Legal Fact Sheet

Virginia Food Donation: Tax Incentives

Created by the Harvard Law School Food Law and Policy Clinic, April 2024

Federal tax incentives provide important financial incentives that make food donation more cost-effective and economically beneficial. These tax incentives have been extraordinarily successful in motivating food donation. In the past, federal tax incentives for food donations were limited to C-corporations.[i] Tax incentives for donations were temporarily expanded to cover more businesses in 2005, and Congress made this expansion permanent in 2015,[ii] providing all businesses with added incentive to increase food donations and prevent food waste. At the federal level, tax incentives are available in the form of general or enhanced deductions, each of which are discussed in this fact sheet.

In addition to the federal tax incentives, several states have enacted state-level tax incentives. As of July 2023, Virginia provides a state-level tax incentive in the form of a tax credit for farmers that donate food.[iii] Virginia also conforms to the federal tax law, which allows businesses to claim the federal tax deductions thereby reducing the taxable income on which Virginia state income taxes will be assessed.

Federal Tax Incentives

How are the tax incentives calculated?

General (non-enhanced) tax deduction: Businesses that donate inventory may claim a tax deduction in the amount of the property's basis,[iv] which is usually the value of the property's cost to the business and is often lower than the fair market value (the value at which goods can be sold). Businesses other than C-corporations— including S-corporations,[v] sole proprietorships,[vi] and some LLCs[vii] — cannot deduct more than either 30% or 50% of the business' total taxable income each year, depending on the type of organization to which the business is donating.[viii] C-corporations generally cannot deduct more than 10% of their taxable income each year.[ix]

Enhanced tax deduction: The enhanced tax deduction provides an extra incentive for donation by allowing the donating business to deduct the lesser of (a) twice the basis value of the donated food or (b) the basis value of the donated food plus one-half of the food's expected profit margin (if the food were to be sold at fair market value).[x] Under the enhanced deduction, all businesses may deduct up to 15% of their taxable income for food donations.[xi]

> *Example: A grocery store donates potatoes with a fair market value of $100. The basis value of these potatoes was $30. The expected profit margin is the fair market value*

minus the basis value ($100 - $30), which is $70. Under the enhanced deduction, the grocery store is eligible to deduct the smaller of:

> *(a) Basis Value x 2 = $30 x 2 = $60, or (b) Basis Value + (expected profit margin / 2) = $30 + ($70 / 2) = $65*

The enhanced deduction would be $60, which is substantially higher than the general deduction (the $30 basis value).

Businesses that do not account for inventories and are not required to capitalize indirect costs will have the option to calculate the basis value at 25% of the products' fair market value.[xii] Businesses also have the option to calculate the fair market value of certain products—i.e., those that cannot be sold because of failure to meet internal standards, lack of a market, or similar reasons—by using the price of the same or substantially similar, saleable food items.[xiii]

How can a donating business know if they are eligible for a tax deduction?

General tax deduction requirements: In order for a charitable contribution to qualify for a federal tax deduction, the donation must be used for charitable purposes and given to a qualified organization as laid out under section 170 of the Internal Revenue Code (IRC).[xiv]

Enhanced tax deduction requirements: In order to qualify for the enhanced tax deduction, a business must donate to a recipient organization that meets several criteria. First, the recipient must be a qualified 501(c)(3) not-for-profit as defined by the IRC.[xv] Additionally, the donor and recipient must meet the following requirements:[xvi]

(A) The recipient must use the donated food in a manner consistent with the purpose constituting that organization's exempt status under IRC 501(c)(3), which means that the donated food must be used exclusively for charitable purposes;

(B) The food must be used for the care of the ill, needy, or infants;

(C) The food may not be transferred by the recipient organization in exchange for money, other property, or services; however, the recipient organization may charge another organization a nominal amount for "administrative, warehousing, or other similar costs."

Example: If a business donates food to a food bank (the recipient organization), the food bank may not charge a soup kitchen for the donated food, and the soup kitchen may not charge the individuals eating at the soup kitchen. The food bank can, however, charge the soup kitchen a nominal fee for reimbursement of the costs of storing the food in a warehouse.

(D) The donating business must receive a written statement from the recipient organization. The statement must describe the contributed property and represent that the property will be used in compliance with the requirements outlined above; and

(E) The donated property must satisfy the requirements of the Federal Food, Drug, and Cosmetic Act (FDCA) at the time of donation and for the preceding 180 days. For food that did not exist for 180 days prior to donation, this requirement is satisfied if the food was in compliance with the FDCA for the period of its existence and at donation, and any similar property held by the donor during the 180 days prior to donation was also held in compliance with the FDCA.

Most states with corporate income tax conform to the Internal Revenue Code (I.R.C) calculation of corporate income tax in lines 1 through 28 of IRS Form 1120.[xvii] Some states must pass new legislation in order to conform with changes in the Internal Revenue Code while others employ what is called rolling conformity, whereby the states automatically implement federal tax changes as they are enacted. Virginia is a "static" conformity state—it adopts the federal tax code as it exists at a certain point in time and must update its tax laws to conform to any changes in the I.R.C. at later dates.[xviii] In February of 2023, Virginia passed legislation to conform to the terms of the I.R.C. as of December 31, 2022.[xix] In states with I.R.C conformity, businesses are eligible to use federal tax deductions to calculate their taxable state income. Businesses claim the charitable contribution deduction on Line 19 of IRS Form 1120.[xx] The income amount used for the calculation of state taxes is already reduced by the amount of federal deductions, including charitable contributions, when it is transferred from Line 28 or Line 30 of IRS Form 1120 to state corporate income tax return forms.[xxi] Because Virginia conforms to the I.R.C with respect to charitable deductions, businesses in the state benefit from the federal deductions for charitable food donations, which reduce their state income tax liability.

Virginia Tax Incentives

More than a dozen states currently offer state level tax incentives specifically for food donations.[xxii] In 2016, Virginia passed a tax credit for the donation of grains, fruits, nuts, or vegetables, which expired January 1, 2022. In 2023, Virginia reenacted and amended its food donation tax credit.[xxiii] For tax years beginning January 1, 2023, farmers who donate grains, fruits, nuts, vegetables, or other wholesome foods to a nonprofit food bank can claim a credit equal to 50% of the fair market value of such food, up to $10,000 annually.[xxiv] Wholesome foods are those foods that may not be marketable due to their appearance, age, freshness, grade, surplus, or other factors but still meet federal, state, and local quality standards.[xxv] To be eligible for the credit, the nonprofit food bank must have used the donated food to provide food to needy individuals in Virginia.[xxvi] If the nonprofit food bank sold the donated food, it must have been sold to the needy, other nonprofit food banks, or organizations that intended to use the donated food to provide food to the needy.[xxvii] Nonprofit food banks cannot trade or use the donated food to obtain services or personal property and the donated food must remain in Virginia.[xxviii]

Virginia caps the total tax credits that it will issue for donated food to $250,000 annually.[xxix] To receive the tax credit, a farmer must apply to the Virginia Department of Taxation and have their application approved.[xxx] The farmer must present a receipt, letter or other written certification from the nonprofit food bank showing the name of the food bank, the identity of the donor, donation date, the weight and fair market value of the donated food, and confirmation that the food bank will use and distribute the donated food consistent with the requirements set forth above.[xxxi] Virginia's Tax Commission is responsible for issuing the tax credits and making sure that Virginia does not spend more than $250,000 annually on tax credits for donated food, across all claimants.

The law allows for any unused credit to be carried over and credited against income taxes in the next five succeeding taxable years, or until 2028.[xxxii] The food donation tax credit is schedule to expire before the tax year beginning on January 1, 2028.[xxxiii]

Conclusion

As of July 2023, Virginia farmers may claim a state tax credit for food donations. Virginia has adopted the Internal Revenue Code provisions covering food donation deductions, so eligible businesses may use the deductions to reduce their taxable income for the purpose of Virginia state income taxes.

---

[i] I.R.C. § 170(e)(3)(C) (2017).
[ii] I.R.C. § 170(e)(3)(C) (2017); Protecting Americans Against Tax Hikes (PATH) Act of 2015, H.R. 2029, 114th Cong. § 1139(a) (2015).
[iii] VA. Code Ann. § 58.1-439.12:12 (2023).
[iv] I.R.C. § 170(e)(1) (2017); 26 C.F.R.§1.170A—4(a)(1) (2018); *Charitable Contributions: For Use in Preparing 2017 Tax Returns,* I.R.S., DEP'T OF THE TREASURY 11, (Jan. 24, 2018), http://www.irs.gov/pub/irs-pdf/p526.pdf (noting the amount of the deduction is the fair market value minus the amount of income gained had the product been sold at fair market value).
[v] I.R.C. § 170(b)(1)(B)(i) (2017); I.R.C. § 1363(b) (2017).
[vi] I.R.C. § 170(b)(1)(B)(i) (2017); *Sole Proprietorships*, I.R.S., https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Sole-Proprietorships (last visited Oct. 29, 2018).
[vii] I.R.C. § 170(b)(1)(B)(i) (2017); Single Member Limited Liability Companies, I.R.S., https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies (last visited Jan. 30, 2023) (explaining that whether an LLC will be treated as an individual for tax purposes—and hence be subject to the 30% total charitable contribution cap—depends on the number of members in the LLC).
[viii] I.R.C. § 170(b)(1)(A) (2017).
[ix] I.R.C. § 170(b)(2)(A) (2017).
[x] I.R.C. § 170(e)(3)(B) (2017); 26 C.F.R. § 1.170A-4A(b)(4) (2017).
[xi] I.R.C. § 170(e)(3)(C)(ii) (2017).
[xii] I.R.C. § 170(e)(3)(C)(iv) (2017).
[xiii] I.R.C. § 170(e)(3)(C)(v) (2017).
[xiv] I.R.C. § 170(b),(c), (e)(3)(c) (2017).
[xv] I.R.C. § 170(e)(3)(A) (2017).
[xvi] I.R.C. § 170(e)(3)(A) (2017); 26 C.F.R. § 1.170A-4A(b) (2019).
[xvii] *See* Toward a State of Conformity: State Tax Codes a Year After Federal Tax Reform, TAX FOUNDATION (Jan. 28, 2019), https://taxfoundation.org/state-conformity-one-year-after-tcja/.
[xviii] *See* Toward a State of Conformity: State Tax Codes a Year After Federal Tax Reform, TAX FOUNDATION (Jan. 28, 2019), https://taxfoundation.org/state-conformity-one-year-after-tcja/.
[xix] *See* VIRGINIA DEP'T OF TAXATION, TAX BULLETIN 23-1, (Feb. 27, 2023), https://www.tax.virginia.gov/sites/default/files/inline-files/tb-23-1-date-of-irc-conformity-advanced.pdf?utm_content=february_2023&utm_medium=email&utm_name=Conformity&utm_source=govdelivery&utm_term=tax_preparer; VA. Code Ann. § 58.1-301; 58.1-322.02; 58.1-322.03; 58.1-402 (2022).
[xx] *See* I.R.S FORM 1120, U.S. CORPORATION INCOME TAX RETURN (2022).
[xxi] *See* I.R.S FORM 1120, U.S. CORPORATION INCOME TAX RETURN (2022).

[xxii] *See e.g.*, Arizona, see Ariz. Rev. Stat. Ann. §§ 42-5074, 43-1025 (West 2016); California, see Cal. Rev. & Tax Code §§ 17053.12, 17053.88 (West 2016); Colorado, see Colo. Rev. Stat. Ann. § 39-22-301 (West 2016); Iowa, see Iowa Code §§ 190B.101–190B.106, 422.33(30) (West 2016); Maryland, see Md. Tax-Gen. Code Ann. § 10-745 (West 2018); Missouri, see Mo. Rev. Stat. § 135.647 (West 2016); New York, see N.Y. Tax § 210-B(52) (McKinney 2018); Oregon, see Or. Rev. Stat. §§ 315.154, 315.156 (West 2016); South Carolina, see S.C. Code Ann. § 12-6-3750 (West 2016); and West Virginia, see W. Va. Code § 11-13DD (West 2017).

[xxiii] VA. Code Ann. § 58.1-439.12:12 (2023).

[xxiv] VA. Code Ann. § 58.1-439.12:12 B (2023).

[xxv] VA. Code Ann. § 58.1-439.12:12 A (2023).

[xxvi] VA. Code Ann. § 58.1-439.12:12 C (2023).

[xxvii] VA. Code Ann. § 58.1-439.12:12 C (2023).

[xxviii] VA. Code Ann. § 58.1-439.12:12 C.ii (2023).

[xxix] VA. Code Ann. § 58.1-439.12:12 D (2023).

[xxx] VA. Code Ann. § 58.1-439.12:12 D (2023).

[xxxi] VA. Code Ann. § 58.1-439.12:12 D (2023).

[xxxii] VA. Code Ann. § 58.1-439.12:12 E (2023).

[xxxiii] VA. Code Ann. § 58.1-439.12:12 B (2023).