The Loan Rangers

The story of two Commissioners seeking justice through Payroll Apportionment

- Ann Burkholder, MCOR, City of Winchester
- Seth Thatcher, MCOR, County of Frederick

Background

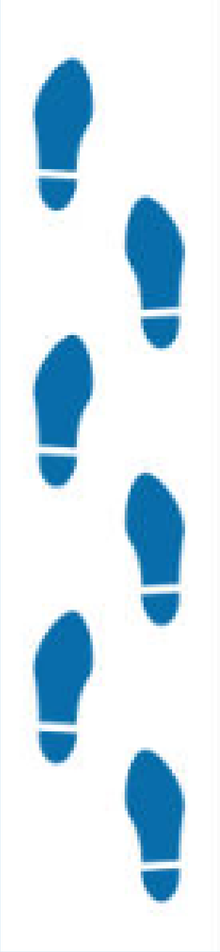
- "Company" = home mortgage co. with HQ in Frederick County
- Due to growth, Company needed additional space
- In 2020, Company leased office space in Winchester City
- Leasing agent contacted City COR on Company's behalf to confirm whether County business license would cover both locations

… It was time to saddle up and start learnin'

“We’re from the government and we’re here to help!”

The Loan Process from Company's website

Steps



STEP 1 Pre-qualification

Contact mortgage loan originator to submit a pre-qualification request to determine how much you can afford before house hunting. Most real estate agents will require a pre-qual letter to assist in finding a home within your price range.

STEP 2 Find Your New Home

At this time, you will meet with your real estate agent and begin the journey of finding a home that suits your needs.

STEP 3 Application

Meet with your mortgage loan originator to submit a mortgage loan application. This is typically done when you have a ratified contract on the home. A Ratified Contract is a sales contract that has been signed by all parties involved.

STEP 4 Processing

Your mortgage loan originator will submit your file to processing where the collecting of initial financial documentation will be requested to complete your file. An appraisal will be ordered during this step.

STEP 5 Underwriting

The underwriters will verify the financial documentation submitted in your file along with the property appraisal to make sure you meet program guidelines and requirements. Additional documentation may be requested at this time and is normal in the loan process.

STEP 6 Road to Settlement

If the loan has been approved you will then go to settlement where you will sign final loan documentation and receive the **keys to your new home!**

Company Personnel who contribute:

- Steps 1 and 3: Mortgage Loan Originator
- Step 4: Processor
- Step 5: Underwriters
- Step 6: Settlement (finalize loan – Closing/Post-Closing)

Who does what and where?

- At this point, we think: Frederick County / City of Winchester division needs to be determined
- Request description of entire loan process, location of employees, and work activities at each location
- Company reports the following division:

County

- Loan Originators: only individuals with direct contact with borrowers; complete applications & assemble documentation
- Accounting
- Secondary Department: Register locks, commit loans to investors to purchase & hedge lock pipeline

City

- Loan Partners: review, processing, order of appraisals, verification of qualification
- Closing Department: prepare closing package for settlement company
- Post-Closing Department: receive final closing package from settlement company, works with warehouse lenders & investors
- Quality Control

Company's Request:

Desires the simplest solution possible, so we explore various options at Company's request

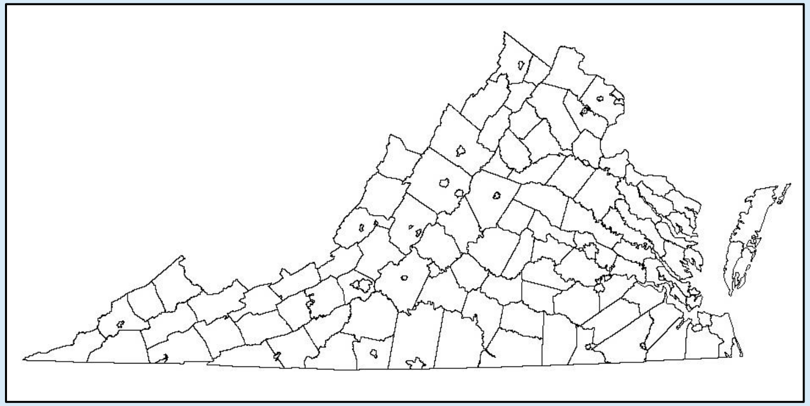
- Option 1: Division of gross receipts based upon percentage of office square feet at each location
- Option 2: Division of gross receipts based upon percentage of W-2 personnel at each location

It's time to rustle up some Code.
A lively discussion ensues…

But wait, there's more:

Our mutual research reveals the Company, while headquartered in Frederick County, has locations in:

- **13 Virginia localities**
- **8 other States and Washington DC**



From the Company's Perspective:

- Their internal compliance requires verification of local tax compliance
- They have another City business license already: for a desk in a local realty office where the Company markets its services to realtors for referrals
- They want the same minimum business license for the new City office space

Times passes -- it's now February 2021 = business license renewal season and we're still at a draw.

23VAC10-500-220: Apportionment; agreement to apportion among localities

A. Local assessors may enter into agreements with each other regarding the manner in which gross receipts shall be apportioned among definite places of business. The sum of the gross receipts apportioned by the agreement shall not exceed the total gross receipts attributable to all definite places of business affected by the agreement. Upon notification from a taxpayer that a method attributing gross receipts is inconsistent with the method of one or more other localities in which the taxpayer is licensed, and that the difference has, or is likely to, result in taxes on more than 100% of its gross receipts from all locations in which the taxpayer is licensed, the assessor shall make a good faith effort to reach an apportionment agreement with the other localities involved. If an agreement cannot be reached, either the assessor or taxpayer may seek an advisory opinion from the Department of Taxation pursuant to § 58.1-3701 of the Code of Virginia. Notice of the request must be given to the other party.

From the County:

58.1-3703.1 [Uniform Provisions]
Section A(3) [Situs of gross receipts]

Subsection (a)(4):

"The gross receipts from the performance of services shall be attributed to the definite place of business at which the services are performed or, if not performed at any definite place of business, then to the definite place of business from which the services are directed or controlled."

Subsection (b):

"Apportionment. If the licensee has more than one definite place of business and it is impractical or impossible to determine to which definite place of business gross receipts should be attributed under the general rule, the gross receipts of the business shall be apportioned between the definite places of businesses on the basis of payroll."

Since it is not impractical or impossible to determine which definite place of business the gross receipts should be attributed under the general rule, I feel that it falls to where the activity is directed or controlled, which in this case is Frederick County. Nothing in our conversations with the company makes me believe that the activity taking place in Winchester City (Cedar Creek Grade) would give rise to a situation where apportionment would be necessary.

From the City:

Take a look at this case, which is well known in our Association, but which I had forgotten in the meantime:

https://casetext.com/case/ford-motor-credit-co-v-chesterfield-county

This case is directly analogous to the situation at hand. In this case, the taxpayer requested a significant BPOL refund on the basis that gross receipts were attributable to multiple locations. The commissioner denied the refund on the basis that the loans originated in the county site and thus the county was the definite point of business. The circuit court upheld this determination.

From the City:

However, upon further appeal, the Supreme Court of Virginia overturned the decision and ruled with the taxpayer. The court stated that gross receipts are not generated with the initial application, but rather upon final approval of the loan which may involve multiple people at multiple sites. The court also specified that when financial services provided in other jurisdictions contribute to the derivation of the gross receipts, those services must be accorded some proportion of the gross receipts and the BPOL taxable measure reduced accordingly.

Joe Horbal (now our CORVA lobbyist) was the well-regarded Chesterfield Commissioner at that time. He made many presentations to the Association and had apprised the Association of the case and the initial ruling. I was newly in office at the time and remember the subsequent ruling was big news among the Association and resulted in many Commissioners altering their prior concept with regard to situs of gross receipts.

You'll want to take a look, because it may, in fact, mean that certain gross receipts should be excluded altogether and others should be apportioned.

"If you think the problems we create are bad, wait until you see our solutions."

The Government

We team up:

Frederick County takes the lead on contacting the Company to avoid conflicting communication. We request additional information to proceed with determining payroll apportionment. Company stalls in responding.

It's now June 2021: We send a request with possible meeting dates.

September 2021: We all meet with Taxpayer. County attorney attends. Company finally and reluctantly acknowledges that the case law is definitive and agrees to develop a spreadsheet for payroll apportionment.

Guidance Documents:

Virginia Administrative Code, Title 23, Chapter 500 / BPOL Regulations

Section 210: Apportionment; in general

Section 220: Agreement to apportion among localities

LIS VIRGINIA LAW

23VAC10-500-210. Apportionment; in general.

A. If the taxpayer has more than one definite place of business and it is not possible or practical to determine at which definite place of business gross receipts should be taxed, gross receipts must be divided between the definite places of businesses by payroll. Some activity must occur or be controlled from a definite place of business for gross receipts to be taxed by the locality of the definite place of business. If an entity's definite place of business is in a locality that does not tax gross receipts, a different locality may not tax these gross receipts simply because the first locality does not have a license tax.

B. If apportionment has been used to divide the gross receipts of the business among its definite places of businesses, then the use of apportionment to assign gross receipts to a definite place of business is presumed to have compromised the ability of the taxpayer to determine the situs of the assigned gross receipts for any other purpose, such as the other-state deduction. For the purposes of this section, "other-state deducation" means a deduction for receipts attributable to business in another state in which it is subject to income tax as described in § 58.1-3732 B of the Code of Virginia. Generally, the same apportionment method used to assign gross receipts to a definite place of business must be used to subdivide those receipts unless the taxpayer has demonstrated that some other method is feasible and more accurate. This requires an analysis of the facts and circumstances applicable to each taxpayer and its definite places of business. Both of the following conditions must be satisfied before apportionment can be used to subdivide receipts assigned to a definite place of business by any method.

1. The business satisfies the conditions in subsection A of this section that make it necessary to subdivide the gross receipts assigned to a definite place of business. For example, in the case of the other-state deduction this would require determining if any employees at the Virginia definite place of business participated in interstate transactions by, for example, contacting or shipping goods to customers in other states, participating with employees in other offices in transactions, etc. If there has been no participation in transactions that generate interstate receipts, then the business is not eligible for the deduction and it has no need to subdivide the receipts assigned to the definite place of business.

2. It must be impossible or impractical to use specific criteria to subdivide the receipts assigned to the definite place of business. This will normally be the case when gross receipts have been assigned to a definite place of business by apportionment because apportionment ignores anything related to a specific transaction other than the criteria used for apportionment, which usually is payroll.

23VAC10-500-220. Apportionment; agreement to apportion among localities.

A. Local assessors may enter into agreements with each other regarding the manner in which gross receipts shall be apportioned among definite places of business. The sum of the gross receipts apportioned by the agreement shall not exceed the total gross receipts attributable to all definite places of business affected by the agreement. Upon notification from a taxpayer that a method attributing gross receipts is inconsistent with the method of one or more other localities in which the taxpayer is licensed, and that the difference has, or is likely to, result in taxes on more than 100% of its gross receipts from all locations in which the taxpayer is licensed, the assessor shall make a good faith effort to reach an apportionment agreement with the other localities involved. If an agreement cannot be reached, either the assessor or taxpayer may seek an advisory opinion from the Department of Taxation pursuant to § 58.1-3701 of the Code of Virginia. Notice of the request must be given to the other party.

B. Notwithstanding the provisions of § 58.1-3993 of the Code of Virginia, when a taxpayer has demonstrated to a court that two or more political subdivisions of Virginia have assessed taxes on gross receipts that may create a double assessment within the meaning of § 58.1-3986 of the Code of Virginia, the court may enter such orders pending resolution of the litigation as may be necessary to ensure that the taxpayer is not required to pay multiple assessments even though it is not then known which assessment is correct and which is erroneous.

Payroll to Include in Apportionment:

Include only the payroll of those employees who directly contribute to the gross receipts.

This excludes:

- Management
- Accounting Department
- Quality Control
- Supporting clerical staff

Gross Receipts to Include:

Other localities?

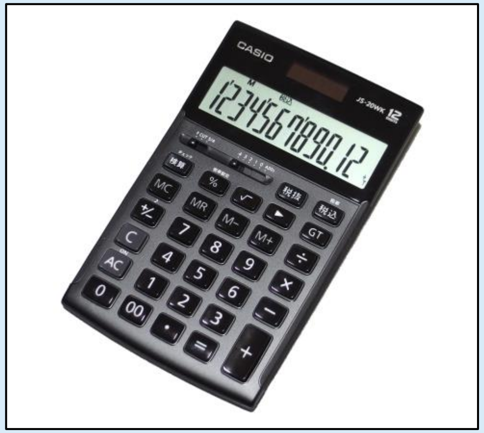
A. If the taxpayer has more than one definite place of business and it is not possible or practical to determine at which definite place of business gross receipts should be taxed, gross receipts must be divided between the definite places of businesses by payroll. Some activity must occur or be controlled from a definite place of business for gross receipts to be taxed by the locality of the definite place of business. If an entity's definite place of business is in a locality that does not tax gross receipts, a different locality may not tax these gross receipts simply because the first locality does not have a license tax.

Gross Receipts to Include:

Other states?

B. If apportionment has been used to divide the gross receipts of the business among its definite places of businesses, then the use of apportionment to assign gross receipts to a definite place of business is presumed to have compromised the ability of the taxpayer to determine the situs of the assigned gross receipts for any other purpose, such as the other-state deduction. For the purposes of this section, "other-state deduction" means a deduction for receipts attributable to business in another state in which it is subject to income tax as described in § 58.1-3732 B of the Code of Virginia. Generally, the same apportionment method used to assign gross receipts to a definite place of business must be used to subdivide those receipts unless the taxpayer has demonstrated that some other method is feasible and more accurate. This requires an analysis of the facts and circumstances applicable to each taxpayer and its definite places of business. Both of the following conditions must be satisfied before apportionment can be used to subdivide receipts assigned to a definite place of business by any method.

Taxpayer Corrects Error



- Reallocates reported gross receipts
- Sends letters to localities w/ explanation

- Requests refunds from some
- Makes additional appropriate payments

Lessons Learned (This is not the last rodeo):

- **The nature of business continues to change – expect continued decentralization**
- **Cooperation among COR offices is key**
- **Do your research – reading Code is not enough. From Code, we go to AG opinions and Tax Commissioner rulings, and from there we go to court rulings … and more court rulings**
- ***Nielsen Company US LLC v. County Board of Arlington County*, January 2015. The assessments in question date to 2007.**
- **https://caselaw.findlaw.com/va-supreme-court/1689035.html**

The Loan Rangers

Hi Ho Silver & Away