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SENATE BILL NO. 1225

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 18, 2005)

(Patron Prior to Substitute—Senator Stosch)

A BILL to amend and reenact § 58.1-302 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 58.1-348.1 and 58.1-348.2 relating to assisting in the evasion of taxes; penalty.

Be it enacted by the General Assembly of Virginia:

1. That § 58.1-302 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding sections numbered 58.1-348.1 and 58.1-348.2, as follows:

§ 58.1-302. Definitions.

For the purpose of this chapter and unless otherwise required by the context:

"Affiliated" means two or more corporations subject to Virginia income taxes whose relationship to each other is such that (i) one corporation owns at least 80 percent of the voting stock of the other or others or (ii) at least 80 percent of the voting stock of two or more corporations is owned by the same interests.

"Compensation" means wages, salaries, commissions and any other form of remuneration paid or accrued to employees for personal services.

"Corporation" includes associations, joint stock companies and insurance companies.

"Domicile" means the permanent place of residence of a taxpayer and the place to which he intends to return even though he may actually reside elsewhere. In determining domicile, consideration may be given to the applicant's expressed intent, conduct, and all attendant circumstances including, but not limited to, financial independence, business pursuits, employment, income sources, residence for federal income tax purposes, marital status, residence of parents, spouse and children, if any, leasehold, sites of personal and real property owned by the applicant, motor vehicle and other personal property registration, residence for purposes of voting as proven by registration to vote, if any, and such other factors as may reasonably be deemed necessary to determine the person's domicile.

"Foreign source income" means:

1. Interest, other than interest derived from sources within the United States;
2. Dividends, other than dividends derived from sources within the United States;
3. Rents, royalties, license, and technical fees from property located or services performed without the United States or from any interest in such property, including rents, royalties, or fees for the use of or the privilege of using without the United States any patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other like properties;
4. Gains, profits, or other income from the sale of intangible or real property located without the United States; and
5. The amount of an individual's share of net income attributable to a foreign source qualified business unit of an electing small business corporation (S corporation). For purposes of this subsection, qualified business unit shall be defined by § 989 of the Internal Revenue Code, and the source of such income shall be determined in accordance with §§ 861, 862 and 987 of the Internal Revenue Code.

In determining the source of "foreign source income," the provisions of §§ 861, 862, and 863 of the Internal Revenue Code shall be applied except as specifically provided in subsection 5 above.

"Income and deductions from Virginia sources" includes:

1. Items of income, gain, loss and deduction attributable to:
 - a. The ownership of any interest in real or tangible personal property in Virginia;
 - b. A business, trade, profession or occupation carried on in Virginia; or
 - c. Prizes paid by the Virginia Lottery Department, and gambling winnings from wagers placed or paid at a location in Virginia.
2. Income from intangible personal property, including annuities, dividends, interest, royalties and gains from the disposition of intangible personal property to the extent that such income is from property employed by the taxpayer in a business, trade, profession, or occupation carried on in Virginia.

"Income tax return preparer" means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this chapter or any claim for refund of tax. For purposes of the preceding sentence, the preparation for compensation of any portion of a return or claim for refund shall be treated as if it were the preparation of the return or claim for refund. A person shall not be an "income tax return preparer" merely because the person:

1. *Furnishes typing, reproducing, or other mechanical assistance;*
2. *Prepares a return or claim for refund of the employer (or of an officer or employee of the*

60 employer) by whom he is regularly and continuously employed;

61 3. Prepares as a fiduciary a return or claim for refund for any person; or

62 4. Prepares an application for correction of an erroneous assessment or a protective claim for
63 refund for a taxpayer in response to any assessment pursuant to § 58.1-1812 issued to the taxpayer or
64 in response to any waiver pursuant to § 58.1-101 or 58.1-220 after the commencement of an audit of the
65 taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or
66 indirectly affects the tax liability of such taxpayer.

67 "Individual" means all natural persons whether married or unmarried and fiduciaries acting for
68 natural persons, but not fiduciaries acting for trusts or estates.

69 "Intangible expenses and costs" means:

70 1. Expenses, losses and costs for, related to, or in connection directly or indirectly with the direct or
71 indirect acquisition, use, maintenance or management, ownership, sale, exchange, lease, transfer, or any
72 other disposition of intangible property to the extent such amounts are allowed as deductions or costs in
73 determining taxable income;

74 2. Losses related to or incurred in connection directly or indirectly with factoring transactions or
75 discounting transactions;

76 3. Royalty, patent, technical and copyright fees;

77 4. Licensing fees; and

78 5. Other similar expenses and costs.

79 "Intangible property" means patents, patent applications, trade names, trademarks, service marks,
80 copyrights and similar types of intangible assets.

81 "Interest expenses and costs" means amounts directly or indirectly allowed as deductions under
82 Section 163 of the Internal Revenue Code for purposes of determining taxable income under the Internal
83 Revenue Code to the extent such expenses and costs are directly or indirectly for, related to, or in
84 connection with the direct or indirect acquisition, use, maintenance, management, ownership, sale,
85 exchange, lease, transfer, or disposition of intangible property.

86 "Nonresident estate or trust" means an estate or trust which is not a resident estate or trust.

87 "Related entity" means:

88 1. A stockholder who is an individual, or a member of the stockholder's family enumerated in
89 Section 318 of the Internal Revenue Code, if the stockholder and the members of the stockholder's
90 family own, directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the
91 value of the taxpayer's outstanding stock;

92 2. A stockholder, or a stockholder's partnership, limited liability company, estate, trust or corporation,
93 if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts and
94 corporations own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent
95 of the value of the taxpayer's outstanding stock; or

96 3. A corporation, or a party related to the corporation in a manner that would require an attribution
97 of stock from the corporation to the party or from the party to the corporation under the attribution rules
98 of Section 318 of the Internal Revenue Code, if the taxpayer owns, directly, indirectly, beneficially or
99 constructively, at least 50 percent of the value of the corporation's outstanding stock. The attribution
100 rules of Section 318 of the Internal Revenue Code shall apply for purposes of determining whether the
101 ownership requirements of this subdivision have been met.

102 "Related member" means a person that, with respect to the taxpayer during all or any portion of the
103 taxable year, is a related entity, a component member as defined in Section 1563 (b) of the Internal
104 Revenue Code, or is a person to or from whom there is attribution of stock ownership in accordance
105 with Section 1563 (e) of the Internal Revenue Code.

106 "Resident" applies only to natural persons and includes, for the purpose of determining liability for
107 the taxes imposed by this chapter upon the income of any taxable year every person domiciled in
108 Virginia at any time during the taxable year and every other person who, for an aggregate of more than
109 183 days of the taxable year, maintained his place of abode within Virginia, whether domiciled in
110 Virginia or not. The word "resident" shall not include any member of the United States Congress who is
111 domiciled in another state.

112 "Resident estate or trust" means:

113 1. The estate of a decedent who at his death was domiciled in the Commonwealth;

114 2. A trust created by will of a decedent who at his death was domiciled in the Commonwealth;

115 3. A trust created by or consisting of property of a person domiciled in the Commonwealth; or

116 4. A trust or estate which is being administered in the Commonwealth.

117 "Sales" means all gross receipts of the corporation not allocated under § 58.1-407, except the sale or
118 other disposition of intangible property shall include only the net gain realized from the transaction.

119 "State" means for purposes of Article 10 of this chapter any state of the United States, the District of
120 Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any
121 foreign country.

"Trust" or "estate" means a trust or estate, or a fiduciary thereof, which is required to file a fiduciary income tax return under the laws of the United States.

"Virginia fiduciary adjustment" means the net amount of the applicable modifications described in § 58.1-322 (including subsection E thereof if the estate or trust is a beneficiary of another estate or trust) which relate to items of income, gain, loss or deduction of an estate or trust. The fiduciary adjustment shall not include the modification in subsection D of § 58.1-322, except that the amount of state income taxes excluded from federal taxable income shall be included. The fiduciary adjustment shall also include the modification in subsection D of § 58.1-322, regarding the deduction for the purchase of a prepaid tuition contract or contribution to a savings trust account.

§ 58.1-348.1. *Fraudulent assistance; penalty.*

Any income tax return preparer, as defined in § 58.1-302, who knowingly and willfully aids or assists in, counsels or advises the preparation or presentation of a return, affidavit, claim or other document required by this chapter that he knows is fraudulent or false as to any material matter, is guilty of a Class 6 felony.

§ 58.1-348.2. *Authority to enjoin income tax return preparers.*

A. The Department may commence a civil action to enjoin any person who is an income tax return preparer from further engaging in any conduct described in subsection B or from further action as an income tax return preparer. The venue for any action under this section shall be brought in the circuit court in the circuit where the income tax return preparer resides or has his principal place of business or in the jurisdiction in which the taxpayer with respect to whose income tax return the action is brought resides. The court may exercise its jurisdiction over such action separate and apart from any other administrative or judicial action brought by the Commonwealth against such income tax return preparer or any taxpayer.

B. In any action under subsection A, the court may enjoin the income tax return preparer from further engaging in any conduct specified in this subsection if the court finds that injunctive relief is appropriate to prevent the recurrence of such conduct. The court may enjoin conduct when an income tax return preparer has:

1. Engaged in any conduct subject to penalty under Section 6694 or 6695 of the Internal Revenue Code, or subject to any criminal penalty provided by the Internal Revenue Code or this title; or

2. Engaged in any other fraudulent or deceptive conduct that substantially interferes with the proper administration of the tax laws of the Commonwealth.

C. If the court finds that an income tax return preparer has continually or repeatedly engaged in any conduct described in subsection B and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of the tax laws of the Commonwealth, the court may enjoin such person from acting as an income tax return preparer. The fact that that person has been enjoined from preparing income tax returns for the United States or any other state in the five years preceding the petition for an injunction shall establish a prima facie case for an injunction under this section.

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