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SENATE BILL NO. 1238

Offered January 10, 2007

Prefiled January 10, 2007

A BILL to amend the Code of Virginia by adding in Chapter 3 of Title 58.1 an article numbered 16.1, consisting of sections numbered 58.1-486.1 and 58.1-486.2, relating to a withholding tax paid by pass-through entities for nonresident taxpayers.

Patron—Obenshain

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 16.1, consisting of sections numbered 58.1-486.1 and 58.1-486.2 as follows:

*Article 16.1.**Withholding by Pass-through Entities.**§ 58.1-486.1 Definitions.*

"Owner" means the same as that term is defined in § 58.1-390.1.

"Pass-through entity" means the same as that term is defined in § 58.1-390.1.

"Taxable year" when used in regard to pass-through entities means the taxable year of the pass-through entity for federal income tax purposes. If a pass-through entity does not have a taxable year for federal tax purposes, its tax year for purposes of this article shall be the calendar year.

§ 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 four percent of the Virginia taxable income 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

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59 section and the cost to the Commonwealth of collecting the tax directly from a nonresident owner who
60 does not voluntarily file a return and pay the amount of tax due under this chapter with respect to his
61 allocable Virginia taxable income.

62 D. 1. Each pass-through entity required to withhold tax under this section shall pay the amount
63 required to be withheld to the Tax Commissioner at the same time that the return under Article 9
64 (§ 58.1-390.1 et seq.), if required, is to be filed.

65 2. An extension of time for filing the return under § 58.1-393.1 shall not extend the time for paying
66 the amount of withholding tax due under this section. In cases of an extension of time for filing, the
67 pass-through entity shall pay, by the due date specified in subsection A of § 58.1-392, at least 90
68 percent of the withholding tax due for the taxable year or 100 percent of the tax paid under this section
69 for the prior taxable year, if that taxable year was a taxable year of 12 months and tax was paid under
70 this section for that taxable year. The remaining portion of the tax due under this section, if any, shall
71 be paid at the time the pass-through entity files the return required under § 58.1-392. If the balance due
72 is paid by the last day of the extension period for filing such return and the amount of tax due with that
73 return is 10 percent or less of the tax due under this section for the taxable year, no penalty shall be
74 imposed with respect to the balance so remitted. If the amount of withholding tax due under this section
75 for the taxable year is less than the estimated withholding taxes paid for the taxable year by the
76 pass-through entity, the excess shall be refunded to the pass-through entity or, at its election, established
77 as a credit against withholding tax due under this section for the then current taxable year.

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

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

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

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

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

99 G. Every pass-through entity required to deduct and withhold tax under this section is hereby made
100 liable for the payment of the tax due under this section for taxable years beginning on or after January
101 1, 2007. Any amount of tax withheld under this section shall be held in trust for the Tax Commissioner.
102 No nonresident owner shall have a right of action against the pass-through entity in respect to any
103 moneys withheld from such owner's distributive share and paid over to the Tax Commissioner in
104 compliance with or in intended compliance with this section.

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

110 2. That the Tax Commissioner shall develop and publish guidelines for purposes of implementing
111 the provisions of this act and shall make such guidelines publicly available by September 1, 2007.
112 The development of such guidelines shall be exempt from the provisions of the Administrative
113 Process Act (§ 2.2-4000 et seq. of the Code of Virginia).