

Food Donation Tax Credit Guidelines

(Updated October 17, 2023)

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 was an individual and corporate income tax credit for certain persons engaged in the business of farming or growing food crops in the Commonwealth and donating such crops to a nonprofit food bank. It expired after Taxable Year 2022.

During the 2023 Session, the Virginia General Assembly enacted House Bill 2445 (2023 *Acts of Assembly*, Chapter 165) and Senate Bill 1525 (2023 *Acts of Assembly*, Chapter 166), which converted Virginia's Food Crop Donation Tax Credit that expired after Taxable Year 2022 into the Food Donation Tax Credit and made several changes to the credit.

These guidelines are published by the Department of Taxation ("the Department") to provide updated guidance to taxpayers regarding the Food Donation Tax Credit for Taxable Years 2023 and after. 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 beginning with Taxable Year 2023, Virginia allows an individual and corporate income tax credit referred to as the Food Donation Tax Credit. Such credit is available for certain persons engaged in the business of farming that donate food crops grown or wholesome food produced by the person in the Commonwealth to a nonprofit food bank. The amount of the credit is equal to 50 percent of the fair market value of such food. No taxpayer is permitted to claim more than \$10,000 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 may not exceed the total amount of income taxes upon

Food Donation Tax Credit Guidelines **(Updated October 17, 2023)**

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.

For Taxable Year 2016 through Taxable Year 2022, the individual and corporate income tax credit was referred to as the Food Crop Donation Tax Credit. Unlike the Food Donation Tax Credit, the Food Crop Donation Tax Credit was limited to food crop donations only and was equal to 30 percent of the fair market value of the amount of donated food crops, not to exceed an aggregate credit of \$5,000 for all such donations made during such year.

Definitions

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

“Donation” means a “contribution or gift” as that term is used in I.R.C. § 170(c).

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

“Food crops” means grains, fruits, nuts, or vegetables.

“Grown or produced by the person” means that the donor was directly engaged in the growing or production of the qualifying food. The donor is directly engaged in the growing or production of the food when they have a profit interest in the growing or production of the food, assumes the risks incidental to the growing or production of the food, and his supervision and involvement in the growing or production of the food 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.

“Wholesome food” means food that meets all quality standards imposed by federal, state, and local laws or regulations, including food that may not be readily marketable due to appearance, age, freshness, grade, surplus, or other condition.

“Providing food to the needy” means the distribution of food to the needy, either directly or through a network of other organizations.

“Qualifying food” means food crops, wholesome food, or both.

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. An entity will generally be considered to be “organized with a principal purpose of providing food to the needy” if it is expressly

Food Donation Tax Credit Guidelines **(Updated October 17, 2023)**

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 qualifying food, 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, their social security number or employer identification number, their mailing address, and their phone number.
- The date of the donation.
- The number of pounds and the fair market value of qualifying food donated. Fair market value must be determined by the nonprofit food bank according to the “Determining Fair Market Value” section below. The nonprofit food bank must also identify the type of food 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 qualifying food complies with the requirements described under “Nonprofit Food Bank’s Use and Disposition of Qualifying Food” 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 Donation Tax Credit and do not have to be described in the certification.

Food Donation Tax Credit Guidelines **(Updated October 17, 2023)**

The written certification must be prepared and furnished within 30 days after the donation was made.

A Virginia Food Donation Certification form, Form FCD-2 is available for nonprofit food banks to download from the Department's website (www.tax.virginia.gov).

Determining Fair Market Value

The written certification prepared by the donee nonprofit food bank must determine the fair market value of the qualifying food donated. Fair market value must be determined pursuant to I.R.C. § 170, which generally requires a consideration of all the facts and circumstances connected with the donated food, including their desirability, use, and scarcity. The nonprofit food bank is required to ascertain the price that the donor would have received if they had sold such food in the usual market in which they customarily sell, 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). However, in the case of any donation of apparently wholesome food that cannot or will not be sold solely by reason of internal standards of the donor, lack of market, or similar circumstances, or by reason of being produced by the donor exclusively for the purposes of transferring the food to a nonprofit food bank, the fair market value of such donation shall be determined pursuant to I.R.C. § 170(e)(3)(C)(v):

- Without regard to such internal standards, such as lack of market or similar circumstances, or such exclusive purpose, and
- By taking into account the price at which the same or substantially the same food items (as to both type and quality) are sold by the donor at the time of the donations (or, if not so sold at such time, in the recent past).

In no case may the fair market value calculated for the purposes of the Food Donation Tax Credit exceed the fair market value used to claim the federal charitable deduction with respect to a particular donation. However, the fair market value for the purposes of the Food Donation Tax Credit is not subject to the reductions contained in I.R.C. § 170(e).

Example 1:

In Taxable Year 2024, Taxpayer A makes a donation of qualifying food with a fair market value of \$1,000 on the date of the donation and an adjusted basis of \$600. Since the Food Donation Tax Credit is calculated before the reductions contained in I.R.C. § 170(e), Taxpayer A will be considered to have donated \$1,000 of food for the purposes of this tax credit.

Because determining fair market value may be unduly burdensome on nonprofit food banks in some cases, the food bank may fulfill its obligation of certifying fair market value in one of the following ways:

Food Donation Tax Credit Guidelines **(Updated October 17, 2023)**

- Accept the fair market value amount provided by the donor. If this option is elected, the donor must provide the nonprofit food bank with a copy of an invoice or other statement identifying the price received by the donor from the most recent sale of comparable qualifying food.

- Determine fair market value based on the average wholesale market price published by the U.S. Department of Agriculture Market News Service for the qualifying food 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 and as if the quantity of the donated food was marketable.

Where a donor transfers qualifying food to a nonprofit food bank in exchange for consideration that is less than the fair market value of the food, they are considered to have made a “bargain sale” for the purposes of the federal charitable deduction. A bargain sale is treated in part as a charitable contribution or gift and in part as a sale or exchange of property. The procedures for determining the federal charitable deduction for the gift portion and the gain or loss on the sale portion are commonly referred to as the “bargain sale rules.” To the extent the transfer is considered a charitable contribution or gift under federal bargain sale rules, it shall be considered a donation for purposes of this tax credit. Consequently, fair market value shall be determined only on that portion of the transferred food that are considered donated under the federal bargain sale rules.

Example 2:

In Taxable Year 2024, Taxpayer B sells qualifying food to a nonprofit food bank for \$200. Such food has a fair market value of \$1,200 on the date of the donation and an adjusted basis of \$600. Applying the federal bargain sale rules, Taxpayer B will be considered to have donated \$1,000 of food (\$1,200 fair market value – \$200 amount realized) for the purposes of this tax credit.

Although the donee nonprofit food bank is required to determine the fair market value of qualifying food donated for the purposes of the written certification, the donor is ultimately responsible to prove that they are eligible for this tax credit for the amount claimed on their application and on their Virginia income tax return. Therefore, the donor must retain timely and accurate records necessary to substantiate, among other things, the fair market value of any food donated. Donors will not be required to submit such records with their application or Virginia income tax return, but the Department may request such records when reviewing an application or auditing an income tax return.

Nonprofit Food Bank’s Use and Disposition of Qualifying Food

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

Food Donation Tax Credit Guidelines (Updated October 17, 2023)

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

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

- The qualifying food must be used for providing food to the needy, and
- The donee nonprofit food bank may not transfer the qualifying food 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 Qualifying Food as Consideration for Services Performed or Personal Property Purchased

Generally, the donee nonprofit food bank (or any subsequent transferee) may not use donated qualifying food as consideration for services performed or personal property purchased. Nevertheless, the donated food 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 to provide food to the needy. To the extent the food is 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, they shall be subject to all the restrictions on the use of the food as if they were the donee nonprofit food bank.

Administration of the Tax Credit

To receive the Food Donation Tax Credit, donors must apply to the Department by completing Form FCD-1, which is available to download from the Department’s website (www.tax.virginia.gov). This form and any supporting documentation must be completed and mailed no later than February 1 of the year following the taxable year during which the donations were made. No donor shall apply for more than \$10,000 in credits for a taxable year. Every donor that applies for the Food Donation Tax Credit must obtain a written certification (Form FCD-2) from the donee nonprofit food bank. Such written certification (Form FCD-2) must then be attached to Form FCD-1.

The maximum amount of Food 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 March 1 of the calendar year in which Form FCD was submitted. If any additional information is needed, it must be provided no later than March 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 April 1 of the calendar year in which Form FCD was submitted.

Food Donation Tax Credit Guidelines **(Updated October 17, 2023)**

Upon receiving notification of the credit amount from the Department, the donor may claim the credit on their Virginia income tax return. In the event that a taxpayer does not receive notification of the allowable credit amount before their Virginia income tax return is due, the taxpayer may file the return during the extension period, or they 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.

The amount of the credit claimed may not exceed the taxpayer's income tax liability for the taxable year. However, to the extent that the amount of the credit granted to a taxpayer exceeds their income tax liability, they may carry over the credit against their income tax liability for the next five succeeding taxable years or until the total amount of the tax credit has been taken, whichever is sooner. Tax credits granted to a partnership, limited liability company, or electing small business corporation (S corporation) shall be allocated to the individual partners, members, or shareholders, respectively, in proportion to their ownership or interest in such business entities.

Addition to Income

To the extent the Food 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.

Example 3:

Taxpayer C is an individual taxpayer engaged in the business of farming who makes a donation of qualifying food in Taxable Year 2024. Such food has a fair market value of \$1,000 on the date of the donation and an adjusted basis of \$600. Taxpayer C claimed a federal charitable contribution deduction of \$800, after taking into account the reductions in I.R.C. § 170(e). Since the Food Donation Tax Credit is calculated before the reductions contained in I.R.C. § 170(e), Taxpayer C is considered to have donated \$1,000 of food for the purposes of this tax credit. For Virginia income tax purposes, Taxpayer C was issued and claimed on his Taxable Year 2024 Virginia income tax return a credit equal to 50 percent of fair market value of their donation, \$500 ($\$1,000 \times 50\%$).

Thus, Taxpayer C will be required to report an addition to federal adjusted gross income on their Virginia income tax return equal to the amount of the federal charitable contribution deduction claimed for such donation, \$800.

Example 4:

Taxpayer D is an individual taxpayer engaged in the business of farming who makes a donation of qualifying food in Taxable Year 2024. Such food has a fair market value of \$40,000 on the date of the donation and an adjusted basis of

Food Donation Tax Credit Guidelines **(Updated October 17, 2023)**

\$24,000. On Taxpayer D's Taxable Year 2024 federal income tax return, they claimed a federal charitable contribution deduction of \$32,000, after taking into account the reductions in I.R.C. § 170(e). Since the Food Donation Tax Credit is calculated before the reductions contained in I.R.C. § 170(e), Taxpayer D is considered to have donated \$40,000 of food for the purposes of this tax credit. However, because no taxpayer is permitted to claim more than \$10,000 in credits for a taxable year, Taxpayer D may only receive a credit for \$20,000 of their donation (computed as follows: \$20,000 x 50% = \$10,000).

Taxpayer D must report an addition to federal adjusted gross income on their Virginia income tax return. However, they are only required to report an addition for the portion of their federal charitable deduction attributable to the \$20,000 donation for which they also received a Virginia credit. Such addition is computed as follows:

$$\$32,000 \times \frac{20,000}{40,000} = \$16,000.$$

Therefore, Taxpayer D will be required to report an addition of \$16,000 to their federal adjusted gross income.

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. In such a case, the addition is required in the taxable year or years during which the federal charitable contribution deduction attributable to the donation is claimed, regardless of the taxable year during which the donation was made.

Example 5:

Assume the same facts as Example 3, except also assume that Taxpayer C claims a \$200 deduction with respect to these contributions on their Taxable Year 2024 federal income tax return. The remaining \$600 deduction is carried over and claimed on their Taxable Year 2025 federal income tax return. On their 2024 Virginia income tax return, Taxpayer C claims a credit equal to \$300.

Since the federal deduction is claimed over two taxable years, Taxpayer C's addition must also be reported on their Virginia income tax return over two taxable years. Therefore, Taxpayer C would be subject to an addition of \$200 to their federal adjusted gross income in Taxable Year 2024 and an addition of \$600 to their federal adjusted gross income in Taxable Year 2025.

Food Donation Tax Credit Guidelines (Updated October 17, 2023)

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) 786-2992.

Approved:

A handwritten signature in black ink, appearing to read "Craig M. Burns". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Craig M. Burns
Tax Commissioner