

**REDACTED DECISION -- 07-033 RMFE -- BY ROBERT W. KIEFER, JR., ALJ --
SUBMITTED for DECISION on APRIL 12, 2007 -- ISSUED on OCTOBER 17, 2007**

SYNOPSIS

MOTOR FUEL EXCISE TAX -- STATUTE OF LIMITATIONS -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the Petitioner to show that it is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002].

MOTOR FUEL EXCISE TAX -- STATUTE OF LIMITATIONS -- The Petitioner was required to file its refund claim timely in compliance with the provisions of W. Va. Code § 11-14C-31(c)(3).

MOTOR FUEL EXCISE TAX -- STATUTE OF LIMITATIONS -- The Petitioner did not file its refund claim timely in compliance with the provisions of W. Va. Code § 11-14C-31(c)(3).

MOTOR FUEL EXCISE TAX -- STATUTE OF LIMITATIONS -- BURDEN OF PROOF -- The Petitioner in this matter has failed to carry its burden of showing that it is entitled to a refund.

CORRECTED FINAL DECISION

On November 6, 2006, the Petitioner filed a claim for refund of motor fuel excise tax in the amount of \$_____, for the period of July 1, 2006, through September 30, 2006. The Fuel Tax Administration Unit of the Internal Auditing “Division” of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or the “Respondent”), by letter dated November 16, 2006, denied the Petitioner’s refund claim. The reason stated for the denial was that the refund claim was not timely filed, that is, it was filed after October 31, 2006, in violation of W. Va. Code § 11-14C-31(c)(3) [2005].

Thereafter, by mail postmarked January 13, 2007, and received on January 16, 2007 in the offices of this tribunal, the West Virginia Office of Tax Appeals, the Petitioner timely filed a petition for refund. W. Va. Code §§ 11-10A-8(2) [2002] & 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the Petitioner. With the Tax Commissioner appearing in person and the Petitioner appearing by telephone, the Office of Tax Appeals discussed with the parties whether an evidentiary hearing was necessary and, if not, how this matter would further proceed. At that time it was agreed that the parties would submit additional arguments in writing. Both parties submitted additional argument in writing.

FINDINGS OF FACT

1. On November 7, 2006, the Petitioner submitted a refund claim, specifically denominated “Special Fuel Off-Highway Refund Application,” for fuel that was used off-highway.

2. The refund claim, in the amount of \$_____, was for the third quarter of 2006, July 1, 2006 through September 30, 2006.

3. The Petitioner’s refund claim was denied by the State Tax Commissioner on the grounds that the claim was not timely filed.

4. The Tax Commissioner’s denial letter stated that the Petitioner’s claim was required to be filed on or before October 31, 2006.

DISCUSSION

The issue presented by this matter is whether or not the Petitioner timely filed its claim for refund. It appears that the Petitioner is claiming a refund of tax for fuel which is exempt from the tax under the provisions of W. Va. Code § 11-14C-9, which provides; in relevant part:

§ 11-14C-9. Exemptions from tax; claiming refunds of tax.

....

(c) Refundable exemptions from flat rate component of tax.

Any person having a right or claim to any of the following exemptions from the flat rate component of the tax levied by section five [§ 11-14C-5] of this article shall first pay the tax levied by this article and then apply to the Tax Commissioner for a refund:

....

(8) All gallons of motor fuel used and consumed in stationary off-highway turbine engines;

....

(15) All gallons of motor fuel purchased in quantities of twenty-five gallons or more for use as a motor fuel for internal combustion engines not operated upon highways of this state[.]

It appears that the Petitioner claimed a refund pursuant to subsection (c)(15), although it is possible that it may have made its claim pursuant to subsection (c)(8). For purposes of this decision, the exact subsection under which the Petitioner is claiming the refund is immaterial.

West Virginia Code § 11-14C-31, governing the filing of claims for refund, provides, in relevant part:

§ 11-14C-31. Claiming refunds.

(a) Any person seeking a refund pursuant to subsection (c) or (d), section nine [§ 11-14C-9] of this article shall present to the Commissioner a petition [claim] for refund in the form required by the Commissioner and provide the information required by the Commissioner. . . .

....

(c) The right to receive any refund under the provisions of this section is not assignable and any assignment thereof is void and of no effect. No payment of any refund may be made to any person other than the original person entitled to claim the refund except as otherwise expressly provided in this article. The Commissioner shall cause a refund to be made under the authority of this section

only when the claim for refund is filed with the Commissioner within the following time periods:

....

(3) A petition [claim] for refund under subsection (c) or (d), section nine [§ 11-14C-9] of this article shall be filed with the Commissioner on or before the last day of January, April, July and October for purchases of motor fuel during the immediately preceding calendar quarter:

(d) Any petition [claim] for a refund not timely filed is not construed to be or constitute a moral obligation of the state of West Virginia for payment. Every petition [claim] for refund is subject to the provisions of section fourteen [§ 11-14C-14] article ten of this chapter. *

The Petitioner filed its claim for refund for the third quarter of 2006. Thus, pursuant to W. Va. Code § 11-14C-31(c)(3), it was required to file its claim for refund on or before the last day of October. Because it filed its claim no earlier than November 7, the date of its refund application, it failed to file its claim in a timely manner.

The Petitioner maintains that it is entitled to file for a refund for a period of up to eight quarters following the quarter in which the credit accrued which, under its theory, is the quarter in which the exempt fuel was purchased. The Petitioner cites Section R1120.100.010 of the International Fuel Tax Agreement (IFTA). Sections R1100, R1110 and R1120 provide as follows:

ARTICLE XI

R1100 CREDITS AND REFUNDS

A licensee shall receive full credit or refund for tax-paid fuel used outside the jurisdiction where the fuel was purchased. The base jurisdiction shall allow credits and issue refunds for all of its licensees on behalf of all member jurisdictions. Refunds to licensees will be made only when all tax liability, including audit assessments, have been satisfied to all member jurisdictions.

* Although § 11-14C-31 denominates the application for refund as a “petition,” pursuant to W. Va. Code § 11-10-14, the initial application to the State Tax Commissioner by a taxpayer is, in fact, a claim for refund. A “petition” is the document filed with this Office instituting a formal proceeding to collect a refund that has been formally denied by the State Tax Commissioner.

R1110 CASH REFUNDS

The licensee shall receive, on request, a cash refund of any accumulated credits. All requests for refunds of credit balances must be filed in writing.

R1120 APPLICATION OF CREDITS

.100 Such credits, when not refunded, shall be carried over to offset liabilities of the licensee in future tax reporting periods until:

005 The credit is fully offset; or

010 Eight calendar quarters shall have passed from the end of the calendar quarter in which the credit accrued,

whichever occurs sooner.

.200 When filing a tax return, a licensee may apply the overpayment generated in one jurisdiction to the taxes owed to another jurisdiction and remit the net tax owed to the base jurisdiction.

R1130 AUTHORIZATION TO WITHHOLD REFUNDS

As a condition to issuance of a motor fuel tax license under this Agreement, an applicant will authorize on the application that refunds may be withheld if the licensee is delinquent on fuel use taxes due to any member jurisdiction.

The State Tax Commissioner responds by contending that Section R1100 applies only to situations where the special fuel is used outside of the jurisdiction where it was purchased. He contends that the fuel was purchased and used in West Virginia. Therefore, Section R1100 is not applicable to this situation. Because Section R1100 is not applicable to the Petitioner in this situation, then the eight quarter period set out in Section R1120.100.010 does not apply to it either.

The State Tax Commissioner contends that Section 830 of IFTA is applicable to the Petitioner in this situation. Section 830 provides:

R830 EXEMPT FUEL USE

.100 A member jurisdiction may exempt from taxation any use of motor fuel within its jurisdiction.

- .200 Fuel use defined as exempt by a particular jurisdiction must be reported under this Agreements. For reporting tax-exempt miles or kilometers, the licensee is required to obtain the definition of operations that qualify for tax-exempt status from the jurisdictions of the Agreement.
- .300 Licensees must submit claims for refund for tax paid on tax-exempt fuel directly to the respective jurisdiction. (See IFTA Articles of Agreement Sections R1000 and R1100.)

Specifically, the Tax Commissioner maintains that Section 830.300 is the specific subsection that applies to this situation.

The Tax Commissioner's position is supported by the executive director of IFTA, Inc. The executive director distinguishes between exempt miles and exempt purchases. In response to specific questions submitted by the Petitioner respecting the refund claim at issue, she states:

Tax exempt fuel refunds are treated differently [than tax exempt distance]. R830.300 of the IFTA Articles of Agreement requires that licensees must submit claims of refund for tax paid on tax-exempt fuel directly to the respective jurisdictions. I believe this is what applies to the West Virginia example. Because not all jurisdictions allow certain types of fuel tax exemptions that others allow (fuel consumed in take-off units, idle time, etc.), there is no way to allow the exemption to be taken on the IFTA tax return. A licensee must go to the jurisdictions that allow the exemptions and file a claim for refund. The law of the jurisdiction where the claim for refund is filed applies to that claim for refund.

Thus, the executive director of IFTA, Inc. agrees with the State Tax Commissioner that the Petitioner was required to file its claim with the State of West Virginia, in compliance with the laws of the State of West Virginia. The Petitioner did not timely file its claim for refund in compliance with the laws of the State of West Virginia. Therefore, the Petitioner was rightfully denied the claim.

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 refund, the burden of proof is upon the Petitioner to show that it is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002].

2. In the circumstances presented by this matter, the Petitioner was required to file its refund claim timely in compliance with the provisions of W. Va. Code § 11-14C-31(c)(3).

3. The Petitioner did not file its refund claim timely in compliance with the provisions of W. Va. Code § 11-14C-31(c)(3).

4. The Petitioner in this matter has failed to carry its burden of showing that it is entitled to a refund.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of \$_____ of motor fuel excise tax, for the period of July 1, 2006 through September 30, 2006, must be and is hereby **DENIED**.