HAMPTON ROADS TAX FORUM
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SALT DISPUTES AND DEVELOPMENTS:
5 Things to Know

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The Five

1. When you definitely owe the tax
2. The truth about property tax assessment
3. A trust fund liability reality check
4. Virginia's response to *Wayfair*
5. Virginia's conformity with IRC

1. When You Definitely Owe the Tax

- Voluntary Disclosure Program
- Offers in compromise

Voluntary Disclosure

- To be eligible for the Voluntary Disclosure program, a business must not already be the subject of any compliance inquiry from DOT.
- Ineligible candidates:
  - The taxpayer is under audit by DOT;
  - The taxpayer is already registered for the tax type in question; or
  - The taxpayer has received bills, nonfilter notices or any inquiries about a potential tax liability

Voluntary Disclosure

- Terms of a voluntary disclosure agreement:
  - Register with DOT
  - Commit to future compliance
  - Perform a self-audit for a three-year look-back period, and
  - Pay the tax and interest due for the look-back period.
- In exchange, DOT may waive some or all late penalties for the look-back period and waive older periods entirely. When sales tax has been collected but not properly remitted, the required look-back period may be longer and penalty waiver more limited.

Offers in Compromise

- An offer in compromise is a proposal to settle your tax bill for less than the full amount due.
- Va Code 58.1-105: in certain cases, DOT has discretion to accept offers made in compromise of prosecution and in compromise or in lieu of penalties.
- The Tax Commissioner may compromise and settle doubtful or disputed claims for taxes or tax liability of doubtful collectability.

Offers in Compromise

- As a general rule, interest is waived only in cases where an assessment is potentially invalid or the liability has been assigned to the wrong person (doubtful liability), or where the balance due cannot be collected (doubtful collectability).
- DOT will usually waive the late filing penalty where the taxpayer voluntarily filed delinquent returns after discovering the liability, without being notified by the DOT.

2. The Truth About Property Tax Assessment

Personal Property Tax

- Business tangible personal property
- Supposed to be taxed at “fair market value”: FMV is *the price a willing buyer would pay a willing seller when neither was under a compulsion to buy or sell*
- Many municipalities assess BTPP at 50% of original cost
- Original cost is true original cost – not cost as of subsequent acquisitions (such as an asset purchase)
- While the 50% approach meets uniformity requirements, uniformity cannot trump FMV – so if 50% rule exceeds FMV, Commissioner of Revenue is supposed to adjust to FMV

Real Property Tax

- Land, buildings, improvements, fixtures
- Also taxed at FMV - *the price a willing buyer would pay a willing seller when neither was under a compulsion to buy or sell*
- Real estate assessors are supposed to consider all three appraisal methodologies in determining FMV: cost method, income method, sales comparison
- Cost method is replacement or reproduction cost new, minus depreciation
- Income method has several variations – Virginia localities generally use direct cap (see next slide)
- Sales comparison is traditional comparison of sales price of comparable properties

Real Property Tax, cont.
Income Method

- Direct capitalization is most common method in HR
- Used with apartment complexes, other income generating properties
- Involves calculating net operating income, then capitalizing it
- NOI is supposed to be market rents, minus market vacancies, minus market operating expenses
- Cap rate is economic rate plus tax rate
- Also must consider capital costs required to achieve or maintain market status (i.e., can't assume market rents if property is in below market condition)
- Contract rents, vacancies, etc. should be considered as a check on market data
- Only income generated by real property can be considered – so must segregate income generated by intangible property, personal property or goodwill (e.g., McDonald's property)

3. <u>A Trust Fund Liability Reality Check</u>

Trust Fund Liability
State Rules

- Four conditions of Va. Code § 58.1-1813 must be met before a person can be held individually liable for taxes assessed against a corporation. "First, the person must willfully fail to pay, collect, or truthfully account for and pay over a state tax, or willfully attempt in any manner to evade or defeat such tax or its payment. Second, the person must be an officer or employee of the corporation and have a duty to perform the act in respect of which the violation occurs. Third, the person must have (actual) knowledge of the failure or attempt as set out in the statute. And fourth, the person must have authority to prevent such failure or attempt." The absence of any one of these conditions prohibits the Department from collecting corporate taxes from an individual. PD 16-172 (09-012-16); *Angelson v. Commonwealth of Virginia*, 25 Va. Cir. 319 (City of Richmond, 1991).

Trust Fund Liability
Federal Rules

- Any person who (1) is 'responsible' for collection and payment of [employer withholding] taxes, and (2) 'willfully fails' to see that the taxes are paid," is personally liable. *Plett v. United States*, 185 F.3d 216, 218 (4th Cir. 1999).

- "Responsible person" status depends upon "whether [the taxpayer] had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed."
- Factors: whether the employee (1) served as an officer or director of the company; (2) controlled the company's payroll; (3) determined which creditors to pay and when to pay them; (4) participated in the corporation's day-to-day management; (5) had the ability to hire and fire employees; and (6) possessed the power to write checks.
- No single factor dispositive

Trust Fund Liability, cont.

- "Willfulness" = A responsible person's intentional preference for creditors other than the United States establishes willfulness as a matter of law; such an intentional preference occurs when the responsible person knows of or recklessly disregards an unpaid deficiency
- Knowledge of outstanding tax liability + payment to creditors other than the USA = willfulness
- Assurances from another person that taxes will be paid does not absolve the responsible person of his duty to pay the taxes. E.g. *Greenberg v. United States*, 46 F.3d 239, 241,244 (3d Cir. 1994) (holding taxpayer acted willfully in not paying taxes despite taxpayer receiving assurances from his superior that tax delinquencies would be paid).

4. <u>Sales Tax Nexus</u>:

Virginia's Response to *Wayfair*

Virginia's Response to the Wayfair Decision: House Bill 1722

House Bill 1722: Remote sales & use tax collection; sufficient activity by dealers & marketplace facilitators, etc.

- As of 2/15/19: enrolled bill signed by Speaker of House and President of Senate. To be sent to Governor.
- Obligation to collect sales and use tax does not apply to transactions occurring before July 1, 2019.
- The measure is estimated to generate about $155 million in total annual revenue.

House Bill 1722

- Directs the Department of Taxation to require a remote seller to collect sales and use tax if the seller has more than $100,000 in annual gross revenue from sales in Virginia or at least 200 sales transactions in Virginia.
- Requires a marketplace facilitator, which enables marketplace sellers to sell in Virginia through its marketplace [think Amazon, eBay, Wayfair], to collect sales and use tax if its annual gross revenue from facilitated sales in Virginia exceeds $100,000 or it facilitates at least 200 sales transactions in Virginia.
- *Note: Virginia is not a member of the Streamlined Sales and Use Tax Agreement.*

House Bill 1722

- “Marketplace seller” means a person that is not a commonly controlled person to a marketplace facilitator and that makes sales through any physical or electronic marketplace operated by such marketplace facilitator.
- “No marketplace seller shall collect sales and use tax on a transaction made through a marketplace facilitator's marketplace.”
- The DOT will allow a waiver of the marketplace facilitator’s requirement to collect tax on transactions it facilitates through its marketplace if either (i) all marketplace sellers are already registered dealers or (ii) the marketplace seller has sufficient nexus to require registration and that collection of the tax by the marketplace facilitator would create an undue burden or hardship for either party.

House Bill 1722

- For auditing purposes, the DOT is directed to allow a remote seller to complete a single audit covering all localities.
- The bill also relieves a marketplace facilitator of liability if it collects an incorrect amount of tax based on certain incorrect information provided by a seller or purchaser.

5. Virginia's Conformity with IRC

Virginia's Conformity with IRC: Senate Bill 1372 and House Bill 2529

- Signed by Governor 2/15/19.
- Approved as emergency legislation and will take effect immediately.
- Provides for $420 million in tax rebates. One time rebate in October 2019 of up to:
  - $110 per individual filer
  - $220 per married couple filing a joint return
- Standard deduction is increased by 50%:
  - From $3,000 to $4,500 for individuals
  - From $6,000 to $9,000 for married couples

Senate Bill 1372 and House Bill 2529

- For tax years beginning on and after January 1, 2018:
  - Adds subtraction for 20% business interest disallowed under IRC 163(j).
  - Increases standard deduction by 50%.
  - Subtracts amounts included by operation of IRC 951A (GILTI).
- For taxable years beginning on or after January 1, 2019:
  - Allows a deduction as to real and personal property taxes limited under IRC 164(b)(6)(B).

Senate Bill 1372 and House Bill 2529

- Establishes the Taxpayer Relief Fund:
  - "Any revenues generated by the individual reform provisions contained in Subtitle A of Title I and §§ 13611-13613 of the federal Tax Cuts and Jobs Act, P.L. 115-97 (2017), from the collection of taxes during Fiscal Years 2019 through 2025, estimated to be approximately $450 million annually, beyond those revenues reasonably expected to be collected due to general economic growth and absent the federal policy changes, less the estimated reduction in revenues needed to implement the tax policy changes set forth in the first enactment of this act for the relevant fiscal year, shall be transferred to the Fund."
- Directs the General Assembly to appropriate money from the fund to enact permanent or temporary tax reform measures.

R. Johan Conrod, Jr. Bio

- Johan is a partner in the litigation section of Kaufman & Canoles
- His practice focuses on tax disputes, shareholder/fiduciary duty disputes, insurance coverage litigation, business torts, defamation, and other complex business cases
- Johan is a 2001 graduate of the University of Virginia School of Law, where he served on the Managing and Editorial Boards of the Virginia Law Review
- Johan has handled tax disputes in state and federal courts and before the Virginia tax commissioner. The issues involved have ranged from real and personal property tax assessments, to historic tax rehabilitation credits, to sales and use tax exemptions, to trust fund liability, to estate tax issues.

Jacob L. Glasser Bio

- Jake is an associate in Kaufman & Canoles' Business Tax and Mergers, Acquisitions and Strategic Alliances practice groups
- He advises clients on business taxation issues, mergers and acquisitions, general business law and commercial transactions
- Jake is a 2016 graduate of the University of Richmond School of Law, where he served as an Articles and Comments Editor of the University of Richmond Law Review
- Jake received a Master of Laws in Taxation from New York University School of Law in 2018