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HOUSE BILL NO. 149

Offered January 14, 2004

Prefiled December 30, 2003

A BILL to amend and reenact §§ 58.1-391, 58.1-392 and 58.1-441 of the Code of Virginia, to amend the Code of Virginia by adding sections numbered §§ 58.1-390.1, 58.1-390.2 and 58.1-393.1 and by adding in Article 9 of Chapter 3 of Title 58.1 sections numbered 58.1-394.1, 58.1-394.2 and 58.1-395, and to repeal §§ 58.1-390 and 58.1-394 of the Code of Virginia, relating to pass-through entities information return filing; penalty.

Patron—Albo

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-391, 58.1-392 and 58.1-441 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 58.1-390.1, 58.1-390.2 and 58.1-393.1 and by adding in Article 9 of Chapter 3 of Title 58.1 sections numbered 58.1-394.1, 58.1-394.2 and 58.1-395 as follows:

§ 58.1-390.1. Definitions.

The following words and terms, when used in this article, shall have the following meanings unless the context clearly indicates otherwise:

"Pass-through entity" means any entity, including a limited partnership, a limited liability partnership, a general partnership, a limited liability company, a professional limited liability company, a business trust or a Subchapter S Corporation, that is recognized as a separate entity for federal income tax purposes, in which the partners, members or shareholders report their share of the income, gains, losses, deductions and credits from the entity on their federal income tax returns.

"Owner" means any individual or entity that is treated as a partner, member, or shareholder of a pass-through entity for federal income tax purposes.

§ 58.1-390.2. Taxation of pass-through entities.

Except as provided for in this article, owners of pass-through entities shall be liable for tax under this chapter only in their separate or individual capacities.

§ 58.1-391. Virginia taxable income of owners of a pass-through entity.

A. In determining Virginia taxable income of a ~~partner~~ *an owner of a pass-through entity*, any modification described in § 58.1-322 which relates to an item of ~~partnership~~ *pass-through entity* income, gain, loss or deduction shall be made in accordance with the ~~partner's~~ *owner's* distributive share, for federal income tax purposes, of the item to which the modification relates. Where a ~~partner's~~ *an owner's* distributive share of any such item is not included in any category of income, gain, loss or deduction required to be taken into account separately for federal income tax purposes, the ~~partner's~~ *owner's* distributive share of such item shall be determined in accordance with his distributive share, for federal income tax purposes, of ~~partnership~~ *pass-through entity* taxable income or loss.

B. Each item of ~~partnership~~ *pass-through entity* income, gain, loss or deduction shall have the same character for a ~~partner~~ *an owner* under this chapter as for federal income tax purposes. Where an item is not characterized for federal income tax purposes, it shall have the same character for a ~~partner~~ *an owner* as if realized directly from the source from which realized by the ~~partnership~~ *pass-through entity* or incurred in the same manner by the ~~partnership~~ *pass-through entity*.

C. Where a ~~partner's~~ *an owner's* distributive shares of an item of ~~partnership~~ *pass-through entity* income, gain, loss or deduction is determined for federal income tax purposes by special provision in the ~~partnership~~ *pass-through entity* agreement with respect to such item, and where the principal purpose of such provision is the avoidance or evasion of tax under this chapter, the ~~partner's~~ *owner's* distributive share of such item, and any modification required with respect thereto, shall be determined as if the ~~partnership~~ *pass-through entity* agreement made no special provision with respect to such item.

§ 58.1-392. Reports by pass-through entities.

No report shall be required to be filed with the Department of Taxation by any ~~partnership~~ *organized* under the laws of the Commonwealth or having income from Virginia sources. However, the Tax Commissioner shall have the authority to promulgate regulations requiring that ~~partnerships~~ *furnish* copies of federal ~~partnership~~ *returns* and attached schedules or any other information which he deems necessary. In promulgating such regulations, the Tax Commissioner may prescribe the imposition of a penalty in the amount of \$100 for failure to comply, within a reasonable time, to the request for information as set forth therein.

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59 A. Every pass-through entity doing business in Virginia, or having income from Virginia sources,
60 shall make a return to the Department of Taxation on or before the fifteenth day of the fourth month
61 following the close of its taxable year. Such returns shall be made and filed in the manner prescribed by
62 the Department.

63 B. The return of a pass-through entity shall be signed by any one of the owners. An owner's name
64 signed on the return shall be prima facie evidence that such owner is authorized to sign the return on
65 behalf of the pass-through entity.

66 C. The Tax Commissioner may establish an income threshold for the filing of returns by
67 pass-through entities and their owners. Pass-through entities and owners with income below this
68 threshold shall not be required to file a return.

69 D. Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or
70 business of pass-through entities must make and file returns of income for such pass-through entities. If
71 a receiver has full custody of and control over the business or property of a pass-through entity, he
72 shall be deemed to be operating such business or property, whether he is engaged in carrying on the
73 business for which the pass-through entity was organized or only in marshaling, selling, or disposing of
74 its assets for purposes of liquidation.

75 E. Pass-through entities may be required to file the return using an electronic medium prescribed by
76 the Tax Commissioner. The Tax Commissioner shall establish a minimum number of owners for the
77 electronic filing requirement. Waivers shall be granted only if the Tax Commissioner finds that the
78 requirement creates an unreasonable burden on the pass-through entity. All requests for waiver must be
79 submitted to the Tax Commissioner in writing. Pass-through entities that have fewer than the established
80 minimum number of owners may, at such pass-through entity's option, file such annual return on such
81 prescribed electronic medium in lieu of filing the annual return on paper.

82 § 58.1-393.1. Extension of time for filing return by pass-through entity.

83 A. Whenever any pass-through entity has been allowed or granted an extension of time within which
84 to file any federal report of its income for any taxable year, the due date for the filing of the report or
85 return required by this article shall be extended to the date six months after such due date, or thirty
86 days after the extended date for filing the federal report, whichever is later.

87 B. In addition, the Department may grant an extension or extensions of time not to exceed a
88 maximum of six months beyond the due date required by this article for filing such pass-through entity
89 return.

90 § 58.1-394.1. Failure of pass-through entity to make a return.

91 A. Any pass-through entity that fails to file a return required by this article within the time required
92 shall be liable for a penalty of \$200 if the failure is for not more than one month, with an additional
93 \$200 for each additional month or fraction thereof during which such failure to file continues, not
94 exceeding six months in the aggregate. In no case, however, shall the penalty be less than \$200.

95 B. If any pass-through entity's failure to file a return required by this article exceeds six months, the
96 Department shall assess a penalty of six percent of the total amount of Virginia taxable income derived
97 by its owners from the pass-through entity for the taxable year. The Department may determine such
98 penalty from any information in its possession. The penalty assessed pursuant to this subsection shall be
99 reduced by the penalty assessed pursuant to subsection A and any tax paid by the owners on their share
100 of income from the pass-through entity for the taxable year.

101 C. The penalties set forth in this section shall be assessed and collected by the Department in the
102 manner provided for the assessment and collection of taxes under this chapter or in a civil action, at the
103 instance of the Department. In addition, such pass-through entity shall be compellable by mandamus to
104 file such return.

105 § 58.1-394.2. Fraudulent returns, etc., of pass-through entities; penalty.

106 A. Any officer or owner of any pass-through entity who makes a fraudulent return or statement with
107 the intent of assisting or facilitating the evasion of the payment of the taxes prescribed by this chapter
108 by the pass-through entity or an owner shall be liable for a penalty of not more than \$1,000, to be
109 assessed and collected in the manner provided for the assessment and collection of taxes under this
110 chapter or in a civil action, at the instance of the Department.

111 B. In addition to other penalties provided by law, any officer or owner of a pass-through entity who
112 makes a fraudulent return or statement with the intent of assisting or facilitating the evasion of the
113 payment of the taxes prescribed by this chapter by the pass-through entity or an owner, shall be guilty
114 of a Class 6 felony, or who willfully fails or refuses to make a return required by this chapter at the
115 time or times required by law shall be guilty of a Class 1 misdemeanor. A prosecution under this
116 section shall be commenced within five years next after the commission of the offense.

117 § 58.1-395. Nonresident owners.

118 Pass-through entities may make written application to the Tax Commissioner for permission to file a
119 statement of combined pass-through entity income attributable to nonresident owners and thereby relieve
120 nonresident owners from filing individual nonresident returns. The application must state the reasons for

121 *seeking such permission. The Tax Commissioner, in his sole discretion, may, for good cause, grant*
122 *permission to file a combined nonresident return upon such terms as he may determine.*

123 § 58.1-441. Reports by corporations.

124 A. Every corporation organized under the laws of the Commonwealth, or having income from
125 Virginia sources, *other than a Subchapter S corporation subject to the return filing requirements of*
126 *§ 58.1-392*, shall make a report to the Department on or before the fifteenth day of the fourth month
127 following the close of its taxable year. Such reports shall be made on forms prescribed by the
128 Department and shall contain such information, including the gross receipts from any business carried on
129 in the Commonwealth and a depreciation schedule of property used in such trade or business, as may be
130 necessary for the proper enforcement of this chapter and be accompanied by a copy of any federal tax
131 return or report filed for such taxable year. The Department shall not require any nonprofit organization
132 created exclusively to assist a law-enforcement official or agency in apprehending and convicting
133 perpetrators of crimes, to report on such returns, or otherwise, the names of individuals or amounts paid
134 to such individuals by the organization for providing information about certain crimes.

135 Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or
136 business of corporations must make returns of income for such corporations. If a receiver has full
137 custody of and control over the business or property of a corporation, he shall be deemed to be
138 operating such business or property, whether he is engaged in carrying on the business for which the
139 corporation was organized or only in marshaling, selling, or disposing of its assets for purposes of
140 liquidation.

141 B. Notwithstanding the provisions of subsection A, every organization to whom subdivision 5 of
142 § 58.1-401 applies, and having unrelated business taxable income or other taxable income, shall make a
143 report to the Department on or before the fifteenth day of the sixth month following the close of the
144 organization's taxable year.

145 **2. That §§ 58.1-390 and 58.1-394 of the Code of Virginia are repealed.**

146 **3. That the provisions of this act may result in a net increase in periods of imprisonment or**
147 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot**
148 **be determined for periods of imprisonment in state adult correctional facilities and is \$0 for**
149 **periods of commitment to the custody of the Department of Juvenile Justice.**