

**REDACTED DECISION – DOCKET NUMBER 12-464 RMFE -- By – GEORGE V. PIPER -- ADMINISTRATIVE LAW JUDGE – SUBMITTED for DECISION on MAY 21, 2013 -- DECISION ISSUED on MARCH 24, 2014**

**SYNOPSIS**

**TAXATION**

**SUPERVISION**

**GENERAL DUTIES AND POWERS OF COMMISSIONER; APPRAISERS**

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**

**MOTOR FUEL EXCISE TAX**

**EXEMPTIONS FROM TAX; CLAIMING REFUNDS OF TAX**

Pursuant to West Virginia Code Section 11-14C-9(d)(2) the Petitioner, as an institution of the State of West Virginia, may claim an exemption from the motor fuel excise tax by first paying the tax and then applying to the Tax Commissioner for a refund.

**TAXATION**

**MOTOR FUEL EXCISE TAX**

**CLAIMING REFUNDS**

West Virginia Code Section 11-14C-31(c)(3) provides that any such refund request under subsection (d) of section nine of Article 14C must be filed no later than the thirty-first day of August for all such purchases of motor fuel made during the preceding fiscal year ending the thirtieth of June.

**TAXATION**

**MOTOR FUEL EXCISE TAX**

**CLAIMING REFUNDS**

W. Va. Code Section 11-14C-31(d) provides that untimely refund requests are not to be construed as a moral obligation of the State of West Virginia for payment.

**WEST VIRGINIA SUPREME COURT OF APPEALS**

**CASE LAW**

The term “shall” as used by the Legislature, makes the statutory requirement mandatory rather than directory. *Helton v. Reed*, 219 W. Va. 557 638 S.E.2d 160 (2006) (Benjamin concurring)

**WEST VIRGINIA OFFICE OF TAX APPEALS**

**CONCLUSION OF LAW**

The Petitioner has presented no legal authority to this Tribunal to disregard the express statutory requirement specifying the date by which a claim for refund of motor fuel excise tax must be filed.

**WEST VIRGINIA OFFICE OF TAX APPEALS  
HEARING PROCEDURES**

In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the Petitioner to show that it is entitled to a refund. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010); W. Va. Code R. §§121-1-63.1 and 69.2 (2003).

**TAXATION**

**WEST VIRGINIA OFFICE OF TAX APPEALS  
HEARING PROCEDURES**

Petitioner has failed to carry its burden of showing that it is entitled to its refund claims. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010); W. Va. Code R. §121-1-63.1 and 69.2 (2003).

**FINAL DECISION**

On September 25, 2012, and September 26, 2012, respectively, the Petitioner, filed claims for refund totaling \$\_\_\_\_\_ of motor fuel excise tax for the tax period ending June 30, 2013. By two letters both dated September 27, 2012, the Excise Tax Unit Manager of the Internal Auditing Division (“The Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”), denied both refund claims. The reason stated for the denials was that a refund of fuel purchased for the June period of 2012, must be filed with a postmark date of no later than August 31, 2012, and therefore, Petitioner’s claims for refund filed on September 25, 2012, and September 26, 2012, were untimely filed in violation of West Virginia Code Section 11-14C-31(c)(3)[2003].

Thereafter, on December 3, 2012, the Petitioner timely filed a petition for refund with this Tribunal. *See* W. Va. Code §§11-10A-8(2) and 11-10A-9(a)-(b)(West 2010).

Subsequently, a notice of hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

## **FINDINGS OF FACT**

1. Petitioner is a not-for-profit state agency of the State of West Virginia, .
2. For the filing period ending June 30, 2013<sup>1</sup>, the Petitioner purchased \_\_\_\_\_gallons of gasoline in May 2012, for which it paid motor fuel excise tax in the amount of \$\_\_\_\_\_.
3. For the filing period ending June 30, 2013, the Petitioner purchased \_\_\_\_\_gallons of clear kerosene and \_\_\_\_\_ gallons of propane in June 2012, for which it paid motor fuel excise tax in the amount of \$\_\_\_\_\_.
4. On September 27, 2012, Respondent, having reviewed the Petitioner's motor fuel refund returns, denied both refund claims in their entirety because the last acceptable date to claim the refunds was August 31, 2012. Petitioner's refund claims had been dated September 25 and 26, 2012.
5. The August 31 filing deadline appears on each motor-fuel-refund application form for government entities, as well as on Respondent's website.
6. Petitioner had received timely filed motor fuel refund claims in past years.

## **DISCUSSION**

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<sup>1</sup> In response to an inquiry made by the Petitioner, Respondent testified that the reason why the filing period in this matter ends June 30, 2013 and not 2012 is that all refundable exemptions for the motor fuel excise tax for all governmental entities are to be filed with respect to the June 30 fiscal year. The filing period for Petitioner's receipts would, therefore, run from July 1 of the previous year to June 30 of 2013, because all government entities are treated as fiscal-year filers. In addition, government entities can file as many times as they wish under that June period for those dates. Any fuel purchases made after June 30, 2013, would then be considered part of the June 2014 filing period.

The first applicable issue presented for determination is whether Petitioner has met its burden of proof by showing that, it is entitled to the motor fuel excise tax refunds, which were previously denied by Respondent.

West Virginia Code Section 11-14C-9 provides, in relevant part:

(d) *Refundable exemptions from variable rate component of tax.* - Any of the following persons may claim an exemption from the variable rate component of the tax levied by section five of this article on the purchase and use of motor fuel by first paying the tax levied by this article and then applying to the Tax Commissioner for a refund.

(2) This state and its institutions;

West Virginia Code Section 11-14C-31(c)(3) then provides that any such refund request made under the aforementioned subsection (d) of section nine of Article 14C shall be filed no later than the thirty-first day of August for all such purchases of motor fuel made during the preceding fiscal year ending the thirtieth day of June.

The other applicable statute is West Virginia Code Section 11-14C-31(d) which explicitly states, “Any petition for a refund not timely filed is not construed to be or constitute a moral obligation of the State of West Virginia for payment.”

West Virginia Code Section 11-14C-31(c)(3) thus provides a definite date by which this state and its institutions must file its claim for refund with the State Tax Commissioner. The statute specifies no grounds upon which the date certain set forth in the statute may be waived or disregarded. The statute makes no provision for any late filing of a claim for refund based on extenuating circumstances. On the contrary, by its use of the word “shall,” the West Virginia Legislature has clearly indicated that the deadline contained in Section 31(c)(3) is mandatory and West Virginia law on this point is well settled.

This court has repeatedly said that the term “shall” as used by the Legislature, makes the statutory requirement mandatory rather than directory. *See*, Syl. Pt. 1, Nelson v. West Virginia Public Employees Ins. Bd., 171 W. Va. 445, 300 S.E.2d 86 (1992) (“It is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.”). Accord State ex rel. Stump v. Johnson, 217 W. Va. 773, 619 S.E.2d 246, 255 (2005). *See also State ex rel. Brooks v. Zakaib*, 214 W. Va. 253, 264-65, 588 S.E.2d 418, 429-30 (2003) (“Ordinarily, the word ‘shall’ has a mandatory, directory connotation.” (citations omitted)); State v. Allen, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) (“Generally, ‘shall’ commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary.” citations omitted)).

Helton v. Reed, 219 W. Va. 557, 563 638 S.E.2d 160, 166 (2006) (Benjamin concurring).

Notwithstanding the explicit language of the statute, Petitioner principally cites the case of Hinchman v. Gillette, 217 W.Va. 378, 618 S.E.2d 387 (2005) for the proposition that the West Virginia Supreme Court of Appeals has resisted harsh results related to filing deadlines and has pursued the course of equitable modification in cases such as this.

Petitioner asserts that this case is precedent, in this matter; however, we find no such precedent. In Hinchman v. Gillette, the Court had before it a medical malpractice case that required that a claimant send a pre-suit notice of claim before a claimant could file suit. *See* West Virginia Code Section 55-7B-6.

The Court’s reversal, in that case, was based entirely on its finding that the claimant’s suit was not clearly frivolous, and that its dismissal was therefore, in error. The Court found that the alleged defects in the pre-suit notice noted by the health care provider could easily be addressed by further submissions from the claimant, which could then promote a possible pre-suit resolution of the non-frivolous medical malpractice claims.

The Court remarked that this was a new statutory provision that it was reviewing for the very first time. Further, it concluded that in order to achieve the aims of that statute, a claimant must be given a reasonable amount of time, not to exceed thirty days, in which to reply to a healthcare provider's request for a more definite statement and that all applicable periods of limitation were to be extended to include such periods. The Court was therefore construing the intended purpose of the statute, rather than engaging in what Petitioner considers to be equitable modification.

Petitioner also principally relies upon Sypolt v. WCD and W. Va. DHHR, No. 30812 (Memo. Order, March 12, 2003) as standing for the proposition that the West Virginia Supreme Court of Appeals allows equitable modification of filing deadlines in worker's compensation claims. The ruling in that case had to do with the Workers' Compensation Office of Judges affirming the Division in finding that the claim was not timely filed, because there was no showing made by claimant that she had sustained an occupational injury in the course of, or resulting from, her employment. Its Appeal Board later affirmed that ruling.

Thereafter, when the Court reversed the Appeal Board with directions to find that the claimant's back injury to be timely filed, it did so only to develop factual evidence as to whether the claimant had ever suffered a compensable injury.

Accordingly, the Court reversed the timeliness issue, only for a stated purpose, and not to achieve an equitable result. Petitioner's reliance on this case is therefore misplaced.

We assume that, by citing this workers' compensation case, Petitioner is seeking to show that the Court routinely ignores statute of limitations in all cases where a better result could be achieved by equitable modification. We summarily reject that argument inasmuch as Petitioner

submitted no legal support to arrive at such a conclusion. Moreover, in its reply brief, Respondent cited three prior decisions of this Tribunal that found the failure to file for their refunds by government entities no later than August 31, mandated that the refund claims be denied in toto. *See* West Virginia Office of Tax Appeals Decisions Docket Nos. 05-550 RMFE, 05-537 RMFE and 05-547 RMFE.

Petitioner did cite, in passing, the case of Shepherdstown Developers, Inc. v. Russell Frits, Inc., 183 W.Va. 691, 398 S.E.2d 517 520 (1990), for the general proposition that the procedural merger of law and equity had not abolished the distinction between the two. While that general proposition may exist, it does not modify the filing deadline contained in West Virginia Code Section 11-14C-31(c)(3). We find the same misapplication with respect to Petitioner's recitation that the State of Washington in W.A.C. 458-20-22802 allows a request for waiver when a taxpayer is unaware of a due date. Although Petitioner's knowledge or lack thereof, is not a consideration in this matter, it should be noted that the Petitioner was aware of the August 31 deadline. It also cannot go without comment that the Petitioner's tax filing history did not show any problems regarding the other years for which motor fuel excise tax refunds were sought.

In Petitioner's brief, it raises what it considers other issues that should mandate that the refunds be granted; however, we find these not to be persuasive. First, Petitioner states that special consideration should be afforded to it because of its unique mission., However, the statute of limitations in this case does not distinguish one state entity from another based upon its mission. The statute applies equally to all.

Second, the Petitioner notes that it is a not-for-profit entity. However, the statute does not distinguish between profit and not-for-profit government entities. The statute again is to be applied equally to all.

Third, the Petitioner contends that Respondent bears some responsibility for the training of Petitioner's personnel concerning how and when to file for such refunds. We find that Petitioner made no showing that such is this case. Moreover, Respondent's testimony clearly showed that the instructions as to how to file, as well as the required due date, appears on all of Respondent's motor fuel refund forms as well as its website. Accordingly, we reject Petitioner's argument that seeks to blame Respondent for Petitioner's failure to properly file in this matter.

Fourth, we also find no merit in Petitioner's argument that Respondent's witness should not have told it to file the refund claims, when he knew, as did the Petitioner, that they were being filed late. The implication being that in doing so, the Respondent had agreed to grant the refund claims. As to this issue, Respondent's witness clearly testified that he advised all callers to file their refund claims no matter what because he is not the one who decides what is, or is not, timely filed. He further testified, under no circumstances would he ever tell a taxpayer not to bother to file a refund claim. It is important to add that this same witness also testified that he had no recollection of ever having spoken to the Petitioner about these refund claims. He also questioned whether he would have even taken this telephone call in 2012, because he had not been taking such calls for the past five years.

Finally, Petitioner makes mention that the words "casual filer" appears as to Petitioner's account status and it therefore concludes that must mean that this Petitioner has no statutory deadline to file for such refunds. In her direct testimony, Respondent's other witness testified

that all motor fuel refund accounts are set up as casual filers, probably, because casual means not monthly, quarterly, or annually. She further testified that the term casual was, therefore, never intended to change the required due date which appears on all of the Respondent's motor fuel tax refund forms.

In that context, we find that it defies reality to believe that the use of the words "casual filer," as to this account, somehow makes inoperative the statutory filing deadline that appears on both the refund claim forms and on Respondent's website. Accordingly, we reject Petitioner's interpretation of the use of the term, "casual filer," as a means to circumvent the statutory due date.

In summary, it is not disputed, by the Petitioner, that it failed to file its refund claims on or before August 31, 2012. As such, the Petitioner's claims for refund were not timely filed, as required by the statute. Further, Petitioner's failure to timely file its refund requests are not to be construed, or constitute a moral obligation of the State of West Virginia for payment. *See W. Va. Code Ann. §11-14C-31(d) (West 2014) supra.*

The Petitioner has presented no legal authority, to this Tribunal, to disregard the expressed statutory requirement specifying the date by which a claim for refund of motor fuel excise tax must be filed. Accordingly, it is determined that Petitioner has not met its burden of proof showing that it is entitled to the motor fuel excise tax refunds denied by the Respondent.

### **CONCLUSIONS OF LAW**

Based upon all of the above it is **DETERMINED** that:

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. Pursuant to West Virginia Code Section 11-14C-9(d)(2) the Petitioner, as an institution of the State of West Virginia, may claim an exemption from the motor fuel excise tax by first paying the tax and then applying to the Tax Commissioner for a refund.

3. West Virginia Code Section 11-14C-31(c)(3) provides that any such refund request under subsection (d) of section nine of Article 14C must be filed no later than the thirty-first day of August for all such purchases of motor fuel made during the preceding fiscal year ending the thirtieth of June.

4. W. Va. Code Section 11-14C-31(d) provides that untimely refund requests are not to be construed as a moral obligation of the State of West Virginia for payment.

5. The term “shall” as used by the Legislature, makes the statutory requirement mandatory rather than directory. Helton v. Reed, 219 W. Va. 557 638 S.E.2d 160 (2006) (Benjamin concurring)

6. The Petitioner has presented no legal authority to this Tribunal to disregard the express statutory requirement specifying the date by which a claim for refund of motor fuel excise tax must be filed.

7. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the Petitioner to show that it is entitled to a refund. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010); W. Va. Code R. §§121-1-63.1 and 69.2 (2003).

8. Petitioner has failed to carry its burden of showing that it is entitled to its refund claims. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010); W. Va. Code R. §121-1-63.1 and 69.2 (2003).

**DISPOSITION**

**WHEREFORE**, it is the final decision of the West Virginia Office of Tax Appeals that the Petitioner's petition for refund of \$\_\_\_\_\_of motor fuel excise tax, for the period ending June 30, 2013, should be, and hereby is **DENIED**.

**WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
George V. Piper  
Administrative Law Judge

\_\_\_\_\_  
Date Entered