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Fast-Track Regulation Agency Background Document

Agency name	Virginia Department of Taxation
Virginia Administrative Code (VAC) citation(s)	23 VAC 10-500-210
Regulation title(s)	Business, Professional, and Occupational License Tax Regulation
Action title	To Amend the Business, Professional, and Occupational License Tax Regulation to Reflect a Recent Decision of the Virginia Supreme Court.
Date this document prepared	June 28, 2017

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

This regulatory action will amend the Business, Professional, and Occupational License Tax Regulation to incorporate policies related to apportionment of gross receipts that were upheld by the Virginia Supreme Court in *Nielsen Co. (US), LLC v. County Bd. of Arlington County*, 289 Va. 79; 767 S.E.2d 1 (2015).

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.

The following acronyms are used in this agency background document. Every technical term used in this document is defined in the regulation.

BPOL: means Business, Professional, and Occupational License Tax Regulation

PD: means Department of Taxation Public Document

Statement of final agency action

Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

The Tax Commissioner approved the amendment of the Business, Professional, and Occupational License Tax Regulation on December 9, 2016.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’s overall regulatory authority.

Code of Virginia § 58.1-203 provides that the “Tax Commissioner shall have the power to issue regulations relating to the interpretation and enforcement of the laws of this Commonwealth governing taxes administered by the Department.” The authority for the current regulatory action is discretionary.

Code of Virginia § 58.1-3701 directs the Department to issue BPOL guidelines, which after July 1, 2001, are subject to the Administrative Process Act and shall be given the weight of regulations. The BPOL Guidelines were formally promulgated as regulations in Volume 24, Issue 23, of the Virginia Register, effective. October 6, 2008.

*2017 Acts of Assembly, Ch. 50 (HB 1961) directs the Department to “promulgate regulations that clarify its interpretation of subdivision B 2 of § 58.1-3732 of the Code of Virginia regarding the methodology for determining deductible gross receipts attributable to business conducted in another state or a foreign country. The regulations shall be based on previous Rulings of the Tax Commissioner regarding subdivision B 2 of § 58.1-3732 and the decision of the Supreme Court of Virginia in *The Nielsen Company, LLC v. County Board of Arlington County*, 289 Va. 79 (2015).”*

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The BPOL tax requires a multistate business to assign its gross receipts to each office or other definite place of business. The statute specifies the criteria to be used by various types of businesses (e.g., contractors, retailers, wholesalers, etc.), but some businesses do not keep records or operate in a manner that fits the statutory criteria. Therefore the statute allows such businesses to apportion their gross receipts using payroll in each office.

Multistate businesses are allowed a deduction from the gross receipts assigned to an office to the extent that gross receipts are attributable to a state in which the business is subject to income tax. However, when a business has used payroll apportionment to assign receipts to an office it is usually impossible to identify which of those receipts are attributable to another state. Therefore the regulation is amended to address this situation and allow payroll apportionment to be used again in computing the deduction.

Rationale for using fast-track process

Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

The fast-track process is intended for proposed regulations that are expected to be noncontroversial. As this regulatory action will incorporate policies recently upheld by the Virginia Supreme Court, this action is not expected to be controversial.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of changes" section below.

This regulatory action will amend the section of the Business, Professional, and Occupational License Tax Regulation entitled "Apportionment; in general." (23 VAC 10-500-210) to reflect the Department's policy with respect to apportionment of gross receipts as applied in PD 12-146 and upheld by *Nielsen Co. (US), LLC v. County Bd. of Arlington County*, 289 Va. 79; 767 S.E.2d 1 (2015).

The issue is how a taxpayer can subdivide gross receipts that have been assigned to a definite place of business by means of payroll apportionment. Normally a taxpayer would have to identify specific gross receipts that qualify for any deduction or exemption. However, the use of payroll apportionment to assign gross receipts to a location compromises the ability of a taxpayer to identify specific characteristics of those receipts. Insisting on specific identification of receipts after apportionment would effectively deny any deduction or exemption for which some receipts may qualify.

Therefore, this regulatory action amends the section relating to apportionment to allow apportionment to be used a second time to calculate deductions and exemptions. An example illustrating this policy is also added.

Issues

Please identify the issues associated with the proposed regulatory action, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community,

government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

This regulatory action ensures uniform application of the tax laws to taxpayers and may avoid the necessity for taxpayers to file appeals with the Department or the courts.

This regulatory action poses no disadvantages to the public or the Commonwealth.

There are no other matters of interest.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

All Virginia localities imposing the BPOL tax will be affected by the proposed regulation. However, there will be no material impact because the proposed regulation merely incorporates the policies upheld in *Nielsen Co. (US), LLC v. County Bd. of Arlington County*, 289 Va. 79; 767 S.E.2d 1 (2015).

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The regulatory method follows the least intrusive and burdensome method consistent with the statutory language. As the proposed amendment to the regulation impacts only multistate businesses, it is unlikely that any small businesses would be impacted. The regulation could not be made less burdensome for small businesses without jeopardizing the enforcement of the tax laws. Exempting small businesses from the regulation could deprive them of the statutory deduction from gross receipts allowed for gross receipts subject to tax in another state.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

<p>Projected cost to the state to implement and enforce the proposed regulation, including: a) fund source / fund detail; and b) a delineation of one-time versus on-going expenditures</p>	<p>Because the intent of this regulatory action is to incorporate policies recently upheld by the Virginia Supreme Court, this amendment will result in no changes to Virginia’s policies. Therefore, there will be no cost to the state to implement and enforce the amended regulation section.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>Because the intent of this regulatory action is to incorporate policies recently upheld by the Virginia Supreme Court, this amendment will result in no changes to Virginia’s policies. Therefore, there will be no cost to localities to implement and enforce the amended regulation section.</p>
<p>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>Because the intent of this regulatory action is to incorporate policies recently upheld by the Virginia Supreme Court, this amendment will result in no changes to Virginia’s policies. Therefore, no taxpayers will be impacted by the amended regulation section.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>Because the intent of this regulatory action is to incorporate policies recently upheld by the Virginia Supreme Court, this amendment will result in no changes to Virginia’s policies. Therefore, no taxpayers will be impacted by the amended regulation section.</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>Because the intent of this regulatory action is to incorporate policies recently upheld by the Virginia Supreme Court, this amendment will result in no changes to Virginia’s policies. Therefore, no taxpayers will be impacted by the amended regulation section.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>This regulatory action incorporates policies recently upheld by the Virginia Supreme Court.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

There are two alternatives:

The Department could promulgate a regulation that changes the policy just upheld by the Virginia Supreme Court. The most obvious change would be to adopt the policy asserted by Arlington County requiring specific identification of receipts qualifying for any exemption or deduction regardless of whether or not apportionment had been used. The Department believes that this policy would effectively deny taxpayers an exemption or deduction that the General Assembly wanted them to have.

The Department could also do nothing, relying on the fact that the Virginia Supreme Court upheld the Department's policy. However, without a regulation any taxpayer in the same situation may have to challenge local BPOL assessments in appeals to the Department or to the courts, or both. Before analyzing and upholding the Department's policy, the Virginia Supreme Court first noted that in the absence of a regulation the Department's ruling and policy was entitled to no deference and no weight. Therefore the Department believes that taxpayers would be better served if this policy is incorporated into a regulation.

Public participation notice

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

Periodic review and small business impact review report of findings

If this fast-track is the result of a periodic review/small business impact review, use this form to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

Commenter	Comment	Agency response

This fast-track action is not a result of a periodic review or small business impact review.

Family impact

Please assess the impact of this regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

This regulatory action is not expected to have an impact on family formation, stability and autonomy.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below.

For changes to existing regulation(s), please use the following chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
10-500-210		Sets forth the general rule for when payroll apportionment may be used to assign receipts to a taxpayer's definite place(s) of business within a locality.	A new subsection is added to state that if payroll apportionment has been used to assign receipts to a location it may also be used to subdivide those receipts in calculating any deduction or exemption for which the taxpayer may qualify. An example is also added to illustrate the application of a second apportionment.