

**REDACTED DECISION -- 07-350 MFE -- BY ROBERT W. KIEFER, JR., ALJ --
SUBMITTED for DECISION on OCTOBER 31, 2007 -- ISSUED on APRIL 29, 2008**

SYNOPSIS

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- 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 any assessment of a motor fuel excise tax civil penalty 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 -- STATUTORY REQUIREMENT OF W. VA. CODE § 11-14C-34(b)(3) -- The plain language of W. Va. Code § 11-14C-34(b)(3) requires that the “invoice gallons loaded” be included on any shipping document carried by any person transporting fuel in or into the State of West Virginia.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- PLAIN STATUTORY LANGUAGE -- In the absence of some gap or ambiguity in the statute, or if the statute is not silent as to a particular subject, the State Tax Commissioner may not impose any additional requirements on terminal operators or transporters, especially when it is done on an individual, *ad hoc* or case-by-case basis.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- COMPLIANCE WITH STATUTORY REQUIREMENT -- In the present matter, the shipping document contained the number of invoiced gallons loaded at the terminal and, therefore, complied with the statute.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- BURDEN OF PROOF SATISFIED -- The Petitioner in this matter has carried its burden of proving that the motor fuel excise tax civil penalty assessment against it is erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On or about March 14, 2007, an officer with the Criminal Investigation “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. The 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 a violation that purportedly occurred on February 16, 2007, for a civil penalty in the amount of \$_____. According to the Petitioner, written notice of this assessment was served on it on March 20, 2007.

Thereafter, by mail postmarked May 8, 2007, and received on May 11, 2007, 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 assessment was issued because the Petitioner purportedly was in possession of an incomplete shipping document.

2. By letter dated May 13, 2004, the Corporation, by its Controller, requested that the Respondent State Tax Commissioner authorize it to use other than machine generated shipping documents when transporting motor fuel loaded at two West Virginia terminals. *See* State's Exhibit No. 3.

3. Attached to the May 13, 2004 letter were pre-printed forms generated by or on behalf of the Corporation, which were used as examples to show the handwritten information that the Corporation would provide on the pre-printed forms. *See* State's Exhibit No. 3.

4. By letter dated May 13, 2004, the Respondent, Unit Manager, Excise Tax Unit, Internal Auditing "Division," authorized the Corporation to transport its fuel by means of third-party carriers without machine-generated shipping documents. *See* State's Exhibit No. 3.

5. State's Exhibit No. 2 is the purportedly incomplete shipping document for which the Respondent issued the civil penalty assessment against the Petitioner in this matter.

6. State's Exhibit No. 2 is a pre-printed form that is generated by or on behalf of the Corporation.

7. The terminal at which the fuel was loaded, specifically the Refining Company, is part of the preprinted form. See State's Exhibit No. 2.

8. State's Exhibit No. 2 sets out the date on which the fuel was loaded, February 16, 2007, as evidenced by the handwritten as "2-16-06" on a blank line following the preprinted notation "Transfer Date:".

9. State's Exhibit No. 2 identifies the destination state as West Virginia, as evidenced by the handwritten "WV" on a blank line following the preprinted notation "Address:".

10. State's Exhibit No. 2 includes the number of gallons of fuel loaded on February 16, 2007, as evidenced by the handwritten "8900" in the preprinted box labeled "Gallons Loaded," which is located in the lower left hand corner of said document.

11. The "8900" handwritten on the form as gallons of fuel loaded corresponds to the difference between the beginning meter reading stamped on said document, "_____", and the ending meter reading stamped on said document, "_____."

12. The number of gallons of fuel loaded on February 16, 2007, is not included in any of the boxes in the column headed "Quantity (Gallons)" in the table contained in the preprinted form.

13. There is nothing in State's Exhibit No. 2 which would indicate the type of fuel loaded in the Petitioner's truck on February 16, 2007.

14. The Petitioner points out that the forms submitted to the State Tax Commissioner by the Corporation with its letter of May 13, 2004, as part of State's Exhibit No. 3, and the purportedly

incomplete form issued to the Petitioner by the Corporation, State's Exhibit No. 2, although similar, are not exactly the same.

15. The State Tax Commissioner concedes what is apparent, that the two forms are not identical.

16. The Tax Commissioner maintains that in requesting permission to use shipping documents that are not machine generated and submitting sample forms with its request, the Corporation represented that it would include the quantity, in gallons, of each type of fuel shipped, and that the State Tax Commissioner approved the use of non-machine generated forms on the basis of those representations.

17. The Tax Commissioner takes the position that the shipping document for which the civil penalty was issued, State's Exhibit No. 2, was deficient because in the "Quantity (Gallons)" column of the table contained in the document, it did not specify the number of gallons next to one or more of the types of fuel that are listed under the "Products" column of the table.

18. The State Tax Commissioner maintains that approval was given to the Corporation to insert handwritten information on the pre-printed form and the Corporation is responsible for inserting the information on the form.

19. The Petitioner's witness testified that State's Exhibit No. 2 is generated by the terminal, and there is no evidence in the record to the contrary.

20. The handwritten information on the pre-printed form is inserted by the Corporation personnel, as opposed to the Petitioner's personnel.

21. The State Tax Commissioner maintains that the Petitioner's driver should not accept the document if the form is incomplete, or the information entered thereon is incorrect or otherwise inaccurate.

22. The Petitioner maintains that its drivers do not know whether the forms presented to them at the terminal have been expressly approved by the State Tax Commissioner or are slightly different than those approved by the Tax Commissioner, and that its drivers can only determine whether or not the pre-printed form complies with the statute.

23. The Petitioner trains its drivers to know whether or not the quantity of fuel loaded is set out on the form.

24. The Petitioner contends that the shipping document complies with the provisions of W. Va. Code § 11-14C-34(b)(1)-(4), in that it identifies the terminal or bulk plant from which the fuel was loaded, the date it was loaded, the invoiced gallons loaded, and the destination state of the motor fuel.

25. The Petitioner points out that the quantity of fuel loaded, 8900 gallons, is shown in the left-hand “margin” of State’s Exhibit No. 2, and that the beginning and ending quantities as inserted in the left-hand “margin” of the form by the meter demonstrate that 8900 gallons of fuel was loaded, although that figure is not included in the “Quantity (Gallons)” column of the table on the form.

DISCUSSION

W. Va. Code § 11-14C-34 provides, in relevant part:

(a) A person shall not transport in this state any motor fuel by barge, watercraft, railroad tank car or transport vehicle unless the person has a machine-generated shipping document, including applicable multiple copies thereof, for the motor fuel that complies with this section: Provided, That in the event a terminal operator or operator of a bulk plant does not have installed on the first day of January, two thousand four, an automated machine that will print machine-generated shipping documents, the commissioner may authorize the terminal operator or operator of a bulk plant to issue manually prepared shipping documents: A terminal operator or operator of a bulk plant shall give a shipping document to the person who operates the barge, watercraft, railroad tank car or transport vehicle into which motor fuel is loaded at the terminal rack or bulk plant rack.

(b) The shipping document issued by the terminal operator or operator of a bulk plant shall contain the following information and any other information required by the commissioner:

(1) Identification, including address, of the terminal or bulk plant from which the motor fuel was received;

(2) Date the motor fuel was loaded;

(3) Invoiced gallons loaded;

(4) Destination state of the motor fuel as represented by the purchaser of the motor fuel or the purchaser's agent;

(5) In the case of aviation jet fuel, the shipping document shall be marked with the phrase "Aviation Jet Fuel, Not for On-road Use" or a similar phrase;

(6) In the case of dyed diesel fuel, the shipping document shall be marked with the phrase "Dyed Diesel Fuel, Nontaxable Use Only, Penalty for Taxable Use" or a similar phrase; and

(7) If the document is issued by a terminal operator, the invoiced gallons loaded and a statement indicating the name of the supplier that is responsible for the tax due on the motor fuel.

The issue presented by this matter is whether or not the shipping document issued by the terminal to the Petitioner complied with the statute.

The State Tax Commissioner concedes that the shipping document contains the address of the terminal at which the fuel was loaded, the date it was loaded and the destination state of the motor fuel, satisfying the requirements of W. Va. Code §§ 11-14C-34(b)(1), (2) & (4). The Tax Commissioner concedes that the provisions of W. Va. Code §§ 11-14C-34(b)(5)-(7) are not relevant to this matter. The only question to be decided is whether or not the shipping document carried by the Petitioner satisfied W. Va. Code § 11-14C-34(b)(3).

The State Tax Commissioner contends that the shipping document does not satisfy the requirements of W. Va. Code § 11-14C-34(b)(3). The shipping document sets forth the number

of gallons loaded in the lower left hand corner, in a box labeled "Gallons." He takes the position that this is inadequate. He maintains that the shipping document is incomplete because it does not set forth the number of gallons of fuel being transported in the column headed "Quantity (Gallons)" in the table contained in the preprinted form, next to the type of fuel being transported. Counsel for the State Tax Commissioner did not expressly state why this is required. Presumably, it is because failure to list the number of gallons of fuel being transported in any of the boxes in the column headed "Quantity (Gallons)" in the table contained in the preprinted form makes it difficult, if not impossible, for the Tax Commissioner to track the type of fuel is being transported.

The State Tax Commissioner's position has its genesis in the fact that the owner of the fuel, the Corporation, requested that it be permitted to generate handwritten shipping documents in lieu of machine generated documents. The Corporation provided sample documents with its request, all of which showed the number of gallons loaded in the "Quantity" column, next to the particular type of motor fuel being shipped.¹ Because the sample forms submitted by the Corporation all listed the quantity of fuel loaded next to the type of fuel, the Commissioner maintains that his approval of the Corporation's request required all future handwritten shipping documents to be completed in the exact same manner. The shipping document for which the assessment was issued was not completed in such a manner. Therefore, he argues, the assessment was valid and must be affirmed.

The Tax Commissioner maintains that a shipper should not accept an incomplete shipping document. In this instance, he believes the Petitioner's driver should have rejected the

¹ The forms submitted with the request are not exactly the same as the shipping document in this action, but they are quite similar. One difference is that the forms submitted with the Corporation's request contain a column headed "Quantity," while the comparable column on the form for which the Petitioner was assessed is headed

shipping document, requiring the terminal operator to “complete” the document by inserting the number of gallons in the “Quantity (Gallons)” column. If a shipping document is incomplete, the Tax Commissioner is correct that a driver should not accept it.

The Petitioner counters by arguing that the shipping document contains all of the information required by statute. According to the Petitioner, the number of gallons of fuel loaded is set out in the lower left-hand corner of the document. According to the Petitioner, so long as the number of gallons loaded is set out on the shipping document, the statute is satisfied. It is immaterial that the number of gallons of fuel loaded is not contained in the “Quantity (Gallons)” column next to one of the types of fuel listed thereon.

The plain language of the statute imposes the simple requirement that the shipping document contain “invoiced gallons loaded.” W. Va. Code § 11-14C-34(b)(3). This clearly means that the number of gallons loaded must be included on the shipping document. It does not specify where and how this number is to be included on the shipping document. In the present matter, the number was included in a box labeled “Gallons,” in the lower left-hand corner of the document. This certainly complies with the plain language of the statute.

In responding to the Tax Commissioner’s argument, the Petitioner argues that its employees are trained to ensure that the information required by statute is included on the shipping document. It further argues that its employees cannot be expected to know whether the State Tax Commissioner and the owner of the fuel have entered into some sort of agreement requiring information that is not required by the statute. The Petitioner makes a valid point. It correctly argues that its employees should be able to look at a shipping document and know whether or not it complies with the statute. They should not be required to know or to determine

“Quantity (Gallons). Failure to include the number of gallons transported by the Petitioner in the “Quantity” column cannot be attributed to any difference in the forms.

whether the State Tax Commissioner has imposed additional requirements on an individual taxpayer or based on circumstances that are not set out in the statute.² It is imperative that the Petitioner's employees be able to know that there is an objective standard for complying with the statute. They should not have to rely on the State Tax Commissioner, the terminal operator or some third party to inform them that the shipping document satisfies some extra-statutory requirement imposed by the State Tax Commissioner.

Based on the foregoing, it is the conclusion of this Office that the shipping document carried by the Petitioner complied with the requirements of W. Va. Code § 11-14C-34(b)(3). Accordingly, the civil penalty assessment against the Petitioner must be vacated.

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 a motor fuel excise tax civil penalty 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. The plain language of W. Va. Code § 11-14C-34(b)(3) requires that the "invoice gallons loaded" be included on any shipping document carried by any person transporting fuel in or into the State of West Virginia.

3. In the absence of some gap or ambiguity in the statute, or if the statute is not silent as to a particular subject, the State Tax Commissioner may not impose any additional requirements

² The Tax Commissioner would certainly have a better argument if, where there is an ambiguity or gap in the statute, he imposed additional requirements as to form by legislative or interpretive rule. This would have the effect of putting all taxpayers and transporters on constructive, if not actual, notice.

on terminal operators or transporters, especially when it is done on an individual, *ad hoc* or case-by-case basis.

4. In the present matter, the shipping document contained the number of invoiced gallons loaded at the terminal and, therefore, complied with the statute.

5. The Petitioner in this matter has carried its burden of proving that the motor fuel excise tax 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 fuel loaded on February 16, 2007, in the amount of \$_____ should be and is hereby **VACATED**, and the Petitioner owes no further tax liability for the period in question.