

99-057

TAXATION: MISCELLANEOUS TAXES – FOOD AND BEVERAGE TAX.

HOTELS, RESTAURANTS, SUMMER CAMPS, ETC.: EXEMPTIONS.

Governing body may adopt by ordinance reasonable and uniformly applied definition of term "occasional" for purposes of food and beverage tax exemption.

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You ask whether, pursuant to § 35.1-25(3) of the *Code of Virginia*, an organization which holds five dinners a year to raise money for its charitable causes is exempt from a food and beverage tax levied under § 58.1-3833. You ask specifically for an interpretation of the word "occasional" in § 35.1-25(3).

Section 58.1-3833(A) provides:

Any county is hereby authorized to levy a tax on food and beverages sold, for human consumption, by a restaurant, as such term is defined in subdivision 9 of § 35.1-1 Such tax shall not be levied on food and beverages sold ... by any person described in subdivisions 1, 2, 3, and 5 of § 35.1-25

Section 35.1-25(3) contains the following description:

Churches, fraternal, school and social organizations, and volunteer fire departments and rescue squads which hold occasional dinners, bazaars, and other fund raisers of one or two days' duration, at which food prepared in the homes of members or in the kitchen of the church, school or organization is offered for sale to the public[.]

While the term "occasional" clearly implies an infrequent as opposed to a regular activity, neither § 58.1-3833 nor § 35.1-25 defines the term. Section 58.1-3833(A) does provide, however, that the food and beverage tax "shall be effective in an amount and on such terms as the governing body may by ordinance prescribe." It is my opinion that this language permits the governing body to adopt a reasonable and uniformly applied definition of the term "occasional." I note that the Department of Taxation has adopted regulations interpreting the term "occasional sale" for purposes of the exemption for an "occasional sale" under § 58.1-609.10(2) of the Virginia Retail Sales and Use Tax Act.¹ The regulations provide that a nonprofit organization "not regularly engaged in selling tangible personal property is not required to ... collect the tax on its sales provided it makes sales on three or fewer separate occasions within the calendar year."²

A locality likewise may establish a numerical definition of the term "occasional" for purposes of the food and beverage tax. The local standard need not be the same as the standard established by the Department of Taxation in defining "occasional sale." The Department of Taxation's definition is consistent with the principle that statutes granting *exemptions* from the state sales and use tax are to be narrowly construed.³ On the other hand, statutes granting *taxing power* to localities are also to be narrowly construed.⁴ This distinction would justify a county establishing a standard less strict than the one established by the state sales and use tax regulations.⁵

¹Sections 58.1-600 to 58.1-639. Section 58.1-602 defines "occasional sale" as "a sale of tangible personal property not held or used by a seller in the course of an activity for which he is required to hold a certificate of registration." A nonprofit organization that regularly sells tangible personal property is required to register as a dealer, unless specifically exempted by statute. See 23 VAC 10-210-1070(A) (Law. Coop. 1996).

²23 VAC 10-210-1072(C) (Law. Coop. 1996). This regulation further provides that "sales made at fairs, flea markets, festivals and carnivals are not considered occasional sales." *Id.*

³See *Commonwealth v. Research Analysis*, 214 Va. 161, 198 S.E.2d 622 (1973); see *also* 1989 Op. Va. Att'y Gen. 327, 329.

⁴See *Hampton Nissan v. City of Hampton*, 251 Va. 100, 105, 466 S.E.2d 95, 98 (1996) (city derives taxing power through positive grants of legislative authority; must be able to identify statute conferring taxing authority); see *also* Op. Va. Att'y Gen.: 1997 at 186, 187; 1995 at 260, 262.

⁵In the absence of an ordinance establishing a definition of "occasional," the local taxing authority should apply a uniform and reasonable standard. Under the language of § 35.1-25(3), any fundraiser of more than two days' duration would not be entitled to the exemption.