

DRAFT Food Crop Donation Tax Credit Guidelines

Introduction

During the 2016 Session, the Virginia General Assembly enacted House Bill 1093 (2016 *Acts of Assembly*, Chapter 391) and Senate Bill 580 (2016 *Acts of Assembly*, Chapter 304), which established the Food Crop Donation Tax Credit. This is an individual and corporate income tax credit for certain persons engaged in the business of farming for growing food crops in the Commonwealth and donating such crops to a nonprofit food bank.

These guidelines are published by the Department of Taxation (“the Department”) to provide guidance to taxpayers regarding the Food Crop Donation Tax Credit. These guidelines are not rules or regulations subject to the provisions of the Administrative Process Act (*Va. Code* § 2.2-4000 et seq.) and are being published in accordance with the Tax Commissioner’s general authority to supervise the administration of the tax laws of the Commonwealth pursuant to *Va. Code* § 58.1-202. As necessary, additional information will be published and posted on the Department’s website, www.tax.virginia.gov.

These guidelines represent the Department’s interpretation of the relevant laws. They do not constitute formal rulemaking and hence do not have the force and effect of law or regulation. In the event that the final determination of any court holds that any provision of these guidelines is contrary to law, taxpayers who follow these guidelines will be treated as relying on erroneous written advice for purposes of waiving penalty and interest under *Va. Code* §§ 58.1-105, 58.1-1835, and 58.1-1845. To the extent there is a question regarding the application of these guidelines, taxpayers are encouraged to write to the Department and seek a written response to their question.

General Overview

Effective for Taxable Year 2016, Virginia allows an individual and corporate income tax credit for certain persons engaged in the business of farming for growing food crops in the Commonwealth and donating such crops to a nonprofit food bank. The amount of the credit is equal to 30 percent of the fair market value of such crops. No taxpayer is permitted to claim more than \$5,000 in credits for a taxable year. The credit is allowed only to the extent that the total amount of credits granted for a fiscal year does not exceed the annual \$250,000 credit cap.

The amount of the credit claimed shall not exceed the total amount of income taxes upon the person for the taxable year. Any credit not usable for the taxable year for which the credit was first allowed may be carried over for credit against the income taxes of the person in the next five succeeding taxable years or until the total amount of the tax credit has been taken, whichever is sooner.

Definitions

“The business of farming” means “the business of farming” as defined in Treas. Reg. § 1.175-3.

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“Food” means a nourishing substance that is fit for human consumption.

"Food crops" means grains, fruits, nuts, or vegetables.

“Grown by the person” means that the donor was directly engaged in the growing of the food crop. The donor is directly engaged in the growing of a food crop when he has a profit interest in the growing of the food crop, assumes the of the risks incidental to the growing of the food crop, and his supervision and involvement in the growing of the food crop are substantial.

"Nonprofit food bank" means an entity located in the Commonwealth that is exempt from taxation under I.R.C. § 501(c)(3), as amended or renumbered, and organized with a principal purpose of providing food to the needy.

Determining Whether an Organization Is a Nonprofit Food Bank

To be considered a "nonprofit food bank," an entity must be organized with a principal purpose of providing food to the needy. “Providing food to the needy” means the distribution of food to the needy, either directly or through a network of other organizations. An entity will generally be considered to be “organized with a principal purpose of providing food to the needy” if it is expressly organized for such purpose and is actually engaged primarily in providing food to the needy. Other facts and circumstances, however, may dictate whether an entity meets the principal purpose requirement, regardless of the purpose stated in its governing instrument.

Organizations that are unsure of whether they qualify as nonprofit food banks may request a ruling from the Department.

Written Certification by Nonprofit Food Bank

In the case of any donation of food crops, a nonprofit food bank must prepare a written certification that identifies:

- The donee nonprofit food bank. This must include the name of the nonprofit food bank, its employer identification number, its mailing address, its phone number, and the date on which this certification was prepared. This must also include the name and signature of the individual completing the certification on behalf of the nonprofit food bank.
- The donor. This must include the name of the person making the donation, his social security number or employer identification number, his mailing address, and his phone number.
- The date of the donation.

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- The number of pounds and the fair market value of food crops donated. Fair market value must be determined by the nonprofit food bank according to the approaches set forth under the “Determining Fair Market Value” section below. The nonprofit food bank must also identify the type of food crop or crops donated.

The written certification must include a statement by the donee nonprofit food bank:

- That it is an entity located in the Commonwealth that is exempt from taxation under I.R.C. § 501(c)(3) and is organized with a principal purpose of providing food to the needy,
- That its use and disposition of the food crops complies with the requirements described under “Nonprofit Food Bank’s Use and Disposition of Food Crops” below, and
- Whether the donee nonprofit food bank provided any goods or services in consideration for the donation, and if it did, a description and good-faith estimate of their value or, if applicable, a statement pursuant to I.R.C § 170(f)(8)(B)(iii). Notwithstanding the foregoing, any goods or services disregarded for the purposes of Treas. Reg. § 1.170A-13(f)(8) shall also be disregarded for the purposes of the Food Crop Donation Tax Credit and do not have to be described in the certification.

For Taxable Year 2016, such written certification must be prepared by the nonprofit food bank and furnished to the donor by January 31, 2017. For Taxable Year 2017 and each taxable year thereafter, such written certification must be prepared and furnished within 30 days after the donation was made.

A Virginia Food Crop Donation Certification form, Form FCD-2 is available for nonprofit food banks to download from the Department’s website (<http://www.tax.virginia.gov>).

Determining Fair Market Value

The written certification prepared by the donee nonprofit food bank must identify the fair market value of the food crops donated. Generally, federal law requires that the fair market value be determined by a consideration of all the facts and circumstances connected with the donated food crops, such as their desirability, use, and scarcity. The nonprofit food bank would be required to ascertain the price which the donor would have received if he had sold such food crops in the usual market in which he customarily sells, at the time and place of the donation and, in the case of a donation of crops in quantity, in the quantity donated. See Treas. Reg. § 1.170A-1(c)(2). This may referred to as the “federal approach.”

Because determining fair market value in this manner may be unduly burdensome in some cases, fair market value may also be determined based on the average wholesale

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market price published by the U.S. Department of Agriculture Market News Service for the food crops donated in the nearest regional market during the month in which the donation is made. The average wholesale market price shall be determined without consideration of grade or quality of the food crop and as if the quantity of the donated food crop was marketable. This may be referred to as the “average price approach.”

To the extent that the federal approach is used, the fair market value used to claim the Food Crop Donation Tax Credit may not exceed the fair market value reported by the donor for the purposes of the federal charitable deduction, before the reductions contained in I.R.C. § 170(e), with respect to the same donation.

Nonprofit Food Bank’s Use and Disposition of Food Crops

In order for the donation to qualify for the tax credit, the nonprofit food bank must certify that the following requirements will be met.

Requirement That the Use of Donated Food Crops be Related to Providing Food to the Needy

The use of food crops must be related to providing food to the needy. To determine whether the food crops are being used in such a manner, the provisions of Treas. Reg. § 1.170A-4A(b)(2)(ii)(A) are applicable, except that:

- The food crops must be used for providing food to the needy, and
- The donee nonprofit food bank may not transfer the food crops for use outside Virginia.

For the purposes of this requirement, the definition of “the needy” in Treas. Reg. § 1.170A-4A(b)(2)(ii)(D) shall apply.

Prohibition on the Use of Donated Food Crops as Consideration for Services Performed or Personal Property Purchased

Generally, the donee nonprofit food bank (or any subsequent transferee) may not use donated food crops as consideration for services performed or personal property purchased. Nevertheless, the donated food crops may be transferred or sold by the nonprofit food bank to the needy, other nonprofit food banks, or organizations that intend to use the food crops to provide food to the needy. To the extent the food crops are sold, such sales must conform to the provisions of Treas. Reg. § 1.170A-4A(b)(3). If other nonprofit food banks or organizations receive or purchase the donated food crops, they shall be subject to all the restrictions on the use of food crops as if they were the donee nonprofit food bank.

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Administration of the Tax Credit

To receive the Food Crop Donation Tax Credit, donors must apply to the Department by completing Form FCD, which is available to download from the Department's website (<http://www.tax.virginia.gov>). This form and any supporting documentation must be completed and mailed no later than April 1 of the year following the taxable year during which the donations were made. Every donor that applies for the Food Crop Donation Tax Credit must obtain a written certification from the donee nonprofit food bank. Such written certification must then be attached to Form FCD.

The maximum amount of Food Crop Donation Tax Credits for all qualifying taxpayers is limited to \$250,000 for each fiscal year. If the amount of credits applied for exceeds \$250,000, the Department will allocate all credits on a pro rata basis. The Department will review all applications for completeness and notify donors of any errors by June 1 of the calendar year in which Form FCD was submitted. If any additional information is needed, it must be provided no later than June 15 of that year to be considered for the tax credit. The Department will notify all eligible donors of the amount of allocated credits by June 30 of the calendar year in which Form FCD was submitted.

Upon receiving notification of the credit amount from the Department, the donor may claim the credit on his Virginia income tax return. In the event that a taxpayer does not receive notification of the allowable credit amount before his Virginia income tax return is due, the taxpayer may file the return during the extension period, or he may file the original return without claiming the credit and then file an amended tax return once notification of the allowable credit amount is received. Any tax credit amount that exceeds the taxpayer's tax liability for the taxable year may be carried forward for five taxable years.

Addition to Income

To the extent the Food Crop Donation Tax Credit is allowed for a donation, an addition to federal adjusted gross income, in the case of individuals, or to federal taxable income, in the case of corporations, shall be required for any amount claimed as a federal income tax deduction for such donation.

Under federal income tax law, donors who are barred from claiming a charitable contribution deduction during the taxable year may be eligible to carry forward the deduction to subsequent taxable years. Under the Food Crop Donation Tax Credit, donors who are barred from claiming the tax credit during the taxable year may be eligible to carry forward the tax credit to subsequent taxable years. In either case, the addition is required in the taxable year during which the federal charitable contribution deduction attributable to the donation is claimed, regardless of the taxable year during which the donation was made and regardless of the taxable year during which the Food Crop Donation Tax Credit was claimed.

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Additional Information

These guidelines are available online in the Laws, Rules & Decisions section of the Department's website, located at www.tax.virginia.gov. For additional information, please contact the Department at (804) 367-8037.

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