

TAXATION: GENERAL PROVISIONS OF TITLE 58.1 — TAXES ADMINISTERED BY THE DEPARTMENT OF TAXATION.

RULES OF SUPREME COURT OF VIRGINIA: PRETRIAL PROCEDURES, DEPOSITIONS & PRODUCTION AT TRIAL.

Subpoena duces tecum does not constitute proper judicial order authorizing disclosure of confidential tax information to litigants. Such information should be produced under seal to court whose judge then determines whether disclosure of information contained in requested tax returns is justifiable.

The Honorable N. Everette Carmichael

Commissioner of the Revenue for Chesterfield County

October 22, 1998

You ask whether a subpoena duces tecum constitutes a "proper judicial order" under § 58.1-3 of the *Code of Virginia*.

Section 58.1-3 establishes the general principle that constitutional officers and other local tax and revenue officials are prohibited from disclosing confidential information about the transactions, property, income or business of any taxpayer.¹ This rule originally was enacted by the 1926 Session of the General Assembly,² and its application continues, "[e]xcept in accordance with proper judicial order or as otherwise provided by law."³ The General Assembly has not defined the term "proper judicial order" in the context of § 58.1-3.

As a general rule, it would appear that a subpoena duces tecum, whether signed by a judge or clerk of court, is a type of judicial order.⁴ It does not necessarily follow, however, that a subpoena duces tecum constitutes a "proper judicial order" as that term is used in § 58.1-3.

The primary goal of statutory construction is to discern and give effect to the intent of the legislature.⁵ The purpose underlying a statute's enactment is particularly significant in its construction.⁶ Moreover, an accepted rule of statutory construction requires that statutes dealing with the same subject are to be construed together to arrive at the object sought to be accomplished.⁷ Finally, statutes relating to the same subject are not to be considered in isolation but must be construed together to produce harmonious results that will give effect to all provisions.⁸

To interpret the phrase "proper judicial order" as it is used in § 58.1-3 to authorize the production of confidential tax information to requesting litigants in response to subpoenas duces tecum, which routinely are issued and signed by clerks of court without consideration of the confidential nature of the information sought or of its relevance to pending litigation,⁹ would appear to be in conflict with the overall intent of the statute—to ensure the privacy of Virginia's taxpayers. Furthermore, such a construction is inconsistent with the plain meaning of § 58.1-109, which governs the disclosure of confidential tax information by the Department of Taxation. Section 58.1-109 directs the Tax Commissioner and all employees of the Department of Taxation *not* to produce copies of confidential tax returns to litigants in response to subpoenas duces tecum, but, instead, to produce such information *under seal* and *to the court*. A judge of the court that has issued the subpoena then must determine whether the information contained within the requested

returns "is of such importance that the ends of justice require that the secrecy and confidentiality of such returns be violated."¹⁰

In my opinion, the procedural protections afforded by § 58.1-109 reflect that the General Assembly did not intend for confidential tax information to be provided directly to litigants in response to routinely issued subpoenas duces tecum.¹¹ Because of the intent of the General Assembly to protect the privacy of Virginia's taxpayers, it is also my opinion that a subpoena duces tecum issued under such circumstances does not constitute a "proper judicial order" authorizing the disclosure of such confidential information pursuant to § 58.1-3.

¹1997 Op. Va. Att'y Gen. 167, 168.

²See 1926 Va. Acts ch. 147, § 6, at 252, 255.

³Section 58.1-3 (emphasis added). This statute and § 58.1-3.1 also specify certain *limited* instances in which taxpayer information may be shared.

⁴A 1979 opinion equates a subpoena to a judicial order. See 1978-1979 Op. Va. Att'y Gen. 232, 234 (concluding that federal law precludes release of educational records containing identifiable information about student without "lawfully issued subpoena or *other* judicial order" (emphasis added)); see also *Bellis v. Commonwealth*, 241 Va. at 257, 402 S.E.2d at 211 (noting that persons served with subpoenas may be held in contempt if they do not respond in timely manner, even if court ultimately concludes that subpoena is invalid in some way).

⁵See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); Op. Va. Att'y Gen.: 1997 at 46, 46; *id.* at 29, 30.

⁶See *VEPCO v. Prince William Co.*, 226 Va. 382, 388, 309 S.E.2d 308, 311 (1983).

⁷See *Prillaman v. Commonwealth*, 199 Va. 401, 406, 100 S.E.2d 4, 7-8 (1957).

⁸See *id.* at 405, 100 S.E.2d at 7.

⁹See Va. Sup. Ct. R. 4:9(c-1) (reflecting that party to litigation is *automatically* entitled to issuance of subpoena, *without* prior order of court, unless records are being sought from certain government officials).

¹⁰Section 58.1-109.

¹¹I do not mean to suggest, however, that a local official who is governed by § 58.1-3 may ignore a subpoena duces tecum seeking confidential tax information. The willful refusal to respond to a subpoena duces tecum served on a person who is not a party to an action is cause for punishment for contempt of court. See Va. Sup. Ct. R. 4:9(d); see also *Bellis v. Commonwealth*, 241 Va. 257, 402 S.E.2d 211 (1991) (finding of contempt for physician's willful disobedience of subpoena left with his secretary; physician admitted knowledge of subpoena). Under the circumstances, if a local official or governmental entity is served with a subpoena duces tecum for records or documents containing confidential tax information, a proper response would appear to be to file a motion to quash. If the court concludes that the requested records are relevant and essential to the litigation for which they are sought, the court may deny the motion to quash and order their production. At that time, the local official or entity would appear to be responding to a

"proper judicial order," in accordance with § 58.1-3. This procedure also would appear to be consistent with the preproduction review noted above that is required by § 58.1-109.