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SENATE BILL NO. 1158

Offered January 13, 2021

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A BILL to amend and reenact §§ 58.1-439.12:06, 58.1-439.12:09, and 58.1-439.12:10 of the Code of Virginia, relating to Port of Virginia tax credits; sunset.

Patron—Spruill

Referred to Committee on Finance and Appropriations

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-439.12:06, 58.1-439.12:09, and 58.1-439.12:10 of the Code of Virginia are amended and reenacted as follows:

§ 58.1-439.12:06. International trade facility tax credit.

A. As used in this section, unless the context requires a different meaning:

"Affiliated companies" means two or more companies related to each other so that (i) one company owns at least 80 percent of the voting power of the other or others or (ii) the same interest owns at least 80 percent of the voting power of two or more companies.

"Capital investment" means the amount properly chargeable to a capital account for improvements to rehabilitate or expand depreciable real property placed in service during the taxable year and the cost of machinery, tools, and equipment used in an international trade facility directly related to the movement of cargo. Capital investment includes expenditures associated with any exterior, structural, mechanical, or electrical improvements necessary to expand or rehabilitate a building for commercial or industrial use and excavations, grading, paving, driveways, roads, sidewalks, landscaping, or other land improvements. For purposes of this section, machinery, tools, and equipment shall be deemed to include only that property placed in service by the international trade facility on and after January 1, 2011. Machinery, tools, and equipment excludes property (i) for which a credit under this section was previously granted; (ii) placed in service by the taxpayer, a related party as defined in § 267(b) of the Internal Revenue Code, as amended, or by a trade or business under common control as defined in § 52(b) of the Internal Revenue Code, as amended; or (iii) previously in service in the Commonwealth that has a basis in the hands of the person acquiring it, determined in whole or in part by reference to the basis of such property in the hands of the person from whom acquired or § 1014(a) of the Internal Revenue Code, as amended.

"Capital investment" shall not include:

1. The cost of acquiring any real property or building;
2. The cost of furnishings;
3. Any expenditure associated with appraisal, architectural, engineering, or interior design fees;
4. Loan fees, points, or capitalized interest;
5. Legal, accounting, realtor, sales and marketing, or other professional fees;
6. Closing costs, permit fees, user fees, zoning fees, impact fees, and inspection fees;
7. Bids, insurance, signage, utilities, bonding, copying, rent loss, or temporary facilities costs incurred during construction;
8. Utility hook-up or access fees;
9. Outbuildings; or
10. The cost of any well or septic system.

"Credit year" means the first taxable year following the taxable year in which the international trade facility commenced or expanded its operations. A separate credit year and a three-year allowance shall exist for each distinct international trade facility of a single taxpayer.

"International trade facility" means a company that:

1. Is engaged in port-related activities, including, but not limited to, warehousing, distribution, freight forwarding and handling, and goods processing;
2. Uses maritime port facilities located in the Commonwealth; and
3. Transports at least five percent more cargo through maritime port facilities in the Commonwealth during the taxable year than was transported by the company through such facilities during the preceding taxable year.

"New, permanent full-time position" means a job of indefinite duration, created by the company after establishing or expanding an international trade facility in the Commonwealth, requiring a minimum of 35 hours of employment per week for each employee for the entire normal year of the company's operations, or a position of indefinite duration that requires a minimum of 35 hours of employment per

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59 week for each employee for the portion of the taxable year in which the employee was initially hired
60 for, or transferred to, the international trade facility in the Commonwealth. Seasonal or temporary
61 positions, or a job created when a job function is shifted from an existing location in the
62 Commonwealth to the international trade facility, and positions in building and grounds maintenance,
63 security, and other such positions that are ancillary to the principal activities performed by the
64 employees at the international trade facility shall not qualify as new, permanent full-time positions.

65 "Normal year" means at least 48 weeks in a calendar year.

66 "Qualified full-time employee" means an employee filling a new, permanent full-time position in an
67 international trade facility in the Commonwealth.

68 "Qualified trade activities" means the completed exportation or importation of at least (i) one
69 International Organization for Standardization ocean container with a minimum 20-foot length, (ii) 16
70 tons of noncontainerized cargo, or (iii) one unit of roll-on/roll-off cargo through any publicly or
71 privately owned cargo facility located within the Commonwealth through which cargo is transported.
72 Export cargo must be loaded on a barge or ocean-going vessel and import cargo must be discharged
73 from a barge or ocean-going vessel at such facility.

74 B. For taxable years beginning on and after January 1, 2011, but before January 1, ~~2022~~ 2025, a
75 taxpayer satisfying the requirements of this section shall be allowed a credit against the taxes imposed
76 by Articles 2 (§ 58.1-320 et seq.) and 10 (§ 58.1-400 et seq.). The amount of the credit earned pursuant
77 to this section shall be equal to either (i) \$3,500 per qualified full-time employee that results from
78 increased qualified trade activities by the taxpayer or (ii) an amount equal to two percent of the capital
79 investment made by the taxpayer to facilitate the increased qualified trade activities. The election of
80 which tax credit amount to claim shall be the responsibility of the taxpayer. Both tax credits shall not be
81 claimed for the same activities that occur in a calendar year. The portion of the \$3,500 credit earned
82 with respect to any qualified full-time employee who works in the Commonwealth for less than 12 full
83 months during the credit year shall be determined by multiplying the credit amount by a fraction, the
84 numerator of which is the number of full months such employee worked for the international trade
85 facility in the Commonwealth during the credit year and the denominator of which is 12.

86 C. The Tax Commissioner shall issue tax credits under this section, and in no case shall the Tax
87 Commissioner issue more than \$1,250,000 in tax credits pursuant to this section in any fiscal year of the
88 Commonwealth. If the amount of tax credits requested under this section for any taxable year exceeds
89 \$1,250,000, such credits shall be allocated proportionately among all qualified taxpayers. The Tax
90 Commissioner shall not issue tax credits under this section subsequent to the Commonwealth's fiscal
91 year ending on June 30, ~~2022~~ 2025. The taxpayer shall not be allowed to claim any tax credit under this
92 section unless it has applied to the Department for the tax credit and the Department has approved the
93 credit. The Department shall determine the credit amount allowable for the taxable year and shall
94 provide a written certification to the taxpayer, which certification shall report the amount of the tax
95 credit approved by the Department. The taxpayer shall attach the certification to the applicable income
96 tax return.

97 D. The amount of the credit allowed pursuant to this section shall not exceed 50 percent of the tax
98 imposed for the taxable year. Any remaining credit amount may be carried forward for the next 10
99 taxable years. In the event a taxpayer who is subject to the limitation imposed pursuant to this
100 subsection is allowed a different tax credit pursuant to another section of the Code, or has a credit carry
101 forward from a preceding taxable year, such taxpayer shall be considered to have first utilized any credit
102 that does not have a carry forward provision, and then any credit carried forward from a preceding
103 taxable year, before using any of the credit allowed pursuant to this section.

104 E. No credit shall be earned for any employee (i) for whom a credit under this section was
105 previously earned by a related party as defined in § 267(b) of the Internal Revenue Code, as amended,
106 or a trade or business under common control as defined in § 52(b) of the Internal Revenue Code, as
107 amended; (ii) who was previously employed in the same job function in Virginia by a related party as
108 defined in § 267(b) of the Internal Revenue Code, as amended, or a trade or business under common
109 control as defined in § 52(b) of the Internal Revenue Code, as amended; (iii) whose job function was
110 previously performed at a different location in Virginia by an employee of the taxpayer, by a related
111 party as defined in § 267(b) of the Internal Revenue Code, as amended, or by a trade or business under
112 common control as defined in § 52(b) of the Internal Revenue Code, as amended; or (iv) whose job
113 function previously qualified for a credit under this section at a different major business facility, as
114 defined in subsection C of § 58.1-439, on behalf of the taxpayer, by a related party as defined in
115 § 267(b) of the Internal Revenue Code, as amended, or a trade or business under common control as
116 defined in § 52(b) of the Internal Revenue Code, as amended.

117 F. For purposes of this section, the amount of any credit attributable to a partnership, electing small
118 business corporation (S corporation), or limited liability company shall be allocated to the individual
119 partners, shareholders, or members, respectively, in proportion to their ownership or interest in such
120 business entities.

121 G. For purposes of this section, two or more affiliated companies may elect to aggregate the number
122 of jobs created for qualified full-time employees or the amounts of capital investments as the result of
123 the establishment or expansion by the individual companies in order to qualify for the credit allowed
124 herein.

125 H. Recapture of the credit amount, under the following circumstances, shall be accomplished by
126 increasing the tax in any of the five years succeeding the taxable year in which a credit has been earned
127 pursuant to this section if the number of qualified full-time employees falls below the average number
128 of qualified full-time employees during the taxable year. The tax increase amount shall be determined by
129 (i) recalculating the credit that would have been earned for the original taxable year using the decreased
130 number of qualified full-time employees and (ii) subtracting the recalculated credit amount from the
131 amount previously earned. In the event that the average number of qualified full-time employees
132 employed at an international trade facility falls below the number employed by the taxpayer prior to
133 claiming any credits pursuant to this section in any of the five taxable years succeeding the year in
134 which the credits were earned, all credits earned with respect to the international trade facility shall be
135 recaptured. No credit amount shall be recaptured more than once pursuant to this subsection. Any
136 recapture pursuant to this subsection shall reduce credits earned but not yet allowed, and credits allowed
137 but carried forward, before the taxpayer's tax liability is increased.

138 I. Notwithstanding the provisions of § 58.1-3, the Department of Taxation shall annually provide
139 information to the Virginia Port Authority related to tax credits issued pursuant to this section.

140 J. The Tax Commissioner shall issue guidelines that are necessary and desirable to carry out the
141 provisions of this section, including (i) the computation, carryover, and recapture of the credits provided
142 under this section; (ii) the establishment of criteria for (a) international trade facilities, (b) qualified
143 full-time employees at such facilities, and (c) capital investments; and (iii) the computation, carryover,
144 recapture, and redemption of the credit by affiliated companies. Such guidelines shall be exempt from
145 the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

146 **§ 58.1-439.12:09. Barge and rail usage tax credit.**

147 A. As used in this section:

148 "International trade facility" means a company that:

- 149 1. Is doing business in the Commonwealth and engaged in port-related activities, including but not
- 150 limited to warehousing, distribution, freight forwarding and handling, and goods processing;
- 151 2. Has the sole discretion and authority to move cargo originating or terminating in the
- 152 Commonwealth;
- 153 3. Uses maritime port facilities located in the Commonwealth; and
- 154 4. Uses barges and rail systems to move cargo through port facilities in the Commonwealth rather
- 155 than trucks or other motor vehicles on the Commonwealth's highways.

156 B. For taxable years beginning on and after January 1, 2011, but before January 1, ~~2022~~ 2025, a
157 company that is an international trade facility shall be allowed a credit against the taxes imposed by
158 Articles 2 (§ 58.1-320 et seq.), 6 (§ 58.1-360 et seq.), and 10 (§ 58.1-400 et seq.); Chapter 12
159 (§ 58.1-1200 et seq.); Article 1 (§ 58.1-2500 et seq.) of Chapter 25; or Article 2 (§ 58.1-2620 et seq.) of
160 Chapter 26. The amount of the credit shall be \$25 per 20-foot equivalent unit (TEU), 16 tons of
161 noncontainerized cargo, or one unit of roll-on/roll-off cargo moved by barge or rail rather than by trucks
162 or other motor vehicles on the Commonwealth's highways.

163 C. The Tax Commissioner shall issue tax credits under this section, and in no case shall the Tax
164 Commissioner issue more than \$500,000 in tax credits pursuant to this section in any fiscal year of the
165 Commonwealth. In addition, the Tax Commissioner shall not issue tax credits under this section
166 subsequent to the Commonwealth's fiscal year ending on June 30, ~~2022~~ 2025. The international trade
167 facility shall not be allowed to claim any tax credit under this section unless it has applied to the
168 Department for the tax credit and the Department has approved the credit. The Department shall
169 determine the credit amount allowable for the year and shall provide a written certification to the
170 international trade facility, which certification shall report the amount of the tax credit approved by the
171 Department. The international trade facility shall attach the certification to the applicable tax return.

172 D. For purposes of this section, the amount of any credit attributable to a partnership, electing small
173 business corporation (S corporation), or limited liability company shall be allocated to the individual
174 partners, shareholders, or members, respectively, in proportion to their ownership or interest in such
175 business entities.

176 E. Any credit not usable for the taxable year may be carried over for the next five taxable years or
177 until such credit is fully taken, whichever occurs first. The amount of the credit allowed pursuant to this
178 section shall not exceed the tax imposed for such taxable year. No credit shall be carried back to a
179 preceding taxable year. If a taxpayer that is subject to the tax limitation imposed pursuant to this
180 subsection is allowed another credit pursuant to any other section of this Code or has a credit carryover
181 from a preceding taxable year, such taxpayer shall be considered to have first utilized any credit allowed

182 that does not have a carryover provision, and then any credit that is carried forward from a preceding
183 taxable year, before using any credit allowed pursuant to this section.

184 F. Notwithstanding the provisions of § 58.1-3, the Department of Taxation shall annually provide
185 information to the Virginia Port Authority related to tax credits issued pursuant to this section.

186 G. The Tax Commissioner shall issue guidelines that are necessary and desirable to carry out the
187 provisions of this section, including (i) the computation and carryover of the credits provided under this
188 section and (ii) the establishment of criteria for international trade facilities. Such guidelines shall be
189 exempt from the Administrative Process Act (§ 2.2-4000 et seq.).

190 **§ 58.1-439.12:10. Virginia port volume increase tax credit.**

191 A. As used in this section, unless the context indicates otherwise:

192 "Agricultural entity" means a person engaged in growing or producing wheat, grains, fruits, nuts,
193 crops; tobacco, nursery, or floral products; forestry products excluding raw wood fiber or wood fiber
194 processed or manufactured for use as fuel for the generation of electricity; or seafood, meat, dairy, or
195 poultry products.

196 "Base year port cargo volume" means the total amount of (i) net tons of noncontainerized cargo, (ii)
197 TEUs of cargo, or (iii) units of roll-on/roll-off cargo actually transported by way of a waterborne ship or
198 vehicle through a port facility during the period from (i) January 1, 2010, through December 31, 2010,
199 for manufacturing-related entities or (ii) January 1, 2012, through December 31, 2012, for agricultural
200 entities and mineral and gas entities. Base year port cargo volume must be at least 75 net tons of
201 noncontainerized cargo, 10 loaded TEUs, or 10 units of roll-on/roll-off cargo for a taxpayer to be
202 eligible for the credits provided in this section. For a taxpayer that does not ship that amount in the year
203 ending December 31, 2010, or December 31, 2012, as applicable, including a taxpayer who locates in
204 Virginia after such periods, its base cargo volume will be measured by the initial January 1 through
205 December 31 calendar year in which it meets the requirements of 75 net tons of noncontainerized cargo,
206 10 loaded TEUs, or 10 units of roll-on/roll-off cargo. Base year port cargo volume must be recalculated
207 each calendar year after the initial base year.

208 "Major facility" means a new facility to be located in Virginia that is projected to import or export
209 cargo through a port in excess of 25,000 TEUs in its first calendar year.

210 "Manufacturing-related entity" means a person engaged in the manufacturing of goods or the
211 distribution of manufactured goods.

212 "Mineral and gas entity" means a person engaged in severing minerals or gases from the earth.

213 "Port cargo volume" means the total amount of net tons of noncontainerized cargo, net units of
214 roll-on/roll-off cargo, or containers measured in TEUs of cargo transported by way of a waterborne ship
215 or vehicle through a port facility.

216 "Port facility" means any publicly or privately owned facility located within the Commonwealth
217 through which cargo is transported by way of a waterborne ship or vehicle to or from destinations
218 outside the Commonwealth and which handles cargo owned by third parties in addition to cargo owned
219 by the port facility's owner.

220 "TEU" or "20-foot equivalent unit" means a volumetric measure based on the size of a container that
221 is 20 feet long by eight feet wide by eight feet, six inches high.

222 B. 1. For taxable years beginning on and after January 1, 2011, but before January 1, ~~2022~~ 2025, a
223 taxpayer that is an agricultural entity, manufacturing-related entity, or mineral and gas entity that uses
224 port facilities in the Commonwealth and increases its port cargo volume at these facilities by a minimum
225 of five percent in a single calendar year over its base year port cargo volume is eligible to claim a
226 credit against the tax levied pursuant to §§ 58.1-320 and 58.1-400 in an amount determined by the
227 Virginia Port Authority. The Virginia Port Authority may waive the requirement that port cargo volume
228 be increased by a minimum of five percent over base year port cargo volume for any taxpayer that
229 qualifies as a major facility.

230 2. Qualifying taxpayers that increase their port cargo volume by a minimum of five percent in a
231 qualifying calendar year shall receive a \$50 credit against the tax levied pursuant to §§ 58.1-320 and
232 58.1-400 for each TEU, unit of roll-on/roll-off cargo, or 16 net tons of noncontainerized cargo, as
233 applicable, above the base year port cargo volume. A qualifying taxpayer that is a major facility as
234 defined in this section shall receive a \$50 credit against the tax levied pursuant to §§ 58.1-320 and
235 58.1-400 for each TEU, unit of roll-on/roll-off cargo, or 16 net tons of noncontainerized cargo, as
236 applicable, transported through a port facility during the major facility's first calendar year. A qualifying
237 taxpayer may not receive more than \$250,000 for each calendar year except as provided for in
238 subdivision C 2. The maximum amount of credits allowed for all qualifying taxpayers pursuant to this
239 section shall not exceed \$3.2 million for each calendar year. The Virginia Port Authority shall allocate
240 the credits pursuant to the provisions in subdivisions C 1 and C 2.

241 3. If the credit exceeds the taxpayer's tax liability for the taxable year, the excess amount may be
242 carried forward and claimed against income taxes in the next five succeeding taxable years.

243 4. The credit may be claimed by the taxpayer as provided in subdivision 1 only if the taxpayer owns

244 the cargo at the time the port facilities are used.

245 C. 1. For every year in which a taxpayer claims the credit, the taxpayer shall submit an application
246 to the Virginia Port Authority by March 1 of the calendar year after the calendar year in which the
247 increase in port cargo volume occurs. The taxpayer shall attach a schedule to the taxpayer's application
248 to the Virginia Port Authority with the following information and any other information requested by the
249 Virginia Port Authority or the Department:

250 a. A description of how the base year port cargo volume and the increase in port cargo volume were
251 determined;

252 b. The amount of the base year port cargo volume;

253 c. The amount of the increase in port cargo volume for the taxable year stated both as a percentage
254 increase and as a total increase in net tons of noncontainerized cargo, TEUs of cargo, and units of
255 roll-on/roll-off cargo, as applicable, including information that demonstrates an increase in port cargo
256 volume in excess of the minimum amount required to claim the tax credits pursuant to this section;

257 d. Any tax credit utilized by the taxpayer in prior years; and

258 e. The amount of tax credit carried over from prior years.

259 2. If on March 15 of each year the \$3.2 million amount of credit is not fully allocated among
260 qualifying taxpayers, then those taxpayers who have been allocated a credit for the prior year shall be
261 allowed a pro rata share of the remaining allocated credit up to \$3.2 million. If on March 15 of each
262 year, the cumulative amount of tax credits requested by qualifying taxpayers for the prior year exceeds
263 \$3.2 million, then the \$3.2 million in credits shall be prorated among the qualifying taxpayers who
264 requested the credit.

265 3. The taxpayer shall claim the credit on its income tax return in a manner prescribed by the
266 Department. The Department may require a copy of the certification form issued by the Virginia Port
267 Authority be attached to the return or otherwise provided. Qualifying taxpayers may also claim the
268 credit pursuant to § 58.1-439.12:09 for the same containers, noncontainerized cargo, or roll-on/roll-off
269 units of cargo for which a credit is claimed under this section provided such taxpayer meets the
270 applicable criteria set forth therein.

271 D. 1. Any taxpayer holding a credit under this section may transfer unused but otherwise allowable
272 credit for use by another taxpayer on Virginia income tax returns. A taxpayer who transfers any amount
273 of credit under this section shall file a notification of such transfer to the Department in accordance with
274 procedures and forms prescribed by the Tax Commissioner. The transferred credits may be retroactively
275 applied from the date such credits were originally issued, and the transferee may file an amended return
276 under this chapter to claim such transferred credit for a prior tax year. However, nothing in this section
277 shall be construed to extend the statute of limitations for filing an amended return under § 58.1-1823 or
278 any other provision of law.

279 2. No transfer of tax credits pursuant to the provisions of this subsection shall be allowed unless
280 such transfer occurs within one calendar year of the credit holder earning such credit.

281 3. Only tax credits issued in taxable years beginning on and after January 1, 2018, but before
282 January 1, ~~2022~~ 2025, shall be transferable pursuant to the provisions of this subsection.

283 E. Credits granted to a partnership, limited liability company, or electing small business corporation
284 (S corporation) shall be allocated to the individual partners, members, or shareholders, respectively, in
285 proportion to their ownership interests in such business entities.