

# TACS FACTS<sup>SM</sup>

*A Resource for Government Finance Professionals on Developments and Trends in Collection, Assessment, Bankruptcy and Other Areas*

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## THE DEADBEAT RESTAURANT... BRINGING CRIMINAL CHARGES

By Jeffrey Scharf, TACS Partner

Eating out has a long history. Taverns existed as early as 1700 B.C.E. There is a record of a public dining places in Ancient Egypt, Ancient Rome and in other ancient civilizations. But no matter how old restaurants and dining out are...the imposition of taxes is even older.

Since the beginning of modern history, the government has imposed taxes on multiple areas of commerce. So, it is no surprise that dining out and restaurant meals have been made a subject of taxation. Many Virginia localities have adopted a tax on restaurant meals. This “meals tax” is charged to the customer and is collected by the restaurateur to be remitted to the locality with a report of the amount collected.

Because the restaurant actually takes the place of the tax collector and receives the tax money, the funds collected are considered to be held in trust for the locality. This is also true for other taxes collected by the merchant for subsequent remittance such as taxes on hotel stays (transient occupancy), short-term rentals, and admissions

among others. Since the meals tax collections are held in trust, a special relationship is created between the restaurant and the taxing authority. This relationship creates additional means to pursue a recalcitrant restaurant that has failed to file meals tax returns or pay over the amounts collected from their customers.



More on this in a future issue of **TACS FACTS**.

In addition to these additional avenues of collection, the Code makes the failure to file or pay a trust tax a criminal act subject to punishment as a class 1 misdemeanor.

*§ 58.1-3907. Willful failure to collect and account for tax; penalty. (in part)*

*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.*

*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.*

Pursuant to Code of Virginia §18.2-11, a class 1 misdemeanor is punishable by imprisonment for a term up to 12 months and/or a fine of not more than \$2,500.00.

So, you ask, how do I go about pursuing these criminal charges? This article will share some information learned by various treasurers who have pursued such action. In doing so, you are going to need to work with your Commonwealth's Attorney (CA) so it is a good idea to have a sit down meeting to discuss your plans and to learn what the CA's needs and expectations are.

One thing that local treasurers and finance directors have learned in this process is the need to thoroughly document everything. This includes notices sent to the



taxpayer, bills, calls and other interactions. This course of communication is important in providing a record of notice of the liability. In addition, the communications should be tailored with information about the nature of the trust tax liability, explaining the consequences for failure to pay. The City of Roanoke created a flyer to enclose with all meals tax bills more

than 60 days delinquent to convey this message including the possibility of referral to the CA.

**NOTIFICATION OF REFERRAL TO COMMONWEALTH ATTORNEY'S OFFICE FOR DELINQUENT TRUST TAXES**

**\*\*\*\*\*IMMEDIATE ATTENTION REQUIRED\*\*\*\*\***

The City of Roanoke Treasurer's office is charged with the responsibility of the collection of delinquent accounts under the Code of Virginia and the Code of the City of Roanoke. Our office takes this duty seriously. Trust taxes (e.g. meals taxes, transient occupancy taxes, admissions taxes) are required by law to be collected by businesses and held in trust for timely remittance to the Roanoke City Treasurer. The wrongful and fraudulent use of such taxes collected constitutes felony embezzlement pursuant to Section 58.1-3833, Code of Virginia. Any person willfully violating, failing, refusing or neglecting to remit such trust is further chargeable with a Class 1 misdemeanor pursuant to Section 58.1-3907, Code of Virginia.

Your account has been identified as having delinquent trust taxes which remain unpaid. **Please be advised that the Treasurer's Office may refer this matter to the Commonwealth Attorney's Office for further investigation and potential prosecution, if not paid in full immediately.**

You certainly can, and should, try other collection efforts prior to bringing criminal charges. In fact, the CA may be interested in what other efforts have been attempted, such as notices, calls, bank liens, etc. This should also include communication with the responsible officers of the business if it is an LLC or corporation. If there is sufficient cause, the CA would present the matter to a Grand Jury who would decide whether to hand down an indictment. If the business and/or the owner are charged, it should be picked up and reported by the local media. You should be prepared to issue a press release with agreement of the CA with the details of the matter.

Here are some news stories regarding some Treasurer's undertakings with regard to meals taxes:

[Roanoke Treasurer taking tougher approach to delinquent meals tax](#)

[Suffolk Treasurer cracks down on meals tax](#)

[Five Louisa businesses face criminal charges](#)

Once the case is in the hands of the CA, it is a criminal matter and the simple payment of the amount due should not matter. The criminal prosecution is to punish their failure to act. Even once the debt is paid, they are still subject to the prosecution. Of course, the payment may mitigate the severity of the charge or the punishment on conviction. The CA reserves the ability to reduce the charges, whether from felony to misdemeanor, or the severity of the charge. Once a plea or conviction is entered, there is another opportunity to communicate these events to the population at large and hope it is seen by other delinquent restaurants. In addition to triggering some residual compliance, it will also make your future threats of collection action more effective.

### [Former Roanoke restaurant pays taxes and enters plea](#)

There are more news stories about the City of Roanoke's actions on their [website](#) too, which is a good way to let the public see what actions have been taken and remain a reminder of what can be done. Taking these types of actions and getting these stories covered in the media also help the Treasurer or Finance Director illustrate their strong stance against tax delinquency and demonstrate to the general public that they are on the ball and working to make everyone pay their fair share which will help to keep everyone else's taxes lower.

### **UPCOMING TAX CLASSES**

Bankruptcy, Stafford March 5-6  
Delinquent Collections, Roanoke March 18-19  
Bankruptcy, Augusta County, May 12-13  
Delinquent Collections, Williamsburg May 18-19

### **WHO IS TACS?**

Taxing Authority Consulting Services, P.C. is a Virginia law firm formed to meet the needs of treasurers, assessors and local tax officials. Attorneys Jeffrey Scharf, Mark Ames, John Rife, Andrew Neville, Ray Warren, Paul LaBarr and Greg Haynes 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](mailto:info@taxva.com) to discuss your needs or for more information about the firm.

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