



# COMMONWEALTH of VIRGINIA

*Department of Taxation*

May 1, 2009

**TO:** Janie E. Bowen  
Tax Commissioner

**FROM:** Mark Haskins  
Policy Development

**SUBJECT:** Statute of Limitations on Withholding Tax

## **Issue**

A significant number of withholding tax returns were filed, but have been held without processing for several years. A question has arisen as to the application of the three-year limitations period to these returns. There are several situations.

### VA-6 Annual Reconciliation Return – Refund Owed

Once the taxpayer has filed the annual reconciliation return showing that a refund is owed that is all the taxpayer has to do (unless we ask for more information). There is no time limit on our issuance of the refund. Therefore, we should issue the refund regardless of when we process the return unless there are questions we would normally ask.

In P.D. No. 82-20 (3/15/82) we ruled that the taxpayer had three years and three months to file a court application when we fail to issue a refund. Under *Va. Code* § 58.1-1823 our failure to issue a refund within three months is treated as an assessment for purposes of pursuing administrative and judicial remedies. This, however, is a limitation on the taxpayer's right to sue us. It does not limit our right or obligation to issue a refund based upon a timely filed return when we have the necessary information. In the 1982 ruling the taxpayer had waited almost ten years to inquire about the missing refund, by which time some of the necessary records could not be located.

### VA-6 Annual Reconciliation Return – Tax Owed

Under *Va. Code* § 58.1-312 we can assess income and withholding taxes at any time if no return is filed. But when a return is filed *Va. Code* § 58.1-1812 requires us to make assessments within three years of the filing of the return regardless of whether the return is timely or late. Therefore, unpaid amounts shown on VA-6 returns for 2005, due 2/28/06, cannot be the basis for an assessment after 2/28/09, more than three years after they were filed.



**MEMORANDUM**

Janie E. Bowen

May 1, 2009

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**VA-5 Monthly or Quarterly Return – Tax Owed**

If filed, any tax owed with respect to these returns must be assessed within three years of the date filed. Withholding tax, however, is unique in that liability is shown on two returns: the monthly or quarterly VA-5 and the annual VA-6.

In some situations a taxpayer may have filed the annual VA-6 showing an amount due because of a failure to file one or more monthly or quarterly returns. In this situation an argument can be made that we have the right to assess the tax owed on the unfiled VA-5 return(s) at any time even though the same liability may also be shown on a timely filed annual VA-6. We would obviously have to use the VA-6 information to assess the tax, penalty and interest, but our notice of assessment would have to make it clear that we are assessing for a monthly or quarterly period for which no return was filed.

No previous rulings have been found on our authority to assess tax in this situation.

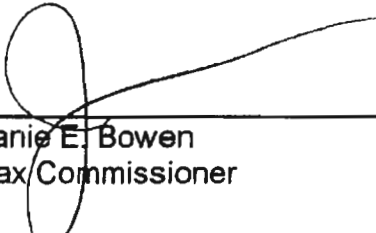
**VA-16 Quarterly Reconciliation Return – Tax Owed**

Large employers are required to pay the withholding tax as often as twice a week, and to file quarterly reconciliation returns on Form VA-16 in addition to the annual reconciliation return on VA-6. Payments and payment vouchers are not returns, but the VA-16 is a return. The same situation discussed above with respect to the VA-5 return could apply to VA-16 returns that were not filed.

**Recommendation**

Treat the VA-6 as the return for the entire year, superseding the monthly or quarterly VA-5 or VA-16. Thus, withholding assessments must be made within three years of the VA 6 filing, regardless of whether or not a VA 5 or VA 16 was filed. Refunds shown on the VA-6 should be made regardless of how long we take to process the return as long as it was filed with in three years of the due date.

**Approved:**

  
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Janie E. Bowen  
Tax Commissioner