



COMMONWEALTH of VIRGINIA

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The Honorable Calvin C. Massie, Jr.
Commissioner of the Revenue, Campbell County
P.O. Box 66
Rustburg, Virginia 24583

Dear Mr. Massie:

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 regarding who may be liable for payment of local business, professional, and occupational license (“BPOL”) taxes and in which instances Virginia law permits businesses subject to BPOL taxation to invoice separately and charge their customers for the businesses’ BPOL taxes. Specifically, you ask whether motor vehicle dealers remain liable for payment of BPOL taxes when the dealer invoices BPOL taxes imposed on its sales separately from the base charges pursuant to § 58.1-3734, or whether the tax liability then attaches to customers. You further inquire whether § 58.1-3734 provides the sole legal basis upon which motor vehicle dealers may pass their BPOL tax on to consumers, and if not, whether a BPOL taxpayer other than a motor vehicle dealer, such as a telecommunications service provider, may demand payment from its customers of charges that it separately invoices as “local gross receipts tax” or “local business license surcharge.”¹

Response

It is my opinion that liability for payment of BPOL taxes always lies with the persons engaged in businesses, professions, or occupations upon which localities levy such taxes, and not with their customers. It further is my opinion that only motor vehicle dealers may recover from their customers by

¹ You ask two additional, related questions concerning whether a motor vehicle dealer may refuse to consummate a sale of a motor vehicle to a customer who refuses to pay separately invoiced BPOL taxes, and assuming a telecommunications service provider may similarly pass on its BPOL taxes, whether a customer has any obligation to pay such charges, and if not, what legal rights and remedies the customer may assert to avoid or recover those charges. Pursuant to § 2.2-505(B), the Attorney General may render an official opinion requested by a commissioner of the revenue only where “the question dealt with is directly related to the discharge of the duties of the [commissioner].” Therefore, because questions concerning the rights and obligations of motor vehicle dealers and telecommunications service providers vis-à-vis their customers, and vice versa, deal with contractual matters between private parties, and not the official duties of commissioners of the revenue, I offer no opinion in response to those questions.

way of a surcharge the BPOL taxes attributable to the gross receipts generated by sales to those customers without the surcharge also being included in the gross receipts and subjected to the BPOL tax.

Applicable Law and Discussion

Section 58.1-3703(A) authorizes a local governing body to “levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein with the county, city or town.” This tax has come to be known by the shorthand “BPOL.”

Section 58.1-3734 provides further, in relevant part, “whenever any locality imposes a license tax applicable to motor vehicle dealers measured by the gross receipts of such dealer, the dealer may separately state the amount of tax applicable to each sale of a motor vehicle and add such tax to the sales price of the motor vehicle.” In effect, this statute permits a motor vehicle dealer who is subject to BPOL taxation to recover from its customers the tax on the dealer’s gross receipts arising out of the sale of a motor vehicle. Notwithstanding this statutory authority, however, a motor vehicle dealer’s failure “to recover the tax from [its] purchaser shall not relieve such [dealer] from the obligation to pay the tax to the locality.”² This statutory provision plainly and unambiguously states the General Assembly’s intent that motor vehicle dealers subject to local BPOL ordinances will remain liable for the payment of taxes imposed on them by such ordinances, irrespective of whether the dealers successfully recover those taxes from their customers and, therefore, its literal terms must be given effect.³

Furthermore, even if § 58.1-3734 did not expressly state that the liability for payment of BPOL tax remains with the motor vehicle dealer, that liability could not shift to the customers because “statutes imposing taxes are to be construed most strongly against the government and are not to be extended beyond the clear import of the language used . . . and the official who seeks to enforce a tax must be able to put his finger on the statute which confers such authority.”⁴ The sole authority that the General Assembly has afforded localities to levy license taxes appears in Chapter 37 of Title 58.1 of the Virginia Code.⁵ The provisions contained in that section clearly authorize localities to assess BPOL taxes on persons engaged in *businesses* subject to local licensure,⁶ but no statute permits localities to impose such taxes on *customers* of those licensed businesses. I therefore conclude that localities may enforce their BPOL tax ordinances only against persons engaged in businesses, professions, or occupations subject to licensure, and not against customers of such entities.

The only provision in Chapter 37 of Title 58.1 of the *Code* specifically authorizing a taxpayer to recover BPOL taxes attributable to its gross receipts from the source of those receipts, *i.e.*, the taxpayer’s customer, appears in § 58.1-3734, dealing specifically with licensed motor vehicle dealers. “[W]hen a statute mentions specific items, an implication arises that items not present were not intended to be

² VA. CODE ANN. § 58.1-3734(A) (2009).

³“When a statute is clear and unambiguous, the rules of statutory construction dictate that the statute is interpreted according to its plain language;” *Virginia Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc.*, 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006).

⁴ *City of Lynchburg v. English Constr. Co., Inc.*, 277 Va. 574, 583, 675 S.E.2d 197, 201 (2009) (quoting *Commonwealth v. Carter*, 198 Va. 141, 147, 92 S.E.2d 369, 373 (1956)).

⁵ Section 58.1-3702 (2009).

⁶ *Id. See, e.g.*, § 58.1-3703.1(A)(1) (2009).

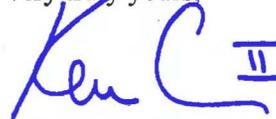
included within the scope of the statute.”⁷ Therefore, it is my opinion that in the absence of an express statutory grant of authority like that contained in § 58.1-3734, businesses subject to BPOL taxation other than motor vehicle dealers may not pass through to their customers by way of a surcharge the tax attributable to the gross receipts of the business without the surcharge also being included in the gross receipts of the business and subjected to the BPOL tax.⁸

Conclusion

Accordingly, it is my opinion that liability for payment of BPOL taxes always lies with the persons engaged in businesses, professions, or occupations upon which localities levy such taxes, and not with their customers. It further is my opinion that, absent an express statutory authorization such as that applying to motor vehicle dealers, no business may pass through to its customers by way of a surcharge the BPOL taxes attributable to the gross receipts generated by sales to those customers without the surcharge also being included in the gross receipts of the business and subjected to the BPOL tax.

With kindest regards, I am

Very truly yours,



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⁷ *Wise County Bd. of Supervisors v. Wilson*, 250 Va. 482, 485, 463 S.E.2d 650, 652 (1995) (citing *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992)). This canon of construction is known as “*esprssio unious exclusion alterious*” – to express one is to exclude the other.

⁸ The term “gross receipts” for the purposes of license taxation “means the whole, entire, total receipts, without deduction.” Section 58.1-3700.1 (2009). Consequently, expenses or costs incurred by a business subject to the BPOL tax generally are not deducted or excluded unless specifically authorized by law. See 2001 Op. Va. Att’y Gen. 179, 180 (carrier costs incurred by mobile telephone company are not deductible from gross receipts of company); 1990 Op. Va. Att’y Gen. 224, 225 (motor vehicle dealer may not deduct expenses for labor or materials used to recondition trade-in vehicle for resale when computing gross receipts). It follows, then, if a business recovers certain of its costs from a customer by way of a surcharge, that surcharge would be included in gross receipts for the purposes of license taxation unless expressly excluded by statute.