|---|---|
| Advertising agencies  | Collection agents or agencies   |
| Airports  | Commercial photography, art and graphics  |
| Ambulance services  | Copying over the counter (including copies made by the customer on the business' equipment)   |
| Amusements and recreation services  | Court reporting and public stenographers  |
| Animal hospitals, grooming services, kennels or stables (except for the services of a veterinarian) | Dance studios and schools   |
| Auctioneers and common criers   | Data processing, computer and systems development services  |
| Automobile driving schools  | Developing or enlarging photographs   |
| Barber shops, beauty parlors, and hairdressing establishments, schools & services                   | Detective agency and protective services  |
| Bid or building reporting services  | Drafting services   |
| Billiard or pool establishments or parlors  | Employment agencies   |
| Boat landings   | Engraving outside of the manufacturing process  |
| Bondsman  | Erecting, installing, removing or storing awnings   |
| Booking agents or concert managers  | Extermination services [unless the services involve performing functions defined as contracting under <i>Code of Virginia</i> § 58.1-3714(D)] |
| Bowling alleys  |   |
| Brokers and commission merchants other than real estate or financial brokers                        |   |
| Business and governmental research and consulting services  |   |
| Chartered clubs   | Farrier or blacksmith   |
| Child care attendants or schools  | Forester  |

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Freight traffic bureaus	Packing, crating, shipping, hauling or moving goods or chattels for others
Fumigating or disinfecting	Parcel delivery services
Funeral services and crematories	Parking lots, public garages and valet parking
Golf courses, driving ranges and miniature golf courses	Pawnbrokers
Hauling of sand, gravel or dirt (excavated by others)	Personnel services, labor agents and employment bureaus
Home for adults (licensed by Department of Social Services)	Piano tuning
Hospitals (other than the performance of medical services falling within the definition of professional services)	Picture framing and gilding
Hotels, motels, tourist courts, boarding and rooming houses and transient trailer parks and campsites	Porter services
House cleaning services	Press clipping services
Information bureaus	Professional sports ( <i>i.e.</i> , commercial rather than amateur)
Instructors, tutors, schools and studios of music, ceramics, art, sewing, sports and the like	Promotional agents or agencies
Interior decorating	Public relations services
Janitorial services	Realty multiple listing services
Laundry cleaning and garment services including laundries, dry cleaners, linen supply, diaper service, coin operated laundries and carpet and upholstery cleaning	Renting or leasing any items of tangible personal property
Mailing, messenger and correspondent services	Research and development laboratories
Movie theaters and drive-in theaters	Secretarial services
Nickel plating, chromizing and electroplating	Septic tank cleaning
Nurses and physician registries	Shoe repair, shoe shine and hat repair shops
Nursing and personal care facilities including nursing homes, convalescent homes, homes for the retarded, old age homes and rest homes	Sign painting (unless the painting services involve performing functions defined as contracting under subsection D of § 58.1-3714)
	Storage--all types
	Swimming pool maintenance and management
	Tabulation services
	Tax preparers (other than professionals described in § 5.4.4.2)
	Taxicab companies
	Taxidermist
	Telephone answering services
	Temporary employee services
	Testing laboratories
	Theaters
	Theatrical performers, bands and orchestras
	Towing services
	Transportation services including buses

and taxis  
Travel agencies  
Tree surgeons, trimmers and removal  
services  
Trucking companies, intrastate  
  
Wake-up services  
Washing, cleaning or polishing automobiles

1991 Op. Va. Att'y Gen. 261. (An adult care home licensed by Dept. of Social Services is not in business of renting real property as owner, as used in § 58.1-3703 B 7, but is providing personal services.)
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### § 5.6. COMMISSION MERCHANTS.

A commission merchant as defined in § 58.1-3733 is deemed to be providing a service to the manufacturer or merchant for whom he sells. The commission merchant's commission income may be subject to a license tax of up to thirty-six cents per hundred dollars of gross receipts under this classification.