

**REDACTED DECISION -- 07-487 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 ASSESSMENT -- 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 a civil penalty assessment 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 ASSESSMENT -- BURDEN OF PROOF -- In order to show that the civil penalty assessment against it was erroneous, unlawful, void or otherwise invalid, the Petitioner was required to prove either that the load of fuel in this matter was supplied by a permissive supplier, or that it obtained an import confirmation number with respect to said load of fuel.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY ASSESSMENT -- BURDEN OF PROOF -- The Petitioner in this matter has failed to carry its burden of proving that any assessment of taxes against it is erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On July 31, 2007, the Motor Fuel Excise Tax Unit Supervisor with the Internal Auditing “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, Corporation, LLC¹. 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 ending July 31, 2007, for a civil penalty in the amount of \$_____. Written notice of this assessment was served on the Petitioner.

¹ The assessment was actually issued in the name of, Corporation, Inc.

Thereafter, by mail postmarked August 30, 2007, and received in the offices of the West Virginia Office of Tax Appeals on September 4, 2007, the Petitioner timely filed with this tribunal a petition for reassessment. 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 and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The State Tax Commissioner received a West Virginia Importer Report for a company, which was dated in July. See State's Exhibit No. 2.

2. Attached to the West Virginia Importer Report was a Schedule of Receipts showing a load sold by Company A, and transported by the Petitioner from a city in another State, to a city in West Virginia. See State's Exhibit No. 2.

3. The Schedule of Receipts did not show an import confirmation number. See State's Exhibit No. 2.

4. The importer, Company B, is not a "supplier" or "permissive supplier" as defined by W. Va. Code § 11-14C-2.

5. Because no import confirmation number was supplied with the Schedule of Receipts, a representative of the State Tax Commissioner issued the civil penalty assessment.

6. The fuel in question was loaded at a Company C terminal in another state, which is sometimes referred to as Terminal.

7. Company C terminal is not a West Virginia permissive supplier.

8. The Petitioner's witness testified that the correct supplier of the fuel should have been Company D, who is a permissive supplier.

9. According to the Petitioner's witness, its driver "punched in" an incorrect supplier number, the result of which was to show a supplier on the trip ticket that was not a permissive supplier.

10. The Petitioner's witness testified that its drivers do not always know that a supplier is not a permissive supplier.

11. The bill of lading issued by the terminal, number _____, did not show Company D as the supplier.

12. The purported error was discovered upon the driver's return to his home base.

13. The Petitioner contacted the terminal, advised them of the error and asked the terminal to issue a bill of lading showing Company D as the supplier.

14. The Petitioner presented a letter dated August 14, 2007, from the Terminal Supervisor, Company C.

15. The letter states that Company C "cancel[ed]" bill of lading number _____, because it was loaded under the "wrong stockholder" and customer account number, and rebilled with bill of lading number _____, with the stockholder being Company D.

16. The Petitioner submitted the original, purportedly incorrect bill of lading, number _____. See Petitioner's Exhibit No. 2.

17. The Petitioner also submitted the trip ticket, showing the original, purportedly incorrect information. See Petitioner's Exhibit No. 3.

18. Nothing on Petitioner's Exhibits Nos. 2 & 3 show that Company D was the supplier of the fuel.

19. The Petitioner has not presented a corrected bill of lading.

20. Company C did not notify the State Tax Commissioner of the issuance of a corrected bill of lading.

21. The motor fuel excise tax was paid by the importer.

22. Counsel for the State Tax Commissioner represented that Company D did not report this load to the State Tax Commissioner.

23. Counsel for the State Tax Commissioner represented that State Tax Commissioner employees have attempted to located information showing that this load was reported by Company D, but no such information has been located.

24. The Petitioner did not present any evidence at the hearing to show that Company D reported this load to the State Tax Commissioner.

25. The record was left open so that the Petitioner would have the opportunity to submit a copy of the corrected bill of lading from Company C.

26. The record was left open so that the Petitioner would also have the opportunity to contact Company D and attempt to get Company D to submit an amended return to show that Company D reported the fuel to the State of West Virginia.

27. Subsequent to the hearing, the Petitioner neither presented a copy of a corrected bill of lading nor any evidence that Company D submitted an amended return showing that it reported the fuel to the State of West Virginia.

DISCUSSION

The issue in this matter is whether or not the Petitioner has provided sufficient evidence to show that the fuel was reported to the State of West Virginia from a permissive supplier or, if it was not, whether or not the Petitioner obtained an import confirmation number.

The Petitioner's witness testified that the supplier of the fuel was Company D, a permissive supplier. If Company D supplied the fuel then, because it was a permissive supplier, no import confirmation number was required of the Petitioner.

The only evidence in the record to show that Company D was the supplier is the testimony of the Petitioner's witness, who does not appear to be a first-hand observer of the transaction in question, and the unsworn statement of the Company C terminal supervisor, in the form of his letter of August 14, 2007, which could not be subjected to cross-examination. The evidence presented by the Petitioner is hearsay evidence. This evidence is not as reliable as the documentary evidence that was presented to show that the supplier was not a permissive supplier. The evidence presented was also not as reliable as the evidence that the Petitioner indicated that it could provide, specifically the corrected bill of lading and evidence that Company D reported the load of fuel to the State of West Virginia.

At the close of the hearing in this matter, the record was left open to allow the Petitioner additional time to provide additional evidence to show that Company D was the supplier and that it reported this load of fuel to the State of West Virginia. The Petitioner's representative was told that it should do so within sixty (60) days, but that if additional time was necessary, the additional time would likely be granted. The Petitioner's representative was also told that the Petitioner should apprise the State Tax Commissioner and this Office of any attempts to locate and provide such additional information. This Office has received no additional submissions of evidence and has not been apprised of any attempts by the Petitioner to do so.

Based on the evidence in the record, it has not been proven by a preponderance of the evidence that Company D was the supplier of the load in question and that said load was reported to the State of West Virginia. The best evidence that Company D was the supplier of

the fuel would be a document demonstrating that fact. A document demonstrating that fact purportedly exists, specifically the corrected bill of lading. Since the corrected bill of lading was issued to the Petitioner and should be in its possession, it should not be difficult for the Petitioner to present the same.

More difficult for the Petitioner to present is some evidence to show that Company D reported this load to the State of West Virginia. Clearly, the Petitioner cannot force Company D to report this load to the State. However, it has not shown that it even made an effort to do so.

In matters involving civil penalties issued by the State Tax Commissioner under Article 14C of the West Virginia Code, the burden is on the Petitioner to prove that the civil penalty is erroneous, unlawful, void or otherwise invalid. In the present matter, the Petitioner has not satisfied its burden. It has neither presented information that is in its possession, nor attempted to get a third-party to present evidence that is in its possession. Thus, the assessment must be affirmed.

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 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).

2. In order to show that the civil penalty assessment against it was erroneous, unlawful, void or otherwise invalid, the Petitioner was required to prove either that the load of fuel in this matter was supplied by a permissive supplier, or that it obtained an import confirmation number with respect to said load of fuel.

3. The Petitioner in this matter has failed to carry its burden of proving that any assessment of taxes 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 the period ending June 30, 2007, in the amount of \$_____, should be and is hereby **AFFIRMED**.