

**REDACTED DECISION—09-192 MFE—BY MICHELE DUNCAN BISHOP, CHIEF ALJ—SUBMITTED FOR DECISION on OCTOBER 2, 2009—ISSUED on MARCH 31, 2010**

**SYNOPSIS**

A person found to be using dyed diesel fuel in a highway vehicle is subject to the civil penalty set forth in W.Va. Code § 11-14C-36(b), inasmuch as the state legislature has not articulated the component of intent as necessary to its application.

**OVERVIEW**

The Office of Tax Appeals received, on June 2, 2009, a petition for reassessment on behalf of (“the petitioner”), referencing Assessment for the amount of \$2000 for violation of W.Va. Code § 11-14C-36. The respondent, State Tax Commissioner Christopher G. Morris, filed his answer on July 8, 2009, asserting only that he was without sufficient information to affirm or deny the allegations contained in the petition.

A telephonic pre-hearing conference was conducted on July 28, 2009, by the undersigned. During the conference, the respondent’s counsel consented to the request of the petitioner to submit the matter for review of documentary evidence and arguments, without the need for an evidentiary hearing. A scheduling order was entered on August 3, 2009.

The petitioner submitted a written argument, together with one 8x10 color photograph containing handwritten notations, on September 3, 2009. No response has been received from the respondent. Inasmuch as no response or objection was received from the respondent, those facts set forth in the petitioner’s correspondence are taken as true and there appears to be no factual dispute.

The matter having been submitted for decision on October 2, 2009, the date on which a response would have been due from respondent, the matter is considered on the existing record.

### **FINDINGS OF FACT**

1. On May 28, 2009, the petitioner filled his dual-tank 1996 Ford vehicle from a pump at a gas station in West Virginia, at a price of \$2.399 per gallon.

2. According to the petition, petitioner's 1996 Ford is used primarily on his farm, but he fills the tanks with highway fuel when employing it for highway use.

3. The fuel the petitioner put into his vehicle on May 28 was off-road, dyed diesel fuel which was dispensed by a pump in very close proximity to the highway fuel pump.

4. Petitioner did not intentionally fill his vehicle with dyed diesel fuel.

5. Petitioner was not aware that the gas station sold dyed diesel fuel from a pump that was adjacent to the pump used for dispensing highway fuel.

6. Petitioner owns a farm on which he has a tank for the storage of off-road dyed diesel fuel. Petitioner represented that he paid \$1.82 for the fuel contained in that tank.

7. Petitioner would not likely have fueled his vehicle at a cost of \$2.399 per gallon when he could have filled his tanks with the same type of fuel at his farm for \$1.82 per gallon.

8. Petitioner submitted 8x10 color photograph is accepted as a true representation of the pump from which he purchased dyed diesel fuel; however, the angle from which the photograph is taken does not provide a view of the signs posted on the pump or the adjacent pump.

### **DISCUSSION**

W.Va. Code § 11-14C-36(a)(3) provides that any person who “[u]ses dyed diesel fuel in a highway vehicle” is subject to a civil penalty, unless the use of such fuel is permitted under 26 U.S.C. § 4082. There is no argument that the petitioner was entitled to the use of such fuel under that federal statute.

As set forth in the factual findings above, it is determined that the petitioner did not intentionally place dyed diesel fuel in his dual-tank Ford. The petitioner does not dispute, however, that he filled the tanks of his dual-tank vehicle with dyed diesel fuel, or that his vehicle was a highway-use vehicle.

W.Va. Code § 11-14C-36, as it pertains to those persons using dyed diesel fuel in their highway vehicles, is a statute of strict liability. Inasmuch as the statute offers no exceptions to its application, the petitioner’s intent is not relevant to this analysis. The petitioner was found to have dyed diesel fuel in his highway vehicle while operating that vehicle on a public highway and he is, therefore, subject to the civil penalty set forth in the statute.<sup>1</sup>

### **CONCLUSION**

It is accordingly HELD:

1. Petitioner has not carried the burden of proof in this matter.
2. A person found to be using dyed diesel fuel in a highway vehicle is subject to the civil penalty set forth in W.Va. Code § 11-14C-36(b), inasmuch as the state legislature has not articulated the component of intent as necessary to its application.

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<sup>1</sup> We do not at this time undertake consideration of the possible outcome were a petitioner to show that the pumps were not clearly marked or were mismarked. In the matter before us, the petitioner has shown that the pumps were in close enough proximity to be confusing to him. Though we find he did not intend to use dyed-diesel fuel, the evidence is not sufficient to show that his mistake was unavoidable.

3. The petitioner is subject to the civil penalty set forth in W.Va. Code § 11-14C-36(b), and the assessment of the State Tax Department is AFFIRMED.

## **APPEAL PROCEDURES**

If an aggrieved party wishes to appeal this Final Decision to an appropriate West Virginia circuit court, W. Va. Code § 11-10A-19(a), as last amended, requires that such an appeal must be filed within sixty days after the date of service of this Final Decision upon the party. An appeal petition filing fee is normally required by the circuit court, and, in most cases, an appeal bond must be filed, if the appeal to the circuit court is by a taxpayer.

The appellant-petitioner must provide the West Virginia Office of Tax Appeals, as well as the other party and the West Virginia Attorney General's Office with a copy of the filed petition for judicial review, along with a copy of the accompanying docketing statement.

Within fifteen days after receipt of this written notice of the appeal, or within such further time as the circuit court may allow, the West Virginia Office of Tax Appeals will prepare and transmit to the circuit court a certified copy of the entire record in the matter.

As set forth in this office's Rules of Practice and Procedure contained in W. Va. Code St. R. § 121-1-86 (Apr. 20, 2003), the West Virginia Office of Tax Appeals will: (1) send to the parties a detailed index of the record at the same time it transmits to the circuit court a certified copy of the entire record (2) at the same time send to the appellant(s) a bill payable to the "State of West Virginia", due within thirty calendar days, for the reasonable costs of preparing the record; and (3) upon payment of such record preparation costs, send to the parties a certified copy of the entire record.