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Statutory Assessments as a Compliance Tool

By Ray Warren, Taxing Authority Consulting Services, P.C.

Tax assessors are often faced with situations in which taxpayers fail or willfully refuse to file local tax returns. While this is frustrating, it is important to realize that Virginia law makes it possible to make a reasonable assessment whether or not the taxpayer chooses to cooperate.

It is the duty of every Commissioner of the Revenue (or other person exercising the power to assess local taxes) to assess taxes, whether or not a return is filed. This is generally referred to as a “statutory assessment” because the power to enter it arises from state statutes empowering (and, indeed requiring) local assessing officers to assess taxes with or without the cooperation of the taxpayer.

There is a specific mandate to do this in the personal property tax section of the Tax Code:

§ 58.1-3519. Commissioner to assess property if taxpayer fails to file return.

If any taxpayer, liable to file a return of any of the subjects of taxation mentioned in this chapter, neglects or refuses to file such return for any year within the time prescribed, the commissioner of the revenue shall, from the best information he can obtain, enter the fair market value of such property and assess the same as if it had been reported to him.

But there is also a more inclusive instruction to make assessments for all local taxes, even without returns, in the general duties of the Commissioner of the Revenue section of the code:

Code of Virginia §58.1-3103 Omitted local taxes or levies.

If the commissioner of the revenue of any county or

WHO IS TACS?

Taxing Authority Consulting Services, P.C. is a Virginia law firm formed to meet the needs of treasurers, commissioners of revenue and local tax officials.

Attorneys Jeffrey Scharf, Mark Ames, John Rife, Andrew Neville, Phillip Lecky, Paul LaBarr, Greg Haynes and Ray Warren are dedicated to serving the needs of local taxing authorities.

TACS’ focus is on tax collection, assessment and bankruptcy issues faced by governments. TACS can provide assistance to your locality to help increase your revenue. Please contact us at (804) 649-2445 or by e-mail to info@taxva.com to discuss your collection needs or for more information about the firm.



city or the tax-assessing officer of any town ascertains that any local tax has not been assessed for any tax year of the three preceding tax years or that the same has been assessed at less than the law required for any one or more of such years, or that the taxes for any cause have not been realized, the commissioner of the revenue or other assessing officer shall list and assess the same with taxes at the rate or rates prescribed for that year, adding thereto penalty and interest at the rate provided under §§ 58.1-3916 and 58.1-3918...

The above Code provision requires the assessor to correct any assessment that have “been assessed at less than the law required for any one or more of such years”. Thus, even when a taxpayer does file a return, a corrected assessment can also be a “statutory assessment” if made by the assessor based on information other than that supplied by the taxpayer.

“TACS”ing Thoughts

When a new source of taxation is found it never means, in practice, that an old source is abandoned. It merely means that the politicians have two ways of milking the taxpayer where they had only one before.

-H. L. Mencken



There is very little case law or administrative opinion on the ability of the Commissioner or other local assessor to enter a statutory assessment. The references that do exist emphasize that a statutory assessment is just like other assessments. For example, the Virginia Attorney General stated: *Finally, you inquire what procedure must the Commissioner establish for those wishing to appeal statutory assessments. It is not necessary for the Commissioner to establish any separate procedure. The procedures for correction of erroneous assessment of local levies are set forth in {the Code} (1976-77 Va. Op. Atty. Gen. 34).* The tax collector can then take steps to collect a statutory assessment just like any other tax that is assessed using the full range of collection tools available under the Code.

In the context of BPOL (license) taxation the Department of Taxation has

ruled that a statutory assessment is an assessment from which the taxpayer can appeal as allowed for other assessments:

The County asserts that the Taxpayer's appeal is invalid because the statutory assessments were not an "appealable event" under Va. Code § 58.1-3703.1 A 5 a. An appealable event includes "an assessment of a local license tax when no return has been filled by the taxpayer." In this instance, the Taxpayer did not file a BPOL tax return during the years in dispute. Clearly, the statutory assessments issued by the County were an appealable event. Therefore, the Taxpayer had the right to appeal the assessments to the County. PD 08-83, June 6, 2008.

Recognizing that an assessor can and must enter an assessment with or without taxpayer cooperation, the issue becomes how to fairly and effectively use that power. For the sake of the Treasurers who must collect any assessment, and for the sake of legally defending whatever is eventually entered, an assessor should make every effort to obtain cooperation and to assess based on the best information available. But in the end, it often makes more sense to use what information one has and enter something (not on the low end) and gather further needed information as part of the administrative appeal process.

If reasonable efforts are not producing the required information, entering a statutory assessment is sometimes the best way to get the information needed to reach a truly well documented assessment. Once an assessment based on some degree of rational estimation is entered, the assessor has significant leverage. And assertive and prompt collection action by the Treasurer can help bring the recalcitrant filer forward to provide the information necessary for the "true" assessment.

Even in cases that are appealable to the Tax Commissioner (BPOL, business tangible and machinery and tools), the first appeal of a statutory assessment must be to the local assessor. At this point the taxpayer must provide the information previously not provided, and failure to do so will probably doom its appeal to Richmond. (Going directly to court is also an option for the taxpayer, but, given the cost, a rarely used one. And, even more so there, the burden will be on the taxpayer to provide actual evidence, so the court can set the proper assessment.)



Keep in mind, that while the assessment process starts with no particular presumptions, once an assessment is entered, the local assessor enjoys a

presumption that the assessment is correct. So, entering a statutory assessment not only moves the process along, it shifts the burden the taxpayer must meet. Some things to consider:

- A. Because a statutory assessment is treated like any other assessment, statute of limitation rules apply. It is not wise to enter an unsupported or purely speculative assessment, but if the statute of limitations is near, it is perfectly acceptable to enter a reasonable one with the full knowledge that it can be refined and corrected if the taxpayer seeks correction. (The taxpayer is always allowed to ask for administrative correction of an assessment within one year of the entry of the assessment.)
- B. Before entering a statutory assessment, it is wise to solicit as much information as possible from the taxpayer. Even if the taxpayer refuses to cooperate, it is important to document the request and the refusal. In administrative appeals to the Tax Commissioner and the courts such documentation is important.
- C. If the taxpayer provides no information or incomplete or incorrect information, the assessor is well advised to utilize all defensible information. There are various ways to obtain such information. For example:
 - a. Utilize all the powers to summon and request documents directly from the taxpayer. In addition to direct information (like gross receipts or acquisition cost of property) consider asking for less obvious documents that will shed light on the proper assessment. (For example, asking a restaurant for copies of their ST-9 and/or income tax returns will shed light on meals tax liability since most receipts from such businesses are also subject to meals tax.)
 - b. If the taxpayer refuses to provide any information, the assessment can be based on similar sized businesses in the jurisdiction. For example, a business tangible assessment might be entered based on the higher end average of taxable property other businesses of the same square footage. Or, gross receipts might be estimated based on similar businesses (such as fast food restaurants). This works best for larger jurisdictions with several similar types of business. For smaller jurisdictions, it is often useful to ask assessors from other jurisdictions to provide tax data under the "line of duty" exception to confidentiality. Keep in mind that such information remains confidential, but it can be used as the basis for entering an assessment in one's own jurisdiction.
 - c. If the taxpayer has filed in the past but refuses to file current returns, continuity from previous returns is a good starting point. *Such assessments, however, should not be overly favorable to the taxpayer.* There are taxpayers who are happy to pay flat statutory assessments each year and avoid their

duty to file returns. So, while an exorbitant increase each year is not justified, the highest *defensible* amount is a good figure to utilize. The taxpayer can always supply the necessary information on appeal to the assessor to correct any over assessment.

A statutory assessment need not be perfect, but it should be defensible and based on more than mere guesswork. Remember, once the assessment is made, the Treasurer will start collection actions and can take steps to levy upon bank accounts or seize other assets to satisfy the amount of the assessment that has been statutorily entered. If the assessment would be more accurate with information available to the taxpayer, actually entering the assessment forces the taxpayer to bring forth that information.

Virginia's robust appeal procedures allow taxpayers ample opportunity to correct assessments. In light of that, it makes little sense to allow a taxpayer to hold the assessment process hostage by their willful refusal to provide information. Entering a statutory assessment turns the tables, starts the collection process and puts the burden on the taxpayer to provide the information that should have been provided upfront. ♦

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FREQUENTLY ASKED QUESTIONS, ANSWERED:

Q: We had a restaurant in town that is no longer in business, the LLC is now defunct. Somehow, they went for a long time without reporting or paying meals tax. In fact, I have learned that the restaurant never even collected the taxes. The owner is now living in another locality. We sent him a delinquent notice but he responded saying that he is not paying it because the LLC no longer exists. What can I get him for now? He's also out of my area which limits what I can do as well. Any suggestions?

A: I think your only feasible means of collection is through pursuing personal liability against the responsible officer/owner of the restaurant. The responsible officer can be assessed for failing to pay the meals taxes with the liability personally. You would need an actual assessment (working with the Commissioner of the Revenue) and could then collect against the responsible officers personal assets.

§ 58.1-3906. Liability of corporate officer or employee, or member or employee of partnership or limited liability company, for failure to pay certain local taxes.

A. Any corporate, partnership or limited liability company officer who willfully fails to pay, collect, or truthfully account for and pay over any local admission, transient

occupancy, food and beverage, and daily rental property tax administered by the commissioner of revenue or other authorized officer, 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 for 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 company officer" as used in this section means an officer or employee of a corporation, or a member, or employee of a partnership or member, manager or employee of a 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 (i) had actual knowledge of the failure or attempt as set forth herein and (ii) had authority to prevent such failure or attempt.

You may also want to consider criminal action through the Commonwealth's Attorney. Code of Virginia §58.1-3907 imposes criminal penalties on any such responsible officer for failing to file or pay meals taxes owed to the locality. So even though he did not collect it (and thus no embezzlement) it is a criminal misdemeanor for the failure to file as well.

§ 58.1-3907. Willful failure to collect and account for tax; penalty.

A. Any corporate or partnership officer as defined in § 58.1-3906, or any other person required to collect, account for and pay over any local admission, transient occupancy, food and beverage, daily rental property or cigarette taxes administered by the commissioner of the revenue or other authorized officer, 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. Any person who willfully utilizes a device or software to falsify the electronic records of cash registers or other point-of-sale systems or otherwise manipulates transaction records that affect any local tax liability shall, in addition to any other penalties provided by law, be guilty of a Class 1 misdemeanor.

C. In addition to the criminal penalty provided in subsection B and any other civil or criminal penalty provided in this title, any person violating subsection B shall pay a civil penalty of \$20,000, to be assessed by the commissioner of the revenue and collected by the treasurer as other local taxes are collected and deposited into the treasury of the political subdivision of the Commonwealth served by the treasurer.

D. Any criminal case brought pursuant to this section may be prosecuted by either the attorney for the Commonwealth or other attorney charged with the responsibility for prosecution of a violation of local ordinances.

Q: A service-member is stationed in Virginia pursuant to military orders and garages an automobile in my jurisdiction. She is a legal resident of another state. The vehicle title, however, is in her name and that of her father, who is a Florida resident. Does the Servicemembers Civil Relief Act (SMCRA) protect the vehicle from property taxation in Virginia?

A: Unfortunately for the servicemember, the vehicle is not protected from Virginia taxation. The SMCRA does not allow Virginia localities to tax vehicles of servicemembers who are not legal residents of Virginia and who are in Virginia pursuant to military orders. Prior to 2009 the law only applied to the interest of the servicemember himself/herself. This created a great deal of hardship on married couples because the interest of the non-military spouse was not protected. Furthermore, the Virginia Attorney General ruled that interest of the second owner is an "undivided" interest in the whole vehicle. In other words, having a non-servicemember co-owner subjected the entire value of the vehicle to Virginia property taxation.

In 2009 Congress responded by also exempting the the interest of spouses of nonresident military members who are stationed in Virginia. While this did cost localities some revenue, it greatly reduced the number of disputes between assessors and military families. Unfortunately, the 2009 amendment applies only to spousal interests. A son, daughter or parent is not covered, and the old rules still apply. If the co-owner is not also exempt, the entire value of the vehicle is subject to local property taxes in Virginia. Also, because Florida has no property tax on vehicles, the father's interest cannot be exempted because of tax paid there.

Q: We received an inquiry from a citizen to find out who the owner of a business is. We have that information in our Business License record. However, due to the confidentiality requirements regarding tax information, I am not sure if we can release it?

A: Code of Virginia §58.1-3 imposes a duty on tax officials to protect the confidentiality of certain tax data. That section provides that the treasurer or commissioner of revenue "to whom tax information is divulged...shall not divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation." This statute excludes from this prohibition (among other things) "matters required by law to be entered on any public assessment roll or book." This exception allows the disclosure of real property tax information and some personal property tax information.

Similarly, the FOIA advisory council is of the opinion that that names and other demographic information on a business license is NOT considered protected tax information. The link to their opinion is below:

http://foiacouncil.dls.virginia.gov/ops/01/AO_11.htm

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