

**SANITIZED DECISION – DOCKET NO. 05-559 MFE – GEORGE V. PIPER, ALJ –  
SUBMITTED for DECISION on JANUARY 18, 2006 – ISSUED on FEBRUARY 9, 2006**

**SYNOPSIS**

**MOTOR FUEL EXCISE TAX—BURDEN OF PROOF NOT MET FOR VACATING CIVIL PENALTY-** Because the provisions of W.Va. Code § 11-14C-34(f)-(f)(1) make crystal clear that the predicate act of failing to show the shipping document to the State Tax Commissioner’s representative mandates that the civil penalty shall be payable by the person in whose name the means of conveyance is registered, this limited-jurisdiction, executive-branch tribunal does not have the statutory authority to eliminate the penalty.

**FINAL DECISION**

On August 30, 2005, the Excise Tax Unit of the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued a motor fuel excise tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. The assessment was for the period ended July 31, 2005, for a civil penalty in the amount.

Thereafter, by mail postmarked October 21, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code §§ 11-10A-8 (1) [2002] and 11-10A-9(a)-(b) [2002].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

**FINDINGS OF FACT**

1. On July 25, 2005, Petitioner’s transport driver, (driver one) purchased a load of diesel fuel in Tennessee and delivered same to Petitioner’s corporate office in, Virginia.

2. Upon arrival driver one unloaded four hundred to five hundred gallons of fuel, before being informed by Petitioner that the truck must be reloaded immediately and the load taken to a location in, West Virginia.

3. Because driver one was not permitted to drive more than eleven hours a day, he was informed that another driver (driver two) would make the West Virginia delivery. Whereupon, as per driver one's testimony, he placed the "Bill of Lading" showing that the load had been picked up in, Tennessee in the pouch on the side of the driver's door and went home.

4. On July 25, 2005 at 2:15 p.m. one of Respondent's so-called Criminal Investigation Division ("CID") officers wrote a citation to driver two for failure to carry a shipping document pursuant to W.Va. Code § 11-14C-34(f) and imposed a civil penalty.

5. Contained within the Respondent's Exhibit No.3 is a letter from CID to driver two informing him that the citation numbered that was issued to him was being withdrawn and would now be issued to the business owner.

6. At hearing the Petitioner testified that although the required bill of lading was in the truck, driver two admitted to him that he never showed it to CID.

7. The Petitioner further testified that he fired driver two, two days later because driver two was illegally selling diesel fuel from the trucks to unauthorized persons and pocketing the money.

8. The Petitioner testified that driver two told him that he did not show the bill of lading because he did not load the shipment, and did not know the import confirmation number and, therefore, believed that he would get into trouble.

9. The Petitioner testified that the fuel truck which driver two was driving at the time that he received the citation has two (2) thirty-five-foot decals which say, " ," the

company name, as well as twelve-inch letters on the back that say, same, and that CID should have issued the citation to Petitioner and not driver two and that if they had done so Petitioner would have told driver two not to move the truck and that the Petitioner would have immediately driven to the place of the citation and shown CID the document.

10. Upon being stopped by CID, driver two attempted to forge a bill of lading and gave it to the officer; however, same was rejected as being improper.

### **DISCUSSION**

The only issue is whether the Petitioner has met its burden of proof by showing that the civil penalty imposed against his company pursuant to W.Va. Code § 11-14C-34(f) is not applicable.

W.Va. Code § 11-14-C(d) explicitly states that a person to whom a shipping document was issued shall:

1. Carry the shipping document in the means of conveyance for which it was issued when transporting the described;
2. Show the shipping document upon request to any law-enforcement officer, representative of the commissioner and any other authorized individual when transporting the motor fuel.

....

W.Va. Code § 11-14C-34 (f) then provides, that any person who transports without a shipping document is subject to a \$5,000.00 civil penalty for a first offense.

Respondent's counsel argues that the circumstances of this case do not matter, only that the bill of lading was not shown at the time of the inspection and that any intent is, therefore, irrelevant.

This tribunal has scoured Article 14C of the West Virginia Code to find any statutory avenue of relief for the Petitioner, given the fact that Petitioner's testimony, his witness' testimony, and his explanation as to what occurred seems accurate and forthcoming. However, the four corners of the statute make crystal clear that if the document (bill of lading) is not, "shown upon request to any... representative of the commissioner . . . ." the civil penalty shall be payable by the person in whose name the means of conveyance is registered. See W.Va. Code § 11-14C -34(f) (1).

It is of no moment that the citation was originally written to driver two, because the means of conveyance is in the name of Petitioner Company and not in the name of driver two, and under W. Va. Code § 14C-34(f)(1) Petitioner was therefore the correct person and the only person to whom the assessment could have been lawfully directed.

It is also of no legal consequence that driver two, and not the Petitioner, was the one who failed to show the document for whatever reason. Driver two worked for Petitioner and Petitioner is the responsible, "person" who is citable for driver two's misconduct, failure, or even possible criminal intent.

Because there is no provision in the statute to waive or otherwise eliminate the civil penalty for such unfortunate circumstances, this tribunal has no option but to affirm the civil penalty as issued.

It should be noted for the record, however, that the precise wording of W.Va. Code § 11-14C-34(f), which frames the violation set forth in W.Va. Code § 11-14-C-34(d) for purposes of imposing the civil penalty, does not mention failure to show the shipping document, only the transporting of motor fuel without a shipping document or the delivery to a destination state other than one shown on the shipping document.

Notwithstanding the above, this tribunal believes that the intent of the law is very clear, because if failure to show the shipping document is not one of the civil penalty offenses it would make the whole statute irrelevant, in that showing the document is the only way any importer can ever prove that he is legally transporting fuel.

It should be finally noted that because this limited-jurisdiction, executive-branch tribunal does not have the statutory authority to sit essentially as a court of “equity,” Petitioner’s argument of “fairness” does not lie with us but, rather, lies with the circuit courts of West Virginia, should an appeal be taken.

### **CONCLUSIONS OF LAW**

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. The Petitioner taxpayer in this matter has failed to carry the burden of proof with respect to his contention that, based upon the evidence, his company did not violate the motor fuel excise tax disclosure statute. *See* W. Va. Code St. R. § 121-1-69.2 (Apr. 20, 2003).

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax assessment issued against the Petitioner for the period ended July 31, 2005, for a civil penalty must be and is hereby **AFFIRMED**.