

REDACTED DECISION – DOCKET NUMBER 14-120 MFE

**BY GEORGE V. PIPER, ADMINISTRATIVE LAW JUDGE – SUBMITTED DECISION
ON OCTOBER 27, 2014 – ISSUED ON JUNE 8, 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

COLLECTION OF TAX

GENERAL

“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

IMPROPER SALE OR USE OF UNTAXED MOTOR FUEL; CIVIL PENALTY

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). Lack of knowledge of its use does not negate the violations.

TAXATION

MOTOR FUEL EXCISE TAX

DEFINITIONS

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(51) (West 2010).

TAXATION

MOTOR FUEL EXCISE TAX

IMPROPER SALE OR USE OF UNTAXED MOTOR FUEL; CIVIL PENALTY

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 in fact, use dyed diesel fuel in two separate tanks in a highway vehicle.

TAXATION

MOTOR FUEL EXCISE TAX

DEFINITION

Use means actual consumption or receipt of motor fuel into a motor vehicle. Use does not mean knowing use but only actual consumption. *See* W. Va. Code Ann. § 11-14C-2(90) (West 2010).

TAXATION

WEST VIRGINIA OFFICE OF TAX APPEALS

HEARING PROCEDURES

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

CONCLUSION OF LAW

The Petitioner in this matter has not carried his burden of proving that the April 1, 2014, assessment issued against him was erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On April 1, 2014, a Tax Department criminal investigator conducted motor-fuel enforcement activities in a West Virginia County. On that date, the criminal investigator issued an assessment to the Petitioner, alleging that he had used dyed diesel in a highway vehicle, in violation of West Virginia Code Section 11-14C-36(a)(3). On April 17, 2014, the Petitioner

timely filed his petition for reassessment with this Tribunal and the matter came on for evidentiary hearing on September 9, 2014.

FINDINGS OF FACT

1. On April 1, 2014, Donald Staats, a criminal investigator with the criminal investigation division of the West Virginia Tax Department conducted enforcement activities at a wrecker site in a West Virginia County. On that same day, Mr. Staats met an officer with the West Virginia Public Service Commission who examined a wrecked vehicle for possible safety violations at that same location.

2. While the PSC safety check was on-going, Mr. Staats noticed that red dye was coming from the wrecked highway vehicle that the Petitioner was operating.

3. During his investigation, Mr. Staats took fuel samples from both the passenger side and the driver side tanks, both of which showed the presence of dyed diesel fuel.

4. Mr. Staats issued a citation to the Petitioner, alleging two violations of West Virginia Code Section 11-14C-36(a)(3). *See* Respondent's Exhibit 1.

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

DISCUSSION

The sole issue presented for determination is whether the Petitioner has met his burden of proof showing that he was not liable for the combined civil penalty of \$2,000.00, despite the fact that dyed diesel fuel was present in a highway vehicle that he was operating on April 1, 2014.

Petitioner's only stated defense is that he did not know that dyed diesel (off-road fuel) was in the on-road vehicle that he was operating on April 1, 2014. In support of such defense, Petitioner produced a witness, Mr. A, the then Owner of a trucking company (his former employer). Mr. A testified that a mechanic at his business location mistakenly put dyed diesel in the vehicle without the prior knowledge of either Mr. A or the Petitioner.

The matter to be determined is, therefore, whether the Petitioner can escape the imposition of the civil penalties because he and his employer both testified that neither of them had prior knowledge that off road (dyed diesel) fuel was mistakenly put into the tanks of a highway vehicle. In other words, do the violations require that the user of the off-road fuel actually know about the illegal use before any citation can be issued?

Upon review of the applicable law in this matter, we first turn to the statute from which the violations were derived, to wit: "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"¹. W. Va. Code Ann. § 11-14C-36(a)(3). The applicable statute goes on to define a highway vehicle as "any self-propelled vehicle, trailer or semi-trailer 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(51) (West 2010). Regarding the penalty imposed by the governing statute, the Respondent's penalty calculation is 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

¹ The use of dyed diesel fuel in this matter was not allowed under the authority of 26 U.S.C. § 4082.

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. Thus, two separate _____ dollar fines were imposed by the Respondent. The only other statute implicated here is West Virginia Code Section 11-14C-2(90), defining “use” as “the actual consumption or receipt of motor fuel by a person into a motor vehicle, aircraft or watercraft.” There is no dispute that the Petitioner used dyed diesel fuel in a highway vehicle or that the vehicle that the Petitioner was operating a highway vehicle. Further, the method used to calculate the civil penalties is undisputed. Moreover, it is clear that there was, in fact, actual consumption of motor fuel by the Petitioner.

All that remains to be decided in this matter is whether the Petitioner can be excused from these violations imposed by the Respondent simply because, as both Petitioner and his witness testified, neither had no prior knowledge that he was consuming dyed diesel in a highway vehicle. Upon review of the applicable statute, the Tribunal finds that there exists no language in Article 14C of Chapter 11 of the West Virginia Code requiring that the user have actual knowledge of the dyed diesel use before the violation(s) can be cited. The statute requires only that the fuel be used as set forth in the applicable law. Accordingly, the violation cannot, by law, be excused or waived once the fuel is used in a highway vehicle.

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 his burden, and as such, the Respondent's assessment is affirmed.

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). Lack of knowledge of its use does not negate the violations.

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(51) (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. *See* W. Va. Code Ann. § 11-14C-36(b) (West 2010).

6. The Petitioner in this matter, did in fact, use dyed diesel fuel in two separate tanks in a highway vehicle.

7. Use means actual consumption or receipt of motor fuel into a motor vehicle. Use does not mean knowing use but only actual consumption. *See* W. Va. Code Ann. § 11-14C-2(90) (West 2010).

8. 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).

9. The Petitioner in this matter has not carried his burden of proving that the April 1, 2014, assessment issued against him was erroneous, unlawful, void or otherwise invalid.

DISPOSITION

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 April 1, 2014, in the amount of \$ _____, should be and is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____

George V. Piper²
Administrative Law Judge

² Chief Administrative Law Judge, A. M. "Fenway" Pollack, heard this matter; however, Judge Pollack is no longer with the West Virginia Office of Tax Appeals. Therefore, this decision was prepared and signed by Administrative Law Judge, George V. Piper.