

## Virginia Procedure

Revised October 31, 2022

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58.1-105. Offers in compromise; Department may accept; authority and duty of Tax Commissioner.

A. In all cases in which under the laws of this Commonwealth a prosecution is authorized for violation of the revenue laws and in all cases in which a penalty is imposed upon the taxpayer for failure to comply with the requirements of the tax laws, the **Department shall in its discretion have authority to accept offers made in compromise of such prosecution and in compromise or in lieu of such penalties.** An offer in lieu of the assessment of a penalty shall be deemed to be made by the filing of a return or payment of tax without payment of a penalty **if information filed with the return or payment of tax or obtained from other sources demonstrates reasonable cause** for the failure or omission for which the penalty would be imposed. The reason for the acceptance of such offers in compromise shall be preserved among the records of the Department.

B. The Tax Commissioner may compromise and **settle doubtful or disputed claims for taxes or tax liability of doubtful collectability.** An offer in compromise shall be deemed accepted only when the taxpayer is notified in writing of the acceptance by the Tax Commissioner. Whenever such a compromise and settlement is made, the Tax Commissioner shall make a complete record of the case showing the tax assessed, recommendations, reports and audits of departmental personnel, if any, the taxpayer's grounds for dispute or contest together with all evidences thereof, and the amounts, conditions and settlement or compromise of same.

- (c) Strategy issues:
  - (i) when merits are contested, Department has more flexibility as avoids publishing adverse precedent.
  - (ii) office review of penalty waiver requests with return seem to be denied routinely. When that happens, appeal the denial to the Commissioner.

5. Burdens of Proof

- (a) Taxpayer typically has a heavy burden of proof in any contest with the Department of Taxation.
  - (i) *LZM, Inc. v. Virginia Dept. Tax*, 269 Va. 105 (2005.)

Charged with the responsibility of administering and enforcing the tax laws of the Commonwealth under Code § 58.1-202, the Department’s interpretation of a tax statute is entitled to great weight. *Department of Taxation v. Delta Air Lines, Inc.*, 257 Va. 419, 426, 513 S.E.2d 130, 133 (1999) (citation omitted). Further, “[a]ny assessment of a tax by the Department shall be deemed prima facie correct.” Code § 58.1-205. See *General Motors Corp. v. Department of Taxation*, 268 Va. 289, 292-93, 602 S.E.2d 123, 125 (2004); *Chesapeake Hosp. Auth. v. Commonwealth*, 262 Va. 551, 560-61, 554 S.E.2d 55, 59 (2001).

A presumption of validity therefore attaches to an assessment of tax, and the burden is on the taxpayer to show that such assessment was the result of “manifest error” or in “total disregard of controlling evidence.” *County of Mecklenburg v. Carter*, 248 Va. 522, 526, 449 S.E.2d 810, 812 (1994) (citation omitted). Plainly, a court should not overturn the Department's decision unless the assessment is contrary to law, was an abuse of discretion, or was the product of arbitrary, capricious, or unreasonable behavior. *Department of Taxation v. Lucky Stores*, 217 Va. 121, 127, 225 S.E.2d 870, 874 (1976).

Exemptions of property from taxation are to be strictly construed against the taxpayer. Va. Const., art. X, § 6(f).

*See, e.g., Department of Taxation v. Wellmore Coal*, 228 Va. 149, 153-54, 320 S.E.2d 509, 511 (1984). The taxpayer has the burden of establishing that it comes within the terms of an exemption. *DKM Richmond Assocs. v. City of Richmond*, 249 Va. 401, 407, 457 S.E.2d 76, 80 (1995). When a tax statute is susceptible to two constructions, one granting an exemption and the other denying

it, the latter construction is adopted. *WTAR Radio-TV v. Commonwealth*, 217 Va. 877, 879-80, 234 S.E.2d 245, 247 (1977); *Winchester TV Cable Co. v. Commissioner*, 216 Va. 286, 289-90, 217 S.E.2d 885, 889 (1975).

(ii) See 1981 Proceedings of William & Mary Tax Conference, “Recent Developments,” for history prior to “reform.” Posted in part to MyLaw.

(b) Burdens of proof are now statutory.

(i) *Chesapeake Hosp. Auth. v. Commonwealth*, 262 Va. 551 (1996) (first opinion to cite new statutory rules of Virginia Code § 58.1-205).

(ii) Virginia Code § 58.1-205:

§ 58.1-205. Effect of regulations, rulings, etc., and administrative interpretations. In any proceeding relating to the interpretation or enforcement of the tax laws of this Commonwealth, the following rules shall apply:

1. Any **assessment** of a tax by the Department shall be deemed **prima facie correct**.

2. Any **regulation promulgated as provided by subsection B of § 58.1-203 shall be sustained unless unreasonable or plainly inconsistent with applicable provisions of law**.

3. **Rulings issued in conformity with § 58.1-203, tax bulletins, guidelines, and other documents published as provided in § 58.1-204, and guidance documents listed in the Virginia Register of Regulations as provided in §§ 2.2-4008 and 2.2-4103 shall be accorded judicial notice.**

\* \* \*

(c) Query: is statement of the law in *LZM* correct?

(i) Distinguish local real estate cases from state tax cases. Va. Const. Art. X, §6(f) applies to exemptions of property.

(ii) Distinguish exemption cases from cases where statute imposes a tax or defines things to be taxed. *Compare, e.g., Commonwealth v. General Electric Co.*, 236 Va. 54 (1988) (income tax statute construed against Department of Taxation) *with WTAR Radio-TV v Commonwealth*, 217 Va. 877 (1977) (sales tax exemption construed against taxpayer).

(iii) Distinguish cases involving a regulation of the Department from a mere opinion. Virginia Code § 58.1-205. *LZM* did involve a regulation.

(iv) *The Nielsen Company (USA) v. Arlington Co.*, 289 Va. 79 (January 8, 2015). Trial court did not err in refusing to defer to Tax Commissioner's ruling simply because the Tax Commissioner had issued prior rulings pertaining to the issue since those prior rulings were not expressed in regulations, and were, therefore, afforded no deference and entitled to no weight.

We have consistently held that courts do not defer to an agency's construction of a statute because the interpretation of statutory language always falls within a court's judicial expertise. Virginia Marine Res. Comm'n v. Chincoteague Inn, 287 Va. 371, 380, 757 S.E.2d 1, 5 (2014). Though a court never defers to an administrative interpretation, in certain situations a court may afford greater weight than normal to an agency's position. When "the statute is obscure or its meaning doubtful, [a court] will give great weight to and sometimes follow the interpretation which those whose duty it has been to administer it have placed upon it." Superior Steel Corp. v. Commonwealth, 147 Va. 202, 206, 136 S.E. 666, 667 (1927). But even when great weight is afforded to an administrative interpretation of a statute, {767 S.E.2d 5} such an interpretation does not bind a court in deciding the statutory issue. Webster Brick Co. v. Department of Taxation, 219 Va. 81, 84-85, 245 S.E.2d 252, 255 & n.4 (1978). In any event, absent ambiguity, the plain language controls and the agency's interpretation is afforded no weight beyond that of a typical litigant. See Davenport v. Little-Bowser, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005).

The Department of Taxation and the Tax Commissioner administer and enforce the Commonwealth's tax laws. Code § 58.1-202; {289 Va. 89} LZM, Inc. v. Virginia Dep't of Taxation, 269 Va. 105, 109, 606 S.E.2d 797, 799 (2005); Commonwealth of Virginia v. Lucky Stores, Inc., 217 Va. 121, 127, 225 S.E.2d 870, 874 (1976). Thus, their "interpretation of a tax statute is entitled to great weight" - if, of course, the statute is ambiguous. LZM, Inc., 269 Va. at 109, 606 S.E.2d at 799; see also Davenport, 269 Va. at 555, 611 S.E.2d at 371; Department of Taxation v. Delta Air Lines, Inc., 257 Va. 419, 426-27, 513 S.E.2d 130, 133-34 (1999) (rejecting the Department of Taxation's interpretation of an unambiguous tax statute).

Applying these principles to this case, the circuit court did not err in refusing to defer to the Tax Commissioner's interpretation of Code § 58.1-3732(B)(2). A court never defers to the Tax Commissioner's interpretation of a statute. Moreover, Code § 58.1-3732(B)(2) is unambiguous. Thus, the Tax Commissioner's interpretation of that statute is not entitled to great weight.

\* \* \*

For purposes of giving weight to the positions of administrative agencies, it does not matter whether an agency has been consistent in its rulings. This is because an agency's "prior rulings and policies themselves are not entitled to great weight, unless expressed in regulations." Chesapeake Hosp. Auth. v. Commonwealth, 262 Va. 551, 560, 554 S.E.2d 55, 59 (2001). Indeed, the Tax Commissioner's "[r]ulings issued in conformity with [Code] § 58.1-203" are only required to be "accorded judicial notice," and "nothing more." Code § 58.1-205(3); Chesapeake Hosp., 262 Va. at 560, 554 S.E.2d at 59. Chesapeake Hospital is particularly on point, because in that case we specifically rejected the Department of Taxation's claim that its prior rulings in Public Documents, which encompassed "the Department's long-standing administrative interpretation," were to be afforded great weight {289 Va. 90} when deciding an issue addressed by those prior rulings. Id. at 556-57, 560, 554 S.E.2d at 57, 59. Thus, the consistency or inconsistency of the Tax Commissioner's prior rulings is irrelevant, because the prior rulings themselves are not afforded great weight unless and until they are expressed in regulations. And if prior rulings are not entitled to great weight, then a court certainly shall not defer to such rulings.

Applying these principles to this case, the circuit court did not err in refusing to defer to the Tax Commissioner's ruling in this matter simply because the Tax Commissioner had issued prior rulings pertaining to the issue. These prior rulings are not expressed in regulations, and are therefore afforded no deference and entitled to no weight.

C. Special Collections Rules.

1. Notice to debtor/bank.

(a) § 58.1-1804. Collection out of estate in hands of or debts due by third party.

The Tax Commissioner may apply in writing to any person indebted to or having in his hands estate of a taxpayer for payment of any taxes assessed under § 58.1-313 or § 58.1-631, or of any taxes more than thirty days delinquent, out of such debt or estate. Payment by such person of such taxes, penalties and interest, either in whole or in part, shall entitle him to a credit against such debt or estate. The taxes, penalties and interest shall constitute a lien on the debt or estate due the taxpayer from the time the application is received. For each application served, the person applied to shall be entitled to a fee of twenty dollars which shall constitute a charge or credit against the debt to or estate of the taxpayer.

The Tax Commissioner shall send a copy of the application to the taxpayer, with a notice informing him of the remedies provided in this chapter.

If the person applied to does not pay so much as ought to be recovered out of such debt or estate, the Tax Commissioner shall procure a summons

directing such person to appear before the appropriate court, where the proper payment may be enforced. Any person so summoned shall have the same rights of removal and appeal as are applicable to disputes among individuals.

(b) Can Virginia send a Notice of Lien to an out of state bank? The practicality is that they do and the banks do respond.

2. §58.1-1805 Memorandum of lien and padlock the doors

(a) Typically affects real estate.

(b) If doors are padlocked, it is Class 1 misdemeanor to enter premises so business is effectively closed.

3. §58.1-1806 Action at law for collection of taxes.

4. Officer liability

§ 58.1-1813. Liability of corporate officer or employee, or member, manager or employee of partnership or limited liability company, for failure to pay tax, etc.

A. Any corporate, partnership or limited liability [1] officer [2] who willfully fails to pay, collect or truthfully account for and pay over [3] any tax administered by the Department of Taxation, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a **penalty of the amount of the tax evaded, or not paid, collected or accounted for and paid over**, to be assessed and collected in the same manner as such taxes are assessed and collected.

B. The term "corporate, partnership or limited liability officer" as used in this section means an officer or employee of a corporation, or a member, manager or employee of a partnership or limited liability company, who as such officer, employee, member or manager is **under a duty to perform on behalf of the corporation, partnership or limited liability company the act in respect of which the violation occurs and who (1) had knowledge of the failure or attempt as set forth herein and (2) had authority to prevent such failure or attempt.**

(i) PD 13-49 (April 12, 2013) (office held personally liable for unpaid income taxes recognized when liquidating sale of assets held).

(ii) PD 13-128 (July 3, 2013) (President who entered into payment plan and did not follow through with it was personally liable even though he left the employment of the company).

The Taxpayer cites the four prong test set out by the Circuit Court of the City of Richmond, Virginia in **Angelson v. Commonwealth, 25 Va. Cir.319 (1991)** for interpreting the above cited statutory provisions. In such case, the Court stated:

**First**, the person must willfully fail to pay, collect, or truthfully account for and pay over a state tax, or willfully attempt in any manner to evade or defeat such tax or its payment. **Second**, the person must be an officer or employee of the corporation and have a duty to perform the act in respect to which the violation occurs. **Third**, the person must have (actual) knowledge of the failure or attempt as set out in the statute. And **fourth**, the person must have the authority to prevent such failure or attempt.

As further authority cited by the Taxpayer, the Court stated that the absence of any one of these conditions prohibits the Department from collecting corporate taxes from an individual. Under the standard of willfulness applied by the courts, what needs to be shown is that the act was "voluntary, conscious, and intentional." *Hewitt v. U.S.*, 377 F.2nd 921, 924 (C.A. Tex.). In other words, **it needs to be proven that the corporate officer was aware of the outstanding liability and knowingly and intentionally paid operating expenses or other debts of the company.**

(iii) Trust fund taxes: criminal offenses.

A) §58.1-1815

Willful failure to collect and account for tax. Any corporate or partnership officer as defined in § 58.1-1813, or any other person required to collect, account for and pay over any sales, use or withholding tax, who willfully fails to collect or truthfully account for and pay over such tax, and any such officer or person who willfully evades or attempts to evade any such tax or the payment thereof, shall, in addition to any other penalties provided by law, be guilty of a Class 1 misdemeanor.

B) §58.1-1816

§ 58.1-1816. Conversion of trust taxes; penalty; limitation of prosecutions. Any corporate or partnership officer as defined in § 58.1-1813, or any other person owning and operating a business, or a fiduciary operating or liquidating a business, who through two or more acts or omissions within a period of ninety days **willfully fails to truthfully account for any state sales use or withholding tax totaling \$1,000 or more collected from others** with the intent not to pay over, shall, in addition to any other penalties provided by law, be guilty of a **Class 6 felony**. A prosecution under this section shall be commenced within five years next after the commission of the offense.

C) Personal liability above

D. **Taxpayer Administrative Remedies:** See 23 VAC 10-20-10, *et. seq.* and more current PD 06-140, Administrative Appeal Guidelines for Taxes Administered by the Virginia Department of Taxation (“Appeal Guidelines”).

1. **Without paying tax:** appeal to State Tax Commissioner: §58.1-1821

§ 58.1-1821. Application to Tax Commissioner for correction.

Any [1] **person assessed** with any [2] **tax administered by the Department of Taxation** may, within [3] **ninety days from the date of such assessment, apply for relief to the Tax Commissioner.** Such application shall be in the form prescribed by the Department, and shall fully set forth the grounds upon which the taxpayer relies and all facts relevant to the taxpayer's contention. The Tax Commissioner may also require such additional information, testimony or documentary evidence as he deems necessary to a fair determination of the application.

\* \* \*

On receipt of a [4] **notice of intent** to file under this section, the Tax Commissioner **shall refrain from collecting the tax** until the time for filing hereunder has expired, unless he determines that collection is in jeopardy.

\* \* \*

(a) Exhaustion of administrative remedies not required. 23 VAC 10-20-160B.

(b) The application:

(i) Person assessed: § 58.1-1820

1. "Person assessed with any tax," with standing to contest such assessment, shall include the person in whose name such assessment is made, a consumer of goods who, pursuant to law or contract, has paid any sales or use tax assessed against a dealer, a consumer of real estate construction who has by contract specifically agreed to pay the taxes assessed on the contractor, and any dealer who agrees to pass on to his customers the amount of any refund (net after expenses of the refund proceeding) to the extent such tax has been passed on to such customers.

A) Whose name is on the bill?

B) Retail merchant can apply too if pass on net sales tax refund to customer.

C) On sales tax refunds, Department’s policy is to try to force taxpayer to seek refund from the retail merchant, though statute clearly allows otherwise. Underlying issue is wanting the merchant to repay the “dealer discount.”

(ii) An assessment: § 58.1-1820:

2. "Assessment," as used in this subtitle, shall include [1] an assessment made **pursuant to notice** by the Department of Taxation and [2] **self-assessments** made by a taxpayer upon the filing of a return or otherwise not pursuant to notice. **Assessments made by the Department of Taxation shall be deemed to be made when a written notice of assessment is delivered to the taxpayer by an employee of the Department of Taxation, or mailed** to the taxpayer at his last known address. Upon approval of the use of the specific medium by the taxpayer, an assessment shall also be deemed to be made when a notice of assessment is transmitted by the Department of Taxation to the taxpayer by either facsimile transmission or electronic mail to a facsimile machine or electronic mail address, respectively, as designated by the taxpayer in writing. Self-assessments shall be deemed made when the tax is paid or, in the case of taxes requiring an annual or monthly return, when the return is filed. A return filed or tax paid before the last day prescribed by law or by regulations pursuant to law for the filing or payment thereof, shall be deemed to be filed or paid on such last day.

(iii) Tax administered by the Department. See, e.g., Table of Contents of Title 58.1 of Code of Virginia.

(iv) The Department treats the 90 day filing requirement as jurisdictional. E.g., PD 12-139; Appeal Guidelines, §4.1B.

(v) Date of Assessment. See Notice, not audit report.

A) *Knopp Bros. v. Department of Tax*, 234 Va. 383 (1987) (rebilling on a Notice form was an assessment that could be appealed).

B) *Commonwealth v. Delta Air Lines*, 257 Va. 419 (1999) (court application was timely based on date shown in most recent Notice).

(vi) Note simple form for an appeal at end of PD 06-140 (Guidelines for Appeals). Form is not mandatory. Just to be safe, some firms file a letter appeal and append the Guideline form.

(vii) Department will acknowledge the appeal in a letter that gives the name and phone number of the staff person (analyst) assigned to the appeal. Appeals Guidelines, § 4.2G.

(viii) Taxpayer can request a conference. Appeal Guidelines, §5. Traditionally, the Department finds such conferences inefficient and avoids them if possible. If a conference is important to your client, need to follow up with the analyst in charge of the appeal to make sure one is scheduled.

- (ix) Notice of Intent required to stop collection machinery.
  - A) Thirty (30) days is standard time.
  - B) Can also alert auditor to appeal and that often works.
  - C) Phone call to Director of Appeals and Rulings can often fix a late Notice problem.
- (x) Power of Attorney must be filed to indicate lawyer's or accountant's authority to represent the client.
- (xi) Register as a taxpayer representative.

(c) The Commissioner's order under Virginia Code §58.1-1822:

§ 58.1-1822. Action of Tax Commissioner on application for correction.

If the Tax Commissioner is satisfied, by evidence submitted to him or otherwise, that an applicant is erroneously or improperly assessed with any tax administered by the Department of Taxation, or that an action with respect to a transferred credit or other tax attribute is erroneous, the Tax Commissioner may order that such assessment or action be corrected. If the assessment exceeds the proper amount, the Tax Commissioner shall order that the applicant be exonerated from the payment of so much as is erroneously or improperly charged, if not already paid into the state treasury, and, if paid, that it be refunded to him. If the assessment is less than the proper amount, the Tax Commissioner shall order that the applicant pay the proper taxes. He shall refund to the taxpayer any exempt funds which have been improperly collected. The Tax Commissioner shall refrain from collecting a contested assessment until he has made a final determination under this section unless he determines that collection is in jeopardy. In any action on an application for correction, the Tax Commissioner shall state in writing the facts and law supporting the action on such application.

\* \* \*

- (i) Commissioner can increase tax on appeal, but rulings say they do not do so if statute of limitations on making an assessment has expired. E.g., PD 11-154 (August 30, 2011).
- (ii) Tax can be paid without prejudice to the appeal, subject to refund.
- (iii) Note interest rate drops to federal short term rate if appeal not decided in nine months from date of assessment (six months if appeal is filed on last day of 90 day appeal limit). (Last paragraph not quoted above).

(iv) No collection until after final determination. (Last paragraph not quoted above).

2. **Pay tax first:**

(a) **Appeal to Commissioner** allowed under §58.1-1821, even after payment, if meet the 90 day filing deadline.

(b) **Amended Return**, “claim for refund: §58.1-1823

(i) Note five statutes of limitations. The general rule is three years (versus three months) to file an amended return or claim for refund; but when desperation strikes, note the alternatives, including two years from payment of an assessment (which may be long after the three years has run).

§ 58.1-1823. Reassessment and refund upon the filing of amended return or the payment of an assessment.

A. Any person filing a tax return or paying an assessment required for any tax administered by the Department of Taxation may file an amended return with the Department within the later of: **(i) three years** from the last day prescribed by law for the timely filing of the return; **(ii) one year from** the final determination of any change or correction in the liability of the taxpayer for any federal tax upon which the state tax is based, provided that the refund does not exceed the amount of the decrease in Virginia tax attributable to such **federal change** or correction; **(iii) two years from the filing of an amended Virginia return resulting in the payment** of additional tax, provided that the amended return raises issues relating solely to such prior amended return and that the refund does not exceed the amount of the payment with such prior amended return; **(iv) two years from the payment of an assessment**, provided that the amended return raises issues relating solely to such assessment and that the refund does not exceed the amount of such payment; **or (v) one year from the final determination of any change or correction in the income tax of the taxpayer for any other state**, provided that the refund does not exceed the amount of the decrease in Virginia tax attributable to such change or correction. If the Department is satisfied, by evidence submitted to it or otherwise, that the tax assessed and paid upon the original return exceeds the proper amount, the Department may reassess the taxpayer and order that any amount excessively paid be refunded to him. The Department may reduce such refund by the amount of any taxes, penalties and interest which are due for the period covered by the amended return, or any past-due taxes, penalties and interest which have been assessed within the appropriate period of limitations. **Any order of the Department denying such reassessment and refund, or the failure of the Department to act thereon within three months shall, as to matters first raised by the amended return, be deemed an assessment for the purpose of enabling the taxpayer to pursue the remedies allowed under this chapter.**

(ii) Commissioner's action is a "new assessment" allowing taxpayer new statute of limitations to go to court. Note also that, at the taxpayer's option, failure of the Department to act within three months allows a new statute of limitations for going to court.

(c) **Protective claim** for refund filed within three years. Virginia Code §58.1-1824. Purpose is to allow taxpayer to protect his refund rights without having to file suit. In appropriate case (e.g., when a controlling case is pending in court), Commissioner will hold the claim without action until court case is concluded.

E. **Judicial Remedy:** Application for Correction §58.1-1825

§ 58.1-1825. Application to court for correction of erroneous or improper assessments of state taxes generally.

A. Any person assessed with any tax administered by the Department of Taxation and aggrieved by any such assessment, or aggrieved by an action by the Department with respect to a transferred credit or other tax attribute, may, unless otherwise specifically provided by law, within **(i) three years from the date such assessment is made or (ii) one year from the date of the Tax Commissioner's determination under § 58.1-1822, whichever is later**, apply to a circuit court for relief. The venue for such proceeding shall be as specified in subdivision 13 b of § 8.01-261. The application shall be before the court when it is filed in the clerk's office.

B. Except as provided in subsection C, the **court shall require the applicant to pay the assessment before proceeding with its application upon granting a motion** by the Tax Commissioner seeking to compel such payment and showing to the satisfaction of the court that the Department is likely to prevail on the merits of the case, that the application is (i) not well grounded in fact; (ii) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (iii) interposed for an improper purpose, such as to harass, to cause unnecessary delay in the collection of the revenue, or to create needless cost to the Commonwealth from the litigation; or (iv) otherwise frivolous.

C. \* \* \*

D. \* \* \*

The Department shall be named as defendant, and the proceedings shall be conducted as an action at law before the court sitting without a jury. It shall be the burden of the applicant in any such proceeding to show that the assessment or collection or action on a transferred credit or other tax attribute complained of is erroneous or otherwise improper. The court's order shall be entered pursuant to § 58.1-1826.

E. Nothing in this section shall prevent the Tax Commissioner from collecting the assessment if he determines that collection is in jeopardy.

1. Exhaustion of remedies not required, but smart. 23 VAC 10-20-160B
2. Statute of limitations: longer of 3 years from assessment or 1 year from State decision.
3. Nature of the application.
  - (a) Action at law.
  - (b) NB: bench trial. No jury.
  - (c) Tax Department is defendant.
  - (d) Burden of proof is on the taxpayer.
4. The Court's order:

§ 58.1-1826. Action of court.

If the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, or that an action with respect to a transferred credit or other tax attribute is erroneous, and **that the erroneous assessment or action was not caused by the willful failure or refusal of the applicant to furnish the Department with the necessary information, as required by law**, the court may order that the assessment or action be corrected. If the assessment exceeds the proper amount, the **court may order that the applicant be exonerated** from the payment of so much as is erroneously or improperly charged, if not already paid and, **if paid, that it be refunded to him**. If the assessment is less than the proper amount, the court shall order that the **applicant pay the proper taxes and to this end the court shall be clothed with all the powers and duties of the authority which made the assessment complained of** as of the time when such assessment was made and all the powers and duties conferred by law upon such authority between the time such assessment was made and the time such application is heard. The court may order that any amount which has been improperly collected be refunded to such applicant. A copy of any order made under this section or § 58.1-1827 correcting an erroneous or improper assessment shall be certified by the clerk of the court to the Tax Commissioner.

- (a) An uncooperative taxpayer is at risk. "... the erroneous assessment or action was not caused by the willful failure or refusal of the applicant to furnish the Department with the necessary information, as required by law ..."
- (b) Court stands in shoes of assessor to increase or decrease amount due and to order refund or payment. Query: to what extent do rules of

procedure in actions at law govern? For example, must Department specifically plead a counterclaim in order to have affirmative recovery? Must that be within statute of limitations?

(c) Appeal lies directly to the Virginia Court of Appeals. §58.1-1828.

5. Interest

(a) Use of money concept

(b) Rarely waived by state: fault/delay issue

§ 58.1-1833. Interest on overpayments or improper collection.

A. Interest shall be allowed and paid upon the overpayment of any tax administered by the Department, the refund of which is permitted or required under the provisions of this article, or on moneys improperly collected from the taxpayer and refunded pursuant to § [58.1-1822](#), at a rate equal to the rate of interest established pursuant to § [58.1-15](#). Such interest shall accrue from a date sixty days after payment of the tax, or sixty days after the last day prescribed by law for such payment, whichever is later, and shall end on a date determined by the Department preceding the date of the refund check by not more than thirty days. Notwithstanding the above, any tax refunded pursuant to a court order or otherwise as a result of an erroneous assessment shall bear interest from the date the assessment was paid. No interest will be paid on sales taxes refunded to a dealer unless the dealer agrees to pass such interest on to the purchaser.

\* \* \*

F. Anti-Injunction Act

(a) Court generally has no authority to enjoin collection or assessment of taxes.

§ 58.1-1831. No injunctions against assessment or collection of taxes. No suit for the purpose of restraining the assessment or collection of any tax, state or local, shall be maintained in any court of this Commonwealth, except when the party has no adequate remedy at law.

(b) Same rule applies to federal courts. 28 USC §1341. E.g., *Rosewell v. LaSalle Nat'l Bnk.*, 450 US 503 (1981).

III. State Corporation Commission

A. SCC sits as a court as well as administrative and regulatory agency. Virginia Constitution, Article IX:

§ 3. Procedures of the Commission.

Before promulgating any general order, rule, or regulation, the Commission shall give reasonable notice of its contents.

In all matters within the jurisdiction of the Commission, **it shall have the powers of a court of record** to administer oaths, to compel the attendance of witnesses and the production of documents, to punish for contempt, and to enforce compliance with its lawful orders or requirements by adjudging and enforcing by its own appropriate process such fines or other penalties as may be prescribed or authorized by law. Before the Commission shall enter any finding, order, or judgment against a party it shall afford such party reasonable notice of the time and place at which he shall be afforded an opportunity to introduce evidence and be heard.

**The Commission may prescribe its own rules of practice and procedure** not inconsistent with those made by the General Assembly. The General Assembly shall have the power to adopt such rules, to amend, modify, or set aside the Commission's rules, or to substitute rules of its own.

§ 4. Appeals from actions of the Commission.

The Commonwealth, any party in interest, or any party aggrieved by any final finding, order, or judgment of the Commission **shall have, of right, an appeal to the Supreme Court**. The method of taking and prosecuting an appeal from any action of the Commission shall be prescribed by law or by the rules of the Supreme Court. All appeals from the Commission shall be to the Supreme Court only.

**No other court of the Commonwealth shall have jurisdiction to review, reverse, correct, or annul any action of the Commission** or to enjoin or restrain it in the performance of its official duties, provided, however, that the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission.

1. Note unique provisions applicable to SCC:
  - (a) Sits as court of record. Virginia Code §12.1-13.
  - (b) Establishes own rules and procedures. Copy available from Clerk of SCC. Virginia Code §12.1-25.
  - (c) Appeal of right to the Supreme Court. Virginia Code §12.1-39.
2. No other Virginia Court has JURISDICTION to challenge an SCC order or action. Virginia Code §12.1-39.

3. No published informal process, though channels are available. All applications require lawyer and are pleadings filed with Clerk of the Commission.

B. Erroneous assessments of property value:

§ 58.1-2670. Application to Commission or Department for review.

Any taxpayer, the Commonwealth or any county, city or town aggrieved by any action of the Commission in the ascertainment of, or the assessment for taxation of, the value of any property of any corporation or company assessed by the Commission, or in the ascertainment of any tax upon any company or corporation of its property, at any time **within three months after receiving a certified copy of such assessment** of value or tax, may apply to the Commission for a review and correction of any specified item or items thereof after which date the Commission shall have no authority under this section or any other provision of law to receive any application or complaint concerning the assessment of value or tax. Such application shall be in a form prescribed by the Commission and shall set forth with reasonable certainty the item or items, of which a review and correction are sought, and the grounds of the complaint. The application shall also be verified by affidavit.

Any company or governmental entity aggrieved by any assessment for taxation of the value of any property by the Department of Taxation may apply to the Department or the Circuit Court of the City of Richmond, Division I, for correction of any such tax valuation or assessment, under Chapter 18 ([§58.1-1800](#) et seq.) of this title. The Department and the court are hereby empowered to correct the valuation or assessment, and the requirement of such sections shall apply to corrections hereunder, mutatis mutandis.

1. 90 days to challenge value or assessment of tax – measured from date of receipt of assessment. SCC allows several days as presumptive mailing time; but rely on that only as a last resort.
2. SCC valuation of certain utility properties creates a split jurisdiction. General rule, SCC assesses value and Commissioner of Revenue determines classification, rate, exemptions, etc. SCC orders can be reviewed only by SCC and Supreme Court.
  - (a) *Transcontinental Gas Pipe Line Co. v. Prince William County*, 210 Va. 550 (1970). Where taxpayer challenged classification as personal or real property, jurisdiction for suit was in circuit court and not SCC.
  - (b) *City of Alexandria v. Richmond, F. & P. R.R.*, 223 Va. 293 (1982). Even though Supreme Court had held the assessment methodology of the SCC invalid in an earlier case involving the same taxpayers, railroad could not obtain refunds for other years from the circuit court because that action

necessarily challenged an order of the SCC and was barred by the Constitution of Virginia.

C. Other SCC taxes: one year statute of limitations.

§ 58.1-2030. Petition for correction of taxes, etc., assessed by State Corporation Commission.

Any person or corporation feeling aggrieved by reason of any registration fee, franchise tax, charter tax, entrance fee, license tax, fee or charge assessed or imposed by or under authority of the State Corporation Commission against and collected from any corporation, domestic or foreign, or any fee paid under the provisions of Chapter 5 (§ [13.1-501](#) et seq.) of Title 13.1, may, unless and except as otherwise specifically provided, **within one year** from the date of the payment of any such tax, fee or charge, apply to the State Corporation Commission for a correction of such assessment or charge and for a refund, in whole or in part, of the tax, fee or charge so assessed or imposed and paid. No payment shall be recovered after a formal adjudication in a proceeding in which the right of appeal existed and was not taken. Such application shall be by written petition, in duplicate and verified by affidavit. Such application shall be filed with the Commission and shall set forth the names and addresses of every party in interest.