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SENATE BILL NO. 178

Senate Amendments in [] — January 28, 2010

A *BILL to amend and reenact § 58.1-486.2 of the Code of Virginia and to amend the Code of Virginia by adding in Article 16.1 of Chapter 3 of Title 58.1 a section numbered 58.1-486.3, relating to penalties on pass-through entities.*

Patron Prior to Engrossment—Senator Stosch

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That § 58.1-486.2 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Article 16.1 of Chapter 3 of Title 58.1 a section numbered 58.1-486.3 as follows:

§ 58.1-486.2. Withholding tax on Virginia source income of nonresident owners.

A. For the privilege of doing business in the Commonwealth, a pass-through entity that has taxable income for the taxable year derived from or connected with Virginia sources, any portion of which is allocable to a nonresident owner, shall pay a withholding tax under this section, except as provided in subsection C.

B. 1. The amount of withholding tax payable by any pass-through entity under this article shall be equal to five percent of the nonresident owner's share of income from Virginia sources of all nonresident owners as determined under this chapter, which may lawfully be taxed by the Commonwealth and which is allocable to a nonresident owner.

2. When determining the amount of withholding tax due under this section, the pass-through entity may apply any tax credits allowable under the Code of Virginia to the pass-through entity that pass through to nonresident owners; provided that in no event may the application of any credit or credits reduce the tax liability of any nonresident owner under this article to less than zero.

C. Withholding shall not be required:

1. For any nonresident owner, other than a nonresident corporation, who is exempt from the tax imposed by this article. An owner shall be exempt from the tax imposed by this article only if the owner is, by reason of the owner's purpose or activities, exempt from paying federal income taxes on the owner's Virginia source income. The pass-through entity may rely on the written statement of the owner claiming to be exempt from the tax imposed by this article provided the pass-through entity discloses the name and federal taxpayer identification number for all such owners in its return for the taxable year filed under § 58.1-392;

2. For any nonresident owner that is a corporation that is exempt from the tax imposed by Article 10 (§ 58.1-400 et seq.). For purposes of this subdivision, a corporation is exempt from the tax imposed by Article 10 only if the corporation, by reason of its purpose or activities, is exempt from paying federal income taxes on the corporation's Virginia source income. The pass-through entity may rely on the written statement of the person claiming to be exempt from the tax imposed by Article 10 provided the pass-through entity discloses the name and federal taxpayer identification number for all such corporations in its return for the taxable year filed under § 58.1-392; or

3. When compliance will cause undue hardship on the pass-through entity. However, no pass-through entity shall be exempt under this subdivision from complying with the withholding requirements of this section unless the Tax Commissioner, in his discretion, approves in writing the pass-through entity's written petition for exemption from the withholding requirements of this section based on undue hardship. The Tax Commissioner may prescribe the form and contents of such a petition and specify standards for when a pass-through entity will not be required to comply with the withholding requirements of this section due to undue hardship. The standards for undue hardship, determined by the Tax Commissioner in his discretion, shall take into account (among other relevant factors) the ability of a pass-through entity to comply at reasonable cost with the withholding requirements of this section and the cost to the Commonwealth of collecting the tax directly from a nonresident owner who does not voluntarily file a return and pay the amount of tax due under this chapter with respect to his allocable Virginia taxable income.

D. 1. Each pass-through entity required to withhold tax under this section shall pay the amount required to be withheld to the Tax Commissioner at the same time that the return under Article 9 (§ 58.1-390.1 et seq.), if required, is to be filed.

2. An extension of time for filing the return under § 58.1-393.1 shall not extend the time for paying the amount of withholding tax due under this section. In cases of an extension of time for filing, the

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pass-through entity shall pay, by the due date specified in subsection A of § 58.1-392, at least 90 percent of the withholding tax due for the taxable year or 100 percent of the tax paid under this section for the prior taxable year, if that taxable year was a taxable year of 12 months and tax was paid under this section for that taxable year. The remaining portion of the tax due under this section, if any, shall be paid at the time the pass-through entity files the return required under § 58.1-392. If the balance due is paid by the last day of the extension period for filing such return and the amount of tax due with that return is 10 percent or less of the tax due under this section for the taxable year, no penalty shall be imposed with respect to the balance so remitted. *In addition to interest, if the underestimation of the balance of tax due exceeds 10 percent of the actual tax liability, there shall be added to the tax as a penalty an amount equal to two percent per month of the balance of tax due for each month or fraction thereof from the original due date for the filing of the withholding tax return to the date of payment.* If the amount of withholding tax due under this section for the taxable year is less than the estimated withholding taxes paid for the taxable year by the pass-through entity, the excess shall be refunded to the pass-through entity or, at its election, established as a credit against withholding tax due under this section for the then current taxable year.

3. The Tax Commissioner may, if he believes it necessary for the protection of trust fund moneys due the Commonwealth, require any pass-through entity to pay over to the Tax Commissioner the tax deducted and withheld under this section at any earlier time or times.

E. 1. Each nonresident owner shall be allowed a credit for that owner's share of the tax withheld by the pass-through entity under this section; provided, that when the distribution is to a corporation taxable under Article 10 (§ 58.1-400 et seq.), the credit allowed by this subsection shall be applied against the corporation's liability for tax under this chapter.

2. A nonresident owner's share of any withholding tax paid by the pass-through entity shall be treated as distributed to such nonresident owner on the earlier of (i) the day on which such tax was paid to the Tax Commissioner by the pass-through entity or (ii) the last day of the taxable year for which such tax was paid by the pass-through entity.

F. 1. Every pass-through entity required to deduct and withhold tax under this section shall furnish to each nonresident owner a written statement, as prescribed by the Tax Commissioner, showing (i) the amount of its allocable Virginia taxable income, whether or not distributed for federal income tax purposes by such pass-through entity to such nonresident owner; (ii) the amount deducted and withheld as tax under this section; and (iii) such other information as the Tax Commissioner may require.

2. A copy of the written statements required by this subsection shall be filed with the Virginia return filed under § 58.1-392 by the pass-through entity for its taxable year to which the distribution relates. The written statement shall be furnished to each nonresident owner on or before the due date of the pass-through entity's return under § 58.1-392 for the taxable year, including extensions of time for filing such return, or a later date as may be allowed by the Tax Commissioner.

G. Every pass-through entity required to deduct and withhold tax under this section is hereby made liable for the payment of the tax due under this section for taxable years beginning on or after January 1, 2008. Any amount of tax withheld under this section shall be held in trust for the Tax Commissioner. No nonresident owner shall have a right of action against the pass-through entity in respect to any moneys withheld from such owner's distributive share and paid over to the Tax Commissioner in compliance with or in intended compliance with this section.

H. If any pass-through entity fails to deduct and withhold tax as required by this section, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld under this section shall not be collected from the pass-through entity, but the pass-through entity shall not be relieved from liability for any penalties or interest or additions to tax otherwise applicable in respect of such failure to withhold.

§ 58.1-486.3. Penalty.

A. *If any payment is not made in full when due, there shall be added to the entire tax or to any unpaid balance of the tax a penalty of six percent of the amount thereof, if the failure is for not more than one month, with an additional six percent for each additional month or fraction thereof during which such failure to pay continues, not exceeding 30 percent in the aggregate. The entire tax or any unpaid balance of the tax, together with such penalty and interest, shall immediately become collectible. Interest upon such tax or any unpaid balance of the tax and on the accrued penalty shall be added at a rate determined in accordance with § 58.1-15 from the date the tax or any unpaid balance of the tax was originally due until paid. In the case of an additional tax assessed by the Department, if the return was made in good faith and the understatement of the amount in the return was not due to any fault of the taxpayer, there shall be no penalty on the additional tax because of such understatement, but interest shall be added to the amount of the deficiency at a rate determined in accordance with § 58.1-15 from the time the return was required by law to be filed until paid.*

B. *In any month or fraction thereof for which the pass-through entity is subject to the penalty imposed under § 58.1-394.1 and the penalty under this section, the greater of the two penalties shall*

122 *apply.*

123 *C. The penalty under this section shall not apply to any tax attributable to income that was included*
124 *in a return filed pursuant to § 58.1-395.*

125 **[2. That the provisions of this act shall be applicable to taxable years beginning on and after**
126 **January 1, 2009.]**

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