

REDACTED DECISION – DOCKET NUMBER 13-360 RMFE-M

**BY A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED DECISION ON AUGUST 26, 2014 – ISSUED ON JANUARY 27, 2015.**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

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)(5) the Petitioner, as a county board of education 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.

TAXATION

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 6, 2013, the Petitioner filed two claims by two letters, both dated September 10, 2013. The Excise Tax Unit Manager of the Internal Auditing Division (The Division) of the West Virginia State Tax Commissioner’s Office (The Respondent), denied both refund claims. The reason stated for the denials was that a refund of fuel purchased for the June period of 2013, must be filed with a postmark date of no later than September 3, 2013, and therefore, Petitioner’s claims for refund filed on September 6, 2013, were untimely filed in violation of West Virginia Code Section 11-14C-31(c)(3)[2003].

Thereafter, on September 12, 2013, the Petitioner timely filed a petition for refund with this Tribunal. *See* W. Va. Code Ann. §§ 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. The Petitioner is a governmental entity located in a West Virginia County.
2. For the filing period ending June 30, 2013, the Petitioner purchased _____ gallons of gasoline and clear and dyed diesel 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 gasoline and clear and dyed diesel for which it paid motor fuel excise tax in the amount of \$_____.
4. On September 10, 2013, 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 September 3, 2013. Petitioner's refund claims had been dated September 6, 2013.
5. The August 31 filing deadline appears on each of the motor-fuel refund application forms for government entities.¹

¹ The reason why the postmark filing date deadline was September 3, 2013, rather than August 31, 2013, was because August 31, 2013, fell on a Saturday and the first mailing day after the Labor Day holiday was September 3, 2013.

DISCUSSION

The sole 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 the Respondent.

West Virginia Code 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.

(5) A county board of education;

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 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’s witness testified at the hearing that both refund applications were actually completed as of August 29, 2013, and that both were placed in the outgoing mail box that very day. However, for whatever reason the envelope never received a postal stamp. The witness added that when he discovered the envelope in the mailroom on September 6, 2013, he immediately mailed it including a letter of explanation.

Finally, he stated that he took the additional step of calling the Respondent before mailing the application and was advised that although both applications were late being filed such refunds would be granted.

Although we may sympathize with the Petitioner’s situation, it is undisputed that it failed to file its refund claims on or before September 3, 2013. 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)(5), the Petitioner, as a county board of education 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: _____
A. M. “Fenway” Pollack
Chief Administrative Law Judge