

**REDACTED DECISION -- 07-253 MFE, 07-275 MFE, 07-276 MFE, and 07-277 MFE --  
BY GEORGE V. PIPER, ALJ -- SUBMITTED for DECISION on OCTOBER 3 2007 --  
ISSUED on OCTOBER 15, 2007**

**SYNOPSIS**

**MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF NOT MET FOR VACATING CIVIL PENALTY** -- Because the provisions of W. Va. Code § 11-14C-38 make it crystal clear that any person who engages in business for which a motor fuel excise tax license is required and who does so without first obtaining said license is subject to civil penalties, without any waiver language, these penalties may not be waived, even if one of the State Tax Commissioner's employees may have mislead the taxpayer into believing that such civil penalties could be waived under certain circumstances, which was not proven here.

**FINAL DECISION**

On January 25, 2007, the Fuel Tax Administration Unit of the Internal Auditing "Division" of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") issued a motor fuel excise tax 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 ended January 31, 2007, for engaging in business without a motor fuel excise tax license, which carried a civil penalty in the amount of \$\_\_\_\_\_. Written notice of this assessment was served on the Petitioner as required by law.

On January 29, 2007, the Commissioner (by the Division) issued a motor fuel excise tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code, for the period ended January 31, 2007, for engaging in business without a motor fuel excise tax license, which carried a civil penalty in the amount of \$\_\_\_\_\_. Written notice of this assessment was served on the Petitioner as required by law.

On February 9, 2007, the Commissioner (by the Division) issued a motor fuel excise tax assessment against the Petitioner under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code, for the period ended February 28, 2007, for engaging in business without a

motor fuel excise tax license, which carried a civil penalty of \$\_\_\_\_\_. Written notice of the assessment was served on the Petitioner as required by law.

On February 12, 2007, the Commissioner (by the Division) issued a motor fuel excise tax assessment against the Petitioner under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code, for the periods ended February 10 and February 11, 2007, for engaging in business without a motor fuel excise tax license, which carried a combined civil penalty of \$\_\_\_\_\_. Written notice of assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked March 29, 2007, the 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) [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).

At the conclusion of the administrative hearing the presiding administrative law judge requested that, because a material witness was not available at the hearing, Respondent's counsel should obtain the material witness' sworn affidavit and that the same be sent to this tribunal (with a copy to the Petitioner) for inclusion into the hearing record.

### **FINDINGS OF FACT**

1. The Petitioner is an importer of petroleum products into the State of West Virginia.
2. On January 16, 2007 the Division sent correspondence to Petitioner cancelling its motor fuel excise tax license for failure to file required reports or information and for failure to pay the full amount of taxes due.

3. Petitioner testified that his problems in complying with the motor fuel excise tax statute began in July, 2006, when he and his wife separated (later divorced), which also coincided with his having severe heart problems culminating in a heart attack.

4. Petitioner further testified that, when he and his wife separated, she stopped filing the required reports, paying the required taxes, etc., and that he, who had never been involved in the paperwork side of the business, stopped opening mail from regulatory authorities, including Respondent.

5. Petitioner testified that the material witness, an employee of the Fuel Tax Administration Unit, made a courtesy telephone call to Petitioner advising him that, because tax filings and payments were in arrears, Petitioner's motor fuel excise tax license had been revoked, but that if Petitioner got those reports, etc., up to date he could legally continue to operate, as long as he called (contacted) Respondent prior to making each and every delivery into West Virginia, which entailed receiving a confirmation number for each load of product.

6. Petitioner also testified that during the course of two conversations, which he and his bookkeeper had with the material witness, she alluded to the fact that, although she did not personally have the authority to waive any of the resulting civil penalties, the material witness' office did have authority to waive such civil penalties.

7. Petitioner testified that, during a subsequent telephone conversation which he had with the material witness' Unit Supervisor, the latter stated that the material witness did not have the authority to say that the Unit could or would waive civil penalties.

8. During direct examination the Unit Supervisor testified that no person without a license may lawfully import products into the State of West Virginia, even if that person had previously obtained a confirmation number, and that assessments had been withdrawn in the past, but none had been waived.

9. The material witness' affidavit, which was received by this tribunal by the required due date, stated under oath that at no time did the material witness inform Petitioner or anyone associated with the Petitioner that the Unit or Unit Supervisor could or would waive any penalties assessed for transporting motor fuel without a motor fuel transporter's license, and that the material witness further informed Petitioner that, even if Petitioner received a confirmation number to transport fuel but still failed to have the required license, that Petitioner was still in noncompliance and would be subject to the required civil penalty. This tribunal credits this testimony.

### **DISCUSSION**

The **ONLY** issue presented for determination by the Petitioner is whether any legal rationale exists for this tribunal to waive one or all of the four (4) motor vehicle excise tax civil penalty assessments which were issued by Respondent.

W. Va. Code §11-14C-38 provides that any person who engages in a business activity for which a license is required and does so without first obtaining said license is subject to a five thousand dollar civil penalty for a first violation and a ten thousand dollar civil penalty for each subsequent violation.

Petitioner does not dispute the fact that he is such a "person" who was and is still required to have a motor fuel excise tax license before importing product into the State of West Virginia, and that on at least four (4) occasions he did, in fact, transport product into the State of West Virginia during such time that his company's license had been revoked for failure to file required reports and pay the required taxes.

Notwithstanding Petitioner's admission of non-compliance, this case presents troubling testimony in that Petitioner testified that he would not have been assessed civil penalties but for the fact that one of Respondent's employees told him to first obtain a confirmation number

before importing each and every load of product into the State of West Virginia, even though Respondent knew Petitioner's license had been lawfully revoked. This advice, if given, was clearly erroneous, although Petitioner testified that it was offered with the best of intentions, namely, to allow Petitioner to make deliveries to customers who had to have Petitioner's petroleum products delivered at that time of the year. The result was that Petitioner alleged that he was assessed each and every time he alerted Respondent that he was going to make a delivery.

However, Petitioner's testimony was later refuted by the same person, namely the material witness, whom he testified told him that he could make those deliveries. In the material witness' sworn affidavit, the material witness testified that at no time did the material witness authorize any of the deliveries while Petitioner's license had been revoked and that material witness never stated that any of the civil penalties could or would be waived.

This is the classic "he said/she said" case. This tribunal finds material witness' testimony to be factual, rather than Petitioner's testimony on this point, as the former is consistent with the statute and the usual practice.

Unfortunately, for Petitioner, this limited jurisdiction, executive branch tribunal does not have the statutory authority to sit essentially as a court of "equity"; instead, we must apply the law as written and may not deviate from that obligation under any circumstances.

Accordingly, because Petitioner violated W. Va. Code § 11-14C-38, in that he engaged in business while his motor fuel excise tax license was revoked, that statute mandates that all of the resulting civil penalties 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 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, this tribunal should waive the motor fuel excise tax assessments. *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 assessment issued against the Petitioner, for the period ended January 31, 2007 for a civil penalty of \$\_\_\_\_\_ must be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax assessment issued against the Petitioner, for the period ended January 31, 2007, for a civil penalty of \$\_\_\_\_\_ must be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax assessment issued against the Petitioner, for the period ended February 28, 2007, for a civil penalty of \$\_\_\_\_\_ must be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax assessment issued against the Petitioner, for the periods ended February 10 and February 11, 2007, for a combined civil penalty of \$\_\_\_\_\_ must be and is hereby **AFFIRMED**.