

MOTOR VEHICLES: LICENSURE OF DRIVERS - HABITUAL OFFENDERS.

TAXATION: MISCELLANEOUS TAXES - TAXES ON SUITS AND OTHER JUDICIAL PROCEEDINGS.

Action to restore driving privileges of habitual offender is adversarial in nature, having stemmed from previous adversarial action resulting in adjudication of individual as habitual offender, for which circuit court clerk shall impose writ tax.

The Honorable Yvonne G. Smith

Clerk, Circuit Court of the County of Henrico

July 8, 1996

You ask whether a circuit court clerk may collect the writ tax imposed by § 58.11727 of the *Code of Virginia* for a petition for restoration of driving privileges under §§ 46.2358 through 46.2361.¹

Prior opinions of the Attorney General conclude that the writ tax imposed by § 58.11727 applies only to adversarial actions.² A 1990 opinion, however, concludes that petitions for the restoration of driving privileges brought under §§ 46.2358 through 46.2361 are nonadversarial in nature because "[t]hese statutes do not provide for the participation of any other party in interest but, rather, allow the court to restore or refuse to restore the privilege and to place conditions on the restoration of the privilege."³

I recognize, however, that it is a long-standing and widespread practice for the circuit courts of the Commonwealth not only to allow but also to require a Commonwealth's attorney to appear at and actively participate in hearings on petitions for the restoration of driving privileges. In appropriate cases, a Commonwealth's attorney may oppose restoration of driving privileges, or seek from the circuit court such conditions upon restoration of driving privileges as are necessary to protect the public. Therefore, the essential components of an adversarial action-notice and an opportunity for opposing interests to be heard-clearly are present in such proceedings.⁴ The long-standing and widespread practice of the circuit courts of the Commonwealth is supported by sound public policy, and strongly suggests that petitions for the restoration of driving privileges brought under §§ 46.2358 through 46.2361 are adversarial in nature.

Petitions for restoration of driving privileges under §§ 46.2358 through 46.2361 also are distinguishable from the other proceedings noted in the 1990 opinion as being nonadversarial, in that the petition for restoration of driving privileges is subsequent to adversarial actions resulting in the adjudication of an individual as a habitual offender.⁵

Consequently, I am of the opinion that the writ tax imposed by § 58.11727 is required to be paid upon the filing of a petition for restoration of driving privileges pursuant to §§ 46.2358 through 46.2361, because the proceeding is adversarial in nature and stems from a prior adversarial action.⁶

¹Section 58.11727 provides: "A tax of five dollars is hereby imposed upon (i) the commencement of every action, in law or chancery, in a court of record, whether commenced by petition or notice, ejection or attachment, other than a summons to answer a suggestion[.]"

Sections 46.2358 through 46.2361 detail the procedure for a habitual offender to petition a court for restoration of his or her driving privilege. There is no specific requirement in these statutes that the Commonwealth be provided notice or an opportunity to appear during these proceedings.

²See Op. Va. Att'y Gen.: 1990 at 235; 1984-1985 at 408 (applying predecessor § 58.13809); 1972-1973 at 74, 75 (applying predecessor § 5872); *id.* at 454, 455 (applying predecessor § 5871); 1970-1971 at 396 (citing 1969-1970 Op. Va. Att'y Gen. 296, applying predecessor § 5871).

³1990 Op. Va. Att'y Gen., *supra*, at 237. You ask me to review the 1990 opinion of the Attorney General concluding that a petition for the restoration of driving privileges is nonadversarial and, therefore, not subject to the imposition of a writ tax. See *id.* The prior opinion states that a writ tax may be imposed only upon commencement of adversarial actions, and makes several determinations as to whether particular actions are adversarial and, therefore, subject to a writ tax. See *id.* at 23638. You relate that a circuit court clerk is required to notice the Commonwealth's attorney of any filing of a petition for restoration of driving privileges and the date of the hearing, and that because a habitual offender may be represented by counsel at the hearing at which the Commonwealth also is represented, this procedure conforms with the definition of "adversarial" in the 1990 opinion. See *id.* at 236.

⁴See *E.P. Heacock v. Commonwealth*, 228 Va. 235, 24142, 321 S.E.2d 645, 649 (1984).

⁵See Tit. 18.2, Ch. 7, Art. 2, §§ 18.2266 to 18.2273; Tit. 46.2, Ch. 3, Art. 9, §§ 46.2351 to 46.2-363.

⁶To the extent that Part IV(E) of the 1990 opinion is inconsistent with this conclusion, that portion of the 1990 opinion is overruled. See 1990 Op. Va. Att'y Gen., *supra* note 2, at 237.