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## ANCIENT SIMPLICITY IS GONE:

### PROCEDURAL ASPECTS OF RELIEF FROM TAXES ADMINISTERED BY THE VIRGINIA DEPARTMENT OF TAXATION

*Lee F. Davis Jr.\**

The Virginia Supreme Court has referred to “the convenience, elasticity and fairness” of the Virginia procedure for the correction of erroneous assessments of taxes.<sup>1</sup> Few would add “clarity” to this description, yet the statutory remedies, however complicated, are usually the only source of relief for the taxpayer.<sup>2</sup>

Prior to 1973, declaratory judgment actions were often used to obtain tax relief in Virginia. Although one observer questioned whether a taxpayer could use the declaratory judgment procedure to obtain tax refunds in Virginia,<sup>3</sup> the practice continued, due in part to an understandable tendency among lawyers to use tools with which they are familiar,<sup>4</sup> and in part to an understandable reluctance on the part of state and local governments to interpose procedural defenses in tax matters.<sup>5</sup> The question was finally resolved in *Perkins v. County of Albemarle*,<sup>6</sup> a declaratory judgment action in which the Virginia Supreme Court initially held the county’s tax assessment procedures to be unconstitutional and directed:

Such [unlawful] taxes collected must be refunded. Such [unlawful] taxes yet uncollected must be abated.<sup>7</sup>

Upon rehearing, however, the court said:

This language has been interpreted to command Albemarle County

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1. *Commonwealth v. Tredegar Co.*, 122 Va. 506, 511, 95 S.E. 279, 281 (1918).

2. *See* VA. CODE ANN. § 58-1158 (Repl. Vol. 1974).

3. Horsley, *Taxation, 1961-1962 Annual Survey of Virginia Law*, 48 VA. L. REV. 1554, 1569 (1962).

4. *See, e.g.*, *Krauss v. City of Norfolk*, 214 Va. 93, 197 S.E.2d 205 (1973).

5. “In the *Valentine* case [*City of Richmond v. Valentine*, 203 Va. 642, 125 S.E.2d 854 (1962)], declaratory judgment procedure was stipulated by the parties to expedite the proceedings . . .” Horsley, *Taxation, 1961-1962 Annual Survey of Virginia Law*, 48 VA. L. REV. 1554, 1569 (1962).

6. 214 Va. 240, 198 S.E.2d 626 (1973).

7. *Id.* at 245, 198 S.E.2d at 629.

to refund or abate taxes *upon its own initiative*. We intended no such construction. This is a declaratory judgment proceeding. The statutes make available to aggrieved taxpayers separate proceedings for refund and abatement of taxes unlawfully imposed. Having made a judgment declaring certain taxes unlawful, we leave taxpayers upon whom Albemarle County levied such unlawful taxes, including the plaintiffs and intervenors, to pursue their remedies as the statutes provide.<sup>8</sup>

The Virginia Code provides four methods for the correction of erroneous assessments of most state taxes: an application to the State Tax Commissioner;<sup>9</sup> an amended tax return;<sup>10</sup> an application to court, either by the taxpayer,<sup>11</sup> or by the assessing officer.<sup>12</sup> In addition, the taxpayer has a common law right to bring an action of *assumpsit* for money had and received if the taxes were paid under compulsion.<sup>13</sup> Each of these methods is hazardous.

Section 58-1153 of the Code of Virginia, providing for a court application by the assessing officer, should not be relied on. This method requires an order of exoneration "upon forms prescribed by the Department of Taxation."<sup>14</sup> No such forms have been prescribed. The section would be invoked by an administrative officer only in a highly unusual situation, and therefore merits no further discussion herein.

The remaining statutory methods for correction of erroneous assessments of state taxes apply to "taxes administered by the Department of Taxation," a term undefined by the Code. The State

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8. *Perkins v. County of Albemarle*, 214 Va. 416, 419, 200 S.E.2d 566, 569 (1973). The danger in using the wrong procedure is that the statute of limitations may run on a taxpayer's right to pursue his statutory remedies. This happened in *Perkins*, but the Albemarle Board of Supervisors arranged for the amendment of VA. CODE ANN. § 58-1152.1 (Repl. Vol. 1974), to permit the County to return the erroneously collected taxes voluntarily. Va. Acts of Assembly 1974, ch. 362, at 596.

9. VA. CODE ANN. § 58-1118 (Repl. Vol. 1974).

10. VA. CODE ANN. § 58-1118.1 (Repl. Vol. 1974).

11. VA. CODE ANN. § 58-1130 (Repl. Vol. 1974).

12. VA. CODE ANN. § 58-1153 (Repl. Vol. 1974).

13. *Charlottesville v. Marks' Shows, Inc.*, 179 Va. 321, 18 S.E.2d 890 (1942). Mere protest, however vigorous, is not sufficient to cause the payment to be under compulsion. *Phoebus v. Manhattan Social Club*, 105 Va. 144, 52 S.E. 839 (1906). Nor is the payment compulsory even if the taxpayer's alternative to payment would be to close his business. *Virginia Brewing Co. v. Commonwealth*, 113 Va. 145, 73 S.E. 354 (1912).

14. VA. CODE ANN. § 58-1154 (Repl. Vol. 1974).

Tax Commissioner has general supervisory authority over all state taxes,<sup>15</sup> but the taxes administered by the Department of Taxation should be considered those set forth in the Department of Taxation's *Annual Report to the Governor of Virginia for the Fiscal Year Ending June 30, 1972*.<sup>16</sup>

The statutes in question were amended in 1973 to delete the requirement that the taxes be "State" taxes,<sup>17</sup> resolving the problem encountered when attempting to get refunds of the local complementary retail sales and use tax which is administered by the Department of Taxation. The 1972 amendment, the first to utilize the term "taxes administered by the Department of Taxation,"<sup>18</sup> indicates that state recordation taxes (which were not set forth in the Department's *1971 Annual Report*) were now to be included.<sup>19</sup> The Department of Taxation is given no authority to administer local recordation taxes. Therefore relief from the state recordation tax will not automatically assure relief from its local equivalent; however, such will almost certainly be the practical result.<sup>20</sup>

#### *Filing of an Amended Tax Return*

The Virginia Code fixes a three year statute of limitations for the filing of an amended tax return.<sup>21</sup> The statute of limitations is extended in the case of taxes conforming to a federal equivalent if there is an adjustment of the federal tax liability. At present, Virginia's only conforming taxes are its income taxes<sup>22</sup> and the mini-

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15. VA. CODE ANN. § 58-33(1) (Repl. Vol. 1974).

16. These taxes include: Individual and corporate income taxes, the Virginia retail sales and use tax, inheritance taxes, gift taxes, state recordation and probate taxes, tax on capital not otherwise taxed, state taxes on shares of stock of banks and trust companies, state business, occupational and professional license taxes, malt beverage excise taxes, tobacco products excise taxes, and miscellaneous excise taxes on forest products, eggs, peanuts, hogs and soybeans.

17. Va. Acts of Assembly 1973, ch. 446, at 686.

18. Va. Acts of Assembly 1972, ch. 721, at 1013.

19. VA. CODE ANN. § 58-1160 (Repl. Vol. 1974), as amended Va. Acts of Assembly 1972, ch. 721, at 1013, fixes a filing date for a fictitious return of recordation tax.

20. There seems to have been no statute permitting a refund of local recordation taxes until the 1974 amendment of VA. CODE ANN. § 58-1145 (Repl. Vol. 1974), Va. Acts of Assembly 1974, ch. 326, at 505. An application to court should comply with the formalities of both section 58-1130 and section 58-1145.

21. VA. CODE ANN. § 58-1118.1 (Repl. Vol. 1974).

22. VA. CODE ANN. Title 58 ch. 4 (Repl. Vol. 1974).

num inheritance tax based on the federal estate tax credit for state taxes paid.<sup>23</sup>

One danger in the amended tax return procedure is that the statute of limitations for obtaining judicial relief is not extended as to matters previously raised.<sup>24</sup> The term "matters first raised by the amended return" should be construed to exclude from the extension of time only those matters raised by assessment of omitted taxes pursuant to Section 58-1160.<sup>25</sup> This restriction should not be construed to apply to matters previously raised with respect to different tax periods nor to matters raised in oral discussions or informal correspondence with the Tax Department.

Most disputes with the Tax Department arise in reference to an audit. Virginia law contains no provision for pre-assessment negotiations with the Tax Department. If, as in the case of field audits, the taxpayer is aware that an additional assessment is being proposed, he may request and will usually receive an opportunity to discuss the proposed assessment with the auditor's supervisors. The level of the conference will generally depend on the magnitude of the issues being raised. This procedure is especially useful if the auditor proposes to assess statutory penalties; for under Virginia law, the courts have no authority to relieve a taxpayer of penalties and interest if the underlying tax is upheld.<sup>26</sup> In no event, however, should a pre-assessment conference be considered an application to the Commissioner under Section 58-1118.<sup>27</sup>

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23. VA. CODE ANN. § 58-162 (Repl. Vol. 1974).

24. VA. CODE ANN. § 58-1118.1 (Repl. Vol. 1974).

25. VA. CODE ANN. § 58-1160 (Repl. Vol. 1974). Sections 58-1118 and 58-1118.1 should be construed as complementary, the amendment and enactment, respectively, of these sections resulting from the same act of assembly. Va. Acts of Assembly 1972, ch. 721, at 1013. Section 58-1118 measures the statute of limitations by the mailing of the assessment. The only assessments which are mailed are inheritance and gift tax assessments and supplemental assessments of omitted taxes. The same session of the General Assembly revised the inheritance tax so as to eliminate the need for mailing inheritance tax assessments, and implicitly, to eliminate the need for mailing gift tax assessments. The due dates for the filing of inheritance tax returns and for the payment of the tax were made identical, thus requiring that payment accompany the return. Va. Acts of Assembly 1972, ch. 140, at 144. Gift tax returns and payment were already due on the same date. Although sections 58-174 and 58-244 continue to provide that the department shall "determine" inheritance and gift taxes and send a statement to the taxpayer, the department does not do so unless additional taxes are due. See text accompanying note 35 *supra*.

26. *Rixey's Ex'rs v. Commonwealth*, 125 Va. 337, 99 S.E. 573 (1919).

27. This distinction would be important if existing law is changed, as was proposed in 1972 by House Bill 579, to make the administrative application a prerequisite to the judicial remedy.

*Applications to the State Tax Commissioner*

Section 58-1118 provides the means for making an application to the State Tax Commissioner to correct an erroneous assessment.<sup>28</sup> It requires that the application be filed within ninety days from the mailing of the assessment to the taxpayer. After the expiration of the ninety day period, the Commissioner may grant relief only on an offer of compromise.<sup>29</sup> The statutory provisions excluding Saturday, Sundays and holidays from due date computations<sup>30</sup> and permitting filing by mail,<sup>31</sup> unlike their federal equivalents,<sup>32</sup> are limited to the filing of returns and the payment of taxes and do not apply to the filing of applications.

The application under Section 58-1118 must contain all relevant facts and the Commissioner may request additional information. The taxpayer should be aware that subsequent judicial relief is prohibited unless the court is "satisfied . . . that the erroneous assessment was not caused by the willful failure or refusal of the applicant upon request to furnish . . . relevant information to the tax-assessing authority as the law requires."<sup>33</sup> Obviously, lawyers who favor surprise as a courtroom weapon may prefer not to apply for administrative relief. The taxpayer who does utilize the administrative remedy must keep one eye on the clock because, since the repeal of former Section 58-1131,<sup>34</sup> the judicial statute of limitations is not tolled while the administrative application is pending.<sup>35</sup>

Under House Bill 579, as originally introduced in 1972, an application to the Tax Commissioner would have been a prerequisite to the filing of an application to court. However, this provision was deleted, not because of hostility toward making the administrative

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28. A conference may, and usually should, be requested but the hearing may be held by a lower level employee of the Tax Department to whom the Commissioner has delegated authority under VA. CODE ANN. § 58-2(2) (Repl. Vol. 1974).

29. See VA. CODE ANN. § 58-45 (Repl. Vol. 1974).

30. VA. CODE ANN. § 58-4.1 (Repl. Vol. 1974).

31. VA. CODE ANN. § 58-4.2 (Repl. Vol. 1974).

32. INT. REV. CODE OF 1954, §§ 7503 and 7502.

33. VA. CODE ANN. § 58-1134 (Repl. Vol. 1974).

34. Va. Acts of Assembly 1972, ch. 721, at 1013.

35. House Bill 579, as originally introduced in 1972, would have begun the running of the statute at the time of the Commissioner's determination with respect to the section 58-1130 application. When the General Assembly deleted the amendments to section 58-1130 from the bill, it did not restore section 58-1131. Va. Acts of Assembly 1972, ch. 721, at 1013.

application a prerequisite to the judicial application, but because the proposed amendment would also have designated specific courts as the only courts of original jurisdiction in tax matters. Thus, the simultaneous repeal of former Section 58-1121,<sup>36</sup> which provided that the administrative remedy was in addition to the judicial remedy, should not be interpreted as making the administrative remedy a prerequisite for, or an exclusive alternative to, the application to court.

### *The Taxpayer's Application To Court*

An application to court, while on the law side of the court,<sup>37</sup> is not subject to the Rules of Court.<sup>38</sup> It is not clear whether the exclusion in Rule 3:1 prevents the application of pretrial procedures under Part Four of the Rules<sup>39</sup> or whether the Tax Commissioner is a "party" as that term is used in Part Four.<sup>40</sup> Generally, however, the Tax Commissioner and the Attorney General will provide and stipulate such information as is relevant.

The initial question in a judicial application is the date on which the action is commenced for statute of limitations purposes. The statute which provided that the period of limitations was tolled between the time of the filing of the application and the hearing, was repealed in 1972.<sup>41</sup> The implication of this repeal is that the case must actually be heard within the two year statutory period, and that the filing of the application no longer tolls the statute of limitations.<sup>42</sup>

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36. Va. Acts of Assembly 1972, ch. 721, at 1013.

37. *Barrow v. Prince Edward County*, 121 Va. 1, 92 S.E. 910 (1917).

38. *Barbour v. City of Roanoke*, 207 Va. 544, 151 S.E.2d 398 (1966).

39. Rule 3:1 provides that "These Rules" apply to certain actions, in contrast to Rule 4:0 which provides for the application of "The rules in this Part Four". Part Five of the Rules of Court is apparently made applicable to tax cases by VA. CODE ANN. § 58-1157 (Repl. Vol. 1974).

40. The statutes do not "in terms provide for the naming of any defendant." *Barbour v. City of Roanoke*, 207 Va. 544, 547, 151 S.E.2d 398, 400 (1966). In *School Board v. Shockley*, 160 Va. 405, 168 S.E. 419 (1933), the court said, with reference to a local tax case: "We therefore think the county school board of Carroll County had the right to become a party defendant in the proceedings in the lower court". 160 Va. at 410, 168 S.E. at 421. (emphasis added). Section 58-48.4 overrides the Rules of Court with respect to confidential tax returns and section 58-48.5 permits the Commissioner's affidavit to be used in evidence in certain situations.

41. VA. CODE ANN. § 58-1131, repealed by Va. Acts of Assembly 1972, ch. 721, at 1013.

42. The initial statutory language was as follows: "The application aforesaid may in all

Rule 3:1 provides that the "established practices and procedure [as of February 1, 1950] are continued" for cases not covered by the Rules. Under the statutes then in effect,<sup>43</sup> actions were commenced by the issuance of a writ to summons the defendant, and the writ was deemed issued when the writ tax, clerk's fee and order were received by the clerk. This led the lower court judge in *Barbour v. City of Roanoke*<sup>44</sup> to conclude that a local tax proceeding was commenced when notice was served on the city attorney, he being the one required to defend the application.<sup>45</sup> The Virginia Supreme Court, however, noted that the applicable statutes did not "in terms provide for the naming of any defendant" and said that it was "not necessary to look beyond the statute [creating the right] for additional limitations in established practice and procedure."<sup>46</sup> Relying on the local tax equivalent of repealed Section 58-1131,<sup>47</sup> the court then held that the filing of the petition within the statutory period was sufficient. Since the repeal of Section 58-1131, the court's reasoning in *Barbour* no longer applies to a state tax case.<sup>48</sup> Therefore,

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cases be filed in the clerk's office of any such court in vacation, and the time which shall elapse from the filing of such application in the clerk's office, as aforesaid, to the hearing on the same by the court, shall be excluded from the computation of the said period of one year or two years, as the case may be," Va. Acts of Assembly 1926, ch. 353, at 644. This statute followed the decision of the Virginia Supreme Court in *Leesburg v. Loudoun Nat'l Bank*, 141 Va. 244, 126 S.E. 196 (1925). In that case, notice was served on the proper parties within the statutory period, but the court held that the action was not timely commenced:

We think the language of the statute is conclusive on this point and that the application must actually be made, and made directly to the court, within two years from September 1st [now December 31] of the year in which the assessment was made. The mere fact that the courts are not continuously in session does not affect the question. The application must be made to the court, which can of necessity only be to the court while in session, and it can only be made during the period prescribed by the statute. *Id.* at 247-48, 126 S.E. at 197.

The *Leesburg* case is consistent with *Union Tanning Co. v. Commonwealth*, 123 Va. 610, 96 S.E. 780 (1918), in which the court stated that written pleadings under a tax application were "unnecessary" but "permissible". *Id.* at 615, 96 S.E. at 780. As "a copy of the application" is now usually required by section 58-1130 to be served on the Tax Commissioner, a written application is now necessary.

43. VA. CODE ANN. §§ 8-45 and 8-46, *repealed by* Va. Acts of Assembly 1954, ch. 593, at 765.

44. 207 Va. 544, 151 S.E.2d 398 (1966).

45. VA. CODE ANN. § 58-1134 (Repl. Vol. 1974).

46. 207 Va. at 546, 151 S.E.2d at 400.

47. VA. CODE ANN. § 58-1146 (Repl. Vol. 1974).

48. The statute creating the right is section 58-1130 which provides the limitation "in language so clear that its meaning cannot be fairly doubted." *Leesburg v. Loudoun Nat'l Bank*, 141 Va. 244, 248, 126 S.E. 196, 197 (1925).

the mere filing of an application with the clerk of court within the statutory period is not sufficient to toll the statute of limitations. The proper procedure to stop the running of the statute would seem to be for the taxpayer to obtain a court order, as follows:

And it appearing to the court that a copy of the notice of the application has been duly served on the State Tax Commissioner, it is upon motion of the applicant ordered that the application be accepted for consideration by the court and this action be docketed for oral argument on \_\_\_\_\_, 19\_\_\_\_.<sup>49</sup>

Another problem with the statute of limitations is the date on which the statute begins to run. An application to court must be made within two years of the year in which the assessment was made.<sup>50</sup> Many assessments are made at the year's end, usually by computer. Where a taxpayer is not notified until the middle of January that he has been assessed, he will understandably believe he has been assessed in January. But his assessment notice may carry a December date, the date the assessment was entered on the computer. In today's world, the computer entry date would seem to be the assessment date.<sup>51</sup>

Section 58-1130 requires that the applicant be the taxpayer assessed with the tax<sup>52</sup> and that he be aggrieved by the assessment. Where the tax has been passed on to a third party a Kentucky court has held that "the appellee's vendees who actually paid the tax are without recourse, both against the commonwealth and their vendor."<sup>53</sup> This defense was asserted by the Tax Commissioner in *Commonwealth ex rel. Morrissett v. Shell Oil Co.*,<sup>54</sup> but the Virginia

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49. Although the State Tax Commissioner is not a party to the application, at least until he has answered or otherwise appeared, courtesy would require that the hearing date be made a date convenient to the Assistant Attorney General representing the Commissioner.

50. If an amended return was filed under VA. CODE ANN. § 58-1118.1 (Repl. Vol. 1974), the denial of relief thereunder constitutes an "assessment" as to matters first raised on the amended return.

51. Cf. INT. REV. CODE OF 1954, § 6203: "The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with the rules or regulations prescribed by the Secretary or his delegate."

52. The application should for this reason ordinarily be styled in the exact name appearing on the assessment notice.

53. *Shannon v. Hughes & Co.*, 270 Ky. 530, 109 S.W.2d 1174, 1176 (1937).

54. 210 Va. 163, 169 S.E.2d 434 (1969).

Supreme Court found it unnecessary to reach the point, and therefore left this issue open in Virginia. The General Assembly has indicated that the vendor/taxpayer in such an instance may bring suit on behalf of his vendee by providing that "no interest will be paid on sales taxes refunded to a dealer unless the dealer agrees to pass such interest on to the purchaser."<sup>55</sup> If an application for refund of sales taxes is filed on behalf of the actual taxpayer, the pleadings should allege that the proceeds from the suit will be paid to the party who bore the ultimate burden of the tax. It is unlikely that a Virginia court will ignore Virginia law in an effort to reach the conclusion of *First Agricultural National Bank v. State Tax Commissioner*,<sup>56</sup> that the purchaser is the taxpayer, but it may be possible for the purchaser to bring suit as the equitable taxpayer, a procedure which was permitted in *Commonwealth v. Smallwood Memorial Institute*.<sup>57</sup> Caution may require that simultaneous applications<sup>58</sup> be filed by the vendor and the vendee, in view of the Virginia Supreme Court's decision denying a bank the right to sue on behalf of its stockholders.<sup>59</sup>

In Virginia the taxpayer is given a choice of courts in which to file an application. Any taxpayer may file in the court in which the assessing officer qualified, or to which his bond and qualification were returned.<sup>60</sup>

An individual may also file in any court of record of the locality in which he resides, and a domestic corporation or partnership has

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55. VA. CODE ANN. § 58-1140.1 (Repl. Vol. 1974).

56. 293 U.S. 339 (1968).

57. 124 Va. 142, 97 S.E. 805 (1919).

58. Although the question has not been raised in a reported decision, the procedures under section 58-1130 are not designed for multiple applicants. A number of tax cases were joined in one pleading in *County Board v. Fogilo*, 215 Va. 110, 205 S.E.2d 390 (1974), but the county did not object. The better practice would be to file separate applications and request consolidation for the hearing. See, e.g., *Northern Virginia Doctors Hosp. Corp. v. Department of Taxation*, 213 Va. 504, 193 S.E.2d 684 (1973). If the problem is merely the misjoinder of causes of action, the apparent willingness of the courts to order consolidation would indicate that the misjoinder may not be fatal. If, however, the joinder of different applications is not in accord with pre-1950 practices and procedure, the actions may be dismissed.

59. *Main St. Bank v. City of Richmond*, 122 Va. 574, 95 S.E. 386 (1918). VA. CODE ANN. § 58-1140 now expressly permits the bank to bring suit.

60. A former acting Tax Commissioner qualified in the Supreme Court of Virginia. Article VI, § 1 of the Constitution of Virginia, however, precludes original jurisdiction of the Virginia Supreme Court. The present Commissioner qualified in the Circuit Court of the City of Richmond, Division I.

a similar option in the locality in which its principal office is located. The optional forum for a foreign corporation is a court of record in "the county or city in which is located the office in this State at which claims against the foreign corporation may be audited, settled and paid."<sup>61</sup> This office was the pre-1956 equivalent of what is now referred to as the registered office<sup>62</sup> and the quoted language should not be construed to require that corporate records be maintained at an office in this state. A court would probably frown on forum shopping by a taxpayer by changing its registered office, although nothing in the statutes would prohibit such a change.

Neither the State Tax Commissioner, who is usually required to be given notice of the application,<sup>63</sup> nor the Commonwealth's Attorney, who formerly was required to defend the application,<sup>64</sup> is originally a party to the judicial application. The application is instituted on an *ex parte* basis, and the initial pleadings should be so drafted.<sup>65</sup> The Attorney General, although not required to do so, will usually answer the application for the purpose of defining the issues in controversy. The required period in which notice must be served for this purpose was extended in 1973 from ten to twenty-one days.<sup>66</sup> The Commonwealth may, however, enter into binding settlements<sup>67</sup> and waive compliance with the technical formalities of the statutes in the same manner as if it were a party.<sup>68</sup> The application should request interest, which is now permitted<sup>69</sup> but should not request costs, for the taxing of costs against the Commonwealth is expressly forbidden.<sup>70</sup> It would appear that an appeal by the Commissioner should be by the Commonwealth at his relation.

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61. VA. CODE ANN. § 58-1130 (Cum. Supp. 1973).

62. See VA. CODE ANN. § 3847 (1942).

63. Notice is not required to be given to the Tax Commissioner unless the assessment was made by the Department of Taxation, but it is advisable to give notice in all instances to lessen the chance of a required rehearing.

64. Unless an attorney designated by the Tax Commissioner did so, see VA. CODE ANN. § 58-1135, repealed by Va. Acts of Assembly 1972, ch. 721, at 1013.

65. See 3 GREGORY, FORMS FOR VIRGINIA AND WEST VIRGINIA ANNOTATED (4th ed. 1952), Nos. 1142, 1145, and 1149, pp. 179, 182, 187.

66. Va. Acts of Assembly 1973, ch. 280, at 369.

67. Commonwealth v. Schmetz, 116 Va. 62, 81 S.E. 45 (1914).

68. Commonwealth v. Columbian Paper Co., 143 Va. 332, 130 S.E. 421 (1925).

69. VA. CODE ANN. § 58-1140.1 (Cum. Supp. 1974).

70. VA. CODE ANN. § 58-1139 (Repl. Vol. 1974).

The court may reduce an assessment and, furthermore, it is clothed with the powers and duties of the authority assessing the tax for the limited purpose of increasing the assessment.<sup>71</sup> The basic duty of the court is to determine to its satisfaction the proper amount of the assessment. In this respect it has broad discretion similar to equity. Presumably the use of a jury, even for the determination of facts, would be improper, for the responsibility of arriving at a proper assessment is clearly fixed on the court. One recent case goes so far as to imply that the court may be bound by the taxpayer's pleadings.<sup>72</sup>

If the taxpayer is successful in obtaining relief, his attorney should insure that a copy of the court order of exoneration is certified by the clerk to the Tax Commissioner, for only then does the statute of limitations begin to run against the Commissioner's statutory right to a rehearing.<sup>73</sup> The Commissioner is permitted to apply for a rehearing at any time within six months after certification of the order. This is true even if he has also noted an appeal.<sup>74</sup> The Virginia Supreme Court has described as "a manifest absurdity, as well as a grave injustice to the taxpayer"<sup>75</sup> the power in a state official to take an appeal and, having lost on appeal (perhaps on proof of facts), to apply for a rehearing and then appeal again. Only the realities of time prevent the Tax Commissioner from exercising this power.

The taxpayer has one year from the date of the order of exoneration to apply to the Comptroller for a refund if the tax has been paid.<sup>76</sup> Unless specific application is made, the taxpayer should not expect to receive his refund check merely because he has won in court. After the expiration of one year from the date of the order, the taxpayer will be forever barred from the recovery of his tax.

If the taxpayer is successful, the court's order of exoneration will restrain the Commissioner from further collection proceedings.<sup>77</sup> This is the first point in time when the Commissioner is so re-

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71. VA. CODE ANN. § 58-1134 (Repl. Vol. 1974).

72. *Fray v. County of Culpeper*, 212 Va. 148, 183 S.E.2d 175 (1971).

73. VA. CODE ANN. § 58-1137 (Repl. Vol. 1974).

74. *Putnam v. Ford*, 155 Va. 625, 155 S.E. 823 (1930).

75. *Commonwealth v. Huntington*, 148 Va. 97, 112, 138 S.E. 650, 655 (1927).

76. VA. CODE ANN. § 58-1136 (Repl. Vol. 1974).

77. *Id.*

strained. If the taxpayer is unsuccessful, he may appeal and request a supersedeas.<sup>78</sup>

In most cases, however, the Tax Department will already have collected the contested amount, since Section 58-1158<sup>79</sup> prohibits suits for the purpose of restraining both the assessment and the collection of taxes.<sup>80</sup> The taxpayer will not usually have the opportunity of raising the invalidity of the tax as a defense, for the Tax Department will most likely proceed in the nature of an administrative garnishment,<sup>81</sup> and the creditor will usually comply with the administrative order. The Tax Department also utilizes a procedure whereunder it may issue a warrant which has the effect of a judgment lien,<sup>82</sup> but which the Department will rarely execute, waiting instead for the taxpayer to attempt to sell the property. If the Department does bring suit, the invalidity of the tax may be asserted as a defense.<sup>83</sup> However, the invalidity of the tax may not be asserted in third party litigation.<sup>84</sup>

### *Injunctive Relief*

Under certain hardship conditions, the taxpayer may seek an injunction on the ground that he has no adequate remedy at law, but he has a difficult burden to meet when attempting to show the necessary hardship conditions.

In *County of Sussex v. Jarratt*,<sup>85</sup> the court held that without a levy there can be no assessment and, without an assessment, Section 58-1158 allows injunctive relief. The case could also, however, be cited for the proposition that, without a valid levy, the court has no authority to grant relief upon an application.

In *Commonwealth v. Safe Deposit and Trust Co.*,<sup>86</sup> the court re-

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78. VA. CODE ANN. § 58-1138 (Repl. Vol. 1974).

79. VA. CODE ANN. § 58-1158 (Repl. Vol. 1974).

80. If, however, the assessment is invalid on its face, it may be possible to enjoin the Tax Commissioner from collection of the tax. See *Commonwealth v. Wilson*, 141 Va. 116, 126 S.E. 220 (1925).

81. VA. CODE ANN. § 58-1010 (Repl. Vol. 1974).

82. VA. CODE ANN. § 58-41 (Repl. Vol. 1974).

83. *Hurt v. City of Bristol*, 104 Va. 213, 51 S.E. 223 (1905).

84. VA. CODE ANN. § 58-1010.1 (Repl. Vol. 1974).

85. 129 Va. 672, 106 S.E. 384 (1921).

86. 155 Va. 452, 155 S.E. 895 (1930).

lied on *Jarratt* in striking an assessment where it found no levy, even though the suit was instituted as an application to correct an erroneous assessment of taxes. In *Chesapeake & Potomac Telephone Co. v. Newport News*,<sup>87</sup> the court refused to apply *Jarratt* where the only "assessment" was made under an ordinance alleged to be unconstitutional. In *Richmond v. Turnpike Authority*,<sup>88</sup> the court construed its recent cases to hold "that relief under § 58-1145 of the Virginia Code [the local tax equivalent of Section 58-1130] is not confined to the correction of an assessment which is merely erroneous, but includes also levies and assessments claimed to be unconstitutional, illegal and void."<sup>89</sup> While not expressly overruling *Jarratt*, the *Turnpike Authority* case requires that *Jarratt* be limited to its specific facts, if it is to be applied at all.<sup>90</sup>

In the absence of unusual circumstances, a taxpayer would be well advised to pursue both the administrative and judicial remedies provided by the statutes. The Attorney General's Office will, upon request, give full cooperation to the taxpayer's lawyer in order to assure that the statutory requirements are met. Improperly drafted applications are an embarrassment to the Tax Department, which does not wish to have substantive issues decided on procedural grounds. The cases are consistent in holding that the remedial statutes are to be liberally construed in favor of the taxpayer.<sup>91</sup> If a lawyer is careful to watch his period of limitations, the statutes can be convenient, elastic and fair.

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87. 194 Va. 409, 73 S.E.2d 394 (1952).

88. 204 Va. 596, 132 S.E.2d 733 (1963).

89. *Id.* at 598, 132 S.E.2d at 735.

90. *Jarrett* may have a limited effect in one narrow area. In a local tax case, if the taxing ordinance is wholly invalid for any reason other than the unconstitutionality of a state statute, no "tax" is imposed, and the appellant must meet the \$300 jurisdictional amount to be heard in the Virginia Supreme Court. *City of Richmond v. Enbank*, 179 Va. 70, 18 S.E.2d 397 (1942).

91. *See, e.g., Todd v. Elizabeth City County*, 191 Va. 52, 60 S.E.2d 23 (1950).

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