



COMMONWEALTH of VIRGINIA

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September 5, 2007

The Honorable Harry B. Blevins
Member, Senate of Virginia
P.O. Box 16207
Chesapeake, Virginia 23328

Dear Senator Blevins:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether the reduction in the amount of franchise fees payable to localities under existing franchise agreements that has occurred under the Virginia Communications Sales and Use Tax Act¹ constitutes an impairment of contract prohibited by Article I, § 11 of the Constitution of Virginia. Further, you inquire whether the Act prohibits localities from directly collecting any unpaid balance of franchise fees remaining after payment to the Department of Taxation.

Response

It is my opinion that the Virginia Communications Sales and Use Tax Act does not reduce the amount of franchise fees owed under existing franchise agreements. Therefore, the Act does not constitute an impairment of contract as prohibited by Article I, § 11 of the Constitution of Virginia. It further is my opinion that the Act does not prohibit a locality from collecting the balance of any franchise fee liability that remains unpaid pursuant to an existing agreement.

Background

You inquire concerning the duties of commissioners of revenue to collect certain tax revenue. You relate a concern regarding the potential for impairment of contracts pursuant to the Virginia Communications Sales and Use Tax Act² that became effective on January 1, 2007.³ You note that the Act has established a new statewide "communications tax."

¹ See *infra* note 2.

² See 2006 Va. Acts ch. 780, at 1112, 1124-29 (codified at VA. CODE ANN. tit. 58.1, ch. 6.2, §§ 58.1-645 to 58.1-662 (Supp. 2007)).

³ See *id.*, cl. 8, at 1131. However, I note that § 58.1-656 has a different effective date. See *id.*, cl. 7, at 1131.

You state that the Department of Taxation has made its first distribution of franchise fees and communication taxes to Virginia localities. You relate that the localities within your district have suffered a loss of approximately twenty-four percent in franchise fee revenues. Although you expect the amount of such losses to decline with increased efficiencies in collections procedures, you believe that localities with cable franchise agreements are at risk for continued losses. Finally, you state that some cable companies have claimed exemptions from the communications tax and have not remitted all of the fees that normally would be paid under the controlling franchise agreement.

Therefore, you inquire whether the diminution of franchise fees due to localities under valid franchise agreements is an impairment of contract under the Virginia Constitution. You also inquire whether such localities may collect the additional payment obligations from the cable companies pursuant to valid franchise agreements in effect prior to January 1, 2007.

Applicable Law and Discussion

Prior to January 1, 2007, localities were authorized to impose local consumer utility taxes on telephone and cable services, as well as business license taxes on telephone and telegraph companies, video programming excise taxes, and the E-911 tax.⁴ Beginning January 1, 2007, the Virginia Communications Sales and Use Tax Act replaced the local taxes with a new statewide “communications tax” of five percent on the sales price of all communications services, including cable, satellite, radio, television, and electronic services other than internet and electronic mail.⁵

Under the Virginia Communications Sales and Use Tax Act, communications service providers collect the tax from consumers⁶ and pay it to the Tax Commissioner.⁷ The Commissioner deposits the taxes into the Communications Sales and Use Tax Trust Fund.⁸ Section 15.2-2108.1:1 represents a correlating amendment to the Act.

Article I, § 11 of the Virginia Constitution provides “that the General Assembly shall not pass any law impairing the obligation of contracts.” Section 15.2-2108.1:1(C) provides that:

Notwithstanding any other provision of law, no new or renewed cable franchise entered into on or after January 1, 2007, shall include a franchise fee as long as cable services are subject to the Virginia Communications Sales and Use Tax (§ 58.1-645 et seq.)....

⁴ See generally §§ 58.1-3812, 58.1-3813.1, 58.1-3818.1 to 58.1-3818.7 (2004); see also 2006 Va. Acts, *supra* note 2, cl. 2, at 1130 (repealing §§ 58.1-3812, 58.1-3813.1, and 58.1-3818.1 to 58.1-3818.7).

⁵ See VA. CODE ANN. § 58.1-648(A) (imposing sales or use tax of 5% on customers of communications services); § 58.1-647 (defining “communications services”); § 58.1-648(C) (providing exemption from tax for Internet access and electronic mail services).

⁶ See § 58.1-651(A). I note that the Tax Commissioner may authorize a person using taxable communication services to make direct payment of the communications tax to the Commonwealth. See § 58.1-658(A).

⁷ See §§ 58.1-654(A), 58.1-659(B).

⁸ See § 58.1-662(A) (creating Fund within “Department of the Treasury”); § 58.1-662(D) (directing Commissioner to certify communication tax revenues).

1. All cable franchises in effect as of January 1, 2007, shall remain in full force and effect, and *nothing in this section shall impair any obligation of any such agreement*; provided, however, that any requirement in such an existing franchise for payment of a monetary franchise fee based on the gross revenues of the franchisee shall be fulfilled in the manner specified in subdivision 2.

2. Each cable operator owing monetary payments for franchise fees, ... shall include with its monthly remittance of the Communications Sales and Use Tax a report, by locality, of the amounts due for franchise fees accruing during that month. The Department of Taxation shall, on behalf of the cable operator ... distribute to each [locality] the amount reported by each locality's franchisee(s). *Such payments shall reduce the cable operator's franchise fee liability.* The monthly distributions shall be paid from the Communications Sales and Use Tax Trust Fund before making the other calculations and distributions required by § 58.1-662. Until distributed to the individual localities, such amounts shall be deemed to be held in trust for their respective accounts.

3. A locality's acceptance of any payment under subdivision 2 shall not prejudice any rights of the locality under the applicable cable franchises (i) to audit or demand adjustment of the amounts reported by its franchisee, or (ii) to *enforce the provisions of the franchise by any lawful administrative or judicial means.* [Emphasis added.]

It is a general rule of statutory construction that the words of a statute are to be given their usual, commonly understood meaning.⁹ However, “[w]here the language of a statute is clear and unambiguous[,] rules of statutory construction are not required.”¹⁰ Based on a plain reading of the Virginia Communications Sales and Use Tax Act and § 15.2-2108.1:1(C)(3), cable operators owing franchise fees to localities no longer make payments directly to such localities. Rather, cable operators report such fee liabilities to the Department of Taxation. The Department, on behalf of the cable operators, distributes payments to the respective localities. The Department applies such payments to the cable operator's franchise fee liability. Therefore, the Act does not reduce the amount of franchise fees that accrue under existing franchise agreements. Instead, the Act merely defines an alternate payment plan for tracking the accrual of franchise fees and the subsequent payoff of those liabilities. Since the Act does not reduce the franchise fees that accrue under an existing franchise agreement, it is my opinion that there is no impairment of contract.

The loss of franchise income that you describe following the first distributions by the Department of Taxation may result from two causes. First, you recognize that inefficiencies in collections procedures following the new reporting and payment methods may explain a portion of such losses. Second, you mention that some cable operators have claimed exemptions from the communications tax and have not remitted all of the fees that normally would be paid under existing franchise agreements. These factors, separately or in combination, may account for the losses you describe.

You also inquire whether the Virginia Communications Sales and Use Tax Act prohibits localities from directly collecting the remainder of the franchise fees not paid to the Department of Taxation. A locality's acceptance of any payment under § 15.2-2108.1:1(C)(2) “shall not prejudice any rights of the

⁹ See Op. Va. Att'y Gen.: 1985-1986 at 69, 69; *id.* at 65, 66; *id.* at 24, 25.

¹⁰ *Ambrogi v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).

The Honorable Harry B. Blevins
September 5, 2007
Page 4

locality under the applicable cable franchises ... to enforce the provisions of the franchise by any lawful administrative or judicial means.”¹¹ In my opinion, this broad language contemplates ongoing enforcement actions by the locality as appropriate, including collection proceedings by administrative or judicial means.

Conclusion

Accordingly, it is my opinion that the Virginia Communications Sales and Use Tax Act does not reduce the amount of franchise fees owed under existing franchise agreements. Therefore, the Act does not constitute an impairment of contract as prohibited by Article I, § 11 of the Constitution of Virginia. It further is my opinion that the Act does not prohibit a locality from collecting the balance of any franchise fee liability that remains unpaid pursuant to an existing agreement.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in cursive script that reads "Robert F. McDonnell". The signature is written in black ink and is centered on the page.

Robert F. McDonnell

2:131; 1:941/07-044

¹¹VA. CODE ANN. § 15.2-2108.1:1(C)(3) (Supp. 2007).