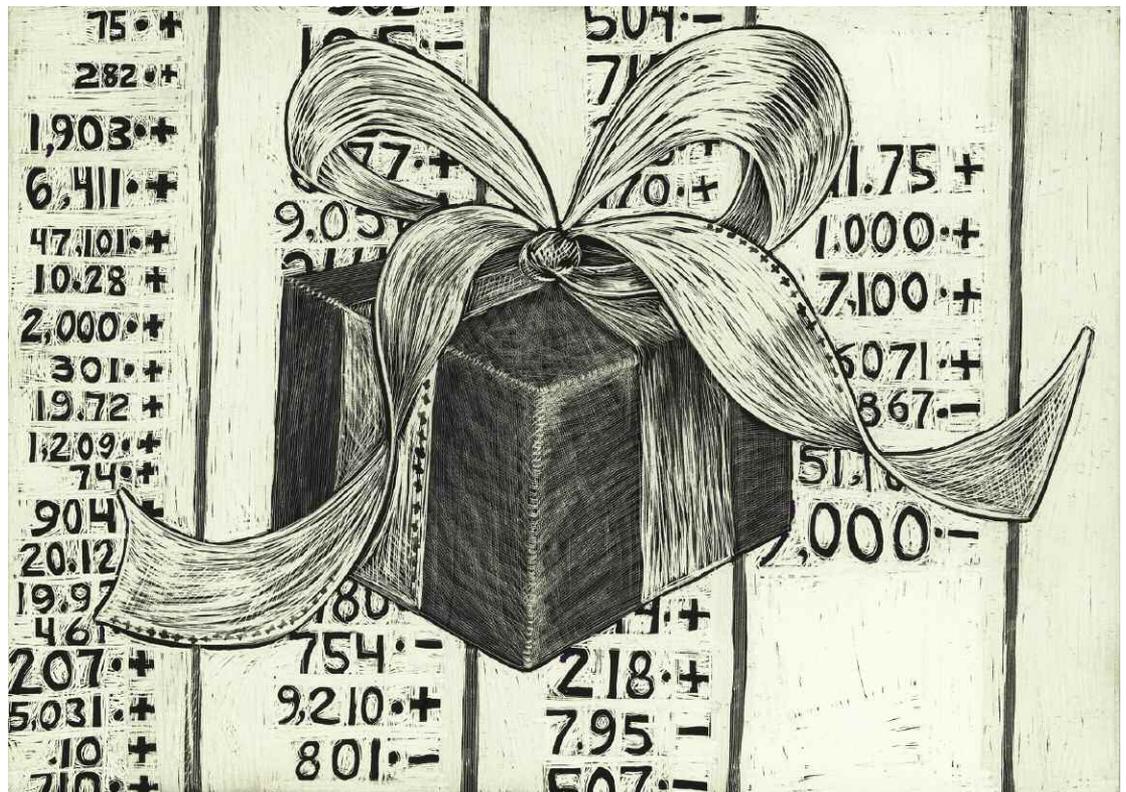


# Everything Old Is New Again: The Virginia Department of Taxation's Attempt to Ignore the Limits of Collection

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On October 17, 2014, the commissioner of the Virginia Department of Taxation issued a Public Document (P.D. 14-177) in which he answered a taxpayer's request for a ruling on the period of limitations for collecting taxes.<sup>1</sup> Turning to § 58.1-1802.1(A) of the Code of Virginia, the commissioner argued "that so long as the any [sic] collection action is initiated or made before the end of the period of limitations, collection may continue until the assessment is

satisfied."<sup>2</sup> According to the commissioner, a "collection effort" has occurred when the Department of Taxation (department) "levies an assessment" on a taxpayer and "encompasses all means of collecting taxes enumerated under Virginia statutes."<sup>3</sup> In practice, this interpretation of § 58.1-1802.1 permits the department to collect assessed taxes by wage garnishments, liens, and any other means no matter how old the underlying liability.

The commissioner's ruling in P.D. 14-177 raises the question as to what is actually limited by § 58.1-1802.1. If the commissioner's ruling is correct, the department has the same ability to pursue a taxpayer for a liability incurred in 1990 as it does for one incurred in 2014 as long as the department has properly made an assessment. According to the commissioner, a collection effort has already begun once the tax is assessed. Since a liability must be assessed in order to exist, and P.D. 14-177 states the department need only begin a collection effort in order to collect beyond the statutory period, every Virginia tax liability is fair game for collection in perpetuity. This seems contrary to the intent of a code section titled "Period of limitations on collection."<sup>4</sup> Moreover, this statute does not limit the time for the department to assess a liability as that period is set out by Va. Code Ann. § 58.1-1812. If § 58.1-1802.1 does not limit the period of time the department actually has to collect the tax or limit the time the department has to assess a tax, then it does not limit anything at all except for the accrual of interest and penalties under certain circumstances.<sup>5</sup>

The Virginia General Assembly enacted § 58.1-1802.1 in 1990. Prior to this statute, there was no law specifically limiting the collection of tax by the department. Originally § 58.1-1802.1 set forth a limitation on collections of twenty years from the date of a proper assessment<sup>6</sup> of a tax.<sup>7</sup> Since then, the code section has been amended twice, first, in 2010 when the limit was reduced to ten years,<sup>8</sup> and again in 2012 when the limit was reduced to seven years.<sup>9</sup> Under the commissioner's ruling, it is unclear what, if anything, would have been changed by this reduction in years.

In both 2010 and 2012, the department issued impact statements in which it argued the reduced time periods would have little effect on the revenue generated from tax collections because it is unusual for the department not to have instituted a collection effort well before the specified time period.<sup>10</sup> These impact statements naturally dovetail nicely with the commissioner's later ruling in P.D. 14-177. Since the commissioner ruled in P.D. 14-177 that the collection effort commences when the department "levies an assessment," a reduction of the limitations period from twenty years to seven years would, in fact, have no effect on the department's ability to collect assessed liabilities.

It seems unlikely the General Assembly would have created and twice amended a law that is largely meaningless. Evidence that the

commissioner has misunderstood the intent of the General Assembly is present in the legislative history. In 2012, the governor formally recommended to the General Assembly an amendment to § 58.1-1802.1, which suggested that the statute, as written, did not, in fact, provide for unlimited collection. The proposed amendment, which the General Assembly tellingly declined to adopt, would have inserted at the end of the statute the following language: "Nothing in this section shall prohibit the continuance of a collection activity begun within the period prescribed in subsection A<sup>11</sup> from continuing beyond that period."<sup>12</sup> Such an amendment would have explicitly allowed for the commissioner's position that the department may continue collection actions past the seven year limit,<sup>13</sup> but again, the General Assembly did not amend § 58.1-1802.1 to include it.

According to the Supreme Court of Virginia, in order to collect a tax, the commissioner must be able to point to a statute that positively and explicitly grants the department such authority.<sup>14</sup> A ruling by the commissioner involving the interpretation of a statute authorizing collection or assessment is presumed to be correct, but only on its face.<sup>15</sup> It may be challenged on the basis that it is "contrary to law, was an abuse of discretion, or was the product of arbitrary, capricious, or unreasonable behavior."<sup>16</sup> Though courts will give weight to the interpretations of the commissioner when statutes are ambiguous, they will never defer to the commissioner.<sup>17</sup> Furthermore, when a statute is unambiguous, a court will grant the interpretation of the commissioner no more consideration than that of a taxpayer.<sup>18</sup>

When it comes to his interpretation of § 58.1-1802.1 in P.D. 14-177, the commissioner has given the department substantial power well beyond the authority explicitly granted by the statute. In P.D. 14-177, the commissioner relies on and interprets a single sentence out of the entire statute:

Where the assessment of any tax imposed by this subtitle has been made within the period of limitation properly applicable thereto, such tax may be collected by levy, by a proceeding in court, or by any other means available to the Tax Commissioner under the laws of the Commonwealth, but only if such collection effort is made or instituted within seven years from the date of the assessment of such tax.<sup>19</sup>

The commissioner considers this sentence in a vacuum, without the surrounding language, and then gives the taxpayer his "clear" interpretation.

The commissioner suggests that if a collection effort is merely “initiated” within seven years of a proper assessment, “any collection” at any time is good until the debt is repaid.<sup>20</sup> However, the sentence does not say that a collection is good so long as “any collection action is initiated or made before the end of the period”<sup>21</sup> but rather that a collection is good only if “such collection effort is made or instituted”<sup>22</sup> within the period. Even if the statute were limited to this single sentence,<sup>23</sup> it does not say what the commissioner needs it to say. Instead, this sentence, on its own, explicitly limits the collection of taxes to those specific collection actions made or instituted before the expiration of the period of limitations and, as such, is unambiguously at odds with the commissioner’s ruling.<sup>24</sup> The commissioner’s ruling becomes even more unreasonable once the sentence is read in conjunction with the rest of the statute, as it would require much of 58.1-1802.1 to be meaningless.

Take for instance the following language from § 58.1-1802.1(A) which immediately follows the sentence relied on by the commissioner in P.D. 14-177:<sup>25</sup> “[p]rior to the expiration of any period for collection, the period may be extended by a written agreement between the tax commissioner and the taxpayer.”<sup>26</sup> Why would it be necessary to extend a period for collections, especially by written agreement, if all the department has to do to make a collection period last forever is to “lev[y] an assessment”<sup>27</sup> on the taxpayer? Or to ask it another way, why would the General Assembly provide the department with such a meager method of extending a collection period when it has already (according to the commissioner) granted it the tremendous ability to collect a tax in perpetuity?

In the very next sentence of § 58.1-1802.1(A), the General Assembly lists its exceptions to the general “period of limitations provided in this subsection during which a tax may be collected.”<sup>28</sup> This language, which directly contradicts the commissioner’s ruling, explicitly marks the statute as a general limitation on the time period for collections (with certain listed exceptions). The commissioner, however, rules that the statute does not limit the time period for collections but rather merely limits the time period for the initiation of collections. This reading is likely incorrect because the language of the statute here identifies § 58.1-1802.1 as a straightforward limitation on collections. Moreover, a

limitation on the initiation of collections is meaningless when, as the commissioner contends, a collection is initiated by the assessment itself.

To arrive at his understanding of the statute, the commissioner seems to put great weight on the fact that a “tax may be collected . . . if such collection effort is . . . instituted within seven years from the date of assessment.”<sup>29</sup> If these specific words could be considered on their own, without the surrounding language of the statute, they might well suggest that § 58.1-1802.1 is an attempt to limit the time period for the initiation of tax collections rather than the time period for the collections themselves. However, given the surrounding language, such an interpretation is flawed.

Considering the statute as a whole, it seems likely that the General Assembly intended to create something like the general federal Collection Statute Expiration Date (CSED), which applies to IRS collections. Using similar language to § 58.1-1802.1, the CSED provides that “[w]here the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun . . . within 10 years after the assessment of the tax.”<sup>30</sup> As in the Virginia statute, the federal CSED mentions that a tax may be collected if a collection proceeding is made or begins before the expiration of the collection period;<sup>31</sup> however, unlike § 58.1-1802.1, the CSED statute has always been interpreted to be a general limitation on the time period for collecting a tax (limiting it to ten years).<sup>32</sup> The IRS interpretation makes sense as such language is easily read to mean that a collection is good to the extent that it is initiated during the statutory period described. Interpreting § 58.1-1802.1 in a similar fashion, the Virginia statute allows that even if a collection cannot be completed during the statutory period, it may still be instituted and partially made during that period. While this reading requires a small degree of interpretation, it does not upend the statute.

Until the commissioner’s ruling is challenged and overturned by the courts, it will likely remain the stated policy of the department. Such a challenge may be particularly slow in coming given the high cost of litigation when compared with the relatively low-cost administrative avenues for the resolution of outstanding tax assessments.

Endnotes:

- 1 Virginia Dep't of Taxation, Pub. Doc. 14-177 (October 17, 2014), *available at* <http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-177>.
- 2 *Id.*
- 3 *Id.*
- 4 VA. CODE ANN. § 58.1-1802.1 (2015).
- 5 VA. CODE ANN. § 58.1-1802.1(C) says that the accrual of penalties and interest cease when the Department has not made contact with the taxpayer for over six years.
- 6 *See* VA. CODE ANN. § 58.1-1812 (2015) (proper assessment of a tax).
- 7 Act of Apr. 9, 1990, ch. 659, 1990 Va. Acts (codified at § 58.1-1802.1(A) (Cum. Supp. 1990)).
- 8 Act of Mar. 4, 2010, ch. 30, 2010 Va. Acts (codified as amended at Va. Code Ann. § 58.1-1802.1(A) (Cum. Supp. 2010)).
- 9 Act of May 18, 2012, ch. 840, 2012 Va. Acts (codified as amended at Va. Code Ann. § 58.1-1802.1(A) (Cum. Supp. 2012)).
- 10 *See* Va. Dep't of Taxation, Fiscal Impact Statement for HB 35 (Feb. 27, 2012) *available at* <http://lis.virginia.gov/cgi-bin/legp604.exe?121+oth+HB35FER161+PDF>; Va. Dep't of Taxation, Fiscal Impact Statement for HB 17 (Feb. 22, 2010) *available at* <https://lis.virginia.gov/cgi-bin/legp604.exe?101+oth+HB17FER161+PDF>.
- 11 Again, in 2012, 58.1-1802.1(A) was amended to limit the period for collections from ten years to seven years.
- 12 Governor's Recommendation for HB 35, *available at* <http://lis.virginia.gov/cgi-bin/legp604.exe?121+amd+HB35AG>.
- 13 Such an amendment would have explicitly authorized the Department to continue collection attempts on liabilities after the limitations period in circumstances where a collection action had already been commenced. However, the issue still remains as to whether the mere assessment of a liability constitutes the commencement of a collection effort.
- 14 City of Richmond v. Suntrust Bank, 283 Va. 439, 442, 722 S.E.2d 268, 270 (2012) (quoting Woodward v. Staunton, 161 Va. 671, 673, 171 S.E. 590, 591 (1933)).
- 15 *See* Chesapeake Hosp. Auth. v. Commonwealth, 262 Va. 551, 560, 554 S.E.2d 55, 59-60 (2001).
- 16 *Id.*
- 17 Nielsen Co. (US), LLC v. County Bd. of Arlington County, 289 Va. 79, 88, 767 S.E.2d 1, 4 (2015).
- 18 *Id.*
- 19 Pub. Doc. 14-177, *supra* note 1 (quoting VA. CODE ANN. § 58.1-1802.1(A)) (emphasis added).
- 20 *Id.*
- 21 *Id.* (emphasis added).
- 22 VA. CODE ANN. § 58.1-1802.1 (2015).
- 23 And obviously it is not. The statute should be read and interpreted as a whole.
- 24 Additionally, there is no explicit support for the Commissioner's proposition that the assessment itself would constitute such a collection action.
- 25 Indeed the very next sentence.
- 26 VA. CODE ANN. § 58.1-1802.1(A) (2015) (emphasis added).
- 27 Pub. Doc. 14-177, *supra* note 1.
- 28 *Id.* (emphasis added).
- 29 *Id.* (emphasis added).
- 30 *See* I.R.C. § 6502.
- 31 *Compare id.* ("made or the proceeding begun") with VA. CODE ANN. § 58.1-1802.1(A) (2015) ("made or instituted").
- 32 *See* IRM 8.21.5.1.2, Internal Revenue Manual (Apr. 20, 2012).



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