

VIRGINIA ACTS OF ASSEMBLY -- 2009 SESSION

CHAPTER 152

An Act to amend and reenact §§ 58.1-390.2, 58.1-400.1, and 58.1-400.3 of the Code of Virginia, relating to minimum taxes on noncorporate entities.

[S 946]

Approved March 6, 2009

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-390.2, 58.1-400.1, and 58.1-400.3 of the Code of Virginia are amended and reenacted as follows:

§ 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 *on income passed through to the owners of pass-through entities. Any taxes imposed on the pass-through entity itself, such as, but not limited to, sales and use taxes, withholding taxes with respect to employees or nonresident owners, and minimum taxes in lieu of income taxes, shall be paid by the pass-through entity.*

§ 58.1-400.1. Minimum tax on telecommunications companies.

A. A telecommunications company *that is incorporated* shall be subject to a minimum tax, instead of the corporate income tax imposed by § 58.1-400, at the applicable rate on its gross receipts for the calendar year which ends during the taxable year if the tax imposed by § 58.1-400 is less than the minimum tax imposed by this section. *A telecommunications company that is organized as a limited liability company, partnership, corporation that has made an election under subchapter S of the Internal Revenue Code, or other entity treated as a pass-through entity shall be subject to the minimum tax in the manner prescribed by regulation. The applicable rate of tax for each calendar year is:*

Calendar Year	Tax Rate
1989	1.2%
1990	1.2%
1991	1.0%
1992	0.9%
1993	0.8%
1994	0.7%
1995	0.6%

~~For all calendar years after 1995, the~~ The minimum tax shall be imposed at the rate of 0.5 percent of gross receipts.

B. In the case of an income tax return for a period of less than twelve months, the minimum tax shall be based on the gross receipts for the calendar year which ends during the taxable period or, if none, the most recent calendar year which ended before the taxable period. The minimum tax shall be prorated by the number of months in the taxable period.

C. The State Corporation Commission shall certify to the Department for each tax year as defined in § 58.1-2600 the name, address, and gross receipts for each telecommunications company. The Commission shall mail or otherwise deliver a copy of the certification to each affected telecommunications company.

D. The following words and terms, when used in this section, shall have the following meanings:

"Gross receipts" means all revenue from business done within the Commonwealth, including the proportionate part of interstate revenue attributable to the Commonwealth if such inclusion will result in annual gross receipts exceeding \$5 million, with the following deductions:

1. Revenue billed on behalf of another such telephone company or person to the extent such revenues are later paid over to or settled with that company or person; and

2. Revenues received from a telecommunications company, or from a telephone utility company providing interstate communications service, for providing to the company any of the following: (i) unbundled network facilities, (ii) completion, origination or interconnection of telephone calls with the taxpayer's network, (iii) transport of telephone calls over taxpayer's network, or (iv) taxpayer's telephone services for resale.

"Telecommunications company" means a telephone company or other person holding a certificate of convenience and necessity granted by the State Corporation Commission authorizing telephone service; or a person authorized by the Federal Communications Commission to provide commercial mobile service as defined in § 332(d) (1) of the Communications Act of 1934, as amended, where such service includes cellular mobile radio communications services or broadband personal communications services; or a person holding a certificate issued pursuant to § 214 of the Communications Act of 1934, as

amended, authorizing domestic telephone service and belonging to an affiliated group including a person holding a certificate of convenience and necessity granted by the State Corporation Commission authorizing telephone service; or a telegraph company or other person operating the apparatus necessary to communicate by telegraph. The term "affiliated group" shall have the meaning given in § 58.1-3700.1.

§ 58.1-400.3. Minimum tax on certain electric suppliers.

A. 1. An electric supplier, except for those organized as cooperatives and exempt from federal taxation under § 501 of the Internal Revenue Code of 1986, as amended, shall be subject to a minimum tax imposed by this section, instead of the corporate income tax imposed by § 58.1-400 if applicable, net of any income tax credits that may be used to offset such tax, if the tax imposed by § 58.1-400 is less than the minimum tax imposed by this subsection. *An electric supplier that is organized as a limited liability, partnership, corporation that has made an election under subchapter S of the Internal Revenue Code, or other entity treated as a pass-through entity shall be subject to the minimum tax in the manner prescribed by regulation.*

2. The minimum tax imposed by this subsection shall be equal to 1.45 percent of such electric supplier's gross receipts for the calendar year that ends during the taxable year minus the state's portion of the electric utility consumption tax billed to consumers.

B. 1. An electric supplier that is organized as a cooperative and exempt from federal taxation under § 501 of the Internal Revenue Code of 1986, as amended, shall be subject to a minimum tax, instead of the tax on modified net income imposed by § 58.1-400.2, if the tax imposed by § 58.1-400.2, net of any credits that may be used to offset such tax, is less than the minimum tax imposed by this subsection.

2. The minimum tax imposed by this subsection shall be equal to 1.45 percent of such electric supplier's gross receipts from sales to nonmembers for the calendar year that ends during the taxable year minus the consumption tax collected from nonmembers.

C. In the case of an income tax return for a period of less than 12 months, the minimum tax shall be based on the gross receipts for the calendar year that ends during the taxable period or, if none, the most recent calendar year that ended before the taxable period. The minimum tax shall be prorated by the number of months in the taxable period.

D. The State Corporation Commission shall calculate and certify to the Department for each tax year as defined in § 58.1-2600 the name, address, and minimum tax for each electric supplier. The Commission shall mail or otherwise deliver a copy of the certification to each affected electric supplier.

E. When an electric supplier subject to the tax imposed by this section is one of several affiliated corporations that file a consolidated or combined income tax return, the portion of the affiliated corporations' tax liability that is attributable to the electric supplier shall be computed as follows:

1. Each corporation included in the consolidated or combined return shall recompute its corporate income tax liability, net of any income tax credits, as if it were filing a separate return. The separate income tax liability of the electric supplier shall then be compared to the affiliated corporations' tax liability, net of any income tax credits, indicated on the consolidated or combined return. For purposes of this section, the lesser amount shall be deemed to be the corporate income tax imposed by § 58.1-400 and attributable to the electric supplier.

2. a. If such corporate income tax amount is less than the minimum tax of the electric supplier as calculated pursuant to subsection A, the electric supplier shall be subject to the minimum tax in lieu of the corporate income tax imposed by § 58.1-400.

b. If such corporate income tax amount exceeds the minimum tax of the electric supplier as calculated pursuant to subsection A, the electric supplier shall not owe the minimum tax.

F. The requirements imposed under Article 20 (§ 58.1-500 et seq.) of Chapter 3 of this title regarding the filing of a declaration of estimated income taxes and the payment of such estimated taxes, shall be applicable to electric suppliers regardless of whether such taxpayer expects to be subject to the minimum tax imposed herein or to the corporate income tax imposed by § 58.1-400.

For purposes of determining the applicability of the exceptions under which the addition to the tax for the underpayment of any installment of estimated taxes shall not be imposed, it shall be irrelevant whether the tax shown on the return for the preceding taxable year is the corporate income tax or the minimum tax.

G. To the extent that a taxpayer is subject to the minimum tax imposed under this section, there shall be allowed a credit against the separate, combined, or consolidated corporate income tax for the total amount of minimum tax paid by the electric supplier in all previous years that is in excess of the tax imposed by § 58.1-400 on the electric supplier for such years.

H. 1. To the extent an electric supplier or its parent company has remitted estimated income tax payments in excess of its corporate income tax liability for the taxable years beginning on or after January 1, 2001, but before January 1, 2004, such overpayments shall only be utilized to offset any corporate income tax liabilities incurred pursuant to § 58.1-400 for taxable years beginning on and after January 1, 2004, and shall not be claimed as a refund of overpaid taxes, except as provided in subdivision 2 of this subsection. For the purposes of this subsection, estimated income tax payments shall include any overpayments from a prior taxable year carried forward as an estimated payment to be credited towards a future tax liability.

2. If an electric supplier has had a corporate income tax liability of greater than \$0 for each taxable year beginning on or after January 1, 2001, but before January 1, 2003, then such electric supplier may claim a refund of any estimated income tax payments in excess of their taxable year 2003 corporate income tax liability.

I. Every electric supplier which owes the minimum tax imposed by this section shall remit such tax payment to the Department of Taxation.

J. Notwithstanding any of the foregoing provisions, an electric supplier may not adjust capped rates pursuant to § 56-582 of the Code of Virginia on any portion of the minimum tax due to the Commonwealth.

K. The following words and terms, for purposes of this section, shall have the following meanings:

"Consumption tax" means the state's portion of the electric utility consumption tax billed pursuant to Chapter 29 (§ 58.1-2900 et seq.) of this title, for which the electric supplier is defined as the "service provider" pursuant to § 58.1-2901 less any amounts billed on behalf of utilities owned and operated by municipalities.

"Electric supplier" means an incumbent electric utility in the Commonwealth that, prior to July 1, 1999, supplied electric energy to retail customers located in an exclusive service territory established by the State Corporation Commission.

"Gross receipts" has the same meaning as defined in § 58.1-2600 less receipts from sales to federal, state and local governments for their own use.

"Nonmember" has the same meaning as defined in § 58.1-400.2.

2. Until such time as the Department of Taxation promulgates a regulation for electric suppliers, the provisions of 23 VAC 10-120-89, Noncorporate telecommunications companies, shall apply, mutatis mutandis, to the minimum tax imposed by § 58.1-400.3 of the Code of Virginia.

3. That the provisions of this act amending and reenacting § 58.1-390.2 of the Code of Virginia are declarative of existing law and therefore effective September 1, 2004.

4. That the provisions of this act amending and reenacting §§ 58.1-400.1 and 58.1-400.3 of the Code of Virginia shall be effective for taxable years beginning on and after January 1, 2004.

5. If any provision of this act or its application to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity shall not affect the other provisions or any other application of this act that shall be given effect without the invalid provision or application, and for this purpose the provisions of this act are declared severable.

6. That an emergency exists and this act is in force from its passage.