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HOUSE BILL NO. 120

Offered January 13, 2016

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A BILL to amend and reenact §§ 58.1-422.2 and 58.1-609.3 of the Code of Virginia, relating to income tax apportionment and sales and use tax exemption; certain data centers.

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Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-422.2 and 58.1-609.3 of the Code of Virginia are amended and reenacted as follows:

§ 58.1-422.2. Apportionment; taxpayers with enterprise data center operations.

A. For taxable years beginning on or after July 1, 2016, the Virginia taxable income of taxpayers with enterprise data center operations, excluding income allocable under § 58.1-407, shall be apportioned within and without the Commonwealth as follows:

1. From July 1, 2016, until July 1, 2017, by multiplying such income by a fraction, the numerator of which is the property factor plus the payroll factor plus quadruple the sales factor and the denominator of which is six, except that when the sales factor does not exist, the denominator of the fraction shall be the number of existing factors, and when the sales factor exists but the payroll factor or property factor does not exist, the denominator of the fraction shall be the number of existing factors plus three; and

2. From July 1, 2017, and thereafter, by multiplying such income by the sales factor.

B. As used in this section:

"Enterprise data center operations" means operations that (i) physically house information technology equipment such as servers, switches, routers, data storage devices, or related equipment; (ii) manage and process digital data and information to provide application services or management for data processing, such as web hosting, Internet, intranet, telecommunication, and information technology; (iii) are developed and owned by the taxpayer; and (iv) are operated by the taxpayer or any of its affiliates substantially for their own use.

C. The provisions of this section requiring an apportionment formula for taxpayers with enterprise data center operations shall apply only to taxpayers that have entered into a memorandum of understanding with the Virginia Economic Development Partnership Authority on or after July 1, 2015, to make a new capital investment of at least \$150 million in an enterprise data center in the Commonwealth on or after such date. The apportionment formula under this section shall apply to such taxpayers beginning with the taxable year for which the Virginia Economic Development Partnership Authority provides a written certification to the taxpayer that the new capital investment has been completed.

D. The General Assembly of Virginia finds that capital investment in data centers is essential to the continued fiscal health of the Commonwealth. In this modern economy, states often compete for quality data centers. Accordingly, the provisions of subsection C relating to capital investment in enterprise data centers are integral to the purpose of this section. If any provision of this section is for any reason held to be invalid or unconstitutional by the decision of a court of competent jurisdiction, that provision shall not be deemed severable.

E. Beginning January 1, 2016, this section shall not apply to any enterprise data center operations that (i) are first located in Virginia on or after January 1, 2016, on property that is not zoned for industrial use and require use of a 150-kilovolt or greater electrical transmission line, where any part of such line is located above ground within 1.5 miles of the data center, or (ii) are located in Virginia prior to January 1, 2016, on property that is not zoned for industrial use and require use of a 150-kilovolt or greater electrical transmission line for the first time on or after January 1, 2016, where any part of such line is located above ground within 1.5 miles of the enterprise data center operations.

§ 58.1-609.3. Commercial and industrial exemptions.

The tax imposed by this chapter or pursuant to the authority granted in §§ 58.1-605 and 58.1-606 shall not apply to the following:

1. Personal property purchased by a contractor which is used solely in another state or in a foreign country, which could be purchased by such contractor for such use free from sales tax in such other state or foreign country, and which is stored temporarily in Virginia pending shipment to such state or country.

2. (i) Industrial materials for future processing, manufacturing, refining, or conversion into articles of

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59 tangible personal property for resale where such industrial materials either enter into the production of or
60 become a component part of the finished product; (ii) industrial materials that are coated upon or
61 impregnated into the product at any stage of its being processed, manufactured, refined, or converted for
62 resale; (iii) machinery or tools or repair parts therefor or replacements thereof, fuel, power, energy, or
63 supplies, used directly in processing, manufacturing, refining, mining or converting products for sale or
64 resale; (iv) materials, containers, labels, sacks, cans, boxes, drums or bags for future use for packaging
65 tangible personal property for shipment or sale; or (v) equipment, printing or supplies used directly to
66 produce a publication described in subdivision 3 of § 58.1-609.6 whether it is ultimately sold at retail or
67 for resale or distribution at no cost. Machinery, tools and equipment, or repair parts therefor or
68 replacements thereof, shall be exempt if the preponderance of their use is directly in processing,
69 manufacturing, refining, mining or converting products for sale or resale. The provisions of this
70 subsection do not apply to the drilling or extraction of oil, gas, natural gas and coalbed methane gas. In
71 addition, the exemption provided herein shall not be applicable to any machinery, tools, and equipment,
72 or any other tangible personal property used by a public service corporation in the generation of electric
73 power, except for raw materials that are inputs to production of electricity, including fuel.

74 3. Tangible personal property sold or leased to a public service corporation engaged in business as a
75 common carrier of property or passengers by railway, for use or consumption by such common carrier
76 directly in the rendition of its public service.

77 4. Ships or vessels, or repairs and alterations thereof, used or to be used exclusively or principally in
78 interstate or foreign commerce; fuel and supplies for use or consumption aboard ships or vessels plying
79 the high seas, either in intercoastal trade between ports in the Commonwealth and ports in other states
80 of the United States or its territories or possessions, or in foreign commerce between ports in the
81 Commonwealth and ports in foreign countries, when delivered directly to such ships or vessels; or
82 tangible personal property used directly in the building, conversion or repair of the ships or vessels
83 covered by this subdivision. This exemption shall include dredges, their supporting equipment, attendant
84 vessels, and fuel and supplies for use or consumption aboard such vessels, provided the dredges are used
85 exclusively or principally in interstate or foreign commerce.

86 5. Tangible personal property purchased for use or consumption directly and exclusively in basic
87 research or research and development in the experimental or laboratory sense.

88 6. Tangible personal property sold or leased to an airline operating in intrastate, interstate or foreign
89 commerce as a common carrier providing scheduled air service on a continuing basis to one or more
90 Virginia airports at least one day per week, for use or consumption by such airline directly in the
91 rendition of its common carrier service.

92 7. Meals furnished by restaurants or food service operators to employees as a part of wages.

93 8. Tangible personal property including machinery and tools, repair parts or replacements thereof,
94 and supplies and materials used directly in maintaining and preparing textile products for rental or
95 leasing by an industrial processor engaged in the commercial leasing or renting of laundered textile
96 products.

97 9. Certified pollution control equipment and facilities as defined in § 58.1-3660, except for any
98 equipment that has not been certified to the Department of Taxation by a state certifying authority
99 pursuant to such section.

100 10. Parts, tires, meters and dispatch radios sold or leased to taxicab operators for use or consumption
101 directly in the rendition of their services.

102 11. High speed electrostatic duplicators or any other duplicators which have a printing capacity of
103 4,000 impressions or more per hour purchased or leased by persons engaged primarily in the printing or
104 photocopying of products for sale or resale.

105 12. From July 1, 1994, and ending July 1, 2016, raw materials, fuel, power, energy, supplies,
106 machinery or tools or repair parts therefor or replacements thereof, used directly in the drilling,
107 extraction, or processing of natural gas or oil and the reclamation of the well area. For the purposes of
108 this section, the term "natural gas" shall mean "gas," "natural gas," and "coalbed methane gas" as
109 defined in § 45.1-361.1. For the purposes of this section, "drilling," "extraction," and "processing" shall
110 include production, inspection, testing, dewatering, dehydration, or distillation of raw natural gas into a
111 usable condition consistent with commercial practices, and the gathering and transportation of raw
112 natural gas to a facility wherein the gas is converted into such a usable condition. Machinery, tools and
113 equipment, or repair parts therefor or replacements thereof, shall be exempt if the preponderance of their
114 use is directly in the drilling, extraction, refining, or processing of natural gas or oil for sale or resale, or
115 in well area reclamation activities required by state or federal law.

116 13. Beginning July 1, 1997, (i) the sale, lease, use, storage, consumption, or distribution of an orbital
117 or suborbital space facility, space propulsion system, space vehicle, satellite, or space station of any kind
118 possessing space flight capability, including the components thereof, irrespective of whether such
119 facility, system, vehicle, satellite, or station is returned to this Commonwealth for subsequent use,
120 storage or consumption in any manner when used to conduct spaceport activities; (ii) the sale, lease, use,

storage, consumption or distribution of tangible personal property placed on or used aboard any orbital or suborbital space facility, space propulsion system, space vehicle, satellite or space station of any kind, irrespective of whether such tangible personal property is returned to this Commonwealth for subsequent use, storage or consumption in any manner when used to conduct spaceport activities; (iii) fuels of such quality not adapted for use in ordinary vehicles, being produced for, sold and exclusively used for space flight when used to conduct spaceport activities; (iv) the sale, lease, use, storage, consumption or distribution of machinery and equipment purchased, sold, leased, rented or used exclusively for spaceport activities and the sale of goods and services provided to operate and maintain launch facilities, launch equipment, payload processing facilities and payload processing equipment used to conduct spaceport activities.

For purposes of this subdivision, "spaceport activities" means activities directed or sponsored at a facility owned, leased, or operated by or on behalf of the Virginia Commercial Space Flight Authority.

The exemptions provided by this subdivision shall not be denied by reason of a failure, postponement or cancellation of a launch of any orbital or suborbital space facility, space propulsion system, space vehicle, satellite or space station of any kind or the destruction of any launch vehicle or any components thereof.

14. Semiconductor cleanrooms or equipment, fuel, power, energy, supplies, or other tangible personal property used primarily in the integrated process of designing, developing, manufacturing, or testing a semiconductor product, a semiconductor manufacturing process or subprocess, or semiconductor equipment without regard to whether the property is actually contained in or used in a cleanroom environment, touches the product, is used before or after production, or is affixed to or incorporated into real estate.

15. Semiconductor wafers for use or consumption by a semiconductor manufacturer.

16. Railroad rolling stock when sold or leased by the manufacturer thereof.

17. Computer equipment purchased or leased on or before June 30, 2011, used in data centers located in a Virginia locality having an unemployment rate above 4.9 percent for the calendar quarter ending November 2007, for the processing, storage, retrieval, or communication of data, including but not limited to servers, routers, connections, and other enabling hardware when part of a new investment of at least \$75 million in such exempt property, when such investment results in the creation of at least 100 new jobs paying at least twice the prevailing average wage in that locality, so long as such investment was made in accordance with a memorandum of understanding with the Virginia Economic Development Partnership Authority entered into or amended between January 1, 2008, and December 31, 2008. The exemption shall also apply to any such computer equipment purchased or leased to upgrade, add to, or replace computer equipment purchased or leased in the initial investment. The exemption shall not apply to any computer software sold separately from the computer equipment, nor shall it apply to general building improvements or fixtures.

18. (Effective until June 30, 2020) Beginning July 1, 2010, and ending June 30, 2020, computer equipment or enabling software purchased or leased for the processing, storage, retrieval, or communication of data, including but not limited to servers, routers, connections, and other enabling hardware, including chillers and backup generators used or to be used in the operation of the equipment exempted in this paragraph, provided that such computer equipment or enabling software is purchased or leased for use in a data center that (i) is located in a Virginia locality, (ii) results in a new capital investment on or after January 1, 2009, of at least \$150 million, and (iii) results in the creation on or after July 1, 2009, of at least 50 new jobs by the data center operator and the tenants of the data center, collectively, associated with the operation or maintenance of the data center provided that such jobs pay at least ~~one and one-half~~ 1.5 times the prevailing average wage in that locality. The requirement of at least 50 new jobs is reduced to 25 new jobs if the data center is located in a locality that has an unemployment rate for the preceding year of at least 150 percent of the average statewide unemployment rate for such year as determined by the Virginia Economic Development Partnership or is located in an enterprise zone. This exemption applies to the data center operator and the tenants of the data center if they collectively meet the requirements listed in this section. Prior to claiming such exemption, any qualifying person claiming the exemption, including a data center operator on behalf of itself and its tenants, must enter into a memorandum of understanding with the Virginia Economic Development Partnership Authority that at a minimum provides the details for determining the amount of capital investment made and the number of new jobs created, the timeline for achieving the capital investment and new job goals, the repayment obligations should those goals not be achieved, and any conditions under which repayment by the qualifying data center or data center tenant claiming the exemption may be required. In addition, the exemption shall apply to any such computer equipment or enabling software purchased or leased to upgrade, supplement, or replace computer equipment or enabling software purchased or leased in the initial investment. The exemption shall not apply to any other computer software otherwise taxable under Chapter 6 of Title 58.1 that is sold or leased separately

182 from the computer equipment, nor shall it apply to general building improvements or other fixtures.

183 *Beginning January 1, 2016, the exemption shall not apply to any data center that (i) is first located*
184 *in Virginia on or after January 1, 2016, on property that is not zoned for industrial use and requires*
185 *use of a 150-kilovolt or greater electrical transmission line, where any part of such line is located*
186 *above ground within 1.5 miles of the data center, or (ii) is located in Virginia prior to January 1, 2016,*
187 *on property that is not zoned for industrial use and requires use of a 150-kilovolt or greater electrical*
188 *transmission line for the first time on or after January 1, 2016, where any part of such line is located*
189 *above ground within 1.5 miles of the data center.*

190 18. (Effective June 30, 2020) Beginning July 1, 2010, and ending June 30, 2020, computer
191 equipment or enabling software purchased or leased for the processing, storage, retrieval, or
192 communication of data, including but not limited to servers, routers, connections, and other enabling
193 hardware, including chillers and backup generators used or to be used in the operation of the equipment
194 exempted in this paragraph, provided that such computer equipment or enabling software is purchased or
195 leased for use in a data center that (i) is located in a Virginia locality, (ii) results in a new capital
196 investment on or after January 1, 2009, of at least \$150 million, and (iii) results in the creation on or
197 after July 1, 2009, of at least 50 new jobs associated with the operation or maintenance of the data
198 center provided that such jobs pay at least one and one-half times the prevailing average wage in that
199 locality. The requirement of at least 50 new jobs is reduced to 25 new jobs if the data center is located
200 in a locality that has an unemployment rate for the preceding year of at least 150 percent of the average
201 statewide unemployment rate for such year as determined by the Virginia Economic Development
202 Partnership or is located in an enterprise zone. Prior to claiming such exemption, any qualifying person
203 claiming the exemption must enter into a memorandum of understanding with the Virginia Economic
204 Development Partnership Authority that at a minimum provides the details for determining the amount
205 of capital investment made and the number of new jobs created, the timeline for achieving the capital
206 investment and new job goals, the repayment obligations should those goals not be achieved, and any
207 conditions under which repayment by the qualifying person claiming the exemption may be required. In
208 addition, the exemption shall apply to any such computer equipment or enabling software purchased or
209 leased to upgrade, supplement, or replace computer equipment or enabling software purchased or leased
210 in the initial investment. The exemption shall not apply to any other computer software otherwise
211 taxable under Chapter 6 of Title 58.1 that is sold or leased separately from the computer equipment, nor
212 shall it apply to general building improvements or other fixtures.