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HOUSE BILL NO. 2065

Offered January 12, 2005

Prefiled January 11, 2005

A *BILL to amend the Code of Virginia by adding in Chapter 3 of Title 58.1 an article numbered 17, consisting of sections numbered 58.1-487.01 through 58.1-487.06 relating to withholding from nonresident contractors.*

Patron—Parrish

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 3 of Title 58.1 an article numbered 17, consisting of sections numbered 58.1-487.01 through 58.1-487.06 as follows:

*Article 17.**Nonresident Contractor Withholding.**§ 58.1-487.01. Definitions.*

For the purpose of this article, unless otherwise provided:

"Contractor" means a general contractor or a subcontractor engaged in the improvement of real property. Contractor includes, but is not limited to, general contractors and subcontractors engaged in one or more of the following kinds of work: construction, electrical, plumbing, heating, painting, decorating, paper hanging, air conditioning, ventilation, insulation, sheet metal, steel, masonry, carpentry, plastering, concrete, road, bridge, landscaping, roofing, demolition, dismantling, or any other type of real property improvement.

"Nonresident contractor" means a contractor that does not maintain a regular place of business in the Commonwealth.

"Regular place of business" means a place at which a person is doing business in the contractor's name in a regular and systematic manner and that is continuously maintained, occupied, and used by the person in carrying on the contractor's business through its employees regularly in attendance, and includes but is not limited to, an office other than a temporary office at the site of construction, a factory, a warehouse, or any other space in the Commonwealth.

§ 58.1-487.02. Withholding required.

A. Except as provided in subsection B or C, any person doing business with a nonresident contractor under a contract that equals or exceeds \$70,000 or reasonably can be expected to equal or exceed \$70,000 shall withhold payment of three percent of the contract price until 30 days after the nonresident contractor has:

- 1. Completed the contract;*
- 2. Requested the Department to issue a tax clearance certificate on a form designated by the Department; and*
- 3. Provided a receipted copy of the request to the person required to withhold the payment.*

B. This section applies only to a person who enters into a direct contract with a nonresident contractor and shall not impose any liability on an owner of property unless the owner enters into a direct contract with a nonresident contractor.

C. This section does not apply to:

1. An owner of property who contracts for the improvement of residential real property that the owner occupies or intends to occupy; or

2. A contract for the improvement of real property if the total value of the improvement is less than \$500,000 or a subcontract under a contract for the improvement of real property if the total value of the improvement is less than \$500,000.

D. A contract shall be deemed completed when (i) the performance requirements of the contract have been met by the nonresident contractor, or (ii) full payment (less the three percent withholding) is made to the nonresident contractor by the person that contracted with the nonresident contractor, whichever occurs first.

§ 58.1-487.03. Tax Clearance Certificate.

A. Within 30 days after receipt of a request for a tax clearance certificate on the appropriate form that includes the names of the contractor and the party required to withhold three percent, the site address, the type of work, the date of completion of the contract, the amount of the contract, the location of records, and any other information required by the Department, the Department shall furnish to the nonresident contractor and to the person required to withhold the payment:

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59 1. A certificate indicating that no tax is due from the nonresident contractor;
60 2. A certificate indicating that taxes are due, including the amount of sales and use tax due and
61 income tax withheld, from the nonresident contractor including any interest and penalties; or
62 3. Notice that the request for a tax clearance certificate is rejected because the request is missing
63 required information or is otherwise unverifiable.

64 B. If the Department (i) furnishes a certificate indicating no tax is due from the nonresident
65 contractor; (ii) fails to provide, within 30 days after receipt of a written request for a tax clearance
66 certificate, to both the nonresident contractor and the person required to withhold the payment, a
67 certificate under subdivision A 1 or A 2; or (iii) fails to provide notice of rejection under subdivision A
68 3, the person required to withhold the payment may pay the nonresident contractor the amount withheld
69 under the terms of the contract free from any claims of the Department against the person required to
70 withhold the payment.

71 C. If the Department furnishes a certificate indicating that taxes are due from the nonresident
72 contractor, the person required to withhold the payment:

73 1. Shall remit to the Department the amount due as stated in the certificate up to three percent of
74 the contract price, taking a receipt for the amount; and
75 2. May pay to the nonresident contractor the excess of the amount withheld over the amount due as
76 stated in the certificate.

77 D. If the Department furnishes a notice of rejection, and the nonresident contractor does not reapply
78 for a tax clearance certificate within 30 days of receipt of the notice, then the person required to
79 withhold the payment shall remit to the Department three percent of the contract price, taking a receipt
80 for the amount.

81 E. On paying over amounts withheld to the Department as required under subsection C or D, the
82 person required to withhold the payment is free from:

83 1. Any claim by the nonresident contractor for that amount; and
84 2. Any claim by the Department for taxes due from the nonresident contractor.

85 § 58.1-487.04. Liability for failure to withhold or pay over.

86 A. A person that fails to withhold or to pay over the amounts withheld as required in this section
87 shall be personally liable for the payment of any sales and use tax or income tax withheld attributable
88 to the contract up to three percent of the contract price.

89 B. The amounts under subsection A shall be assessed and collected by the Department in the same
90 manner as other taxes administered by the Department.

91 C. Amounts withheld shall be deemed to be held in trust for the benefit of the Commonwealth or the
92 nonresident contractor as their interests may arise.

93 D. Amounts required to be withheld under this article shall be deemed sales, use or withholding
94 taxes for the purposes of §§ 58.1-1815 and 58.1-1816.

95 § 58.1-487.05. Liability of nonresident contractor.

96 A. A nonresident contractor's liability for any sales and use tax or income tax withheld attributable
97 to a contract that is subject to this section is not affected by:

98 1. The Department's failure to provide a certificate or notice in accordance with § 58.1-487.03
99 within 30 days after receipt of a written request for a tax clearance certificate; or
100 2. The issuance of an erroneous certificate or notice by the Department.

101 B. The release of payment withheld under this article to a nonresident contractor or the remittance
102 of amounts withheld to the Department by a person required to withhold payment under this article
103 shall not affect a nonresident contractor's liability for any sales and use tax or income tax withheld in
104 excess of the amount remitted to the Department.

105 C. This article may not be construed to prohibit the Department from collecting taxes due from a
106 nonresident contractor in any other manner authorized by law.

107 D. Payments received by the Department pursuant to this article shall be deemed involuntary
108 payments and applied to the account of the nonresident contractor in the amounts specified in the
109 certificate of tax due under subdivision A 2 of § 58.1-487.03 if issued by the Department, or in the
110 manner chosen by the Department if a notice of rejection under subdivision A 3 of § 58.1-487.03 was
111 issued or amounts were collected pursuant to § 58.1-487.04.

112 § 58.1-487.06. Regulations.

113 The Department shall promulgate regulations and shall have the authority to require reports,
114 payments, forms, and procedures that the Tax Commissioner in his discretion deems necessary for the
115 effective and efficient administration of the withholding requirement set forth in this article, including
116 but not limited to, the authority to (i) require registration or reports by nonresident contractors or any
117 person withholding payments pursuant to this article, (ii) require that amounts withheld pursuant to this
118 article be paid to the Department at specified times or in specified circumstances, and (iii) disclose in
119 the line of duty whether a business is registered for income, sales, and withholding taxes if such
120 disclosure would affect the obligation of a person to withhold payment pursuant to this article.

121 2. That this act is effective for contracts entered into on and after July 1, 2005.

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