

**SANITIZED DECISION – 06-416 MFE, 06-416 MFE & 06-418 MFE – BY
GEORGE V. PIPER, ALJ – SUBMITTED for DECISION on OCTOBER 15, 2006
– ISSUED on OCTOBER 24, 2006**

SYNOPSIS

MOTOR FUEL EXCISE TAX—BURDEN OF PROOF NOT MET FOR VACATING CIVIL PENALTY – Because the provisions of W.V. Code § 11-14C-34(a) – (f) make crystal clear that the predicate act of transporting fuel without the proper shipping documentation and without meeting the exception set forth in W.Va. Code § 11-14C-34(d)(A) – (D) mandates that the civil penalty shall be payable by the person in whose name the shipping document was issued, this limited-jurisdiction, executive-branch tribunal does not have the statutory authority to waive or abate the penalty.

FINAL DECISION

On June 29, 2006, the Commissioner (by the Division) issued a motor fuel excise tax assessment against the Petitioner. The 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, for the period ended June 30, 2006, for a civil penalty in the amount of \$. Written notice of the assessment was served on the Petitioner as required by law.

On July 11, 2006, and July 12, 2006, respectively, 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 two (2) separate motor fuel excise tax assessments against the Petitioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. The assessments were both for the period ended May 31, 2006, and the July 11, 2006 assessment was for a civil penalty in the amount of \$, while the July 12, 2006 assessment was for a civil penalty in the amount of \$, for a total liability of \$. Written notice of these assessments was served on the Petitioner as required by law.

Thereafter, by mail postmarked July 18, 2006, Petitioner, timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions 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 consolidated all of the matters 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.

Neither side submitted any specific documentation on the merits by the required due date; however, this tribunal has issued numerous decisions on the point involved, and we will rule in this case in accordance with prior decisions.

FINDINGS OF FACT

1. In December, 2004 and April, 2005, all motor fuel licensees, including the Petitioners, were sent a memo entitled, “West Virginia Motor Fuel Registration System – Important Notice – Effective June 1, 2005,” advising all concerned that every person transporting fuel by barge, water craft, railroad tank car, or transport truck was required to deliver the motor fuel in the destination state printed on the shipping document unless the person to whom the shipping document was issued:

(A) Notifies the Tax Commissioner, **BEFORE** transporting the motor fuel into a state other than the destination state printed on the shipping document, that he or she has received instructions, after the shipping document was issued, to deliver the fuel to a different destination state;

(B) Receives from the Tax Commissioner a confirmation number authorizing the diversion;

(C) Writes on the shipping document the change in destination state and the confirmation number for the diversion; and

(D) Gives a copy of the revised shipping document to the person to whom the motor fuel is delivered. This document does not need to show the gallons delivered to each location. This document is used to verify proper licensing of the importer, transporter, distributor and supplier, and the destination state, etc. *See* W.Va. Code § 11-14C-34(d) (A) – (D).

2. Petitioner admits that it transported fuel without the proper shipping documentation.

3. In all three (3) petitions for reassessment Petitioners state that they haul thousands of loads a year throughout West Virginia and its surrounding states and that, in some instances, clerical errors allowed these diversions to go unreported.

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-34 is not applicable.

W.Va. Code §11-14C-34 (d) explicitly states that a person to whom a shipping document was issued shall . . . (3) Deliver motor fuel to the destination state printed on the shipping document unless the person meets the exception in §34(d)(A) – (D), which is not applicable to them.

W.Va. Code §11-14C-34(f) then provides that any person who transports motor fuel to a destination state other than the destination state shown on the shipping document is subject to a \$ civil penalty for a first offense and \$ for each subsequent violation.

Notwithstanding the plain language of the statute, Petitioner argues that the penalties should be waived because of extenuating circumstances, namely, clerical errors caused these violations to occur.

It should be noted for the record that Petitioners are repeat offenders which under normal circumstances would negate “reasonable cause” for waiver of additions to tax or penalties; however, such language is absent from W.Va. Code § 11-14C-34 and, therefore, no waiver or abatement provision can be inferred from the plain language of the statute.

This tribunal has scoured Article 14C of the West Virginia Code to find any statutory avenue of relief for the Petitioners. However, the four corners of the statute make crystal clear that, if fuel is transported without the proper shipping documentation and without the exception being applicable, the civil penalty shall be payable by the person in whose name(s) the means of conveyance is registered. See W.Va. Code §11-14C-34(f) (1).

Because there is no provision in the statute to waive or abate the civil penalty for any such extenuating circumstances, this tribunal has no option but to affirm the civil penalty as issued against both Petitioners.

It should be noted that because this limited-jurisdiction, executive-branch tribunal does not have the statutory authority to sit essentially as a court of “equity,” we must

apply the law as written and may not deviate from that obligation under any circumstances.

It should finally be noted that Respondent prevailed in this case, on the well-settled law, without appearing at a hearing in person.

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 its contention that, based upon the evidence, its company did not violate the motor fuel excise tax diversion 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 assessments issued against the Petitioner, for the periods ended May 31, 2006 and June 30, 2006, for a combined civil penalty of \$, must be and are hereby **AFFIRMED**.