

**REDACTED DECISION -- 07-182 MFE -- BY GEORGE V. PIPER, ALJ -- SUBMITTED for DECISION on OCTOBER 31, 2007 -- ISSUED on JANUARY 24, 2008**

### **SYNOPSIS**

**MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- ON TAXPAYER --** 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 -- PREPONDERANCE OF EVIDENCE --** 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 -- *PRIMA FACIE* SHOWING NECESSARY FOR STATE TAX COMMISSIONER UNDER W. VA. CODE § 11-14C-36(a)(1) [2003] --** To sustain a challenged civil penalty assessment against a seller of untaxed dyed diesel fuel for violating W. Va. Code § 11-14C-36(a)(1) [2003], by allegedly selling such fuel “for use” in a highway vehicle required to be licensed, the State Tax Commissioner must make at least a *prima facie* case by going forward with sufficient evidence to show that the seller either had actual knowledge of the violation(s) or constructive knowledge of the same, that is, the seller, under all of the circumstances, reasonably should have known that the fuel was being purchased by the seller’s customer(s) “for use” in such a highway vehicle. The State Tax Commissioner need not, however, show a “willful” violation for such a civil offense.

**MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- CARRIED BY TAXPAYER --** In a case where the State Tax Commissioner has shown during the presentation of its *prima facie* case that only one (1) incident took place at the taxpayer’s place of business during which a customer illegally filled his on-highway vehicle with off-road dyed diesel fuel, the preponderance of evidence standard which must be met by the taxpayer is less than that required if the State Tax Commissioner had shown a pattern of numerous occasions when fuel was illegally purchased at the taxpayer’s place of business and the taxpayer had taken no steps to prevent the illegal sales in question.

## **FINAL DECISION**

On January 31, 2007, a criminal investigator with the Criminal Investigation “Division” of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued an assessment for selling dyed fuel for use in highway vehicles, 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 an incident which occurred on January 31, 2007, for a civil penalty in the amount of \$\_\_\_\_\_. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked March 7, 2007, 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) [2005].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10[2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003)

## **FINDINGS OF FACT**

1. Petitioner owns and operates a CITGO station located in West Virginia.
2. Petitioner sells gasoline, diesel, kerosene, and dyed diesel fuel.
3. Petitioner sells approximately 30,000 gallons of dyed diesel fuel per month.
4. On January 31, 2007, Mr. X made a purchase of 28.286 gallons of dyed diesel fuel.
5. Mr. X dispensed the dyed diesel fuel into a vehicle licensed for highway use.

6. Petitioner did not direct or assist Mr. X in the dispensing of the dyed diesel fuel into the vehicle licensed for highway use.

7. Mr. X was cited by the Respondent for the purchase of dyed diesel for use in a highway vehicle.

8. Based upon the purchase by Mr. X, Petitioner was cited and assessed \$\_\_\_\_\_ for “selling dyed diesel fuel for use in highway vehicle.” The \$\_\_\_\_\_ civil penalty was based upon the fact that one of the tanks which held the dyed diesel fuel had a capacity of 5,000 gallons.

9. Testimony elicited from Respondent’s witness by Petitioner’s counsel revealed that the dyed diesel fuel pump from which Mr. X filled his vehicle is not located in the front of Petitioner’s CITGO station, but, rather, behind the station.

10. Respondent’s witness also testified that, on the day of the incident, Mr. X filled up his vehicle from the off-highway pump first, and he then drove around to the entrance of Petitioner’s station, went in, and presumably paid for the fuel at that time.

11. Petitioner’s witness testified that because the dyed diesel fuel pump is not easily seen from the station entrance, he had a camera installed to make sure that fuel was not being dispensed into improper vehicles. He further testified that he also employed an extra attendant to go back and make sure that the fuel was being pumped into the correct container.

12. The sign displayed at the pump from which Mr. X obtained the fuel in question stated, in large letters that the same is “Dyed Diesel Fuel Non-Taxable Use Only—Not Legal for Motor Vehicle Use.”

13. During the presentation of Respondent’s *prima facie* case, no evidence was presented that other incidents had taken place at Petitioner’s place of business similar to that

involving Mr. X, whereby individuals routinely purchased off-road dyed diesel fuel for on-road use in violation of the law.

## **DISCUSSION**

The **ONLY** issue presented for determination in this case is whether the Petitioner has shown that the assessment 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). Any petitioner must satisfy the burden of proof requirement by a preponderance of the evidence and not some higher standard, such as beyond a reasonable doubt, which is the standard in a criminal proceeding for the State.

We must now, of course, apply the preponderance of evidence standard in light of the statute under which Petitioner was cited and assessed, which is as follows. Chapter 11, Article 14C, Section 36 of the West Virginia Code defines the improper sale or use of untaxed motor fuel:

(a) Any person who commits any of the following violations is subject to the civil penalty specified in subsection (b) of this section:

- (1) Sells or stores any dyed diesel fuel **for** use [note: “for use,” not merely, “used”] in a highway vehicle that is licensed or required to be licensed as such, unless that use is allowed under the authority of 26 U.S.C. §4082 [**emphasis added**];
- (2) Willfully alters or attempts to alter the strength or composition of any dye or marker in any dyed diesel fuel;
- (3) Uses dyed diesel fuel in a highway vehicle unless that use is allowed under the authority of 26 U.S. C. §4082;
- (4) Acquires, sells, or stores any motor fuel for use in a watercraft, aircraft, or highway vehicle that is licensed or required to be licensed unless the tax levied by section five of this article has been paid; or

(5) Uses any motor fuel in a watercraft, aircraft, or highway vehicle that is licensed or required to be licensed unless the tax levied by section five of this article has been paid.

To be specific, the Petitioner was cited for: “sells dyed fuel for use in highway vehicle.”

But what was the evidence presented by Respondent that Petitioner was in fact selling such fuel for use in a highway vehicle and conversely what was the evidence presented by Petitioner that it was not doing so?

During the presentation of its *prima facie* case Respondent’s witness testified that it was his contention that Petitioner’s tank of fuel was being used for highway vehicles because of the citation issued to Mr. X and because he had heard of a previous complaint about Petitioner having sold off-road fuel for on-road use.

Simply put Respondent’s evidence consisted of one sale of un-taxed off-road fuel to one (1) individual and Respondent’s witness’s recollection of a previous complaint or incident regarding the same.

To combat Respondent’s *prima facie* case, Petitioner’s counsel, during his cross-examination of Respondent’s witness, highlighted the fact that that witness only had personal knowledge of one (1) illegal sale of dyed diesel fuel to one (1) individual, coupled with that witness’ admission that the fact that Petitioner had dyed diesel fuel being stored in a tank in the ground was not in and of itself a violation of the statute but that only when a portion of that fuel (28.286 gallons) was illegally purchased did the violation occur.

Because the Petitioner testified that he took security measures (camera trained on the dyed diesel fuel pump and an extra attendant) to prevent such violations from occurring -- which measures were not disputed by Respondent -- all that this tribunal is left with is the realization that the Respondent never proved that Petitioner had (1) actual knowledge that such a violation

had taken place or (2) constructive knowledge of same, such as by allowing several customers to purchase dyed diesel fuel for highway use in contravention of state law.

We do not, however, conclude that the burden now rests upon the Respondent to prove “willful” intent on the part of the Petitioner, but more must be presented than a single illegal sale plus mere suspicion that another illegal incident had previously taken place.

To accept Respondent’s reasoning would mean that even if a thimble full of dyed diesel fuel turned up in a highway vehicle the owner of the motor vehicle storage tank from which it came would always be subject to civil penalties based upon the capacity of the storage tank, regardless of what measures the owner put in place to prevent the same from happening. We believe that such a conclusion clearly goes far beyond what the legislature intended.

If the statute were to be viewed as ambiguous, the case of *Expedited Transportation Systems, Inc. v. Vieweg*, 207 W. Va. Code 90, 98, 529 S. E. 2d 110, 118 (2000), stands for the proposition that, whenever possible, a court should avoid a result which leads to absurd, inconsistent or unreasonable results. The respondent’s position may lead to unreasonable results and, as stated previously, does so here.

To sustain a challenged civil penalty assessment against a seller of untaxed dyed diesel fuel for violating W. Va. Code § 11-14C-36(a)(1) [2003], by allegedly selling such fuel “for use” in a highway vehicle required to be licensed, the State Tax Commissioner must make at least a *prima facie* case by going forward with sufficient evidence to show that the seller either had actual knowledge of the violation(s) or constructive knowledge of the same, that is, the seller, under all of the circumstances, reasonably should have known that the fuel was being purchased by the seller’s customer(s) “for use” in such a highway vehicle. The State Tax Commissioner need not, however, show a “willful” violation for such a civil offense.

## **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. To satisfy it's 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, and not by a higher standard, such as beyond a reasonable doubt, which is required of the State in a criminal case.

3. The Petitioner-taxpayer in this matter has carried the burden of proof with respect to the issue of whether he illegally sold five thousand (5,000) gallons of off-highway dyed diesel fuel "for" highway use. 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 civil penalty assessment issued against the Petitioner on January 31, 2007, for selling dyed diesel fuel for highway use in violation of W. Va. Code § 11-14C-36(a)(1), in the amount of \$\_\_\_\_\_, should be and is hereby **FULLY VACATED**.