

Assessment and Appeals of Local Taxes in Virginia

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I. The Assessment

Determining when an assessment has been properly made is essential because it is the date of that event that determines whether the locality has protected its rights and from which the taxpayer's appeal rights are measured.

A. Definitions

1. **Levy.** The act of the legislative body by which a tax is generally imposed within the jurisdiction, that is, by which the subject of the tax and rate are fixed. *City of Richmond v. Eubank*, 179 Va. 70, 18 S.E.2d 397 (1942).
2. **Assessment.**
 - (a) As used in various statutes, the word “assessment” can refer to both the act by which a tax is imposed by the assessing officer, as well as the determination of the value of property. *See, e.g., Hoffman v. County of Augusta*, 206 Va. 799, 146 S.E.2d 249 (1966); *City of Alexandria v. Richmond F&P R.R.*, 223 Va. 293, 288 S.E.2d 457 (1982); *Transcontinental Gas Pipe Line Corp. v. Prince William County*, 210 Va. 550, 172 S.E.2d 757 (1970).
 - (b) The term “assessment” is generally understood to mean “a determination as to the proper rate of tax, the measure to which the tax rate is applied, and ultimately the amount of tax ... that is due.” *See, Va. Code § 58.1-3700.1* (definition of “assessment” for BPOL purposes). *See, also, City of Richmond v. Eubank*, 179 Va. 70, 18 S.E.2d 397 (1942).

B. Responsibility for Making Assessment

1. **General.** A valid assessment requires both a legislative act by which the tax is imposed generally, and action by an administrative official by which the amount of tax owed by an individual or entity is determined. The levy

of a tax requires legislative action. This generally includes fixing the key elements such as the subject of taxation and rate, including any assessment ratio that is part of the rate determination. The application of these components to determine the specific amount of tax owed by a taxpayer is made by an administrative official (*e.g.*, the Commissioner of Revenue or Director of Finance). This process includes determining the value of assessed property by the use of valuation tables, depreciation schedules or otherwise. *See Wise County Bd. of Supvs. v. Wilson*, 250 Va. 482, 463 S.E.2d 650 (1995) (while Commissioner of Revenue is responsible for valuing property, assessment ratios that go to rate are set by the Board of Supervisors).

2. **Implied Powers.** Taxes can be assessed only as expressly provided by law. Because Virginia is a Dillon Rule state, the assessing officer must be able to put his finger on the specific statutory language that authorizes his action. *See Hampton Nissan Limited v. City of Hampton*, 251 Va. 100, 466 S.E.2d 95 (1996) (locality could not require car dealer to remit over-collected taxes absent specific statutory authority). *See, also, Commonwealth v. P. Lorillard Co., Inc.*, 129 Va. 74, 105 S.E. 683 (1921) (State Tax Commissioner without authority to fill statutory gap in state income tax by implementing apportionment procedures administratively). After assessment, the collection of taxes is generally the responsibility of the “Treasurer.” *See Va. Code § 58.1-3123 et. seq.*

C. How An Assessment Is Made

1. Tax Department

- (a) **Communication.** Exactly how an assessment is made has been the subject of some debate. Since 1980, the process has been defined with respect to the Virginia Department of Taxation to refer to both “self-assessments” as well as assessments made by the Department. Va. Code § 58.1-1820(2). Under this statute, the Department must make its assessments pursuant to a written notice that is communicated to the taxpayer in one of the following ways:
 - (i) Delivered to the taxpayer at his last known address by an employee of the Department.
 - (ii) Mailed to the taxpayer at his last known address.
 - (iii) With the taxpayer’s specific written approval, transmitted by facsimile or electronic mail.
- (b) **Written Notice.** For state tax purposes, an assessment requires a written notice that sets forth the date of the assessment, amount of

assessment, the tax type, taxable period and taxpayer. Subsequent statements that report payments and additional accrued interest are not assessments. Correspondence proposing adjustments to a filed return based on an audit or other information does not meet the regulatory definition of a “notice of assessment.” 23 VAC 10-20-160D(3).

- (c) **Proof.** It is the Department of Taxation’s burden to prove that a proper Notice of Assessment has actually been mailed or delivered to the taxpayer. Simply because the Department has a standard procedure by which assessments are entered into its computer system and mailed does not prove that a specific assessment was mailed to a specific taxpayer. *Circuit City Stores v. Commonwealth of Virginia*, Cir. Ct. City of Richmond (Case No. LR-1204-3 (July 29, 2004)); P.D. 04-224 (December 31, 2004). (Department could not prove that assessment had been timely made when taxpayer asserted that its administrative appeals were based on audit work papers but that no Notice of Assessment as defined by the regulations had ever been received).

2. SCC

The State Corporation Commission is responsible for assessing the value of property belonging to certain public service corporations and other such entities. *E.g.*, Va. Code § 58.1-2633. These assessments are then transmitted to the taxpayer and locality, Va. Code § 58.1-2634, and the local levies are then assessed by the Commissioner of Revenue. Va. Code § 58.1-2603. The practice of the SCC is to publish these assessments in the “Brown Book” which is then certified by an order entered by the SCC. It is the date of that order (with reasonable allowances for mailing times) that is generally treated as the date of the assessments.

3. Assessments by Local Officials

When and how an assessment is made by a local official may vary depending upon the type of tax. As a general rule, the requirements for a valid assessment are often not as clearly defined as for state taxes.

- (a) **Personal Property.** An assessment of personal property taxes includes the entry of a calculation in the “assessment book,” the form of which is specified by the Department of Taxation. Va. Code §§ 58.1-3114 (books to be furnished by the Department) and 58.1-3115 (alphabetical listing). The original copy of the personal property book is retained by the Commissioner of Revenue, and a “certified copy” is delivered to the Treasurer. Va. Code § 58.1-

3118. No changes can be made after delivery of the book to the Treasurer. Va. Code § 58.1-3119.

Query: Is the assessment made (i) when the taxes are entered into the personal property book, (ii) when that book is certified by the Commissioner of Revenue, (iii) when the certified copy is delivered to the Treasurer or (iv) when mailed by the Treasurer to the taxpayer? Va. Code § 58.1-3912 strongly suggests that the date of assessment is not based on any action by the Commissioner of Revenue, but rather the date “a bill or bills setting forth the amounts due” are mailed to the taxpayer by the Treasurer. Indeed, that section states that a taxpayer cannot be listed in published notices as delinquent “in connection with a tax debt for which a bill was not sent, without first sending a notice of deficiency to his last known address at least two weeks before such publication.” A tax bill sent by electronic means (with the consent of the taxpayer) has the same effect as a bill posted by first-class mail. Va. Code § 58.1-3912F.

(b) **Real Estate.** The assessment of real estate appears to follow the same pattern as for personal property, that is, assessments are entered in the “land book.” Va. Code §§ 58.1-3300 and 3301.

(c) **BPOL.** Unlike other local taxes, what constitutes an assessment for business license tax purposes is more clearly defined.

1. **Statutory Definition.** Since 1996, “assessment” has been defined to be consistent with the definition provided for taxes assessed by the Virginia Department of Taxation. Va. Code § 58.1-3700.1 provides, in part:

“Assessment” means a determination as to the proper rate of tax, the measure to which the tax rate is applied, and ultimately the amount of tax, including additional or omitted tax, that is due. An assessment shall include a written assessment made pursuant to notice by the assessing official or a self-assessment made by a taxpayer upon the filing of a return or otherwise not pursuant to notice. Assessment shall be deemed made by an assessing official when a written notice of assessment is delivered to the taxpayer by the assessing official or an employee of the assessing official, or mailed to the taxpayer at his last known address. Self-assessments shall be deemed made when a return is filed, or if no return is required, when the tax is paid. A return filed or tax paid before the last day prescribed by ordinance for the filing or payment thereof shall be deemed to be filed or paid on the last day specified for the filing of a return or the payment of tax, as the case may be.

2. **Effect of Statute.** This statute can be fairly read to require different procedures than are now followed by many localities. For example, if interpreted by the courts in the same way as the state statute on which this definition is modeled, a valid assessment could require a written “notice of assessment” which is either delivered or mailed to the taxpayer (i.e., entry of the tax liability on an internal government record is not sufficient). The decision in *Circuit City Stores v. Commonwealth* (supra at p. 3) also indicates that the locality bears the burden of proving when the Notice of Assessment was either delivered or mailed to the taxpayer.

(d) **Other Taxes.** The statutes authorizing the imposition of the taxes should be examined to determine any specific procedural requirements related to the assessment of those taxes. *E.g.*, Va. Code § 58.1-3103 (specific requirements relating to assessment of “local mobile property tax.”)

D. Powers of Assessment Officers.

1. **Returns.** The Commissioner can require every taxpayer to file a return for any tax for which he may be liable. Va. Code §§ 58.1-3107 & 3109(5).
2. **Audit.** The Commissioner can require any person “to furnish access to books of account or other papers and records for purposes of verifying the tax returns of such taxpayers and procuring the information necessary to make a complete assessment ...”. Va. Code § 58.1-3109 (6)
3. **Summons.** Commissioner has power to summon a taxpayer “or any other person” to appear and answer questions under oath except as to matters in litigation. Va. Code § 58.1-3110. Any taxpayer who fails to provide access to books and records or answer questions under oath is guilty of a Class 3 misdemeanor. Va. Code § 58.1-3111. A person other than the taxpayer can be convicted under this section only if he has willfully failed to comply with a summons properly issued under Va. Code § 58.1-3110 (thereby providing such persons the ability to go to court and seek to quash the summons).
4. **Noncooperation.** A taxpayer who does not cooperate fully with the Commissioner of Revenue may jeopardize his administrative and judicial appeal rights.
 - (a) The collection of a local business tax is suspended during an appeal to the local assessing officer and to the State Tax

Commissioner unless the assessing officer determines “that the taxpayer has not responded to a request for relevant information after a reasonable time.” Va. Code § 58.1-3983.1C & E

- (b) A taxpayer who does not provide requested information to the assessing officer is unable to introduce that same information into evidence in court. *City of Richmond v. Gordon*. 224 Va. 103, 294 S.E.2d 846 (1982) (evidence of actual rents and expenses).
- (c) The taxpayer is not entitled to relief in the courts if the erroneous assessment was “caused by the willful failure or refusal of the applicant to furnish the tax-assessing authority with the necessary information, as required by law ...”. Va. Code § 58.1-3987.

5. Penalties.

- (a) Localities have broad authority under Va. Code § 58.1-3916 to provide penalties for failure to file tax returns and for failure to pay taxes on a timely basis. As a general rule, penalties are equal to 10% of the tax, though larger penalties are possible in some cases, and collection fees can also be added to the bill. As a general rule, no penalty can be imposed if the failure to file a return or pay the tax “was not the fault of the taxpayer.” Va. Code §§ 58.1-3915 & 3916. As indicated by the statute and various attorney general opinions, this standard has been narrowly read to suggest that it was virtually impossible for the taxpayer to comply with his legal obligations because of natural disaster, health or death or because the assessing officer failed in his duties.
- (b) **BPOL Penalties.** Special rules apply with respect to the imposition of penalties related to the BPOL tax. Va. Code § 58.1-3703.1A(2)(d). Only one 10% penalty (*i.e.*, either failure to file a return or failure to pay) can be assessed unless the taxpayer has a history of noncompliance. When an additional assessment of tax is made by the assessing officer, no penalty is due if the original return was made “in good faith and the understatement of the tax was not due to any fraud, reckless or intentional disregard of the law.” On the other hand, a taxpayer who does not pay an assessment within thirty days faces a 10% late payment penalty unless the late payment was “not the fault of the taxpayer.” As with the general rule, the standard to show lack of fault is stiff: the taxpayer must show that he acted responsibly and that the failure was due to events beyond his control, terms that are defined in the statute and the Department of Taxation’s Guidelines.

(c) **Criminal.** Local ordinances can also provide for criminal penalties in the case of a “willful failure or refusal to file returns” or for “making false statements with intent to defraud in such returns.” Va. Code § 58.1-3916.1.

6. **Interest.** Interest can also be charged on delinquent taxes. The general rule is 10% interest rate in the first year, with the locality having the option to charge the greater of 10% or the rate established by § 6621 of the Internal Revenue Code, whichever is greater, for the second and subsequent years of delinquency. Va. Code §§ 58.1-3916 & 3918. Localities should beware utilizing unreasonably high rates, however, because statutes now require that refunds to taxpayers bear interest at the same rate as is charged by the locality on delinquencies. *Id.* As a result, localities may be well advised charge a rate of interest that reasonably reflects their cost of borrowing.

II. Statutes of Limitations

A. Making an Assessment

1. **General.** As a general rule, “omitted taxes” must be assessed not later than three years from the last day of the tax year for which the taxes were payable. Stated another way, the Commissioner of Revenue may assess taxes on audit for the current year and the three preceding tax years. Example: taxes for the 2020 tax year may be assessed at any time on or before December 31, 2023. Va. Code § 58.1-3903. Note how this formula renders moot the question of when most property tax assessments are made; but not “omitted assessments.”
2. **BPOL.** Va. Code § 58.1-3703.1A(4)(b) provides a special rule with respect to audits of BPOL taxes. Under that exception, the general three-year rule applies when a return is filed; but a six-year statute of limitations applies in the case of fraud “or failure to apply for a license.” Thus, a taxpayer that fails to file a BPOL return is subject to audit in 2022 for the tax years 2017 – 2022.
3. **Extensions.** Taxpayers and assessing officers can now agree to extend the statute of limitations, thus eliminating the need to make “jeopardy assessments” to preserve a locality’s rights. Va. Code §§ 58.1-3703.1A(4)(a) (BPOL rule) and 58.1-3903.1 (other taxes). Under both statutes, an extension generally serves to extend not only the time for assessing the tax but also for collecting and appealing the assessment.

B. Collections

Not only must a locality assess its taxes within the applicable statute of limitations, but it must also collect those assessments in a timely fashion. In effect, Va. Code § 58.1-3940A applies a second statute of limitations.

A. Except at otherwise specifically provided, collection of local taxes shall only be enforceable for five years following December 31 of the year for which such taxes were assessed.

Thus, a license or personal property tax assessed for the year 2022 must be collected not later than December 31, 2027. Va. Code § 58.1-3940B provides a twenty-year rule with respect to real estate taxes. Note that the statutory rule is that the local taxes are “enforceable” only for five years. A reasonable reading of the statute suggests that any collection action must be completed, not merely commenced, within the five-year period. It would appear that merely commencing suit, therefore, is not sufficient. *See* Va. Code § 58.1-3940C (providing that the limitations on collections does not apply if the tax has been “reduced to judgment or a judgment lien,” such lien being enforceable according to the time periods provided by general law.

III. Administrative Appeals

The Virginia Code sets forth at least four separate procedures by which local taxes can be appealed to an assessing official or other administrative body. Although rooted in history, these are classic forms of “alternative dispute resolution” that rely on the assessing officer to act in a quasi-judicial role. When the assessing official approaches his duties in good faith, these statutes provide the speedy, efficient and inexpensive remedy intended by the General Assembly. *Cf. C&P Tel. Co. v. City of Newport News*, 194 Va. 409, 73 S.E.2d 394 (1952); *Dominion Chevrolet Co. v. County of Henrico*, 217 Va. 243, 228 S.E.2d 131 (1976) (as to the parallel court procedures, noting a rule of liberal construction to insure the intended expeditious and inexpensive remedy). The original forms envisioned an informal procedure by which the taxpayer might simply walk into the office of the Commissioner of Revenue to discuss his tax bill. Davis, *Ancient Simplicity is Gone: Procedural Aspects of Relief from Taxes Administered by the Virginia Department of Taxation*, 9 U. Rich. L. Rev. 121 (1974). In recent years, however, a great deal more specificity has been provided in these statutes. In many cases, this reflects a regrettable tendency on the part of some officials to view this administrative process as an adversarial one instead of one by which government insures that its citizens pay no more tax than what they rightfully owe.

A. Real Estate: Board of Equalization

1. **General.** The real estate tax is the one tax in which part of the assessment process is subject to review by a panel of individuals who are, at least in theory, independent from the assessing officer. Members of the Board of

Equalization are appointed either by the Circuit Court (Va. Code §§ 58.1-3370 & 3373) or, in certain jurisdictions, the Board of Supervisors (Va. Code § 58.1-3371). The three or five members are generally property owners in, and residents of, the locality in which they sit and must attend the training sessions provided by the Department of Taxation and take continuing education instruction. Thirty percent of the members must be a real estate, legal, financial or other professionals presumably with knowledge of valuation issues. Va. Code § 58.1-3258.1.

2. **Jurisdiction.** The Board's primary purpose is to equalize assessments within the jurisdiction and to this end can increase as well as decrease assessments. Va. Code § 58.1-3379A. Previously, some localities argued that Boards of Equalization could consider only matters of uniformity. It is now clear that matters of fair market value are within the purview of the Board. Va. Code § 58.1-3378(1); § 58.1-3379C & § 58.1-3380.
3. **Procedure.**
 - (a) **General.** Although localities as well as taxpayers can apply to the Board to obtain equalization or an adjustment to the assessed fair market value of property (Va. Code § 58.1-3980), in practice Boards of Equalization generally sit to review taxpayer complaints. The appeal should be filed in the name of the taxpayer, that is, the person in whose name the tax was assessed. When a third party is contractually obligated for the tax by the terms of a lease or otherwise, it may be possible to file the appeal in the name of that person. *See Reynolds Metals Co. v. County of Henrico*, 237 Va. 646, 378 S.E.2d 833 (1989). Even in these cases, it is good practice to have both the person against whom the tax was assessed as well as the third party who is contractually obligated to pay the tax join in a single appeal to avoid procedural issues.
 - (b) **Administrative Review.** Most localities provide an informal process for reviewing taxpayer concerns. Many issues can be resolved through this process without having to file with the Board of Equalization. If the administrative process drags on, however, it is important to be certain that an application is filed with the Board in time for it to make any appropriate adjustment.
 - (c) **Burden of Proof.** Va. Code § 58.1-3379.B provides a very clear and specific burden of proof on the taxpayer: The burden of proof on appeal to the board shall be on the taxpayer to rebut the presumption and show by a preponderance of the evidence that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application and that it was

not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations such as the International Association of Assessing Officers (IAAO) and applicable Virginia law relating to valuation of property. Mistakes of fact, including computation, that affect the assessment shall be deemed not to be in accordance with generally accepted appraisal practice.

As a practical matter, taxpayers who are unable to resolve their concerns in the informal administrative process provided by the assessor's office will almost certainly need an opinion of fair market value or other testimony by a real estate expert to prevail in a proceeding before the Board of Equalization.

4. **Judicial Appeals.** The general rule in Virginia is that a taxpayer is not required to exhaust his administrative remedies before applying to the Circuit Court for relief. Va. Code §§ 58.1-3350 and 3983. There are two important modifications to that rule with respect to real estate:

- (a) Va. Code § 58.1-3350, after acknowledging the general rule, provides an exception for "localities where application to the aforementioned board is not a prerequisite to the jurisdiction of the court." This reflects the fact that some localities (*e.g.*, Alexandria and Charlottesville) are authorized by law to require an appeal to the Board of Equalization before suit can be filed in court. There are also other localities in Virginia that argue that Va. Code § 58.1-3350 authorizes them to provide such a restriction by ordinance.
- (b) Va. Code § 15.2-717 requires in some localities that the taxpayer provide a written notice of his disagreement with the assessment for a year other than the current year before he may file suit in the circuit court. This requirement appears to apply with respect to real estate in counties having a county manager form of government (*e.g.*, Arlington and Henrico counties).

B. Appeal to Assessing Officer

1. **General.** Va. Code § 58.1-3980 sets forth the traditional administrative appeal applicable to "any local tax authorized by [Title 58.1]." The taxpayer's "application for correction" is made to the assessing officer who made the assessment in the first place. This is most often the Commissioner of Revenue (or Director of Finance) but can be the Real Estate Assessor or even Director of Public Utilities depending upon the facts and circumstances. Any issue, factual or legal, can be raised by the

taxpayer's application if it causes the underlying assessment to be erroneous and the taxpayer is "aggrieved" thereby. This statute provides an appropriate procedure for consideration of issues raised in audit as well as claims for refund and amended returns.

2. **Applicant.** In most cases, the proper person to file the application for correction is the person who is "assessed" and "aggrieved by such assessment." There are circumstances, however, when a third party who is responsible by the terms of the contract for the payment of the assessment may have standing. *See Reynolds Metals Co. v. County of Henrico*, 237 Va. 646, 378 S.E.2d 833 (1989) (exclusive lessee of property who was responsible for paying all taxes was an appropriate party to refund litigation). There are also circumstances in which the Commissioner of Revenue (or other assessing officer) can utilize this statutory procedure to correct errors discovered by him. *See* Va. Code § 58.1-3981B (clerical error); C (factual error); and § 58.1-3984D (court application by Commissioner to correct an obvious error to so that the "ends of justice may be served" on behalf of one or more taxpayers).
3. **Statute of Limitations.**
 - (a) **General.** Va. Code § 58.1-3980 requires that the taxpayer's application be filed "within three years from the last day of the tax year for which such assessment is made, or within one year from the date of the assessment, whichever is later ...". The three year for which the assessment was made rule will cover most property tax situations and generally avoid the necessity of determining exactly when the property tax assessment was made. The "one year from the date of the assessment rule" exists to avoid the obvious inequity under previous statutes created when a locality made an audit assessment of omitted taxes on the last day leaving no time for the taxpayer to file an appeal. Thus, a property or other tax assessed in the normal course during 2022 can be appealed under this section until December 31, 2025. If an audit assessment is made with respect to the 2022 year as late as December 31, 2022, it can be appealed under this section not later than December 31, 2025.
 - (b) **Special.** Va. Code § 58.1-3980B provides a special appeal period with respect to any unpaid personal property tax that is still collectible under § 58.1-3940 (five years) and also a one-year appeal period for erroneous assessments collected pursuant to the Set-off Debt Collection Act.
4. **Correction.** The assessing officer has broad powers to correct any errors. This includes exonerating the applicant from any amounts that have not

been paid and assessing the applicant with a proper tax (*i.e.*, increasing the assessment). If the tax has been paid, a refund order requires the consent of the town, city or county attorney. Va. Code §58.1-3981A. **Query:** Aside from the obvious practical answer, why should the locality’s lawyer have to consent to a correction when the tax has been paid but not in other situations? Does bringing into the process a locality’s lawyer, who is trained to be a good advocate, undercut the quasi-judicial role that the statute envisions the assessing officer will play? To this question, some would respond that it is only fair for the assessing officer to be represented by counsel since most applications are filed on behalf of taxpayers by accountants, lawyers and other professionals, many of whom are working on a contingent fee basis.

5. **Written Opinion.** Va. Code § 58.1-3981F specifically requires the assessing officer, if so requested by the taxpayer, to “state in writing the facts and law supporting the action on such application ...”. This requirement was intended to insure that taxpayers receive a fair and reasonable response to their applications. It has been suggested that only law and facts set forth in such a written opinion be accorded the presumption of correctness that generally applies in court litigation.
6. **Litigation.** A taxpayer is not required to file an administrative appeal under § 58.1-3980 or otherwise exhaust his administrative remedies before going to court. Va. Code § 58.1-3983. A taxpayer who follows the administrative procedure, however, is given one year from the date of the assessing officer’s adverse determination in which to file suit. Va. Code § 58.1-3984A (clause d). The extended statute of limitations was intended to encourage localities to decide administrative appeals promptly and to encourage administrative resolution of claims. The locality, through its attorney, has six months from the date of the assessing officer’s determination to file a challenge in court. Va. Code § 58.1-3982.

C. Assessments Reviewable by State Tax Commissioner

1. **Background.** Beginning in the 1980’s, there was wide-spread taxpayer discontent with the business license or so-called BPOL tax. When taxpayer demands for repeal of this tax proved impractical for revenue reasons, the General Assembly undertook a wholesale “reform” of the tax. *See* Acts of Assembly 1996, cc. 715 & 720. *See, also*, “Report of the Joint Subcommittee Studying the BPOL Tax,” H.Doc 59 and House Bill 2351 (1995). In an effort to promote uniform administration of the basic principles of this tax throughout the state, Va. Code § 58.1-3703.1 (the “uniform ordinance provisions”) was enacted. In addition, the Department of Taxation was tasked by the General Assembly with developing guidelines to interpret these new uniform provisions and authority to issue advisory written opinions to interpret the new laws. Va. Code § 58.1-

3701. Finally, the uniform ordinance provisions specifically provided a process whereby taxpayers could have their BPOL assessments reviewed and potentially corrected by the Department of Taxation. This process proved to be quite successful in accomplishing the goals of encouraging state-wide uniformity of interpretations and was quite popular, at least with the business community. In 1999 the General Assembly, using the BPOL procedures as a model, created a substantially identical procedure by which certain “local business taxes” could also be reviewed by the State Tax Commissioner. Acts of Assembly 2999, ch. 202. As amended by HB 2679 (2005), the two processes are now substantially identical.

2. **BPOL Appeals.**

(a) **General.** Va. Code § 58.1-3703.1A(5) provides taxpayers with the ability to have disputed local assessments of business license taxes reviewed by the State Tax Commissioner. If the process is correctly followed, the taxpayer is not required to pay any disputed tax until the appeal, including any related litigation, is finally concluded. Although the rule continues to be that exhaustion of administrative remedies is not required with respect to Virginia tax matters, elimination of “pay to play” provides a strong incentive to taxpayers to do so.

(b) **Practice.** The statutes envision a two-step process by which the taxpayer first presents his case to the local assessing officer and, if unsuccessful at that stage, then appeals to the State Tax Commissioner. Only matters that have been considered by the assessing officer will be reviewed by the State Tax Commissioner. Guidelines for BPOL Appeals (P.D. 06-3), § 7.9.5. Even when correspondence with auditors and the local assessing officer himself clearly sets forth the dispute, it is nevertheless good practice for the taxpayer to file a specific appeal with the local assessing officer. Proceeding in this fashion insures that the record below is clear and that the local assessing officer has had a fair chance to consider all the issues.

1. **Contents of Application for Review.** The taxpayer’s application to the local assessing officer is generally set forth in the form of a letter that identifies the taxpayer, tax periods in question and the errors that are alleged. Effective July 1, 2005 with elimination of “pay to play,” the local application must also specify the amount in dispute. Va. Code § 58.1-3703.1A(5)(b); Guidelines § 7.4 (“Application for Review”).

2. **Statute of Limitations.** An appeal can be filed with the local assessing officer within one year of the last day of the tax year for which a contested assessment is made or within one year from the date of an appealable event, whichever is later. Although previous law restricted appeals to “audit assessments,” Va. Code § 58.1-3703.1(A)(5)(a) now defines that term broadly and eliminates the “audit assessment” requirement. The statute specifically makes the denial of an application of an erroneous assessment attendant to the filing of an amended business license application an appealable event. As a result, a taxpayer can file an amended return under Va. Code § 58.1-3980 within three years of the last day of the tax year in question and then have an additional year to appeal a denial of that amended return under the special BPOL procedure.
3. **Action by Assessing Officer.** The assessing officer has broad authority to hold a conference with the taxpayer, require the submission of additional information or even audit. Once he has completed his review, he must issue a “final determination” stating in writing “the facts and argument in support of his decision.” Va. Code § 58.1-3703.1A(5)(b). If the local assessing officer fails to act on the taxpayer’s application within one year, the taxpayer can treat this nondecision as an adverse determination and proceed with his appeal to the State Tax Commissioner unless the delay is in fact attributable to the taxpayer’s noncooperation.
4. **Procedural Notice.** The assessing officer is required to give taxpayers who are assessed with tax as a result of an appealable event an explanation of their administrative appeal rights. Va. Code § 58.1-3703.1A(5)(c).
5. **Collections.** Assuming the taxpayer files a timely and complete administrative appeal, all collection activities must be suspended *with respect to the amount in dispute*. Exceptions to this “no pay to play” rule are provided in three instances: (i) delay would jeopardize ultimate collection; (ii) the taxpayer does not respond to requests for information within a reasonable period of time; and (iii) frivolous appeals. Va. Code § 58.1-3703.1A(5)(d) & (a) (defining “frivolous” and “jeopardized by delay”). The requirement that collection activity be suspended shall cease unless an appeal is filed and served on the necessary

parties within 30 days of the service of notice of intent to file such appeal. Va. Code § 58.1-3703.1A(6)(b).

(c) **Appeal to State Tax Commissioner**

1. **General.** Within 90 days of the local assessing officer's adverse final determination, the taxpayer may file an appeal with the State Tax Commissioner. The appeal is generally handled by correspondence, without a conference or other hearing or the formal submission of evidence. The form of the appeal is similar to the Application for Review except that the taxpayer must include a copy of the local assessing officer's final determination. Because new issues will not be reviewed on appeal, it is good practice for the taxpayer to include a booklet containing all correspondence and other documents reviewed by the local assessing officer in the administrative proceeding below. Copies of all documents provided to the State Tax Commissioner should be "served" on the local assessing officer. In practice, this is accomplished in the same manner as counsel would "serve" copies of pleadings on other counsel of record (*i.e.*, by mail with an appropriate Certificate of Service). Va. Code § 58.1-3703.1A(6)(a) & Guidelines ch. 7.
2. **Collections.** As with the administrative proceeding before the local assessing officer, collections of the *disputed amount* are suspended during the appeal to the State Tax Commissioner subject to the same exceptions for jeopardized collections, frivolous appeals and noncooperative taxpayers. To make sure that the locality's collections machinery remains in neutral gear, the taxpayer should file a "notice of intent to appeal". Guidelines § 7.9.2. Note, however, the inconsistency between Va. Code § 58.1-3703.1A(6) allowing 90 days to perfect the appeal and paragraph (b) of that statute which requires the appeal to be filed within 30 days of the notice of intent. Presumably there is a 30 - 60-day period after the final local determination before the locality will commence aggressive collections activity.
3. **Penalties.** When this special BPOL process is correctly followed, interest continues to accrue on the amount of the unpaid assessment, but no penalties are incurred for "late payment" or otherwise. Va. Code § 58.1-3703.1A(6)(b).

(d) **State Tax Commissioner's Decision**

As modified by the 2005 Session of the General Assembly, the procedure now incorporates specific steps that must be taken upon receipt of the State Tax Commissioner's determination on the appeal. Va. Code § 58.1-3703.1A(6)(c). The local assessing officer is now specifically required by the statute to take the steps necessary either to calculate the amount of tax owed by or the refund due to the taxpayer consistent with the State Tax Commissioner's determination. If the State Tax Commissioner's opinion specifies the exact amount, the local assessing officer has 30 days to make his certifications to the Treasurer and taxpayer. If no specific amount is set forth in the State Tax Commissioner's determination the local assessing officer must take the steps necessary to produce a revised assessment to the taxpayer within 60 days of the State Tax Commissioner's determination or within 60 days after receiving necessary information from the taxpayer.

(e) **Judicial Review.**

Whichever party or parties may be aggrieved by the State Tax Commissioner's decision, whether the taxpayer or the locality, may file an appeal with the circuit court under Va. Code § 58.1-3984 (not more than one year). The burden in any such proceeding is on the party challenging the State Tax Commissioner's opinion. As a result, localities that seek judicial review in such matters will no longer enjoy the presumptions of correctness traditionally attributable to their assessments. Collection of the disputed amount continues to be suspended subject to the exceptions for frivolous appeals and jeopardy situations. There is also an exception when, because of the cumulative effect of pending appeals on the same issue or otherwise, suspension of payment would cause the locality substantial, economic hardship. Note that the suspension rules throughout this entire procedure apply only to the amount that the taxpayer identifies with particularity in his administrative appeals as being in dispute and any interest and penalties attributable to that amount. Undisputed amounts must be paid. Va. Code § 58.1-3703.1A(7)(b). The suspension of the "pay to play" rules applies only to taxpayers who have exhausted this administrative remedy. Va. Code § 58.1-3703.1A(7)(b)(5). There are parallel rules suspending the locality's obligation to refund amounts consistent with the State Tax Commissioner's opinion. Va. Code § 58.1-3703.1A(7)(c). To take advantage of these suspension of collection/payment requirements, however, the affected party must give notice of its intent to file a judicial appeal and do so within 30 days of that notice. As with the entire appeal

process, interest continues to accrue and be payable by the losing party, but no further penalties can be imposed while collection activities are suspended. Va. Code § 58.1-3703.1A(7)(d).

3. **Business Taxes**

- (a) **General.** With few exceptions, the procedures applicable to appeals relating to “local business taxes” are substantially identical to the procedures under Va. Code § 58.1-3703.1A(5) applicable to BPOL taxes. The appeal process provided by Va. Code § 58.1-3983.1 is available only with respect to “local business taxes” a term that is defined in that section to mean: (i) machinery and tools tax, (ii) business tangible personal property tax, (iii) merchants capital tax and (iv) certain consumer utility taxes if the amount in dispute exceeds \$2,500. The consumer utility tax on mobile telecommunication service is not within the definition of “local business tax.”
- (b) **Statute of Limitations.** The taxpayer’s local appeal must be filed within one year from the last day of the tax year for which the disputed assessment is made or within one year from the date of the assessment. Va. Code § 58.1-3983.1B. Because denials of refund applications are not treated as “appealable events” under this procedure, the statute of limitations for seeking administrative review by the state of local business taxes is shorter than in the case of BPOL taxes.

D. Rulings

Both the State Tax Commissioner and local assessing officers have authority under the statutes to issue rulings and advisory opinions concerning taxes that can be appealed under either the BPOL procedure or local business tax procedures. Va. Code § 58.1-3703.1A(5)(e) (local assessing officer as to BPOL taxes); Va. Code § 58.1-3701 (Department of Taxation to promulgate guidelines now treated as having the authority of regulations; and State Tax Commissioner has authority to issue advisory written opinions concerning BPOL tax). The State Tax Commissioner now has specific authority to issue advisory written opinions with respect to local business taxes. Va. Code § 58.1-3983.1J(1) (local assessing officer’s authority) and (2) (State Tax Commissioner’s authority).

E. Settlements

The traditional view of many City and County Attorneys was that local tax assessments could not be settled or compromised except possibly with court permission as part of a proceeding brought under Va. Code § 58.1-3984. At least with respect to taxes for which appeals are permitted to the State Tax

Commissioner, that is, BPOL taxes and local business taxes, Va. Code § 58.1-3994 now permits offers in compromise and settlements by the responsible local assessing officer.

1. **Time.** Settlements can be made only so long as the assessment in question is subject to administrative or judicial review.
2. **Standard.** The assessment can be settled only if the assessing officer determines that there is substantial doubt under applicable law as to the taxpayer's liability for such taxes. The Treasurer can effect a settlement when "the collection of the entire amount due and owing is in substantial doubt and the best interest of the locality will be served by such compromise."
3. **Finality.** When an offer in compromise has been accepted by the responsible local official, "the matter thereafter may not be reopened except upon a showing of fraud, malfeasance or misrepresentation of a material fact." Va. Code § 58.1-3994F.

IV. Judicial Applications

A. Application for Correction to Circuit Court

1. **Nature.** Historically there was some question as to the nature of these proceedings which were sometimes referred to by the Supreme Court of Virginia as "quasi-equitable" in nature. *See, e.g., Union Tanning Co. v. Commonwealth*, 123 Va. 610, 96 S.E. 780 (1918); *Commonwealth v. Schmelz*, 114 Va. 364, 76 S.E. 905 (1913). Because the statutes provide a remedy not found at common law, the requirements of this procedure have been referred to as jurisdictional. *E.g., Town of Leesburg v. Loudoun Nat'l Bank*, 141 Va. 244, 126 S.E. 196 (1925). Nevertheless, more modern cases make clear that the procedure will be liberally construed to provide taxpayers with a remedy. *E.g., Dominion Chevrolet Co. v. County of Henrico*, 217 Va. 243, 288 S.E.2d 131 (1976). As now drafted, Va. Code § 58.1-3984 eliminates many of the historical questions and pitfalls. For example, the statute expressly provides that the proceedings are conducted as an action at law before the court, sitting without a jury; and that the action is actually before the court (for statute of limitations purposes) when it is filed in the clerk's office. Discovery is available. Rules of the Supreme Court of Virginia, Rules 3:1 & 4:0.
2. **Statute of Limitations.** The statute of limitations applicable to taxpayer suits are designed to dovetail with the various administrative procedures and thereby ensure an opportunity for administrative resolutions. Subject to certain exceptions relating to real estate taxes, the following limitations periods apply, whichever is longest:

- (a) **General.** Three years from the last day of the tax year for which any such assessment is made.
- (b) **Audits.** One year from the date of the assessment.
- (c) **State Appeals.** One year from the State Tax Commissioner’s final determination under either the BPOL or local business tax procedure.
- (d) **Other Administrative.** One year from the local assessing officer’s final determination.
- (e) **Double Assessments.** Unlimited statute of limitations. Va. Code § 58.1-3986.
- (f) **Appeals by Localities.** The general statute of limitations (Va. Code § 58.1-3984) applies to a locality’s appeal of a decision of the board of equalization and to any action by the commissioner of the revenue to correct an assessment which he, for some reason, is unable to correct under Va. Code § 58.1-3981. Va. Code §§ 58.1-3382 & 58.1-3984B. The general statute of limitations also applies to a locality’s appeal of a decision of the State Tax Commissioner under Va. Code § 58.1-3983.1D. A locality has 6 months to appeal any correction made by the commissioner of the revenue pursuant to Va. Code § 58.1-3981 (time runs from date correction is certified by commissioner of the revenue to treasurer). Va. Code § 58.1-3982.

B. Injunctions

1. **State Courts.** State courts are prohibited by Va. Code § 58.1-3993 from “restraining the assessment or collection of any local tax ... except where the party has no adequate remedy at law.” Va. Code § 58.1-3993. So long as the courts liberally construe a taxpayer’s remedies under Va. Code § 58.1-3984, proceeding by injunction is not likely to meet with success. Questions have also been raised about a taxpayer’s ability to proceed by declaratory judgment action in light of this statute. *See Perkins v. County of Albemarle*, 214 Va. 240, 198 S.E.2d 626 *modified on rehearing*, 214 Va. 416, 200 S.E.2d 566 (1973) (taxpayer given its declaration of law but left to pursue refunds within the period of limitations provided by predecessor to § 58.1-3984).
2. **Federal Courts.** Taxpayers who attempt to challenge state and local taxes in federal court face an uphill battle based on the federal Tax Injunction Act (or “Johnson Act”) and principles of comity. *E.g., Franchise Tax*

Board v. Alean Aluminum Ltd., 493 U.S. 331, reh. den., 494 U.S. 1012 (1990). See also *Adams v. Board of Supervisors*, 569 F.Supp. 20 (W.D. Va. 1983).

C. Actions in Contract

In theory, the common law remedy of proceeding by an action at law, in contract, is still available. The taxpayer has a heavy burden, however, to demonstrate that the taxes were not only illegally collected, but were not voluntarily paid.

Charlottesville v. Marks' Shows, Inc., 179 Va. 321, 18 S.E.2d 890 (1942).

Query: Does a taxpayer meet this burden of proof when, outside the 3-year statute of limitations during which a suit can be brought under Va. Code § 58.1-3984, the locality seizes his property in payment of a disputed tax? In such situations, the tax certainly was not voluntarily paid.

Dated: October 31, 2022