

FRAIM & FIORELLA

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

PAUL D. FRAIM
TODD M. FIORELLA
EDWARD A. FIORELLA, JR.*
*Also admitted in N.C.

September 16, 2005

JEFFREY A. HUNN
KARA L. STEELE
MEGAN P. SHEARER**
**Also admitted in N.Y.

Alfred James Fillion
Commissioner of the Revenue
Office of Commissioner of the Revenue for
The City of Portsmouth
801 Crawford Street
Portsmouth, VA 23704-3870

Re: *Harbor Center Joint Ventures, LLC*
Formal Appeal of Alleged Tax Liability

Dear Mr. Fillion:

I represent Harbor Center Joint Ventures, LLC, (hereinafter "HCJV"). I am in receipt of your letter dated August 8, 2005 recomputing the tax liability for the years 2002, 2003 and 2004. Your letter requests payment of \$1,216.89 for business license tax and \$112,246.70 for the admissions tax. You have offset this with an overpayment of \$1,959.59 for business personal property tax. Your letter also requests payment of \$623.01 for penalties from a 2005 business license. The total amount you allege that HCJV owes is \$112,869.71, including penalties and interest. You subsequently sent me an e-mail on September 15, 2005 in which you agreed to waive the penalties and interest, reducing the alleged tax liability to \$74,765.28

You and I spoke on September 16, 2005 concerning this matter. I advised you that HCJV disagrees with your computation. You and I agreed that HCJV will pay the sum of \$74,765.28 under protest. HCJV will deliver a check in that amount to the City treasurer on Monday, September 19, 2005. You have agreed that the funds will be held in escrow pending a final determination on the tax liability.

Pursuant to Va. Code Annotated Section 58.1-3983.1 and any other appropriate law or ordinance, HCJV hereby appeals your findings of liability and requests that the matter be submitted for further determination. Pursuant to Va. Code Annotated Section 58.1-3983.1(c), HCJV requests that all collection activity be suspended pending a final determination on the issue.

HCJV initiates this appeal on several grounds. First, HCJV and the City of Portsmouth entered an Amended Contract and Release, hereinafter "Contract," related to operations at the Harbor Center on April 1, 2005. Paragraph 21 of the "Contract," releases any and all claims by either party which arose prior to April 1, 2005, "whether real, personal, tangible or intangible,

Mr. Fillion
September 16, 2005
Page 2 of 3

choate or inchoate, known or unknown.” The “Contract” further requires the submission of any dispute between HCJV and the City of Portsmouth to binding arbitration unless the dispute can be resolved to the mutual satisfaction of both parties. Any alleged tax liability incurred prior to April 1, 2005 clearly falls within the parameters of the “Contract.” HCJV is therefore not liable to the City for the taxes referenced in your August 8, 2005 correspondence.

HCJV also believes that you have mistakenly calculated the admissions tax paid by HCJV for 2002. HCJV paid \$244,998.87 in taxes. I am enclosing copies of cancelled checks in this amount. Your office credited HCJV with \$216,112.69. HCJV should receive a credit for the difference.

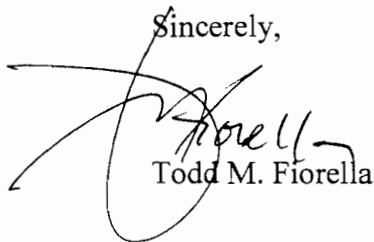
HCJV disagrees with your inclusion of the corporate box seats and season passes in the calculations for your tax assessment. Box seats and season passes are part of the Harbor Center Sponsorship Program. They do not have any ticket value. They should not be taxed by the City of Portsmouth.

Finally, you assessed personal property taxes against HCJV for personal property which has belonged to the City since 2001. This property is specifically addressed in the “Contract.” HCJV and the City of Portsmouth reached the settlement outlined in the “Contract” following several months of negotiations. Paragraph 21 of the release and settlement, previously referenced herein, clearly releases HCJV from any further liability to the City for these items.

As discussed, HCJV would like to bring this matter to a prompt conclusion. You and I discussed meeting some time next week to discuss the matter. It would be helpful if you could send copies of the data used for your calculations to HCJV prior to our meeting.

I appreciate your cooperation.

Sincerely,



Todd M. Fiorella

TMF/acm
Enclosures
cc: A. William Reid
cc: G. Timothy Oksman
cc: Kenneth W. Young
cc: William H. Luther
cc: James L. Williams

Mr. Fillion
September 16, 2005
Page 3 of 3

cc: James B. Oliver, Jr.

Request By:

Honorable C. Richard Cranwell
Member, House of Delegates

Opinion

Opinion by: Mary Sue Terry, Attorney General

You ask two questions concerning the authority of a county board of supervisors (the "board") to settle litigation related to the assessment of county taxes on an alleged tax-exempt institution.

I. Facts

In February 1984, a property owner (the "plaintiff") brought suit under § 58-1145 of the Code of Virginia (now § 58.1-3984) challenging the assessment of local taxes by the commissioner of the revenue (the "commissioner"). During the course of the litigation, hearings were held and at least one interlocutory ruling was made. On February 9, 1987, a final decree was entered. The final decree refers to a memorandum of agreement entered into by the board and the plaintiff with the approval of the commissioner. The final decree, prepared by the attorneys for the parties and submitted to the court for entry, contains the following operative provisions:

- (1) A declaration that the plaintiff is a tax-exempt organization;
- (2) A declaration that certain portions of the plaintiff's property are exempt from taxation and other portions are to be subject to real property taxes;
- (3) A statement that the board, as the real party in interest in the litigation, is authorized to agree to forgive accrued taxes¹ as consideration for the compromise; that the agreement of the board to forgive such taxes is reasonable; and that unpaid taxes assessed on the plaintiff's property are exonerated pursuant to the memorandum of agreement;
- (4) An order that the commissioner and the county treasurer shall note the exoneration of the assessed taxes in the appropriate records; and
- (5) An order that penalties or interest which may have accrued against the parcels remaining subject to taxation are also exonerated.

The final decree was entered by the judge and endorsed by the attorneys for the plaintiff and the board. The commissioner noted his objection to the entry of the final decree.

II. County Has No Independent Authority to Compromise Claim for Taxes; Court Has Authority to Grant Relief from Assessed Taxes

You first ask whether the board has the authority, in the settlement of pending litigation concerning taxation of an alleged tax-exempt institution, to abate or exonerate taxes already assessed against that institution.

A. Local Government Has General Authority to Compromise Claims

It is a well-established principle that a local government has the authority "to settle and adjust unascertained or disputed claims made against it, or made by it against others, as a necessary incident to its right to contract and to sue and be sued." *McKennie v. Charlottesville R. Co.*, 110 Va.

70, 78, 65 S.E. 503, 506 (1909). See also 17 McQuillin, *Municipal Corporations* § 48.17 (1982); 56 Am. Jur. 2d *Municipal Corporations, Etc.*, § 806 (1971); 64 C.J.S. *Municipal Corporations* §§ 2181, 2197 (1950).

B. Local Government Has No Independent Authority to Compromise Claim for Assessed Taxes Absent Statute Authorizing Such Compromise

The authority to settle and compromise claims, however, does not extend to the authority to compromise claims or suits relating to legally assessed taxes absent specific statutory authority. See 17 McQuillin, *supra*; 56 Am. Jur. 2d, *supra*, at § 825; 64 C.J.S., *supra*, at § 2073.

I am unaware of any statute expressly authorizing local governments to compromise claims for taxes. Compare § 58.1-105 (statute authorizing State Tax Commissioner to settle and compromise doubtful or disputed claims for taxes). In accord with the authorities cited above, therefore, it is my opinion that the board has no *independent* authority to compromise claims for legally assessed taxes.

C. Court Authorized by § 58.1-3984 to Grant Relief from Local Assessments

In this instance, the board and the plaintiff have entered into the memorandum of agreement, the court has found the provisions of that agreement to be reasonable, and the final decree orders the exoneration of the previously assessed taxes. The compromise of the board's claim for the assessed taxes, therefore, has been judicially reviewed and the exoneration of assessed taxes specifically provided for by the court's final decree. Section 58.1-3984 specifically authorizes a court to grant relief from local assessments challenged under the statute.² Accordingly, it is my opinion that although the board has no independent authority to abate or exonerate previously assessed taxes to resolve a tax suit seeking correction of an erroneous assessment, a court, pursuant to its authority under § 58.1-3984, may provide for the abatement or exoneration of previously assessed taxes by judicial decree.

III. Commissioner Not Bound by Terms of Memorandum of Agreement; Bound by Provisions of Court's Final Decree

You next ask whether the board has the authority to settle pending litigation as codefendant with the commissioner without the commissioner's concurrence.

In this instance, there are two relevant documents: the memorandum of agreement and the final decree entered by the court. The commissioner, as an independent constitutional officer, would not be bound by the terms of a memorandum of agreement to which he is not a party if the agreement attempts to limit the commissioner's discretion in his area of responsibility. Compare, e.g., Reports of the Attorney General: 1985-1986 at 276; 1984-1985 at 320; 1983-1984 at 349 (eligibility of property owned by educational institutions for tax exemption under Art. X, § 6(a)(4) of the Constitution of Virginia (1971) is a determination of fact which is the responsibility of the office of the commissioner of the revenue). The commissioner would, however, be bound by the provisions of the final decree, entered pursuant to the court's authority under § 58.1-3984, notwithstanding his objection to the entry of that decree.

It is my opinion, therefore, that the board, as the real party in interest in a proceeding under § 58.1-3984,³ may enter into an agreement to settle litigation. Any provision of such an agreement which attempts to control the commissioner in the exercise of his duties, however, would be unenforceable against the commissioner. Nonetheless, the commissioner would be bound, in my opinion, by those provisions in the court's final decree which are applicable to him. Compare, e.g., *University of Richmond v. Goochland*, 218 Va. 801, 802, 241 S.E.2d 751, 752 (1978) (trial court should incorporate in final order directive to county's assessing officer to strike from the land book of taxable real estate property held by court to be tax exempt).

IV. Summary

To summarize, it is my opinion that (1) the board has no independent authority to compromise claims for assessed taxes; (2) a court may provide for the abatement or exoneration of previously assessed taxes in a judicial decree; (3) the commissioner would not be bound by the terms of an agreement to which he was not a party; and (4) the commissioner would be bound by the provisions of a final decree in a suit for erroneous assessment brought under § 58.1-3984.

Footnotes

Footnotes

1 As discussed *infra*, I do not construe the phrase "is authorized to agree to forgive accrued taxes" to suggest that the board may agree to abate disputed taxes unless such agreement is understood to be subject to ratification by the court.

2 I note that the final decree does not include an express finding that the taxes in question were erroneously assessed. The final decree, however, specifically declares that (1) the plaintiff is a tax-exempt organization, and (2) specified portions of the plaintiff's property are to be exempt from taxation.

3 In *Leesburg v. Loudoun Nat. B'k*, 141 Va. 244, 126 S.E. 196 (1925), the Supreme Court of Virginia held that the true parties to proceedings to correct erroneous assessments are either the county or municipality for the use of which the specific levy is made. *See also School Board v. Shockley*, 160 Va. 405, 168 S.E. 419 (1933) (school board has the independent power to appeal decision of lower court concerning relief from certain levies for local taxes when levy made by board of supervisors to support the operations of the public schools).



Attorney General of Virginia

Judy Jagdmann


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TAXATION: LOCAL TAXES - LOCAL OFFICERS - COMMISSIONERS OF THE REVENUE - REVIEW OF LOCAL TAXES - COLLECTION BY TREASURERS, ETC. - CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS.

Board of supervisors may reduce annual tax rate on personal property at any time during calendar year until July 1, 1996, effective date of amendment providing for change in tangible personal property tax rate to be made before date commissioner of revenue delivers personal property and land books to treasurer; lacks authority to make taxpayer refunds resulting from personal property tax reduction, absent specific statutory authority.

The Honorable John H. Tate Jr.

Member, House of Delegates

April 29, 1996

You ask whether the Smythe County Board of Supervisors may reduce the tax rate on personal property after the date established for payment of such taxes, and if so, what would be the proper method for payment of refunds.

You relate that Smythe County observes a calendar year for all purposes, and that during 1995, the county levy on personal property was \$2 per \$100 value. County taxes are due and payable on December 5 of each year. In late December 1995, the Smythe County Board of Supervisors reduced the 1995 rate to \$1.50 per \$100. At that time, approximately 70% of taxpayers in the county had paid their 1995 personal property taxes.

Section 58.1-3001 of the *Code of Virginia* provides that "[t]he governing body of each county shall, at its regular meeting in the month of January in each year, or as soon thereafter as practicable not later than a regular or called meeting in June, fix the amount of the county and district taxes for the current year." A prior opinion of the Attorney General concludes that the purpose of this provision is to require the county to set a tax rate early in the tax year.¹

There are several statutory provisions that must be considered in responding to your inquiry. A rule of statutory construction requires that statutes dealing with the same subject be read together to give effect to the legislative intent. Such statutes should not be considered in isolation, but must be construed to produce a harmonious result, giving effect to all provisions if possible.²

Section 58.1-3118 requires each commissioner of the revenue to prepare personal property books and to deliver copies as provided by statute by September 1 of each year, or within ninety days from the date the personal property tax rate has been determined, whichever date is later.³ The commissioner is subject to penalties if he or she fails to deliver the books on time.⁴ Section 58.1-3119 provides that "[a]fter the commissioner of the revenue has delivered a copy of his personal property book to the county or city treasurer, no alteration *shall* be made therein which affects the taxes or levies of that year." (Emphasis added.) Section 58.1-3913 provides that "[e]ach treasurer *shall* commence to receive local levies as soon as he receives copies of the commissioner's books and continue to receive the same without penalty up to and including December 5 of each year, or such other date set by the governing body" in compliance with the provisions of § 58.1-3916.⁵ (Emphasis added.) This is mandatory language.⁶

Section 58.1-3012, however, begins with the phrase "[n]otwithstanding any other provision of law,

special or general, to the contrary," and provides that the governing body of any locality "which levies taxes on ... tangible personal property ... on a calendar-year basis is authorized and empowered to change the rate of its tax ... during any calendar year." The General Assembly has not provided any guidance for the dates of any such changes.⁷

Section 58.1-3119 provides that personal property books may not be altered after delivery by the commissioner, and § 58.1-3118 requires that such books be delivered not later than September 1 of each year, or within ninety days from the date the personal property tax rate has been determined, whichever date occurs last. Section 58.1-3012, however, was enacted subsequent to §§ 58.1-3913, 58.1-3118 and 58.1-3119.⁸ The General Assembly is presumed to know what statutes previously have been enacted.⁹ When a statute begins "notwithstanding any provision of law, special or general, to the contrary," it is presumed that the intention was to override any potential conflicts with earlier legislation. Even if the later enacted statute is read to be conflicting with the earlier statutes, it is axiomatic that, when there is a conflict, the earlier statutes must yield to the subsequently passed statute.¹⁰

Accordingly, it is my opinion that the Smythe County Board of Supervisors may, consistent with the intent of the General Assembly, reduce the annual tax rate on personal property at any time "during any calendar year,"¹¹ and, specifically, after the date established for payment of such taxes, until July 1, 1996, when the amendment to § 58.1-3012 becomes effective.

You next inquire as to the proper method for making taxpayer refunds that may result from any reduction of the annual tax rate on personal property. A 1987 opinion of the Attorney General concludes that a "board has no *independent* authority to compromise claims for legally assessed taxes."¹² Another 1987 opinion concludes that, "[a]ssuming that no court has declared the tax at issue unconstitutional, ... I am of the opinion that a city council lacks the authority to refund personal property tax payments in the absence of a certification of an erroneous tax assessment by the commissioner [of the revenue]."¹³ I am not aware of any statutory enactment subsequent to the 1987 opinions that would authorize a board of supervisors to refund the personal property taxes in question, in the absence of a certification of an erroneous tax assessment by the local commissioner of the revenue.

Accordingly, the only statutes permitting the refund of such taxes are §§ 58.1-3981 and 58.1-3990. Section 58.1-3981 requires the commissioner of the revenue to correct assessments when he is satisfied that he has erroneously assessed the applicant-taxpayer. Upon certification by the commissioner and concurrence by the attorney for the jurisdiction that an assessment exceeds the proper amount, the local governing body shall direct its treasurer to refund taxes already paid.¹⁴ Section 58.1-3990 similarly authorizes localities to provide by ordinance for the refund of taxes erroneously paid. Under such an ordinance, the tax-collecting officer is authorized to refund local taxes upon certification by the commissioner of the revenue that he has erroneously assessed such taxes.¹⁵ Section 58.1-3990 also permits a local governing body to grant refunds of any local tax that is declared unconstitutional by a court of competent jurisdiction.

¹1973-1974 Op. Va. Att'y Gen. 376, 377.

²*Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); Op. Va. Att'y Gen.: 1993 at 135, 137; 1992 at 97, 99; *id.* at 108, 112.

³The first paragraph of § 58.1-3118 provides, in part: "Each commissioner of the revenue shall retain in his office the original personal property book. Each commissioner of the revenue shall deliver one certified copy of the personal property book to the treasurer of his county or city and to the Department of Taxation.... For failure to deliver the copies in the manner herein provided by the first day of September of each year, or within ninety days from the date the rate of tax on personal property has been determined, whichever date shall occur last, the commissioner of the revenue shall be fined not less than \$50 nor more than \$200 and he shall not be paid any compensation which he may be due,

payable out of the state treasury, for making out such books."

⁴See § 58.1-3118*id.*

⁵Section 58.1-3916 permits localities by ordinance to provide the dates for filing annual tangible personal property tax returns and setting penalties, interest, etc.

⁶See 1986-1987 Op. Va. Att'y Gen. 300, 300, and opinions cited therein (use of word "shall" in statute generally indicates its procedures are intended to be mandatory).

⁷During the 1996 Session, however, the General Assembly amended § 58.1-3012 to authorize any local governing body to change the tangible personal property tax rate, "provided such change is made prior to the date on which the personal property and land books are delivered to the treasurer of the applicable county, city or town." Ch. 354, 1996 Va. Acts Reg. Sess. ____.

⁸Section 58.1-3012 (formerly § 58-851.8) was enacted by the 1974 Session of the General Assembly. See Ch. 293, 1974 Va. Acts 443.

⁹See Op. Va. Att'y Gen.: 1987-1988 at 1, 2; 1985-1986 at 65, 67.

¹⁰See Op. Va. Att'y Gen.: 1987-1988, *supra*; 1985-1986 at 246, 246.

¹¹Section 58.1-3012.

¹²1986-1987 Op. Va. Att'y Gen. 317, 318.

¹³1986-1987 Op. Va. Att'y Gen. 315, 316; *see id.* at 317, 318 (authority of county board of supervisors to settle and compromise claims does not extend to authority to compromise claims or suits relating to legally assessed taxes, absent specific statutory authority).

¹⁴Section 58.1-3981.

¹⁵Section 58.1-3990.

[Return to List](#)



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- [Official Opinions](#)
- [News Releases](#)
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- [Class Action](#)
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- [Gangs](#)
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00-038

TAXATION: LOCAL TAXES — REVIEW OF LOCAL TAXES – CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS.

COUNTIES, CITIES AND TOWNS: BUDGETS, AUDITS AND REPORTS.

Authority of board of supervisors to expend funds appropriated in county budget only for activities supported by statute does not include authority to refund surplus real property taxes that have not been certified by commissioner of revenue as having been erroneously assessed.

The Honorable Paul Clinton Harris Sr.
Member, House of Delegates
July 12, 2000

You ask whether the Albemarle County board of supervisors has authority to refund to the citizens of the county surplus revenues from its fiscal year 1999-2000 budget, which were generated by an increase in real estate taxes collected from the county's taxpayers for calendar year 2000.

You report that on April 12, 2000, the county board of supervisors voted to increase the local real estate tax rate for calendar year 2000 from 72 to 76 cents per \$100 of assessed value. You advise that the board assumed incorrectly that the tax increase would become effective during the 2000-2001 fiscal year beginning on July 1, 2000. You advise further that, since the county operates on a biannual billing cycle (spring and fall), the tax increase became effective immediately upon adoption by the board. Consequently, you advise that the increase in the county's real estate tax rate has resulted in an unanticipated revenue surplus of \$1.2 million to the 1999-2000 budget for Albemarle County.

Section 58.1-3001 provides that "[t]he governing body of each county shall, at its regular meeting in the month of January in each year, or as soon thereafter as practicable not later than a regular or called meeting in June, fix the amount of the county and district taxes for the current year." A 1973 opinion of the Attorney General concludes that the purpose of this provision is to require a county to set a tax rate early in the tax year.¹

In the counties of the Commonwealth, boards of supervisors exercise fiscal control through two distinct processes, budgeting and appropriations. Budgeting is a planning process, required by the General Assembly, to anticipate revenue needs and to make decisions about the priority of programs and level of services to be provided.² Budgets adopted by local governing bodies are, therefore, for planning and informative purposes³ and are statutorily distinguished from appropriations.⁴ The appropriations process is the mechanism by which funds are made available for spending on those programs and operations the governing body has decided to support. The local governing body may disburse money only pursuant to an appropriation for a contemplated expenditure.⁵ Thus, adoption of a budget that contemplates certain expenditures does not automatically result in the expenditure of money for that purpose.

The General Assembly limits the board's discretionary control over county spending. The board may not spend county funds for activities that are not directly authorized or reasonably implied by law. Virginia follows the Dillon Rule of strict construction concerning the powers of local governing bodies, limiting such powers to those conferred expressly by law or by necessary implication from such conferred powers.⁶ As a consequence, each expenditure planned in the budget must be supported by statutory authority.

A 1987 opinion of the Attorney General concludes that a "board [of supervisors] has no independent authority to compromise claims for legally assessed taxes."⁷ Another 1987 opinion concludes that a city council lacks authority to refund a personal property tax payment that the commissioner of the revenue has not certified as an erroneous tax assessment.⁸ I am aware of no statutory enactment following these opinions that would authorize a board of supervisors to refund the real property taxes in question, in the absence of the local commissioner of the revenue's certification of an erroneous tax assessment.

Absent further legislative action by the General Assembly, §§ 58.1-3981 and 58.1-3990 are the only statutes that permit the refund of such taxes. The provisions of § 58.1-3981(A)-(B) require the commissioner of the revenue, or other official performing the duties of a commissioner, to correct assessments when he is satisfied that he has erroneously assessed the applicant-taxpayer or that such assessment is the result of a factual error made by others conducting general assessments. Section 58.1-3990 authorizes localities to provide by ordinance for the refund of taxes erroneously paid. Under such an ordinance, the tax collecting officer has authority to refund local taxes that are certified by the commissioner as having been erroneously assessed by him.⁹ Section 58.1-3990 also permits a local governing body to refund any local tax that a court of competent jurisdiction declares unconstitutional.

¹1973-1974 Op. Va. Att'y Gen. 376, 377 (citing § 58-839, predecessor statute to § 58.1-3001).

²See §§ 15.2-2500 to 15.2-2508.

³See §§ 15.2-2503, 15.2-2506.

⁴See § 15.2-2506; Op. Va. Att'y Gen.: 1986-1987 at 141, 144; 1982-1983 at 16, 16; 1980-1981 at 9, 10; 1976-1977 at 228.

⁵Section 15.2-2506.

⁶*Stallings v. Wall*, 235 Va. 313, 315, 367 S.E.2d 496, 497 (1988); *County Board v. Brown*, 229 Va. 341, 329 S.E.2d 468 (1985); *Winchester v. Redmond*, 93 Va. 711, 25 S.E. 1001 (1896); Op. Va. Att'y Gen.: 1999 at 53, 54; 1986-1987 at 315, 316.

⁷1986-1987 Op. Va. Att'y Gen. 317, 318.

⁸1986-1987 Op. Va. Att'y Gen. 315, 316 (conclusion assumes court has not declared such tax unconstitutional); *see id.* at 317, 318 (authority of county board of supervisors to settle and compromise claims does not extend to authority of board to compromise claims or suits relating to legally assessed taxes, absent specific statutory authority).

⁹Section 58.1-3990; *see also* § 58.1-3981(E).

[Back to Opinions Index](#)