

**REDACTED DECISION – DK#S 11-293 MFE -- BY – A.M. “FENWAY” POLLACK,
CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION ON MARCH 21,
2012 – ISSUED ON AUGUST 29, 2012**

SYNOPSIS POINTS

TAXATION -- SUPERVISION -- GENERAL DUTIES AND POWERS OF TAX COMMISSIONER -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

TAXATION -- PROCEDURE AND ADMINISTRATION -- “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

TAXATION -- MOTOR FUEL EXCISE TAX -- It is a violation for any person to use dyed diesel fuel in a highway vehicle unless that use is allowed under the authority of 26 U.S.C. § 4082. *See* W. Va. Code Ann. § 11-14C-36(a)(3) (West 2010).

TAXATION -- MOTOR FUEL EXCISE TAX -- A highway vehicle, as that term is used in Section 36 of Article 14C, Chapter 11, is “any self-propelled vehicle, trailer or semitrailer that is designed or used for transporting persons or property over the public highway and includes all vehicles subject to registration under article three, chapter seventeen-a of this code”. W. Va. Code Ann. § 11-14C-2(37) (West 2010).

TAXATION -- MOTOR FUEL EXCISE TAX -- The penalty for violating the provisions of West Virginia Code Section 11-14C-36(a)(3) is ten dollars per gallon of motor fuel based upon the maximum capacity of the motor fuel storage tank, container or storage tank of the highway vehicle, watercraft or aircraft in which the motor fuel is found or one thousand dollars, whichever is greater. *See* W. Va. Code Ann. § 11-14C-36(b) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The Petitioner in this matter, did, on August 11, 2011, use dyed diesel fuel in two separate tanks on a highway vehicle.

WEST VIRGINIA OFFICE OF TAX APPEALS -- 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 against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003)

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF NOT MET -- The Petitioner in this matter has not carried her burden of proving that the August 11, 2011, assessment issued against her was erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On August 11, 2011, a Tax Department criminal investigator was conducting motor fuel enforcement activities in Logan County, West Virginia. On that date he issued an assessment¹ to the Petitioner, alleging that she had used dyed diesel fuel in a highway vehicle, in violation of West Virginia Code Section 11-14C-36(a)(3). On August 25, 2011, the Petitioner timely filed her Petition for Reassessment with this Tribunal and the matter came for an evidentiary hearing on March 21, 2012.

FINDINGS OF FACT

1. On August 11, 2011, Victor Bonnett, a criminal investigator with the criminal investigation division of the West Virginia Tax Department was conducting enforcement activities in Logan County, West Virginia. Mr. Bonnett was working in conjunction with an officer, Sam Doss, of the West Virginia Public Service Commission, who also was conducting enforcement activities.

2. On August 11th, Mr. Doss and Mr. Bonnett observed the Petitioner driving a dump truck on Buffalo Creek road. Mr. Doss stopped the Petitioner in order to conduct various safety checks.

3. During this stop, Mr. Bonnett observed what he believed to be dyed diesel fuel in each of the two tanks of the vehicle the Petitioner was operating.

4. Mr. Bonnett issued an assessment to the Petitioner, which alleged two violations of West Virginia Code Section 11-14C-36(a)(3).

5. Subsequently, Mr. Bonnett tested the fuel found in the tanks on the vehicle the Petitioner was operating. That testing confirmed the presence in both tanks of dyed diesel fuel. *See Respondent's Exhibit 2.*

¹ While only one assessment was issued, it alleged two violations with two separate penalties.

6. The Petitioner does not deny using dyed diesel fuel in the vehicle she was operating.

DISCUSSION

It is unclear why the Petitioner in this matter requested an evidentiary hearing. There is no dispute as to what transpired. Nor is there any dispute regarding the law that controls this matter. “Any person who commits any of the following violations is subject to the civil penalty specified in subsection (b) of this section: . . .(3) Uses dyed diesel fuel in a highway vehicle unless that use is allowed under the authority of 26 U.S.C. § 4082”. W. Va. Code Ann. § 11-14C-36(a)(3) (West 2010). Section 14C defines a highway vehicle as “any self-propelled vehicle, trailer or semitrailer that is designed or used for transporting persons or property over the public highway and includes all vehicles subject to registration under article three, chapter seventeen-a of this code”. W. Va. Code Ann. § 11-14C-2(37) (West 2010). The Respondent calculated the penalty in this matter based upon subsection (b) of Section 36, which states:

The amount of the civil penalty for the first two violations of this section in a calendar year, as described in subsection (a) of this section, is ten dollars per gallon of motor fuel based upon the maximum capacity of the motor fuel storage tank, container or storage tank of the highway vehicle, watercraft or aircraft in which the motor fuel is found or one thousand dollars, whichever is greater

W. Va. Code Ann. § 11-14C-36(b) (West 2010). Here, the vehicle in which the Petitioner was using the dyed diesel had two tanks; hence the two separate, thousand dollar fines.

At the evidentiary hearing in this matter the Petitioner only wanted to introduce evidence regarding why she was on Buffalo Creek road. The Petitioner indicated that she had been traveling from a mine site to a warehouse on Toney Fork Road and that she only left Toney Fork Road in an effort to avoid congestion due to paving. The Petitioner did not appreciate the fact

that operating with dyed diesel on either Toney Fork or Buffalo Creek is a violation of West Virginia Code Section 11-14C-36. In fact, based upon the testimony of Mr. Bonnett, (and the plain meaning of Section 36) it was a violation for the Petitioner to be operating a highway vehicle with dyed diesel anywhere, including the mine site. Therefore, it is undisputed that the Petitioner did, in fact, use dyed diesel fuel in a highway vehicle on August 11, 2011. As in every matter before the West Virginia Office of Tax Appeals, the burden is on the Petitioner to prove that any assessment of tax is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003). In this matter, the Petitioner has failed to meet her burden.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. It is a violation for any person to use dyed diesel fuel in a highway vehicle unless that use is allowed under the authority of 26 U.S.C. § 4082. *See* W. Va. Code Ann. § 11-14C-36(a)(3) (West 2010).

4. A highway vehicle, as that term is used in Section 36 of Article 14C, Chapter 11, is “any self-propelled vehicle, trailer or semitrailer that is designed or used for transporting persons or property over the public highway and includes all vehicles subject to registration

under article three, chapter seventeen-a of this code”. W. Va. Code Ann. § 11-14C-2(37) (West 2010).

5. The penalty for violating the provisions of West Virginia Code Section 11-14C-36(a)(3) is ten dollars per gallon of motor fuel based upon the maximum capacity of the motor fuel storage tank, container or storage tank of the highway vehicle, watercraft or aircraft in which the motor fuel is found or one thousand dollars, whichever is greater. W. Va. Code Ann. § 11-14C-36(b) (West 2010).

6. The Petitioner in this matter, did, on August 11, 2011, use dyed diesel fuel in two separate tanks on a highway vehicle.

7. 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 Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003)

8. The Petitioner in this matter has not carried her burden of proving that the August 11, 2011, assessment issued against her was erroneous, unlawful, void or otherwise invalid.

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner on August 11, 2011, in the amount of \$_____, is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. “Fenway” Pollack
Chief Administrative Law Judge

Date Entered