



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Scott A. Surovell
Member, House of Delegates
Post Office Box 289
Mount Vernon, Virginia 22121

Dear Delegate Surovell:

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

Issues Presented

You inquire whether the constitutional limitations on the General Assembly's power to appropriate funds to specified entities preclude the offering of certain income tax credits. Specifically, you ask whether the restrictions imposed by Article IV, § 16 and Article VIII, § 10 of the Constitution of Virginia apply to statutes permitting Virginia taxpayers to claim tax credits for making contributions to sectarian entities, nonprofit organizations not controlled by the Commonwealth or to private schools not owned or controlled by the Commonwealth or one of its political subdivisions.

Response

It is my opinion that that the limitations on the General Assembly's appropriation powers contained in Article IV, § 16 and Article VIII, § 10 of the Constitution of Virginia do not preclude the enactment of statutes allowing tax credits that Virginia taxpayers may claim for making contributions to sectarian entities, nonprofit organizations not controlled by the Commonwealth or to private schools not owned or controlled by the Commonwealth or one of its political subdivisions.

Background

You identify three legislative proposals that would provide tax credits for certain taxpayers. The first tax credit would be available to taxpayers who contribute funds to an entity that is exempt from federal taxation pursuant to Section 501(c)(3) of the Internal Revenue Code ("IRC") but that is not controlled by the Commonwealth. The second credit, proposed by H.B. 1046 in the 2010 General Assembly Session, grants a tax credit to those taxpayers who make a donation to charitable nonprofit organizations that use the donation to construct, purchase, or lease Energy Star qualified products in their headquarters.¹ Finally, the third credit, as proposed by H.B. 2314 in the 2011 General Assembly Session,

¹ See H.B. 1046, 2010 Reg. Sess. (Va. 2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=hb1046>. The bill defines the terms "qualifying" and "Energy Star qualified products."

establishes a credit for businesses that donate to scholarship foundations.² The amount of each credit would be based on the amount that the taxpayer donated to one of the identified entities.

Applicable Law and Discussion

Article IV, § 16 of the Constitution of Virginia provides, in part:

The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth....^[3]

Article VIII, § 10 of the Constitution of Virginia provides, in part:

No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof....^[4]

The proposed income tax credits you identify would be available in specified circumstances to be claimed by taxpayers who made monetary contributions to: (1) churches, sectarian and non-sectarian schools or nonprofit organizations exempt from federal taxation under IRC § 501(c)(3); (2) sectarian and non-sectarian nonprofit organizations using “Energy Star qualified products;”⁵ or (3) approved scholarship foundations, which can include private schools.⁶

In your inquiry, you refer to precedent of the Supreme Court of Virginia and to a prior opinion of this Office. Based on the analysis contained therein, you suggest that by providing state income tax credits for private donations to sectarian entities, private schools and nonprofit organizations not controlled by the Commonwealth, the General Assembly would transgress the noted constitutional prohibitions.⁷ The enactments addressed in that case and opinion, however, are distinguishable from the proposed legislation you present.

² See H.B. 2314, 2011 Reg. Sess. (Va. 2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val=hb2314>. I note that the General Assembly in its 2012 regular session enacted legislation on the same subject, namely to provide a tax credit for monetary donations made to certain qualified scholarship foundations. The Governor signed that legislation, and it will become law effective July 1, 2012, with the tax credit available for taxable years beginning on or after January 1, 2013, but before January 1, 2018. 2012 Va. Acts. chs. 731, 842. See also H.B. 321, 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hb321>; S.B. 131, 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=sb131>.

³ In addition to the above quoted portion, Article IV, § 16 of the Virginia Constitution provides exceptions to the prohibition that are not relevant in resolving your questions.

⁴ In addition to the above quoted portion, Article VIII, § 10 of the Virginia Constitution provides exceptions to the prohibition that are not relevant in resolving your questions.

⁵ See *supra*, note 1.

⁶ See H.B. 2314, 2011 Reg. Sess. (Va. 2011) (defining “approved scholarship foundation”).

⁷ Because you did not ask if the credit schemes would violate either the First Amendment of the U.S. Constitution or Article I, § 16 of the Virginia Constitution, this Opinion does not address those issues.

In *Almond v. Day*,⁸ the Supreme Court analyzed Item 210 of the Appropriation Act of 1954. That Item authorized payments from the Commonwealth's General Fund Revenues to the parents, guardians or custodians of children attending public and private schools and otherwise eligible for benefits under that Act.⁹ An argument advanced in defense of that appropriation was that the general fund payments in question went to private individuals, *i.e.*, parents, guardians or custodians of school age children, and not to private schools.¹⁰ Finding that argument unpersuasive, the Supreme Court held that payments from the general fund for the specific purpose of reimbursing tuition and educational fees benefited the private schools that collected the payments. Because the entities receiving the benefit of the appropriation were not owned or controlled by the Commonwealth, the enactment violated the constitutional prohibition.¹¹

The 2011 Opinion of the Attorney General you cite involved proposed amendments to the state budget to allocate specific sums to charitable organizations that are not owned or controlled by the Commonwealth.¹² This Office, upon review of the legislation, which would have set aside a specific sum of funding for a specific recipient within a specific budget cycle, concluded that such amendments ran afoul of the constitutional prohibition.¹³

What distinguishes the previously addressed legislation from the proposed enactments you put forward is the nature of the legislative action at issue. By their terms, the restrictions of Article IV, § 16 and Article VIII, § 10 apply only to "appropriation[s] of public funds[.]" Absent an appropriation, the constitutional limitations you identify do not apply.¹⁴

"[E]very word employed in the Constitution is to be expounded in its plain, obvious, and common sense[.]"¹⁵ In the context of public law, an "appropriation" is a "specific ... act of the legislature by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular demand."¹⁶ The formal act of appropriation takes place when the General Assembly actually sets aside a specific sum for a specific use.¹⁷ As the *Almond* court noted, "appropriation" is defined as "'[m]oney set aside by formal action to a specific use.'"¹⁸ Moreover, an element .. of 'appropriation' is that [it comes] ... out of the general revenues of the state¹⁹ In contrast, because income tax credits offset dollar for dollar the tax obligation a taxpayer would otherwise incur, the benefit derived from a tax credit does not flow out of the state's general fund; rather, it reduces the tax revenues that would otherwise go into the general fund.

⁸ 197 Va. 419, 89 S.E.2d 851 (1955).

⁹ *Id.* at 420, 89 S.E.2d at 852.

¹⁰ *Id.* at 424, 89 S.E.2d at 854.

¹¹ *Id.* at 426, 89 S.E.2d at 856.

¹² See 2011 Op. Va. Att'y Gen. 52.

¹³ *Id.*

¹⁴ "[I]n construing the Constitution[.]" it is necessary "to give effect to an express provision, rather than to an implication." *Lipscomb v. Nuckols*, 161 Va. 936, 945-56, 172 S.E. 886, 889 (1934).

¹⁵ *Id.* at 945, 172 S.E. at 889 (1934) (quoting *Quesinberry v. Hull*, 159 Va. 270, 274-75, 165 S.E. 382, 383 (1932) (internal quotation marks and further citation omitted)).

¹⁶ BLACK'S LAW DICTIONARY 131 (4th ed. 1968).

¹⁷ 2010 Op. Va. Att'y Gen. 120, 121; 1982-83 Op. Va. Att'y Gen. 407, 409.

¹⁸ *Almond*, 197 Va. at 426, 89 S.E.2d at 855-56 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.)).

¹⁹ See *supra*, note 15.

Legislation providing for tax credits does not set aside a sum certain in the treasury upon its passage, nor does it identify each individual who will benefit from its passage. Moreover, it does not allocate a specific credit amount to any particular claimant since each qualifying taxpayer will not necessarily be entitled to the maximum allowable credit for any specific year. Also, given that most tax credits are nonrefundable,²⁰ available but unused credits can be carried over to subsequent tax years and can be taken throughout additional periods generally ranging from three to five years. Thus, unlike an appropriation, the availability of a tax credit often extends beyond a single budget cycle. Based on these distinctions, I conclude that none of the tax credits you present is the equivalent of an "appropriation" for purposes of Article IV, § 16 and Article VIII, § 10 of the Constitution of Virginia.²¹

Significantly, if the meaning of "appropriation" were extended as you suggest, charitable donations to churches would not be deductible for Virginia income tax purposes, for by allowing deductions for sectarian causes, the General Assembly has decreased the tax revenues that otherwise would flow into the general fund. Similarly, the tax benefits available in statutory schemes such as the Neighborhood Assistance Act Tax Credit²² would be subject to challenge to the extent the donations from which the credits derive benefit sectarian entities or nonprofit organizations not controlled by the Commonwealth.

Conclusion

Accordingly, it is my opinion that the limitations on the General Assembly's appropriation powers contained in Article IV, § 16 and Article VIII, § 10 of the Constitution of Virginia do not preclude the enactment of statutes allowing tax credits that Virginia taxpayers may claim for making contributions to sectarian entities, nonprofit organizations not controlled by the Commonwealth or to private schools not owned or controlled by the Commonwealth or one of its political subdivisions.

With kindest regards, I am

Very truly yours,



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Attorney General

²⁰ A credit is nonrefundable if the amount claimed in any tax year cannot exceed the tax due. H.B. 2314 as introduced in 2011 included a refundable credit but that bill did not become law. If the General Assembly were to enact a refundable credit, that legislation also would not constitute an appropriation because it would not set aside in the treasury a specific sum for general fund payments. I do not address whether, in instances where a refundable credit benefited sectarian entities, nonprofit organizations or private schools and a subsequent appropriation act authorized payments from the general fund for the refundable portions of those credits, such subsequent appropriation would run afoul of the constitutional prohibitions.

²¹ See *MEA-MFT v. McCulloch*, Case No. BDV-2011-961, 2012 Mont. Dist. LEXIS 20 at 5-6 (March 14, 2012) (determining tax credit initiative did not violate state constitutional provision prohibiting appropriations by referendum) (citing *Tax Equity Alliance for Mass., Inc. v. Comm'r of Rev.*, 516 N.E.2d 152, 155 (Mass. 1987) ("The granting of an income tax credit is not an appropriation according to any understood sense of the word.")).

²² VA. CODE ANN. §§ 58.1-439.18 through 58.1-439.24 (2009 & Supp. 2011).