

REDACTED DECISION – DK# 09-264 MFE – BY - CHRISTOPHER B. AMOS, ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on NOVEMBER 29, 2010 – ISSUED ON May 19, 2011

SYNOPSIS

MOTOR FUEL EXCISE TAX – 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 tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W.Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

MOTOR FUEL EXCISE TAX – CIVIL PENALTIES – A person who operates as a distributor of motor fuel, as defined in West Virginia Code Section 11-14C-2(28), without a license pursuant to West Virginia Code Section 11-14C-10(a)(8), is subject to civil penalties under West Virginia Code Section 11-14C-38.

MOTOR FUEL EXCISE TAX – CIVIL PENALTIES – Petitioner’s unique out-of-state business activities satisfies the statutory definition of motor fuel distributor under West Virginia Code Section 11-14C-2(28).

MOTOR FUEL EXCISE TAX – BURDEN OF PROOF – The Petitioner failed to carry its burden of proof that the assessment of penalties in this matter was erroneous, unlawful, void or otherwise invalid. *See* W.Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

FINAL DECISION

On or about May 26, 2009, the West Virginia State Tax Commissioner’s Office (hereinafter “Respondent”) issued sixteen assessments against a corporation (hereinafter “Petitioner”) pursuant to West Virginia Code Section 11-14C-38. The assessments, totaling \$____, were issued consistent with the authorization of the State Tax Commissioner under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. The penalties were assessed for sixteen separate deliveries of diesel fuel to a West Virginia location, from May 31, 2006, to December 28, 2008, when Petitioner purportedly was not licensed in West Virginia to

operate as a motor fuel distributor. Thereafter, Petitioner timely filed with this tribunal a petition for reassessment.

FINDINGS OF FACT

1. Petitioner is an out-of-state corporation and engages in the business of petroleum fuel distribution in some thirty-two states.

2. Sometime in late 2006 or early 2007 Petitioner applied with the Respondent for a license to operate as a motor fuel distributor in West Virginia. Petitioner did not receive a license from the Tax Commissioner to so operate as a motor fuel distributor.¹

3. On or about September 30, 2005, Petitioner entered into a written contractual arrangement with (2) two organizations to deliver diesel fuel to a location in West Virginia on an as-needed basis.²

4. Under this arrangement, when the West Virginia organization needed diesel fuel at the West Virginia location they would make a call to Petitioner and place an order by telephone.

5. Not having a license to distribute fuel in West Virginia, Petitioner would contact a company headquartered in Maryland, with whom it had an informal, unwritten agreement. Petitioner would order diesel fuel from Maryland by telephone and instruct the Maryland company to deliver the fuel to the West Virginia location.

¹ It is unclear from the record when such application was made or why Petitioner did not receive a license to operate as a distributor. In its reply brief the Tax Department alleged that the Petitioner was denied a license due to a prior felony conviction of the company's general manager. Petitioner asserts that it was never denied a distributor's license, and the transcript of the evidentiary hearing hints that there was some problem involving the posting of a bond in order to receive such license. Either way, Petitioner was not granted a license to operate as a motor fuel distributor when it first applied.

² See contract between Petitioner and a company supplied by Petitioner post-hearing and entered into the record by the Honorable Robert W. Kiefer, Jr., Administrative Law Judge.

6. The Maryland company would deliver the fuel to the West Virginia location and Petitioner would receive payment from the company. The Petitioner would in turn pay the Maryland company for the fuel and delivery.

7. The Maryland company, at all times relevant herein, appears to have been properly licensed to distribute motor fuel in the state of West Virginia.

8. On or about April 30, 2009, Petitioner again filed an application with Respondent, seeking a license to distribute or import motor fuel in West Virginia.³ By the time Petitioner applied a second time there had already been several deliveries of diesel fuel to the West Virginia location under the above-described arrangement.

9. On or about May 15, 2009, pursuant to West Virginia Code Section 11-14C-14(a)(4) and (5), Petitioner's application was denied because the applicant, Mr. X, a General Manager of Petitioner's corporation, has a felony conviction for violation of the federal False Claims Act.⁴

10. On or about May 26, 2009, Respondent issued sixteen assessments to Petitioner for alleged violations of West Virginia Code Section 11-14C-38 (specifically, for engaging in the business of motor fuel distribution in the state of West Virginia without a license).

11. Respondent alleges that at various times in 2006 through 2008 Petitioner orchestrated sixteen deliveries of diesel fuel to the West Virginia location without being properly licensed.⁵

³ See Respondent's Exhibit 1 (application for motor fuel license wherein Petitioner check marked "Distributor" and also circled "Importer").

⁴ *United States of America v. Mr. X*, United States Court of Appeals for the Ninth Circuit (1997).

⁵ The delivery dates were May 31, 2006, August 6, 2006, September 13, 2006, December 15, 2006, April 5, 2007, June 11, 2007, August 14, 2007, September 24, 2007, January 10, 2008, April 11, 2008,

12. Pursuant to West Virginia Code Sections 11-14C-38(a) (1) and (2), Petitioner was fined \$____ for the first offense and \$____ for each subsequent offense, for a total of \$____ in civil penalties.

13. On or about July 23, 2009, Petitioner timely filed a petition for reassessment with this tribunal. An evidentiary hearing on the merits was held On January 20, 2010, before the Honorable Robert W. Kiefer, Jr., Administrative Law Judge.⁶

DISCUSSION

Respondent argues that Petitioner acted as either a distributor or an importer of diesel fuel without the proper license, and that the fines against the Petitioner should be upheld.⁷ Petitioner argues that it cannot be a distributor because it does not meet the statutory definition of that term. West Virginia's tax code defines distributor for purposes of that section as "a person who acquires motor fuel from a licensed supplier, permissive supplier, or from another licensed distributor for subsequent sale or use." W. Va. Code Ann. § 11-14C-2(28) (West 2010). Petitioner argues that it cannot be deemed a distributor because it does not actually "acquire" the fuel that is ultimately transported into West Virginia by the Maryland company. In support of its argument, Petitioner calls attention to the definition of "acquire" as found in Black's Law

August 1, 2008, August 4, 2008, September 25, 2008, December 17, 2008, December 27, 2008, and December 28, 2008.

⁶ Petitioner appeared at the evidentiary by Mr. X, General Manager, and Respondent appeared by counsel. The parties submitted written briefs in support of their positions, the last of which was received by this tribunal on November 29, 2010. For administrative reasons, by order dated December 7, 2010, this case was reassigned to the undersigned Administrative Law Judge.

⁷ Petitioner was actually cited for operating as a distributor of motor fuel without a license, pursuant to West Virginia Code Section 11-14C-38. However, at the evidentiary hearing and in its reply brief, the Respondent argued that Petitioner was either a distributor or an importer. Respondent cannot make both arguments because the citations issued to the Petitioner charged them only with operating as a motor fuel distributor without a license. The citations issued to the Petitioner do not cite them for operating as a motor fuel importer without a license, and the Respondent did not submit a prehearing statement raising that issue prior to hearing. Therefore, whether Petitioner operated as a motor fuel importer is not an issue that is properly before this tribunal.

Dictionary, which means “To gain possession or control of; to get or obtain.” Petitioner’s Reply Memorandum In Support of Petition for Reassessment, Page 3. Petitioner asserts that it never physically acquired the fuel in question, that the Maryland company is the party that took actual possession of the fuel and delivered it into the state, and that to accept Respondent’s assertion would be to incorrectly conclude that there were two distributors for each fuel delivery; something that the Petitioner claims is technically impossible.

Petitioner’s reasoning is flawed. While it is true that Petitioner never took physical possession of the fuel that was delivered into the state, it is quite clear that the law recognizes the premise of constructive possession, which is defined as “Control or dominion over a property without actual possession or custody of it.” Black’s Law Dictionary 949 (7th Ed. 2000). Even the definition of acquire, as relied upon by the Petitioner, includes the gaining of control over something versus actual possession. Additionally, based upon the definition of distributor cited *supra*, the Code suggests that there can indeed be situations where there is more than one distributor. As mentioned, a distributor is “a person who acquires motor fuel from a licensed supplier, permissive supplier, **or from another licensed distributor** for subsequent sale or use.” W. Va. Code Ann. § 11-14C-2(28) (West 2010), (emphasis added). Thus, as envisioned under West Virginia law, a motor fuel transaction can involve more than one distributor. By contracting with an organization in West Virginia to supply it with diesel fuel whenever it so needed, and thereafter by arranging for the Maryland company to deliver the fuel with certain specified terms of delivery and payment having been prearranged, the Petitioner exercised such dominion and control over the motor fuel being delivered into West Virginia that it meets the statutory definition of distributor under West Virginia Code Section 11-14C-2(28).

Finally, in its brief, Petitioner asserts that “In compliance with West Virginia Code Section 11-14C-6(a), and as confirmed in the records of the [Respondent], the Maryland company paid all motor fuel taxes due on the deliveries of its motor fuel to the West Virginia location [and] . . . The Maryland company submitted a Distributor Report to the [Respondent] setting forth all of its tax-paid receipts for fuel taxes paid on its fuel deliveries to the West Virginia location.” Petitioner’s Memorandum In Support of Petition for Reassessment, Page 3. Even if this statement is correct, Petitioner’s argument that the Maryland company paid all motor fuel excise taxes that were due is not relevant to the issue of whether Petitioner was required to be licensed under West Virginia Code Section 11-14C-10(a)(8) for the activities in which it engaged, or the issue of whether the Petitioner was properly fined for not being so licensed.

Because the Petitioner orchestrated the sale, shipment and delivery of diesel fuel to the organization at the West Virginia location, it engaged in the business of motor fuel distribution; an activity for which it was required to have been licensed under West Virginia Code Section 11-14C-10(a)(8).

CONCLUSIONS OF LAW

Based upon 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. W. Va. Code § 11-10A-10(e) and W. Va. Code R. § 121-1-63.1 (2003).

2. A person who operates as a distributor of motor fuel, as defined in West Virginia Code Section 11-14C-2(28), without a license pursuant to West Virginia Code Section 11-14C-10(a)(8), is subject to civil penalties under West Virginia Code Section 11-14C-38.

3. Petitioner's activities wherein it arranged the purchase, sale and delivery of motor fuel from out-of-state satisfies the definition of distributor as set forth in West Virginia Code Section 11-14C-2(28).

4. Petitioner did not meet its burden of proof and thus did not establish that the civil penalties issued by the Respondent were erroneous or incorrect as a matter of law.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the civil penalties assessed against the Petitioner in the amount of \$____, pursuant to West Virginia Code Section 11-14C-38, should be and are hereby **AFFIRMED**.