

REDACTED DECISION – DK#’S 16-542 MFE, 16-543 MFE, 16-544 MFE

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON JANUARY 30, 2018
ISSUED ON JUNE 12, 2018**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEAL

FINAL DECISION

On October 26, 2016, the Assistant Director of the Criminal Investigation Division of the West Virginia Tax Department issued three assessments against the Petitioner. All three assessments were for engaging in business without a license, in violation of West Virginia Code Section 11-14C-38. The first assessment was for a violation of Section 38 that allegedly occurred on January 28, 2015. It provided for a \$5,000.00 penalty. The second assessment was for a violation that allegedly occurred on March,10 2015, and provided for a \$10,000.00 penalty. The third assessment was for a violation that allegedly occurred on May 11, 2015, and also provided for a \$10,000.00 penalty. On November 2, 2016, the Petitioner timely filed with this Tribunal three petitions for reassessment. An evidentiary hearing was held on October 10, 2017, after which the parties filed legal briefs, and thereafter the matter became ripe for a decision.¹

FINDINGS OF FACT

1. The Petitioner is an LLC, a Limited Liability Company based in another State.

¹ The evidentiary hearing in this matter was conducted by Chief Administrative Law Judge Heather Harlan. Since the date of the hearing, Judge Harlan has resigned her position, and this decision was written by Chief Administrative Law Judge A.M. “Fenway” Pollack.

2. At some point in 2015, an investigator employed by the Respondent was reviewing bills of lading involving specific gas stations and a company called A. TR P 37-38 and State's Exhibits 1-3.² This review showed various deliveries of motor fuel by the Petitioner to specific gas stations in West Virginia.

3. Subsequently, the investigator determined that on numerous occasions³, the Petitioner had delivered motor fuel to gas stations in West Virginia without a Motor Fuel Transporter's License. TR P 36-37 & Respondent's Exhibit 4. This determination led to the issuance of three assessments against the Petitioner.⁴

4. The three assessments were all issued on October 16, 2015. Petitioner's Ex 2. All three assessments indicated that the Petitioner had violated West Virginia Code Section 11-14C-38, by engaging in business without a license. The first assessment indicated that the violation occurred on January 28, 2015 and contained a civil penalty of five thousand dollars (\$5,000.00). The second assessment had a violation date of March 10, 2015, and the civil penalty of ten thousand dollars (\$10,000.00). The third assessment had a violation date of May 11, 2015 and had a civil penalty of ten thousand dollars (\$10,000.00) as well.

5. These three assessments were issued and sent to Petitioner at its out of state address. When they were received, an officer of Petitioner contacted the West Virginia Tax Department, apparently to discuss the fact that the assessments misidentified the transporter.⁵ TR P 20-21.

² There was no testimony regarding Company A, however the exhibits seem to show that it is the manufacturer of the fuel that was transported and delivered by the Petitioner. Some of those deliveries form the basis of this matter.

³ There was no testimony about exactly how many shipments Petitioner made without a license. However, the record is clear that it was many more than the three times that led to assessments. TR P 46-47 at 4-5

⁴ As will be discussed in greater detail below, the assessments issued in October of 2015 were issued against the wrong company.

⁵ The record is unclear if there is actually a company called by Petitioner's name; or if the assessments just left out the word "_____". To further complicate matters, the corrected assessments still misidentified the company, calling it "Petitioner A". Moreover, when it filed its petition with this Tribunal, it identified itself as Petitioner A. According to the West Virginia Secretary of State, the company's name is Petitioner A1.

6. The Tax Commissioner issued new assessments in October of 2016.⁶ The reissued assessments were virtually identical to the first three, save for now being issued to Petitioner A1 and being signed by the Assistant Director of the Criminal Investigation Division of the Tax Department. The Assistant Director signed them because the investigator who discovered the alleged violations had left the Tax Department prior to the issuance of the new corrected assessments. TR P 36 at 22-23.

DISCUSSION

As is sometimes the case, neither party in this matter disputes the relevant facts, or which law controls. For example, at hearing, Petitioner freely admitted that it transported motor fuel into West Virginia without having first obtained a transporter's license. The law of the case is clear and unambiguous, stating that anyone who engages in any business activity under Article 14C without first obtaining the proper license is subject to a civil penalty of five thousand dollars (\$5,000.00) for the first violation and ten thousand dollars (\$10,000.00) for each subsequent violation. *See* W. Va. Code Ann. §11-14C-38 (West 2013). The licensing requirement that Petitioner is charged with violating is contained in West Virginia Code Section 11-14C-10 which states that all persons shall obtain the appropriate license before conducting the activities of a transporter. *See* W. Va. Code Ann. § 11-14C-10 (West 2013).

At hearing, Petitioner suggested that it was bothered by the Tax Department's failure to assess it sooner, so it could have corrected its behavior and lessened its civil penalties. However, by the briefing stage Petitioner had abandoned that argument, presumably because the record shows that it is unavailing. The testimony (and common sense) shows that the Tax Commissioner does not have enough employees to sit at each gas station in the state waiting for the fuel delivery trucks,

⁶ The record is unclear why it took the Tax Department a year to issue new, corrected assessments.

so that it can check for transporter's licenses. Instead, as happened in this case, an investigator reviews bills of lading in bunches, sometimes months after the deliveries. The testimony further showed that the Tax Commissioner cuts Petitioners like this Petitioner a break, and no matter how many improper deliveries are made, he or she limits the assessments that are written, so as to not assess a money penalty that would be financially crippling. Finally, there does not appear to be any statutory or regulatory authority for the proposition that the Tax Commissioner must issue an engaging in business without a license assessment at the time of the improper delivery.

Petitioner argues that the Tax Commissioner cannot assess it ten thousand dollars (\$10,000.00) for its March and May 2015 alleged violations, because its January 2015 alleged violation has not been fully adjudicated. In making this argument, Petitioner relies exclusively on a 2007 decision from this Tribunal. In Docket No. 07-334, the Petitioner was also a fuel transporter, who allegedly imported fuel into West Virginia on two occasions without having a proper import confirmation number. The Petitioner sent a letter to the Tax Department saying that it did provide an import confirmation number on one of those occasions, and subsequently the Tax Department withdrew the first assessment. However, the Tax Department still maintained that the Petitioner's civil penalty for the second failure to obtain an import confirmation number was ten thousand dollars (\$10,000.00).⁷

Bad facts make bad law, and it was obviously not well thought out for the Tax Commissioner to withdraw the first assessment and then maintain that the other occasion of a failure to obtain, was a "subsequent" violation requiring the ten thousand dollars (\$10,000.00) civil penalty. As such, the ALJ made short work of this argument, stating "This Office is of the opinion

⁷ In Docket No. 07-334, the Petitioner was assessed for violating West Virginia Code Section 11-14C-35, importing fuel into this state without a proper import confirmation number. However, its penalties are identical to those contained in West Virginia Code Section 11-14C-38.

that an assessment issued for a purported violation must become final in order to constitute a “violation” that may result in enhancement of any subsequent civil penalty.” West Virginia Office of Tax Appeals Docket No. 07-334 MFE.

Petitioner characterizes its situation as being “eerily similar” to the Petitioner in 07-334, and as such, the decision in that case should control here. The problem with Petitioner’s argument in that regard is that while its situation may be “similar” to the other Petitioner, it differs in one key way. In the Docket No. 07-334 matter, the assessment that was withdrawn was never reissued. Instead, the Tax Commissioner was apparently holding it over the Taxpayer’s head like some variation of the Sword of Damocles, saying in essence “your first violation for failing to obtain an import confirmation number is going to haunt you the rest of the time you are in business.” However, that violation was never adjudicated, hence the ALJ’s ruling that it could not be considered a first violation, such that any future violation would be considered subsequent.

Here, unlike the facts in 07-334, all the withdrawn assessments were reissued. Yet despite this key factual difference, Petitioner argues that its two other violations (March and May of 2015) cannot be considered subsequent, apparently because the January 2015 violation has not been fully and finally adjudicated. We find this argument unpersuasive. Most troublesome for Petitioner’s argument in this regard is the fact that it admitted to its January 2015 violation (as well as all the others, those assessed and not assessed) under oath during the evidentiary hearing in this matter.

MR. A: Yes. If we were aware of the first situation in January, if we would have had any information that that happened, we would have stopped our trucks from going into West Virginia until we followed up and got the proper permitting to go into that state to operate and make deliveries and pickups. All operations would have stopped until we had those documents and it was put into this permit book.

TR P 22 at 17-21.

MR. A: Well, you know, and that's part of it. And you're --- almost a year before you get any notification about anything as far as permitting. And you know, and again, like I said to you earlier, yes, we were wrong to go in there the first time, and I'll agree to that. And that's why the \$5,000 --- or the payment would have been made as soon as we knew about this. And the proper permits would have been --- we would have had the proper permits in all the trucks before going into that state again. I don't know how ---other ways to put it, but that's our procedure. And we run a safe and, I feel, a good operation.

TR P 23-24 at 22-6. Nor did Petitioner object to Respondent's Exhibit 4, which is a notarized statement from a Tax Department employee stating that a records check showed no transporters license in the name of the Petitioner on the dates of the alleged violations. The evidence in this case clearly shows that Petitioner suffered some type of administrative snafu in 2015 and was transporting fuel into West Virginia without the proper license. As a result, Petitioner's argument that the Tax Commissioner cannot assess it for subsequent violations until the first one has been fully adjudicated is an argument we agree with in the abstract. However, under the facts of this case, Petitioner's first violation has been fully adjudicated. Therefore, to the extent we are following this Tribunal's previous ruling in Docket No. 07-334, we rule that the Petitioner's January 2015 violation of West Virginia Code Section 11-14C-10 has become final, making its March and May 2015 violations "subsequent" as that term is used in West Virginia Code Section 11-14C-38.

We should note that there is one other aspect to the Petitioner's argument that needs to be addressed. The Petitioner is characterizing the ruling in Docket No. 07-334 as standing for the proposition that the Tax Commissioner cannot ever issue a subsequent ten thousand dollars (\$10,000.00) civil penalty assessment under West Virginia Code Section 11-14C-38 until a first violation has been fully adjudicated. We generally agree with that proposition, however the decision in Docket No. 07-334 was based upon a unique and specific set of facts. Today, we are

clarifying that the onus is on the Taxpayer, **not the Tax Commissioner** to ensure that their due process rights are not violated. In plain English, what we mean by this is that we do not today, nor would we in the future, interpret West Virginia Code Section 11-14C-38 to require the Tax Commissioner to only issue five thousand dollar assessments on subsequent violations, because the first violation may be, or has been appealed. Interpreting Section 38 in such a way would lead to an absurd result, something the West Virginia Supreme Court of Appeals has cautioned against. *See e.g., Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 582 S.E.2d 841 (W.Va. 2003).

We can easily use the basic facts of this case (save for the admissions of the violations) to illustrate. The investigator, in reviewing the bills of lading, discovered what he thought were numerous instances when Petitioner transported fuel into West Virginia without a license. He wrote three assessments, one for January, one for March, and one for May. As provided for in West Virginia Code Section 11-14C-38 the penalty for the first was \$5,000.00, and \$10,000.00 for the two subsequent violations. According to the Petitioner's interpretation of Section 38, the investigator should have written all three assessments with a \$5,000.00 penalty, because, as it stated in its post-hearing brief, "there cannot be second without a first". *See* Petitioner's Brief at 10. While we agree with the ruling in Docket No. 07-334, and are not prepared to overrule it, we are clarifying that while due process obviously requires a full and final adjudication of a first violation before there can be a subsequent one, the onus is on the Petitioner, not the Tax Commissioner. By that we mean that it would create an absurd result to expect the Tax Commissioner to only write \$5,000.00 assessments, because years later this Tribunal, or a Circuit Court or the West Virginia Supreme Court of Appeals might overturn a first violation. If and when a violation is overturned, it is incumbent upon the Petitioner to move the tribunal it is before at that time, to move to have its second violation become the first violation, and to change the penalty

amount accordingly. To expect the Tax Commissioner to keep track of the appeal status of every violation written, and to go back to adjust each penalty, would be an administrative burden we do not think the Legislature intended when it drafted West Virginia Code Section 11-14C-38.

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. A person shall obtain the appropriate license or licenses issued by the commissioner before conducting the activities of: . . . (7) A motor fuel transporter. W. Va. Code Ann. § 11-14C-10(a)(7) (West)

4. Petitioner did not have the appropriate license issued by the Tax Commissioner when it transported fuel into West Virginia in January, March and May of 2015.

5. Any person who engages in any business activity for which a license is required by this article without having first obtained and subsequently retained such a valid license is subject to the following civil penalty. (1) For the first violation the amount is five thousand dollars. (2) For each subsequent violation the amount is ten thousand dollars. W. Va. Code Ann. § 11-14C-38 (West).

6. In order to be assessed for a “subsequent” violation, as that term is used in West Virginia Code Section 11-14C-38, there must be a first violation. *See* West Virginia Office of Tax Appeals Final Decision, Docket No. 07-334.

7. The Petitioner’s Director of Business Operations testified under oath that in January of 2015 it transported fuel into West Virginia without the proper license. As such, the Tax Commissioner’s October 26, 2016 assessment of a \$5,000.00 civil penalty for this violation was a first violation, that has been fully and finally adjudicated, pursuant to West Virginia Code Section 11-14C-38 and this Tribunal’s ruling in Docket No. 07-334.

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 its burden of proving that the three assessments issued against it on October 26, 2016 were 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 three assessments issued against the Petitioner on October 26, 2016, in the cumulative amount of \$25,000.00, are hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

A. M. "Fenway" Pollack
Chief Administrative Law Judge

Date