02-146

TAXATION: LICENSE TAXES.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Applicability of gross receipts exemption to real estate broker whose agent receives full commission from real estate sales transaction, minus business license tax paid by broker, and pays desk fee to broker.

The Honorable Charles D. Crowson, Jr.
Commissioner of the Revenue for the City of Newport News
January 27, 2003

Issues Presented

You pose two questions concerning the status and effect of an amendment to the business, professional and occupational license ("BPOL") tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735. Specifically, you inquire concerning the applicability of the 2002 amendment to § 58.1-3732.2 exempting from gross receipts "desk fees" and other overhead costs of certain real estate brokers for purposes of determining BPOL tax. You also ask whether the amendment is retroactive in its application.

Response

It is my opinion that the gross receipts exemption provided by the 2002 amendment to § 58.1-3732.2 is applicable to a real estate broker whose agents (1) receive full commission from the broker less an adjustment for the business license tax paid by the broker and (2) pay desk fees to the broker. It is further my opinion that such amendment is not retroactive and is applicable prospectively as of July 1, 2002, the effective date of the statute.

Background

You relate that certain brokers within the real estate industry purchase a BPOL license for the agents that are associated with the broker. You also relate that other brokers require all associated agents to purchase individual licenses and reduce their reported gross receipts by the amount paid to those agents. Both types of brokers assert that reimbursed expenses are strictly recovered costs and should not be included in the brokers' calculation of BPOL tax liability relating to gross receipts. The brokers claim that they are reporting the entire commission for gross receipts purposes and that reimbursed expenses are a redistribution of the original commission and not additional gross receipts. You inquire as to the proper application of the 2002 amendment to § 58.1-3732.2, as it pertains to the allowable deductions from gross receipts for brokers.

Applicable Law and Discussion

Your initial question pertains to the application of the 2002 amendment to § 58.1-3732.2. The 2002 Session of the General Assembly reenacted the first paragraph of § 58.1-3732.2 and added a second paragraph to the statute as follows:

> Gross receipts of real estate brokers for license tax purposes under Chapter 37 … shall not include amounts received by any broker ~~which~~ *that* arise from real estate sales transactions to the extent that such amounts are paid to a real estate agent as a commission on any real estate sales transaction and the agent is subject to the business license tax on such receipts. The broker claiming the exclusion shall identify on its license application each agent to whom the excluded receipts have been paid, and the jurisdiction in the Commonwealth of Virginia to which the agent is subject to business license taxes.
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> *In the event that a real estate agent receives the full commission from the broker less an adjustment for the business license tax paid by the broker on such commissions and the agent pays a desk fee to the broker, the desk fee and other overhead costs paid by the agent to a broker shall not be included in the broker's gross receipts. If the agent files separately, the agent must identify on its license application the broker to whom such excluded receipts have been paid, and the amount of such receipts that were included in the broker's license application.*[1]

The amendatory language is specific to the circumstances where "the desk fee and other overhead costs" are excluded from a real estate broker's gross receipts.[2] Section 58.1-3732.2 provides for the exclusion of desk fees and overhead costs from the gross receipts of a real estate broker whose agent (1) receives full commission from a sale minus adjustment for the business license tax paid by the broker and (2) pays the broker a desk fee.

It is well-settled that, "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."[3] Pursuant to § 58.1-3732.2, if the financial arrangement between a real estate broker and his agent is structured so that the agent receives "full commission from the broker less an adjustment for the business license tax paid by the broker on such commissions and the agent pays a desk fee to the broker," then desk fees and overhead costs are not included in the broker's gross receipts. The use of the term "and" in § 58.1-3732.2 implies the conjunctive unless the words in the statute clearly express legislative intent otherwise.[4] There is nothing in § 58.1-3732.2 that expresses a legislative intent that the term "and" be disjunctive. Therefore, a real estate broker must pay an agent a full commission, less an adjustment for the business license tax paid by the broker on such commissions, and receive a desk fee from the agent in order to deduct the desk fee and other overhead costs from the gross receipts.[5]

You next ask whether the 2002 amendment to § 58.1-3732.2 is retroactive. The Supreme Court of Virginia has recognized that "'[r]etrospective laws are not favored, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest.'"[6] Moreover, the legislature has also made it clear that, where a statute is "reenacted," the changes to the statute will be effective prospectively absent a specific retroactive date. Section 1-13.39:3 provides:

> Whenever the word *"reenacted"* is used in the title or enactment of a bill or act of assembly, it shall mean that the *changes enacted* to a section of the Code of Virginia or an act of assembly are in addition to the existing substantive provisions in that section or act, and *are effective prospectively unless the bill expressly provides that such changes are effective retroactively* on a specified date. [Second and third emphases added.]

For the 2002 amendment to operate retrospectively, it must contain some manifest indication on its face of such an intent. Otherwise, it only operates prospectively.[7] The 2002 amendment lacks any specific date as required by § 1-13.39:3 upon which it would apply retroactively. Therefore, the new language is applicable on and after July 1, 2002.[8]

Conclusion

Accordingly, it is my opinion that the gross receipts exemption provided by the 2002 amendment to § 58.1-3732.2 is applicable to a real estate broker whose agents (1) receive full commission from the broker less an adjustment for the business license tax paid by the broker and (2) pay desk fees to the broker. It is further my opinion that such amendment is not retroactive and is applicable prospectively as of July 1, 2002, the effective date of the statute.

[1]2002 Va. Acts ch. 532, at 725, 725.

[2]For purposes of BPOL tax, the term "gross receipts" means "the whole, entire, total receipts, without deduction." Va. Code Ann. § 58.1-3700.1 (Michie Repl. Vol. 2000).

[3]Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944), *cited in* op. no. 01-125 to Hon. James L. Williams, Portsmouth City Treas. (Mar. 26, 2002), *available at* http://www.vaag.com/media%20center/Opinions/01-125.htm.

[4]1989 Op. Va. Att'y Gen. 265, 266.

[5]The Tax Department has distinguished this arrangement from a traditional broker arrangement whereby the broker remits a percentage of commission to the agent. *See* Tax Comm'r Priv. Ltr. Rul. PD 01-44 (April 17, 2001), *available at* http://policylibrary.tax.state.va.us/OTP/Policy.nsf.

[6]Adams v. Alliant Techsystems, Inc., 261 Va. 594, 599, 544 S.E.2d 354, 356 (2001) (quoting Duffy v. Hartsock, 187 Va. 406, 419, 46 S.E.2d 570, 576 (1948)).

[7]*See* op. no. 02-062 to Hon. Terrie L. Suit, H. Del. Mbr. (Aug. 14, 2002), *available at* http://www.vaag.com/media%20center/Opinions/02-062.htm.

[8]*Id*.

Back to January 2003 Index