

**SANITIZED DECISION – 06-271 MFE – BY GEORGE V. PIPER, ALJ –
SUBMITTED for DECISION on AUGUST 14, 2006 – ISSUED on AUGUST 23,
2006**

SYNOPSIS

MOTOR FUEL EXCISE TAX – IMPORT CONFIRMATION NUMBER REQUIREMENT WITH WEST VIRGINIA MOTOR FUEL REGISTRY NOT APPLICABLE TO IMPORTER OF PROPANE FOR HOME HEATING AND/OR COOKING USE - W.V. Code § 11-14C-35(a) – (d) which imposes civil penalties upon an importer who imports motor fuel without first obtaining an import confirmation number is not applicable to an importer who imports propane for use only in home heating and for cooking and does not import any fuel for use as a motor fuel in internal combustion engines.

FINAL DECISION

On March 31, 2006, the Accounts Monitoring 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. The assessment was issued pursuant to the authorization of the Commissioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. The assessment was for the period ended February 28, 2006, and was for a civil penalty in the amount of \$. Written notice of the assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked April 12, 2006, 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].

In due course the presiding administrative law judge contacted both the Petitioner and the Respondent, advising them that the matter is being submitted for decision on documents only, in lieu of holding a hearing in person, because he determined that their appearances in person were not necessary in order to render a decision on the merits. Both sides were further advised that, by August 15, 2006, they were to send to this

tribunal detailed written arguments which support their respective positions concerning the motor fuel excise tax assessment.

FINDINGS OF FACT

1. On March 30, 2006, the following correspondence was sent to the Petitioner:

Gentlemen:

Effective June 1, 2005, motor fuel licensees are required to register all motor fuel imports from bulk or from a non-permissive supplier with the West Virginia Motor Fuel Import Confirmation Registry system. West Virginia Code §11-14C-35 imposes a penalty of \$5,000.00 for the first offense and \$10,000.00 for each offense thereafter for failure to register motor fuel imports with the West Virginia Motor Fuel Import Confirmation Registry System.

Enclosed are copies of the notices mailed to all motor fuel licensees in December 2004 and April 2005 regarding the motor fuel importer confirmation registry.

On the February 2006, West Virginia Importer Return a worksheet listing all the drops pertaining to delivery of the 29,638 gallons of propane that was imported into West Virginia was included. However, there is no record of the Import Confirmation Number being obtained per total truckload brought into the state. The worksheet included does qualify to replace the need to obtain a diversion number each time you come into the state. However, the Import Confirmation Number for each truck must be included on the report. After the Import Confirmation Number is obtained for the total gallonage, then the spreadsheet shows how it was dispersed into the state. Example: if a truck comes into the state with 3000 gallons that truck must have one Import Confirmation Number even though it is being dropped to numerous customers.

Since we cannot determine the number of truckloads it took to bring in 29,638 gallons, we are estimating 4 loads for a fine of \$35,000.00, for Failure to Obtain an Import Confirmation Number.

Should you have any questions or need assistance, please contact Tax Department at 304-558-8624.

Sincerely,

Unit Supervisor
Internal Auditing Division
Fuel Tax Administration Unit

2. In its petition for reassessment, Petitioner stated that it had not imported into the State of West Virginia any quantities of motor fuel propane or motor fuel liquefied petroleum gas over the last several years and therefore the assessment is in error. Petitioner noted that it had begun to register its crossing into West Virginia pursuant to the confirmation registry system because it did not want this issue to get out of hand.

3. In its reply correspondence to this tribunal received on August 15, 2006, Petitioner augments the fact that it does not service any residential or commercial customers that use any propane for combustion in or propulsion of a motor vehicle by stating that all deliveries are made to “homes” or “businesses” in West Virginia for people either to use for purposes of heating their homes or businesses and/or for cooking in their homes.

4. Respondent’s own listing of Petitioner’s customers as attached to Petitioner’s West Virginia Fuel Tax Report for February, 2006 shows that all were delivered to individual residences or commercial business locations and none were delivered to businesses for use as motor fuel in an internal combustion engine, *i.e.*, transport companies, service stations, etc.

DISCUSSION

The only issue to be decided is whether Petitioner has met its burden of proof by showing that the civil penalty imposed pursuant to W.Va. Code §11-14C-35 is not applicable.

W.Va. Code § 11-14C-35 explicitly requires importers to register and obtain an import confirmation number with West Virginia Motor Fuel Registry before importing motor fuel into the state.

W.Va. Code § 11-14C-35(a) provides that the importer shall write the import confirmation number on the shipping document issued for the motor fuel and § 35 (b) states that an importer who does not obtain an import confirmation number as required is subject to the following civil penalties; (1) for the first violation, the amount is \$, (2) for each subsequent violation the amount is \$, (c) the civil penalty to be payable by the person in whose name the transport vehicle is registered and (d) the civil penalties to be assessed, collected and paid in the same manner as the motor fuel excise tax imposed by this article.

However, in W. Va. Code § 11-14C-2 definitions, is the following:

(72) “Special fuel” means any gas or liquid, other than gasoline, used or suitable for use as a motor fuel in an internal combustion engine or motor to propel any form of vehicle, machine, or mechanical contrivance, and includes products commonly known as natural or casing-head gasoline, diesel fuel, dyed diesel fuel, biodiesel fuels, transmix, and all forms of motor fuel commonly or commercially known or sold as butane, propane, liquefied natural gas, liquefied petroleum gas, compressed natural gas product, or a combination of liquefied petroleum gas and a compressed natural gas product. “Special fuel” does not include any petroleum product or chemical compound such as alcohol, industrial solvent, heavy furnace oil, or lubricant, unless blended in or sold for use as motor fuel in an internal combustion engine.

Because the term propane is found under the definition of special fuel and because special fuel does not include any petroleum product or chemical compound unless the same is used as motor fuel in an internal combustion engine, the requirements of W.Va. Code § 11-14C-35 (a)-(d) are not applicable to the Petitioner unless its imports are used in internal combustion engines; that is not the case here as shown by Petitioner.

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 carried the burden of proof with respect to its contention that, based upon the evidence, its company did not violate the motor fuel excise tax importation confirmation number 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 February 28, 2006 for a civil penalty of \$, must be and is hereby **VACATED**.