

**REDACTED DECISION -- 06-604 MFE -- BY ROBERT W. KIEFER, JR., ALJ --
SUBMITTED for DECISION on JANUARY 16, 2007 -- ISSUED on JULY 16, 2007**

SYNOPSIS

MOTOR FUEL EXCISE TAX -- 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 a 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).

MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- To satisfy its burden of proof in a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, a taxpayer must prove that the assessment is incorrect and contrary to law, in whole or in part, by a preponderance of the evidence.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- FIRST AND SECOND VIOLATIONS -- A taxpayer who stores dyed diesel fuel for which the motor fuel excise tax has not been paid for use in a licensed vehicle is subject to a civil penalty in the amount of \$10.00 per gallon to the maximum capacity of the fuel tank in which said fuel is stored, or \$1,000.00, whichever is greater, for each of the first two such violations. W. Va. Code § 11-14C-36(a)(1) & (b).

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- THIRD AND SUBSEQUENT VIOLATIONS -- A taxpayer who stores dyed diesel fuel for which the motor fuel excise tax has not been paid for use in a licensed vehicle is subject to a civil penalty in the amount of \$15.00 per gallon to the maximum capacity of the fuel tank in which said fuel is stored, or \$2,000.00, whichever is greater, for each of the third and all subsequent violations. W. Va. Code § 11-14C-36(a)(1) & (b).

FINAL DECISION

Investigators with the Criminal Investigation “Division” of the State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued three motor fuel excise tax civil penalty assessments against the Petitioner. All three assessments were 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 first assessment was for storing dyed diesel fuel for use in a highway vehicle that was licensed with the State of West Virginia, in violation of W. Va. Code § 11-14C-36(a)(1). The fuel in question was stored in the fuel tank of a licensed vehicle. The amount of the civil penalty assessment was \$_____, for a first violation in accordance with W. Va. Code § 11-14C-36(b).

The second assessment was issued for storing dyed diesel fuel for use in a highway vehicle that was licensed with the State of West Virginia, in violation of W. Va. Code § 11-14C-36(a)(1). The fuel in question was stored in a 1,000-gallon bulk fuel tank located on the Petitioner's premises. The amount of the civil penalty assessment was \$_____, \$10.00 per gallon based on the maximum capacity of the tank, for a second violation in accordance with W. Va. Code § 11-14C-36(b).¹

The third assessment was also for storing dyed diesel fuel for use in a highway vehicle that was licensed with the State of West Virginia, in violation of W. Va. Code § 11-14C-36(a)(1). The fuel in question was stored in the fuel tank of a second licensed vehicle. The amount of the civil penalty assessment was \$_____, for a third violation in accordance with W. Va. Code § 11-14C-36(b).

Thereafter, by mail the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(2) [2002] & 11-10A-9(a)-(b) [2005].

¹ W. Va. Code § 11-14C-36(b) provides that the civil penalty for the first *two* violations of § 11-14C-36(a) shall be either \$10.00 per gallon for the maximum storage capacity of the tank, or \$1,000.00, whichever is greater, while the penalty for the third and all subsequent violations is \$15.00 per gallon for the maximum storage capacity of the tank, or \$2,000.00, whichever is greater. Since the Petitioner was assessed only \$_____ for the bulk tank, this civil penalty assessment is clearly intended to be a second violation of the statute.

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 in the business of building access roads for Company A, so that Company A may drill oil and gas wells on leasehold interests that it has throughout the State of West Virginia.

2. The Petitioner's business location is in _____ County, West Virginia.

3. At the time of the violations, the Petitioner was performing work for Company A on a _____-acre lease located in West Virginia.

4. Mr. X was, at all relevant times, an investigator for the Criminal Investigation "Division" of the State Tax Commissioner's Office.

5. Some time on or before October 10, 2006, Mr. X received a tip that the Petitioner was using dyed diesel fuel in vehicles that were licensed for on-road use.

6. On or about October 10, 2006, Mr. X and Mr. Y., another investigator for the Criminal Investigation "Division," traveled to the Petitioner's location.

7. Upon arriving at the Petitioner's location, Messrs. X and Y discovered several vehicles parked on the lot.

8. Messrs. X and Y testified that when they arrived at the Petitioner's premises the only person present at that location was an employee of the Petitioner, Z, who, according to Mr. X, told them that he was in charge at the time and gave them permission to inspect the vehicles on the lot.

9. Mr. Y testified that only three vehicles on the lot had plates and inspection stickers, and that they tested only the fuel those three vehicles.

10. The test revealed that the Petitioner was storing dyed diesel fuel for which motor fuel excise tax had not been paid, in violation of the law, in two of the three licensed vehicles.

11. The two investigators of the State Tax Commissioner took two fuel samples from each of the licensed vehicles, one of which was eventually sent to the Internal Revenue Service for testing, the other of which was retained by them.

12. The fuel in the tanks on the trucks tested by the Commissioner's employees did not have the same amount of dye when measured in parts per million.

13. The investigators determined that storing fuel in two vehicles licensed for use on the highways constituted two separate violations of W. Va. Code § 11-14C-36(a)(1).

14. Based on the samples taken from the two trucks, the State Tax Commissioner issued two assessments against the Petitioner pursuant to W. Va. Code § 11-14C-36.

15. The first assessment, numbered _____, was in the amount of \$_____. *See State's Exhibit No. 1.*

16. The second assessment, numbered _____, was in the amount of \$_____. *See State's Exhibit No. 2.*

17. The Tax Commissioner's investigators also noticed a bulk storage tank on the property.

18. The bulk tank was labeled as containing off-road fuel.

19. Mr. Y asked the Petitioner's employee, Mr. Z, where the fuel in the vehicles' tanks came from.

20. The Petitioner's employee, Mr. Z, responded that the fuel in the trucks came from the bulk tank.

21. The Petitioner's employee, Mr. Z, gave the Tax Commissioner's investigators permission to test the fuel in the bulk tank.

22. The Commissioner's investigators did not test the fuel in the bulk tank.

23. It was possible that the bulk tank contained on-road fuel.

24. The Petitioner's employee, Mr. Z, also told Mr. Y that there were no retailers in the vicinity who sold off-road fuel, and that the off-road fuel was delivered to the bulk fuel tank at the Petitioner's location and, from there, was placed in the vehicles.

25. Mr. Y testified that the Petitioner's employee's (Mr. Z's) statement is the only evidence that the fuel in the trucks came from the bulk tank located on the Petitioner's property.

26. Considering the Petitioner's employee's (Mr. Z's) statement and the proximity of the two trucks to the bulk tank, Mr. Y deduced that the dyed diesel fuel in the two licensed trucks was likely derived from the bulk tank.

27. Mr. Y testified that he is not aware of any test that could prove that the fuel in the trucks came from the bulk tank located on the Petitioner's premises.

28. Mr. Y testified that because the fuel in the tanks did not contain the same amount of dye (see Finding of Fact #12), the fuel in the vehicles' fuel tanks would not have matched the fuel in the bulk tank.

29. Mr. Y testified that he could not determine whether or not the fuel in the trucks came from the bulk tank (in _____ County, West Virginia), or from some other source.

30. Mr. Y issued the assessment respecting the bulk tank because he believed the dyed diesel fuel in the two trucks parked on the lot came from the bulk tank.

31. Based on the representations of the Petitioner's employee (Mr. Z) and his own deductions, and pursuant to W. Va. Code § 11-14C-36(a)(1), Mr. Y issued the third assessment, numbered _____, in the amount of \$_____. *See* State's Exhibit No. 3.

32. The third assessment was for storing dyed diesel fuel in a storage tank which, according to Mr. Y, was for use in a licensed highway vehicle.

33. Mr. Y testified that he did not know how much fuel, if any, was in the bulk tank at that time.

34. Mr. Y testified that the assessment is based on the capacity of the tank, not the amount of fuel actually stored therein.

35. The Petitioner was assessed at \$10.00 per gallon for the maximum capacity of the storage tank. *See* W. Va. Code § 11-14C-36(a)(1).

36. Mr. Y testified that if he had discovered dyed diesel fuel in only one truck, he probably would not have issued an assessment respecting the bulk tank.

37. While the Commissioner's investigators were at the Petitioner's premises, two additional trucks came onto the lot.

38. Mr. X sampled the fuel in the two vehicles that pulled onto the lot.

39. The tanks on those trucks did not contain dyed diesel fuel.

40. The Petitioner filed a petition for reassessment challenging all three assessments.

41. The Petitioner now concedes that it owes the \$_____ and \$_____ assessments because the dyed diesel fuel was stored in vehicles licensed for highway use.

42. Petitioner's president testified that the two vehicles for which the Petitioner was assessed, although licensed, were not used on the public highways.

43. The two trucks are older, and are used by the Petitioner for hauling water and hydro-seeding during the winter months when it is muddy and trucks are more likely to be damaged.

44. The Petitioner's president does not want the newer trucks exposed to this potential damage.

45. The Petitioner transported the trucks between two West Virginia counties on "low boy" trailers.

47. While at the lease site during the winter months, the vehicles were driven on roads within the boundaries of the leased property, but were not driven on the public highways because to do so would cause them to dump mud on the public highways.

48. Petitioner's president testified that he did not believe the dyed diesel fuel in the licensed vehicles came from the bulk storage tank, because the trucks were filled in another West Virginia county, approximately seventy (70) miles from the tank

49. Fuel is transported to trucks on job sites in portable tanks located on pick up trucks.

50. Petitioner's president testified that it would make little sense to haul fuel from one West Virginia county to another, when it can be readily purchased in or around the other county in West Virginia where the job site is located.

51. The fuel in the bulk tank is used primarily to fill equipment used on jobs closer to that location and for farm use.

52. Petitioner's president was forthright in admitting that he could not conclusively testify that none of his employees ever filled one of the portable fuel tanks from the bulk tank and transported the fuel to another West Virginia county, or that such fuel was never placed in one of the vehicles that was the subject of one of the assessments.

53. He testified, however, that this was improbable because the portable tanks were far more likely to have been filled at retail fuel stations located near the job site, or at stations in areas where the Petitioner's employees live or near where they may stay during the week.

54. The Petitioner presented credit card receipts which show that the Petitioner made nearly 400 purchases from gasoline retailers during the months of August, 2006, through October, 2006. *See* Petitioner's Exhibit No. 1.

55. These purchases totaled thousands of dollars. *See* Petitioner's Exhibit No. 1.

56. Of these purchases, approximately 55 were between \$100.00 and \$200.00, approximately 16 were between \$200.00 and \$300.00, and two were in excess of \$300.00. *See* Petitioner's Exhibit No. 1.

57. Fuel from the bulk tank is sometimes transported to vehicles on job sites by means of portable fuel tanks in pick-up trucks.

58. Petitioner's president testified that the Petitioner is now using only diesel fuel for which the motor fuel excise tax had been paid in its vehicles, including those used primarily off-road.

59. Since the Petitioner is now using on-road fuel in all of its trucks, it will now drive the trucks to the job site rather than going through the expense of transporting them.

60. The vehicles were last used on the leasehold site during the winter of 2005-2006.

61. Between the date the vehicles were assessed, October 10, 2006, and the date of the hearing, January 17, 2007, they were not transported from the West Virginia county where the Petitioner's business is located to another West Virginia county where the job site is located, because the weather had not been bad.

62. The Petitioner maintains that it does not owe the largest (\$_____) assessment because there is no evidence to show that the dyed diesel fuel in the bulk tank was stored for use in a highway vehicle, in violation of W. Va. Code § 11-14C-36(a)(1).

63. The Petitioner presented credit card receipts from the period around the August, 2006 through October, 2006, which show that, when performing work in a West Virginia county, its employees stayed in motels near the work site and that it purchased substantial quantities of fuel, both on-road and off-road, from retailers located near the work site.

64. By showing the quantity of fuel purchased from retail locations near the work site, the Petitioner attempts to demonstrate the unlikelihood that the dyed diesel fuel in the licensed vehicles came from the bulk tank in the West Virginia county where that tank is located.

65. The Petitioner licensed the two vehicles on which assessments were issued because Company A required it to maintain liability insurance in the amount of \$_____.

66. The Petitioner could maintain liability insurance on the vehicles only if they were licensed.

67. Petitioner's president testified that the actual authority of Z, the Petitioner's employee, was limited to cleaning the shop and washing vehicles. He (Z) does not fuel vehicles.

68. Petitioner's president testified that Z has no knowledge respecting how the Petitioner operates its business.

69. With respect to Z's statement that no stations sell off-road fuel near the Petitioner's site, Petitioner's president testified that Z is incorrect, because there is one station within approximately two miles and another station within approximately six miles.

DISCUSSION

The Petitioner in this matter has conceded that it owes the assessments related to its storage of fuel in the fuel tanks of licensed vehicles. These assessments were for a first and third violation, and were for \$_____ and \$_____, respectively.² It admits that it was using dyed (off-road) diesel fuel in two vehicles that were licensed with the State of West Virginia. It maintains that it did not use the vehicles on the highways, but that it was required to license them for such use in order to maintain liability insurance coverage on those vehicles. It was required to maintain liability insurance on the vehicles pursuant to its contract with Company A.

The issue presented in this action is whether or not the Petitioner has satisfied its burden of proving that it was not subject to the \$_____ (largest) assessment, which was issued against it because it purportedly stored dyed diesel fuel in a 1,000-gallon bulk tank for use in the two vehicles that were licensed with the State of West Virginia.

In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioners 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). The Petitioner must satisfy its burden of proof by a preponderance of the evidence, not some higher standard.

In discussing proof by “a preponderance of the evidence,” the West Virginia Supreme Court has stated, “Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.” *Jackson v. State Farm Mutual*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352

² W. Va. Code § 11-14C-36(b) provides that the civil penalty for the first *two* violations of that section shall be \$10.00 per gallon of motor fuel based on the maximum capacity of the tank in which the fuel is found, or \$1,000.00, whichever is greater.

(2004). *See also Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 165 W. Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980).

Black's Law Dictionary defines "preponderance of the evidence" as:

The greater weight of the evidence; superior evidentiary weight that, though not sufficient to free mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. • This is the burden of proof in a civil trial, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

In this matter, there is an evidentiary dispute that must be resolved by this Office. The State Tax Commissioner's investigators believed they were justified in issuing an assessment pursuant to W. Va. Code § 11-14C-36(a)(1), because the Petitioner purportedly stored fuel in the bulk tank for use in licensed vehicles. They determined that the Petitioner filled the tanks of the two cited, licensed vehicles from the bulk tank located on its premises. In so determining, they relied on representations made by an employee of the Petitioner, to the effect that dyed diesel fuel from the bulk fuel tank located on the premises had been placed in the two licensed vehicles then located on the premises. The employee also informed them that there was no place in the city where the Petitioner could purchase off road fuel. Counsel for the State Tax Commissioner argues that it is logical to conclude that because the tank and the trucks were all located on the premises and that they all contained dyed diesel fuel, the fuel must have come from the bulk tank.

The Petitioner's president disputes the employee's representation respecting the source of the fuel in the tanks of the cited vehicles. The Petitioner's president testified that the employee's job duties are limited to custodial work on the premises and washing vehicles. He maintains that the employee's statement pertained to a matter that is outside both the scope of his authority and his knowledge. He maintains that the employee is without knowledge respecting the Petitioner's

operations, including when and how trucks are fueled, and the source of said fuel. He also testified that the employee statement that there is no place in the local area to purchase off road fuel is not true. The Petitioner's president named two nearby locations where such fuel can be purchased.

With respect to the two cited vehicles, the Petitioner's president testified that they were transported to the lease site in a West Virginia County on a "low boy," which is a trailer designed for the transportation of trucks and large equipment. He further testified that the trucks did not leave the lease site until the end of the winter season, when the roads on the site ceased being muddy all or most of the time. The trucks were then transported back to the Petitioner's premises in the city on a "low boy." He further testified that the trucks have been on the lot since being returned at the end of the prior winter season. Although he did not testify in express terms, the implication is that the fuel in the trucks was likely the same fuel that was in the trucks at the time they were transported back from the job site to the Petitioner's business location.

The Petitioner's president testified that while at the lease site, the two trucks were fueled by portable tanks which are carried in the beds of pick up trucks. The drivers of the pick up trucks buy fuel, both on road and off road, at retail gas stations. The Petitioner has presented evidence to show it makes substantial purchases of fuel at retail gas stations. The gas stations may be near a motel where the workers stay during the week, somewhere along the route between the employees' homes and the work site, or near the employees' homes.³ There are a substantial number of purchases in excess of \$100.00, which tends to indicate that the Petitioner's employees are filling portable fuel tanks, as well as the fuel tanks of the vehicles

³ Petitioner's Exhibit No. 1 tends to bear this out. The document, several credit card bills from August through October, 2006 shows that during this period the Petitioner made approximately 250 purchases that appear to be fuel along a certain interstate highway and around the job site, near the Company A work site. The purchases were for thousands of dollars.

they are driving. He also testified that the employees may fill their portable tanks from the bulk tank at the Petitioner's premises if they are traveling from the Petitioner's premises.⁴

The Petitioner's president also truthfully testified that he could not absolutely say that the fuel in the cited vehicles did not come indirectly from the bulk tank in the city. He testified that, although unlikely, it was possible that some fuel from the bulk tank had been placed in one of the portable tanks on the back of a pickup truck, and that some of that fuel had been used to fuel the cited vehicles.

The probative value of the evidence presented in this matter weighs in favor of the Petitioner. The Petitioner's president, as the manager of the business, is far more likely to understand how the Petitioner's business is run than is a janitor/vehicle washer in its employ. The investigators' testimony respecting the employee's statement to the investigators is hearsay, which detracts from the weight that can be given to that statement. It does not fit one of the hearsay exceptions, as it is outside the scope of his employment. As such, it is not binding on the Petitioner. What weight can be given to that statement is diminished by the testimony of the Petitioner's president who, as president of the business, is far more likely to know how the business operates than the janitor/vehicle washer employee. He is also far more likely to know whether that particular employee's statement is factually true than are the investigators, who just met him.

Further, the Petitioner's president's testimony is consistent with documentary evidence that was generated by third parties around the time that the incident giving rise to the assessments occurred. The documents are not self-serving documents created by the Petitioner.

⁴ The large number of purchases in or around City A, which is only 39 miles from City B, and City C, which is only 46 miles from City B, along with a smattering of purchases in City D and City E, tend to demonstrate that an employee need not be too far from City B before purchasing fuel at a retailer.

They support the Petitioner's president's testimony that the Petitioner fills its trucks from portable tanks which are fueled at gas stations.

Given the relative weight between the testimony of the Petitioner's president respecting matters of which he has personal knowledge, versus the testimony of the investigators which is based on hearsay by a person respecting matters of which he does not have personal knowledge, this Office must conclude that the Petitioner's version of what happened is more realistic than the State Tax Commissioner's witnesses' testimony.

It is true that the Petitioner has not conclusively demonstrated that fuel from the bulk tank did not end up in the vehicles. However, this is not the applicable evidentiary standard. The Petitioner was only required to prove that the chain of events it proposes was more likely to have occurred than the chain of events proposed by the State Tax Commissioner. This it did. If this Office were to require the Petitioner to conclusively demonstrate that fuel from the bulk tank did not end up in the cited vehicles, it would be holding the Petitioner to a higher burden of proof; certainly it would be proof by clear and convincing evidence, but more likely by proof beyond a reasonable doubt. Instead, the Petitioner has proven that it is more likely than not that the dyed diesel fuel in the cited vehicles did not come from the bulk tank located on the Petitioner's premises.

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 a 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. To satisfy its burden of proof in a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, a taxpayer must prove that the assessment is incorrect and contrary to law, in whole or in part, by a preponderance of the evidence.

3. A taxpayer who stores dyed diesel fuel for which the motor fuel excise tax has not been paid for use in a licensed vehicle is subject to a civil penalty in the amount of \$10.00 per gallon to the maximum capacity of the fuel tank in which said fuel is stored, or \$1,000.00, whichever is greater, for each of the first two such violations. W. Va. Code § 11-14C-36(a)(1) & (b).

4. A taxpayer who stores dyed diesel fuel for which the motor fuel excise tax has not been paid for use in a licensed vehicle is subject to a civil penalty in the amount of \$15.00 per gallon to the maximum capacity of the fuel tank in which said fuel is stored, or \$2,000.00, whichever is greater, for each of the third and all subsequent violations. W. Va. Code § 11-14C-36(a)(1) & (b).

5. The Petitioner has proven by a preponderance of the evidence that it did not violate W. Va. Code § 11-14C-36(a)(1), by storing dyed diesel fuel in the bulk tank at the Petitioner's place of business for use in a licensed vehicle.

6. The Petitioner has admitted that it committed two violations of W. Va. Code § 11-14C-36(a)(1), for storing dyed diesel fuel in the storage tank of two separate licensed vehicles.

7. The Petitioner has committed only two violations of W. Va. Code § 11-14C-36(a)(1).

8. Each of these violations supports an assessment of a civil penalty in the amount of \$_____.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner has proven by a preponderance of the evidence that the third motor fuel excise tax civil penalty assessment issued against the Petitioner on or about October 10, 2006, for storing dyed diesel fuel in bulk tank at the Petitioner's business location for use in a license vehicle, in violation of W. Va. Code § 11-14C-36(a)(1), in the amount of \$_____, should be and is hereby **VACATED** in full.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that one motor fuel excise tax civil penalty assessment issued against the Petitioner on or about October 10, 2006, for storing dyed diesel fuel in the storage tank of a licensed vehicle in violation of W. Va. Code § 11-14C-36(a)(1), in the amount of \$_____, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the second motor fuel excise tax civil penalty assessment issued against the Petitioner on or about October 10, 2006, for storing dyed diesel fuel in the storage tank of a licensed vehicle in violation of W. Va. Code § 11-14C-36(a)(1), in the amount of \$_____, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for civil money penalty in the amount of \$_____.