

TAXATION: REVIEW OF LOCAL TAXES - CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS — LOCAL OFFICERS - COMMISSIONERS OF THE REVENUE — REAL PROPERTY TAX — TANGIBLE PERSONAL PROPERTY, ETC.

Commissioner of revenue may correct erroneous assessment of fair market value of real property resulting either from clerical error or calculation or from error made by commissioner. If commissioner is satisfied that assessment is erroneous, he has mandatory duty to file application with court for relief of affected taxpayer(s) within statutory time frame provided for taxpayer(s) to petition court for relief.

The Honorable Calvin C. Massie

Commissioner of the Revenue for Campbell County

October 2, 1998

You inquire regarding the use of the procedures contained in §§ 58.1-3981¹ and 58.1-3984(B)² of the *Code of Virginia* by a commissioner of the revenue for correcting an erroneous or improper real estate tax assessment.

Your questions relate primarily to instances in which a commissioner of the revenue discovers that an assessment of the fair market value of real estate was based on a factual error. You provide the following examples of factual errors: (1) the assessor used the wrong number of square feet in developing the assessment; (2) land believed to perk will, in fact, not perk according to certification by the Department of Health; (3) a mobile home hookup believed to exist on a lot does not exist; (4) the actual number of apartment units per building is less than what the assessor used in developing the assessment; (5) the assessor believes that a basement is completely finished when it actually is completely unfinished; and (6) an abandoned building believed to have running water and sewage actually has no running water or sewage. You ask whether the commissioner may correct the assessment in such instances and, if so, whether correction would be appropriate under § 58.1-3981 or under § 58.1-3984.

The term "assessment" is used in the tax statutes to mean both the determination of the fair market value of property by the appraiser and the levying of taxes by the commissioner of the revenue on the basis of that valuation.³ The commissioner of the revenue determines the fair market value of personal property.⁴ Subject to certain statutory exceptions, the assessment of the fair market value of real estate ordinarily is performed by the local board of assessors or a local real estate appraiser⁵ rather than by the commissioner of the revenue.⁶

Section 58.1-3980 authorizes persons assessed by a commissioner of the revenue with local taxes on tangible personal property, machinery and tools, and merchants' capital, or a local license tax, to apply to the commissioner for correction of the tax. Section 58.1-3981 authorizes the commissioner to correct an erroneous assessment made by the commissioner of the revenue and to exonerate unpaid amounts. Other than erroneous assessments resulting from "a mere clerical error or calculation,"⁷ §§ 58.1-3980 and 58.1-3981 do not authorize a commissioner to correct an erroneous assessment of real estate taxes unless "the error sought to be corrected in any case was made by the commissioner of the revenue."⁸ Accordingly, in most instances a commissioner of the revenue may not correct an erroneous assessment of the fair market value of real property through the procedure provided in §§ 58.1-3980 and 58.1-3981.⁹

Section 58.1-3984 applies generally to applications to the court for the correction of erroneous local tax assessments, with subsection A authorizing taxpayers to apply for correction and subsection B authorizing commissioners of the revenue to apply for correction. The Supreme Court of Virginia has held that the remedy provided landowners in § 58.1-3984 encompasses an assessment in whichever of its two meanings the word is used, whether as an assessment of the value of the real estate or as an assessment of annual taxes based on the valuation.¹⁰ In addition, § 58.1-3989 expressly provides:

Sections 58.1-3984 through 58.1-3988, insofar as they apply to real estate, shall be construed to include assessments made at a general reassessment, and the remedy therein provided shall be available to any person assessed at such general reassessment although no taxes may have been extended on the basis of such assessment at the time the application is filed.

Prior opinions of the Attorney General recognize that, just as § 58.1-3984(A) enables a taxpayer to challenge the appraisal of the fair market value of real estate, § 58.1-3984(B) enables a commissioner who discovers that an appraisal of the fair market value of real estate is improper or based on obvious error to apply to the court for relief on behalf of the taxpayer.¹¹ The examples you provide appear to involve mistakes of fact that, if relied on by the official or officials responsible for real estate appraisals, could result in an erroneous assessment of the fair market value of the property.¹² Thus, § 58.1-3984(B) would authorize a commissioner of the revenue to institute proceedings for a court to correct any such assessment.¹³

You ask also whether a commissioner is obligated to petition a court for correction or whether pursuit of the matter is left to his discretion once he becomes aware of the error or improper assessment. Section 58.1-3984(B) provides that, once a commissioner becomes aware that an assessment is erroneous or based on obvious error and that it should be corrected to serve "the ends of justice," the commissioner "shall" apply to the court for relief of the taxpayer. The word "shall" is primarily mandatory in its effect.¹⁴ It is my opinion that, unless the commissioner is uncertain as to whether an assessment is erroneous or unless other facts indicate that the "ends of justice" would not be served by filing the application, § 58.1-3984(B) imposes a mandatory duty on a commissioner to file an application for relief of the affected taxpayer or taxpayers.¹⁵

Your next question is regarding the time frame in which an application for correction of an assessment must be filed under § 58.1-3984(B). Section 58.1-3984(A) provides that an application by a taxpayer must be made within the later of (i) three years from the last day of the tax year for which the assessment is made, (ii) one year from the date of the assessment, (iii) one year from the date of a final decision in the appeal of a local license tax assessment under § 58.1-3703.1(A)(5), or (iv) one year from a final decision under § 58.1-3981. Section 58.1-3984(B) provides that an application by a commissioner is to be made "in the manner herein provided for relief of the taxpayer." Accordingly, an application by a commissioner under § 58.1-3984(B) must be brought within the time frame provided for an application by a taxpayer under subsection A.

Your final question seeks clarification of the term "clerical error" as used in § 58.1-3981. Section 58.1-3981 permits a commissioner of the revenue to correct an assessment that is erroneous "because of a mere clerical error or calculation" without a petition from the taxpayer. Such authority extends to clerical errors or calculations made in work performed by others in connection with conducting general assessments. While the exclusion for "clerical error" must be applied on a case-by-case basis, it is my opinion that the term contemplates errors in the recordkeeping or other clerical functions of the assessment process as opposed to errors relating to the actual assessment of the value of the property or the assessment of the tax on the property.¹⁶ It is my further opinion that the examples you provide of mistakes of fact that could result in erroneous assessments of the fair market value of the property are not encompassed

within the exclusion for "mere clerical error," and § 58.1-3981 does not authorize a commissioner to summarily reduce such assessments.

¹Section 58.1-3981 provides:

"If the commissioner of the revenue, or other official performing the duties imposed on commissioners of the revenue under [Title 58.1], is satisfied that he has erroneously assessed such applicant with any such tax, he shall correct such assessment. If the assessment exceeds the proper amount, he shall exonerate the applicant from the payment of so much as is erroneously charged if not paid into the treasury of the county or city. If the assessment has been paid, the governing body of the county or city shall, upon the certificate of the commissioner with consent of the town, city or county attorney, or if none, the attorney for the Commonwealth, that such assessment was erroneous, direct the treasurer of the county, city or town to refund the excess to the taxpayer, with interest if authorized pursuant to § 58.1-3991. However, the governing body of the county, city or town may authorize the treasurer to approve and issue any refund up to \$2,500 as a result of an erroneous assessment.

"If the assessment is less than the proper amount, the commissioner shall assess such applicant with the proper amount. If any assessment is erroneous because of a mere clerical error or calculation, the same may be corrected as herein provided and with or without petition from the taxpayer. If such error or calculation was made in work performed by others in connection with conducting general assessments, such mistake may be corrected by the commissioner of the revenue. An error in the valuation of property subject to the rollback tax imposed under § 58.1-3237 for those years to which such tax is applicable may be corrected within three years of the assessment of the rollback tax.

"A copy of any correction made under this section shall be certified by the commissioner or such other official to the treasurer of his county, city or town. When an unpaid erroneous assessment of real estate is corrected under this section and such real estate has been sold at a delinquent land sale, the commissioner or such other official making such correction shall certify a copy of such correction to the clerk of the circuit court of his county or city; and such clerk shall note such correction in the delinquent land book opposite the entry of the tract or lot for the year or years for which such correction is made.

"In any action on application for correction under § 58.1-3980, if so requested by the applicant, the commissioner or other such official shall state in writing the facts and law supporting the action on such application and mail a copy of such writing to the applicant at his last known address."

²Section 58.1-3984(B) provides: "In the event it comes or is brought to the attention of the commissioner of revenue of the locality that the assessment of any tax is improper or is based on obvious error and should be corrected in order that the ends of justice may be served, and he is not able to correct it under § 58.1-3981, the commissioner of the revenue shall apply to the appropriate court, in the manner herein provided for relief of the taxpayer. Such application may include a petition for relief for any of several taxpayers."

³See *Hoffman v. Augusta County*, 206 Va. 799, 801-02, 146 S.E.2d 249, 250-51 (1966); 1977-1978 Op. Va. Att'y Gen. 71, 71.

⁴See §§ 58.1-3109(6), 58.1-3503(B).

⁵Section 58.1-3271.

⁶See §§ 58.1-3270, 58.1-3281, 58.1-3285, 58.1-3292, 58.1-3293; *see also* 1984-1985 Op. Va. Att'y Gen. 305, 305 (other than in instances provided in tax statutes for commissioner to reassess property on basis of changed circumstances, commissioner has no authority to reassess value of real property). For a discussion of the instances in which a commissioner has the statutory authority to change the valuation of land between general reassessments, see 1978-1979 Op. Va. Att'y Gen. 262, 263. A commissioner of the revenue may perform the assessment of the value of real estate upon authorization of the governing body and the commissioner's consent to making the assessment. See § 58.1-3270. It is my understanding that you do not perform the real estate assessment function in your county.

⁷Section 58.1-3981.

⁸Section 58.1-3980(A).

⁹If a commissioner discovers that the assessment of the value of the property was erroneous because it was based on an error in the amount of acreage, rather than the value of the acreage, the commissioner may correct the error pursuant to § 58.1-3981. See Op. Va. Att'y Gen.: 1996 at 204, 205; 1975-1976 at 393, 394; 1974-1975 at 506, 507-08 (last two opinions construing former § 58-1142, recodified as § 58.1-3981).

¹⁰See *Hoffman v. Augusta County*, 206 Va. at 802, 146 S.E.2d at 251 (construing former § 58-1145, recodified without substantive change as § 58.1-3984 in 1984 recodification of Title 58 as Title 58.1 (see 1984 Va. Acts ch. 675, 1178, 1460-61)).

¹¹See 1973-1974 Op. Va. Att'y Gen. 300, 300; *id.* at 392, 392; *id.* at 397, 398. These opinions also recognize that a commissioner may not correct an assessment under § 58.1-3981 unless the error was made by the commissioner.

¹²See Op. Va. Att'y Gen.: 1978-1979, *supra* note 6, at 262 (when land is assessed as suitable for building but later is found not to percolate, remedy is petition to court); 1973-1974, *supra* note 11, at 392 (when, subsequent to appraisal of property as residential, owner discovers that he is unable to obtain septic tank permit, commissioner of revenue may petition court on taxpayer's behalf if he feels that obvious error has been made).

¹³In response to your inquiry as to whether, if the commissioner himself discovers the error, he may petition the court for permission to correct the error himself, § 58.1-3984(B) does not contemplate such a procedure. If a commissioner is unable to correct an erroneous assessment under § 58.1-3981 and thus files an application with the court under § 58.1-3984(B), the power to correct the assessment is placed in the court. Section 58.1-3984(B) also does not require that, in order for the commissioner to file an application, the taxpayer must have previously applied to the commissioner, board of assessors or board of equalization for correction of the assessment. See §§ 58.1-3350, 58.1-3983.

¹⁴See Op. Va. Att'y Gen.: 1996 at 197, 198; 1986-1987 at 300, 300 (use of word "shall" in statute generally indicates that procedures are intended to be mandatory).

¹⁵See Op. Va. Att'y Gen.: 1984-1985 at 316, 318 (commissioner has no duty to bring judicial action under § 58.1-3984(B) when statute of limitations set out in § 58.1-3984(A) has expired); 1973-1974, *supra* note 11, at 300 (if commissioner is uncertain as to whether assessment is erroneous, commissioner should refrain from taking action and allow taxpayer to pursue his remedy independently).

¹⁶An example of a clerical error would be incorrectly recording the assessed value of the property. See 1967-1968 Op. Va. Att'y Gen. 279 (recording assessed value at \$4,170 rather than correct value of \$417 constitutes clerical error). On the other hand, the determination of the ownership of property involves the exercise of discretion, and incorrectly listing property twice under two different names or other errors in ownership do not constitute mere clerical error. See Op. Va. Att'y Gen.: 1974-1975, *supra* note 9, at 507; 1973-1974, *supra* note 11, at 398 (incorrectly listing property to both grantee and grantor does not constitute mere clerical error).