

VIRGINIA DATA CENTER SALES AND USE TAX EXEMPTION INFORMATION PACKET

Section 58.1-609.3 (18) of the Code of Virginia of 1950, as amended, provides for a sales and use tax exemption (DCRSUT Exemption) on qualifying computer equipment or enabling software that is purchased or leased for use in a data center that is located in a Virginia locality and meets certain capital investment and new job requirements.

Prior to claiming such exemption, a qualifying person must enter into a memorandum of understanding (MOU) with the Virginia Economic Development Partnership (VEDP).

Qualifying Person

Data Center

A qualifying person may be an enterprise or a colocation data center.

A data center may enter into an MOU on behalf of itself or together, jointly and severally, with its affiliates. The MOU is discussed further below.

For purposes of the DCRSUT Exemption, an affiliate is any subsidiary or other entity that would be considered affiliated for purposes of filing a consolidated or combined corporate income tax return in the Commonwealth, treating all such entities as if they were corporations and the ownership interests therein were stock. The data center must include a list of the affiliates for which it wants to obtain use of the DCRSUT Exemption in Exhibit A of the MOU.

A data center must be located in a Virginia locality. For purposes of the DCRSUT Exemption, a Virginia locality is a city or county in the Commonwealth. A data center may have more than one facility physically located in a locality. Multiple facilities in one locality will be considered collectively as one data center. The data center must include a list of the facility addresses in Exhibit B of the MOU.

A colocation data center enters into an MOU permitting the data center and its tenants to use of the DCRSUT Exemption. Together, the colocation data center and its tenants are referred to as a group. The data center must include a list of its tenants permitted to use the DCRSUT Exemption in Exhibit C to the MOU.

Tenant

A tenant of a colocation data center must enter into a Participation Certificate and Agreement (Participation Certificate) with a colocation data center that has an MOU. The Participation Certificate is discussed further below.

For purposes of the DCRSUT Exemption, a tenant is an entity entitled under a rental agreement, license agreement or other document with the data center to occupy a portion of a data center.

Qualifying Computer Equipment or Enabling Software

The computer equipment or enabling software must be purchased or leased for use in a data center located in a Virginia locality.

Pursuant to the statute, qualifying computer equipment or enabling software is such equipment or software used “for the processing, storage, retrieval, or communication of data, including but not limited to servers, routers, connections, and other enabling hardware, including chillers and backup generators used or to be used in the operation of the equipment.”

The Commissioner of the Virginia Department of Taxation (TAX) has ruled that the following property qualifies for the DCRSUT Exemption:

- servers, mainframes, network infrastructure, data storage hardware, and other computer equipment to the extent used for the processing, storage, retrieval, or communication of data;
- cabling, switches, directors, wiring, and similar items to the extent used in the operation of exempt equipment, *but not* general building improvements or other fixtures;
- generators, radiators, exhaust fans, fuel storage tanks, and similar items to the extent used to provide electricity, *but not* fuel otherwise subject to the retail sales and use tax;
- electrical substations, power distribution equipment, cogeneration equipment, batteries, and other electrical equipment to the extent used to provide electricity;
- chillers, computer room air conditioners (CRACs), heating, ventilating, and air conditioning (HVAC) systems, cool towers, and similar items to the extent used to provide the proper environment in the data center, e.g., temperature and humidity;
- water storage tanks, water pumps, piping, and similar items to the extent used to operate chillers and other cooling systems to provide the proper environment in the data center, e.g., temperature and humidity;
- monitoring systems used to monitor the data center’s power generation, transmission, and distribution equipment, to the extent such systems are used to exercise remote control over exempt equipment and to identify specific repair and maintenance needs of exempt equipment, *but not* equipment used for

external surveillance and security and tangible personal property, such as fire and burglar alarm systems, which would be considered general building improvements;

- cabinets, battery racks, and cable trays specifically designed to ensure that the servers and other exempt equipment function properly;
- software used for the processing, storage, retrieval, or communication of data when it is sold or leased with the exempt equipment, *but not* when it is sold or leased separately;¹ and
- custom software which is not prewritten and is specifically designed and developed for only one customer.

General upgrades to the data center facility such as repairing or replacing roofs, lighting, fencing and other general building improvements or fixtures are not qualifying computer equipment.

Qualifying computer equipment and enabling software includes that which is purchased or leased in connection with the initial investment at the data center, as well as any such computer equipment and enabling software purchased or leased to upgrade, supplement, or replace the initial property.

Purchase or Lease and Effective Date of DCRUST Exemption

Pursuant to the TAX Code, a sale occurs when there is a transfer of title or possession or a lease of tangible personal property.

TAX therefore has ruled that a retail sales and use tax is due when such property is either (i) delivered to the purchaser, or (ii) paid for in full by the purchaser, whichever occurs first, regardless of when the property is ordered.

The effective date of the DCRSUT Exemption will be from the date of the data center's MOU through June 30, 2035.

To qualify for the DCRSUT Exemption, the *purchase or lease* of the qualifying computer equipment must be made *after the DCRSUT Exemption effective date*.

A tenant will be able to use the DCRSUT Exemption back to the date of its data center MOU and may claim any refund of sales and use tax on qualifying computer equipment

¹ However, such software may not necessarily be subject to the retail sales and use tax. It is TAX's policy that prewritten software delivered electronically does not constitute the sale of tangible personal property and generally is not subject to sales and use taxation, *provided* no disc, tape, or other tangible medium is provided before or after the electronic download.

and enabling software paid back to that date, regardless of when such tenant entered into a Participation Certificate with the data center.

Memorandum of Understanding

The MOU permits a qualifying person to use the DCRSUT Exemption prior to achieving the capital investment and new job statutory minimum requirements, subject to repayment should these requirements not be met by a performance date.

The MOU will set forth the relevant definitions, performance targets, reporting requirements, and repayment obligations, and is subject to negotiation with VEDP.

An MOU between the data center and VEDP typically is initiated by the data center contacting VEDP.

Once an MOU has been fully executed, VEDP will provide a copy to TAX.

TAX, in turn, will issue an DCRSUT Exemption Certificate as further discussed below.

Operations Target

The data center operations must be maintained during the performance period through the performance date. The performance period typically is a three year period during which the data center must meet the capital investment and new jobs requirements. The performance date is the date by which the data center must meet such requirements.

Capital Investment Target

The data center must result in at least \$150 million in *new* capital investment at the data center in the locality on or after January 1, 2009, through the performance date.

Capital investment is a capital expenditure by the data center and any tenants, if applicable, by purchase or lease of real property and/or tangible personal property.

The cost of the acquisition of land and existing buildings will not count toward capital investment, unless the land and existing buildings are being purchased from a governmental entity and are being returned to the tax rolls.

Capital investment includes the cost to the developer/lessor of real property at the data center facility leased by the data center under a capital lease, but not does not include the cost of such property leased under an operating lease, nor portions of any lease costs representing allocated or direct operating costs, such as electricity, security, and building maintenance.

Capital investment includes capital expenditures such as sales and use taxes paid, installation, freight charges and other expenditures associated with the purchase or lease of assets.

The value of used property transferred by a data center to the project site generally will not count as new capital investment. If such property is being moved to the Commonwealth from outside of the Commonwealth and does not represent more than half of the qualifying capital investment, then such property *may be* counted toward qualifying investment. The locality's assessed value of the property to which the local tax rate will be applied will be considered in determining the amount of capital investment.

Capital investment may be aggregated across the data center's facilities within a locality, but not across localities.

New Jobs Target

The data center must also result in the creation of at least 50 new jobs *associated with the operation or maintenance* of the data center in the locality on or after July 1, 2009, through the performance date.

This requirement is reduced to at least 25 new jobs if the data center is in an enterprise zone or a locality with an unemployment rate for the preceding year of at least 150% of the average statewide unemployment rate for such year.

A new job is:

- full-time employment of an indefinite duration requiring a minimum of either (i) 35 hours per week for the entire normal year of the data center operator or tenant operations, which "normal year" must consist of at least 48 weeks, or (ii) 1,680 hours per year;
- paid at least one and one-half times the prevailing annual average wage in the locality where the data center is located;²
- receives standard fringe benefits, e.g., health benefits;
- a net new job in Commonwealth, i.e., not an existing job; and
- in the locality where the data center is located.

² By statute, each individual job must be above one and one-half times the prevailing local annual average wage. The average annual wage cannot be an average of the annual wages of all new jobs.

A new job may include a contractor or an employee of a contractor so long as it is providing dedicated full-time service associated with the operation and maintenance of the data center, e.g., security or maintenance.

Construction contractors, customers, suppliers and similar multiplier or spin-off jobs will not count as new jobs.

A new job does not necessarily have to be physically located at the data center, but it must be located in the locality where the data center is located and associated with the operation and maintenance of the data center.

New jobs may be aggregated across the data center's facilities within a locality, but not across localities.

No Double Counting

With one very limited exception, capital investment and new jobs may only be counted once by one data center for purposes of meeting the statutory minimum requirements.

Record Keeping

Both data centers and tenants must keep complete and accurate records of the:

- amount of capital investment
- number of new jobs
- qualifying computer equipment or enabling software
- value of the tax benefit received

Reporting

A data center must make an annual report on behalf of itself or the group, if applicable, to VEDP and TAX of the progress made toward achieving the performance targets.

Within 90 days of the performance date, a data center must provide evidence to VEDP and TAX that the performance targets have been achieved.

There is no form for reporting. A data center is expected to provide: a summary breakdown of the capital investment by major category of expenditure; a listing of the new jobs, each with an associated average annual wage; and a certification that the standard fringe benefits were provided. The data center is also expected to provide the amount of capital investment specifically in qualifying computer equipment and the value of the tax benefit received.

Verification of Achievement of the Performance Targets

The capital investment and new jobs information reported by the data center is subject to verification.

A data center is expected to authorize the locality in which the data center facilities are located to release to VEDP and TAX its real estate tax, business personal property tax, and machinery and tools tax information. This information will be marked and considered confidential and proprietary, and used by VEDP and TAX solely for verifying satisfaction of the capital investment.

VEDP will verify new job creation and wage information with the Virginia Employment Commission. A data center may be requested to provide copies to VEDP of the employer's quarterly reports provided to the Virginia Employment Commission.

The data center will receive a letter of satisfaction upon verification of achievement of the performance targets. There will be certain continuing obligations including providing revised exhibits to the MOU as may be necessary and keeping complete and accurate records of qualifying computer equipment or enabling software and the value of the tax benefit received.

Repayment

If it is determined that the data center has not achieved the performance targets as of the performance date, the data center must cease using the DCRSUT Exemption and repay the value of the tax benefit received.

If at any time prior to the performance date, the data center itself or VEDP determines that the data center will be unable to meet the performance targets as of the performance date, the data center must cease using the DCRSUT Exemption and repay the value of the tax benefit received.

In both cases, the data center must notify any tenants that they must cease using their DCRSUT Exemptions and repay the value of the tax benefit received.

The data center is responsible for communicating with its tenants and, if not collecting repayments from the tenants for the submission of the group repayment at one time, reporting to VEDP and TAX when repayment from the tenants is expected.

A data center must agree that, from any repayment that may be required by the group, the Commonwealth will receive the lesser of (i) \$7,500,000, or (ii) the value of the tax benefit received by the group.

Participation Certificate

The Participation Certificate will set forth any performance targets required by the data center, reporting requirements, and repayment obligations. The tenant must agree that it will comply with all the obligations in the MOU as if it were an original signatory to the MOU.

The colocation data center may require a tenant to assist the group in meeting the statutory capital investment and new jobs requirements for qualification for the DCRSUT Exemption.

A Participation Certificate is typically initiated by the tenant contacting a colocation data center. A form Participation Certificate is attached as Exhibit D to an MOU.

The data center will provide the Participation Certificate to VEDP for signature acknowledgement.

Once an MOU has been fully executed, VEDP will provide a copy to TAX.

TAX, in turn, will issue a DCRSUT Exemption Certificate as further discussed below.

Exemption Certificate

Once the copy of the MOU or Participation Certificate is provided to TAX, TAX will issue a DCRSUT Exemption Certificate, sending the original directly to the data center or the tenant, if applicable, at the address set forth in such MOU or Participation Certificate.

The process is typically two weeks from the time that VEDP provides TAX with a copy of the MOU or Participation Certificate. Please note, however, the process may take longer.

An affiliate will be listed on the DCRSUT Exemption Certificate issued by TAX to the data center, permitting it to use such exemption.

TAX will issue a DCRSUT Exemption Certificate individually to each tenant.

Please note that the effective date of the DCRSUT Exemption is from the date of the MOU.

The Exemption Certificate should be presented to the vendor when the qualifying computer equipment or enabling software purchase or lease is made.

A data center may obtain a refund for any sales and use tax paid on qualifying computer equipment or enabling software purchased or leased between the date of the MOU and the date it actually receives the DCRSUT Exemption Certificate.