

**REDACTED DECISION -- 06-502 MFE -- BY ROBERT W. KIEFER, JR., ALJ --  
SUBMITTED for DECISION on SEPTEMBER 27, 2007 -- ISSUED on MARCH 25, 2008**

### **SYNOPSIS**

**MOTOR FUEL EXCISE TAX -- CIVIL PENALTY ASSESSMENT -- BURDEN OF PROOF** -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that a civil penalty assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

**MOTOR FUEL EXCISE TAX -- CIVIL PENALTY ASSESSMENT -- IMPORT CONFIRMATION NUMBERS** -- A transporter of motor fuel that acquires fuel from two separate persons for import into the State of West Virginia must obtain an import confirmation number for each person from whom it obtains said fuel, if said person is neither a “supplier” nor a “permissive supplier,” as defined by W. Va. Code § 11-14C-2 [2003, 2006]. W. Va. Code § 11-14C-35 [2003].

### **FINAL DECISION**

On July 11, 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 civil penalty 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 ending April 30, 2006, for civil penalty in the amount of \$\_\_\_\_\_. Written notice of this assessment was served on the Petitioner on July 18, 2006.

Thereafter, by mail postmarked September 6, 2006, received on September 11, 2006, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9 [2005].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

### **FINDINGS OF FACT**

1. The Petitioner is a transporter of fuel products that is located outside of West Virginia.
2. Mr. A, the Petitioner's Vice-President, testified on behalf of the Petitioner.
3. The Petitioner transports its own fuel products and fuel products belonging to others.
4. The Petitioner is an importer licensed with the State of West Virginia.
5. The Petitioner was assessed a motor fuel excise tax civil penalty pursuant to the provisions of W. Va. Code § 11-14C-35 [2003], by reason of its failure to obtain an import confirmation number from the West Virginia Import and Diversion Registry. *See State's Exhibit No. 1.*
6. The assessment was based on information included on an importer tax return filed by Company A, the relevant schedule of which was provided at the hearing. *See State's Exhibit No. 2.*
7. The importer tax return filed by Company A listed the Petitioner as the transporter of 1440 gallons of biodiesel fuel, which was imported into the State of West Virginia.
8. The importer tax return shows an import confirmation number of "141100," which is not an import confirmation number issued by the State of West Virginia.
9. Company A is not licensed with the State of West Virginia as either a "supplier" or "permissive supplier."
10. Company A is an importer.

11. In the transaction that resulted in the assessment against the Petitioner, the Petitioner acted as common carrier for Company B, a company located in another state.

12. It appears that the Board of Education in a county in West Virginia ordered fuel from Company B, consisting of 20% biodiesel fuel to be purchased from Company A and 80% low-sulfur diesel fuel to be purchased from Sunoco. *See* Petitioner's Exhibit No. 1.

13. Company B engaged the Petitioner to transport the fuel into the State of West Virginia. *See* Petitioner's Exhibit No. 1.

14. The biodiesel obtained from Company A was consigned by Company A to the Petitioner, that is, it was contained in an 8000-gallon tank located on the Petitioner's property.

15. The low-sulfur diesel fuel was located at a Sunoco terminal.

16. Company B does not own fuel until, as in this transaction, one of its common carriers takes possession of the fuel on its behalf.

17. The Petitioner delivered a "mixed product," defined in the West Virginia Code as a "blended fuel," into the State of West Virginia.

18. The Petitioner contends that because it transported a blended fuel into the State of West Virginia, it needed only to obtain a single import confirmation number.

19. Mr. A contends that two import confirmation numbers should not be required because it did not deliver two separate loads of fuel into the State of West Virginia.

20. Because the two products were "splash blended," that is, they were combined in the tank of the truck, the Petitioner did not need a blender's license.

21. When products are splash blended, they are two separate taxable products, and the provider of each product is required to report the same to the State of West Virginia.

22. Mr. A testified that he believes the Petitioner was given the diversion number, “141100,” by Company B at the time that it received the request from Company B.

23. According to Mr. A, the import confirmation number for the low-sulfur diesel fuel acquired from Sunoco may have been obtained by someone working in the Petitioner’s offices.

24. While off the record, Mr. A spoke with his mother, who works in one office location, and an employee, who works in the Petitioner’s other office location. Neither of them could offer an explanation of how the Petitioner obtained the confirmation number that is shown on State’s Exhibit No. 2, and on page 8 of Petitioner’s Exhibit No. 2.

25. The exact origin of the “import confirmation number” shown on State’s Exhibit No. 2, and on page 8 of Petitioner’s Exhibit No. 2, is unknown.

26. Company B is a “permissive supplier.”

27. The State Tax Commissioner conceded on the record that because Company B is a “permissive supplier,” it was not required to have an import confirmation number for the diesel fuel.

## **DISCUSSION**

The issue in this matter is whether the Petitioner is required to obtain an import confirmation number pursuant to W. Va. Code § 11-14C-35 [2003]. The Petitioner imported a load of biodiesel fuel into the State of West Virginia. “Biodiesel fuel” is defined as:

[A]ny motor fuel or mixture of motor fuels that is derived, in whole or in part, from agricultural products or animal fats, or the wastes of such products or fats, and is advertised as, offered for sale as, suitable for use or used as a motor fuel in an internal combustion engine.

W. Va. Code § 11-14C-2(9) [2003, 2006]. “Blended fuel” is defined as:

[A] mixture composed of gasoline and diesel fuel and another liquid, including, but not limited to, gasoline blend stocks, gasohol, ethanol, methanol, furl grade alcohol, diesel fuel enhancers, and resulting blends, other than a *de*

*minimus* amount of a product such as carburetor detergent or oxidation inhibitor, that can be used as a motor fuel in a highway vehicle.

W. Va. Code § 11-14C-2(10) [2003, 2006].

The Petitioner is a transporter for Company B. Company B requested the Petitioner to transport a blended mixture of biodiesel to the Board of Education in a county in West Virginia. The blended fuel consisted of 80% low-sulfur diesel and 20% biodiesel. The biodiesel was owned by Company A, which had been consigned to the Petitioner and was drawn from a tank located on the Petitioner's property. The low-sulfur diesel was acquired from a Sunoco terminal in a state outside of West Virginia. The fuel delivered was, by definition, blended fuel.

West Virginia Code § 11-14C-35 [2003] provides as follows:

(a) The commissioner may require an importer who acquires motor fuel for import from a person who is not a supplier or a permissive supplier to obtain an import confirmation number from the commissioner before importing the motor fuel. The importer shall write the import confirmation number on the shipping document issued from the motor fuel. If required by the commissioner, the importer shall obtain a separate import confirmation number for each delivery of motor fuel into West Virginia.

The language of the statute requires an importer to obtain an import confirmation number when it acquires fuel "from a person" who is not a "supplier" or a "permissive supplier." The statutory language does not require an import confirmation number based on a shipment or a truckload, or on the basis of some ascertainable quantity or measurement. It is not based on the number of trips or number of customers. Instead, an importer must obtain a separate import confirmation number for the fuel acquired from each person who is not a "supplier" or a "permissive supplier." In this situation, where fuel was acquired from two separate persons, compliance with the statute was required with respect to each acquisition.

It is not entirely clear why the Petitioner was not assessed a civil penalty with respect to the diesel fuel it obtained from Sunoco. There is some speculation that it obtained an import

confirmation number with respect to the fuel, or that Company B obtained the import confirmation number. In any event, counsel for the State Tax Commissioner conceded that Company B is a “permissive supplier,” and that an import confirmation number was not required. The requirements of W. Va. Code § 11-14C-35(a) [2003] were apparently satisfied with respect to the diesel fuel obtained from Sunoco. Thus, the Petitioner was not required to prove compliance with the statute with respect to that fuel.

On the other hand, the Petitioner was assessed for failure to obtain an import confirmation number with respect to the biodiesel acquired from Company A. Unlike the diesel fuel acquired from Sunoco, the Tax Commissioner does not concede that Company A is a “supplier” or a “permissive supplier.” He maintains that an import confirmation number was required, and that the import confirmation number provided by the Petitioner is not one issued by the State Tax Commissioner. The Petitioner is unable to demonstrate that the import confirmation number provided is one issued by the State Tax Commissioner. Thus, the Petitioner has failed to satisfy its burden of proof.

It is clear from the evidence that the Petitioner did not intentionally violate the statute. The Petitioner had an import confirmation number with respect to the diesel fuel, although it appears that the number might have been one issued by the federal government. The Petitioner maintains it believed this number was issued by West Virginia, although it is unable to prove this. Nothing in the record indicates that this was anything other than an innocent mistake, rather than some attempt to defraud the State or justify its actions after the fact.

Petitioner’s good faith attempt to comply with the law is also demonstrated by the fact that it complied with the law with respect to the diesel fuel acquired from Sunoco. It maintains that it did not believe it needed a second import confirmation number with respect to the other

acquisition, since it was blending the two fuels. Although this contention is inconsistent with the statutory language, it is certainly not an unreasonable or completely untenable position. This is an argument that one might expect from a layperson. Stated differently, a layperson might well expect the statute to require one import confirmation number per delivery.

In spite of the fact that the Petitioner attempted to comply with the statute and that its violation of the statute was not intentional or in bad faith, there simply is no statutory authority for this Office to waive or abate a civil penalty assessment where a transporter has acted in good faith, or has simply made a mistake. In the absence of some statutory authority permitting abatement of the assessment, this Office is without any authority to do that which the Petitioner asks. A court of general jurisdiction, possessing equitable powers would have the authority to abate the civil penalty assessment. If this Office possessed some equitable jurisdiction, it would likely abate the assessment. However, given its limited jurisdiction, it may not do so. Therefore, the civil penalty assessment must be upheld.

### **CONCLUSIONS OF LAW**

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

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. A transporter of motor fuel that acquires fuel from two separate persons for import into the State of West Virginia must obtain an import confirmation number for each person from whom it obtains said fuel, if said person is neither a “supplier” nor a “permissive supplier,” as defined by W. Va. Code § 11-14C-2 [2003, 2006]. W. Va. Code § 11-14C-35 [2003].

3. The Petitioner in this matter has failed to carry its burden of proving that civil penalty assessment against it is erroneous, unlawful, void or otherwise invalid.

**DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax civil penalty assessment issued against the Petitioner for the period ending April 30, 2006, in the amount of \$\_\_\_\_\_, should be and is hereby **AFFIRMED**.