

SYNOPSIS

MOTOR FUEL EXCISE TAX -- TAXPAYERS' FAILURE TO CARRY BURDEN OF PROOF -- The failure of a taxpayer to appear at a hearing and to present any evidence respecting its claim, will result in a denial of relief to the taxpayer. *See* W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, §§ 63.1 and 69.2 (Apr. 20, 2003).

MOTOR FUEL EXCISE TAX -- W. Va. Code § 11-14C-31(c)(3) requires that any claim for refund of motor fuel excise tax made pursuant to W. Va. Code § 11-14C-9(c)(1)-(6) be filed no later than the thirty-first day of August for purchases made during the preceding fiscal year ending on the thirtieth day of June.

MOTOR FUEL EXCISE TAX -- When a taxpayer claiming a refund pursuant to the provisions of W. Va. Code § 11-14C-9(c)(1)-(6) and W. Va. Code § 11-14C-9(d)(1)-(6) does not file its claim for refund on or before the thirty-first day of August for purchases made during the preceding fiscal year ending on the thirtieth day of June, said claim for refund is not timely and must be denied.

FINAL DECISION

On or about September 27, 2004,¹ the Petitioner filed a claim for refund² with the State Tax Commissioner. The Petitioner requested a refund for motor fuel excise tax paid on 37,079.4 gallons of gasoline purchased by it during the months of January through June, 2004. *See* State's Exhibit No. 1. For reasons that are not apparent from the record and are not relevant to this decision, by letter dated October 13, 2004, the State Tax Commissioner adjusted the refund claim to tax paid on 6,130.6 gallons of gasoline. What is important is that the Tax Commissioner

¹ The Petitioner's claim for refund was dated and notarized on September 24, 2004. A notation on the claim for refund, apparently placed there by an employee of the Tax Commissioner, states that it was postmarked September 27, 2004.

² The motor fuel excise tax statute provides that a taxpayer is to file a "petition" for refund with the state tax commissioner. *See* W. Va. Code § 11-14C-31(a). In spite of the statutory language describing this request for refund as a "petition," it is apparent that it is intended to be the initial "claim" for refund required by W. Va. Code § 11-10-14(c). It is not the subsequent "petition" that is permitted to be filed pursuant to W. Va. Code § 11-10-14(d).

denied the Petitioner's claim for refund on the grounds that it was not timely filed in accordance with the applicable provision of the West Virginia Code. The Commissioner also advised the Petitioner that it was entitled file a petition for refund with this Office. *See* State's Exhibit No. 2.

Thereafter, by mail postmarked October 18, 2004, and received in the offices of this tribunal, the West Virginia Office of Tax Appeals, on October 20, 2004, the Petitioner timely filed a petition for refund.

By letter dated November 5, 2004, this Office notified the parties that the evidentiary hearing in this matter was scheduled for January 13, 2005, at 2:30 p.m. This notice of the hearing was served upon the Petitioner on November 10, 2004, as evidenced by United States Postal Service Form PS 3811, August 2001, Domestic Return Receipt (the "Green Card") signed for.

At the time scheduled for the evidentiary hearing in this matter, there was no appearance on behalf of the Petitioner. However, the hearing was held without an appearance on behalf of the Petitioner, in accordance with the provisions of W. Va. Code § 11-10A-10(a) [2002] and 121 C.S.R. 1, § 69.1 (Apr. 20, 2003).

FINDINGS OF FACT

1. In its petition for refund, the Petitioner asserted "Unclear filing date, were not aware of ability to file for refund, fuel purchased through DOH."

2. It appears that the Petitioner is asking that it be excused for its failure to file its claim for refund within the time required by W. Va. Code § 11-14C-31(c)(3), on the grounds that it was either unaware that it was entitled to file a claim for refund or was unaware of the date by which it was required to file its claim for refund.

3. The Petitioner was provided with notice that it was required to appear at the evidentiary hearing and present evidence respecting the reasons it believed that it was entitled to its claim for refund.

4. The Petitioner did not appear at the time and place of the hearing and presented no evidence respecting its allegations.

5. The grounds articulated by the Petitioner are inadequate to show that it is entitled to the refund claimed.

CONCLUSIONS OF LAW

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

1. 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 the refund claimed by it. *See* W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, §§ 63.1 and 69.2 (Apr. 20, 2003).

2. The Petitioner in this matter has failed to carry its burden of proving that it is entitled to its claim for refund.

3. West Virginia Code § 11-14C-31(c)(3) provides:

(3) A petition [*sic*; claim] for refund under subsection (c), section nine [§ 11-14C-9] of this article shall be filed with the commissioner within six months from the month of purchase or delivery of the motor fuel: . . . Provided, however, That all persons authorized to claim a refundable exemption under the authority of subdivisions (1) through (6), inclusive, subsection (c), section nine of this article and subdivisions (1) through (6), inclusive, subsection (d) of said section shall do so no later than the thirty-first day of August for the purchases of motor fuel made during the preceding fiscal year ending the thirtieth day of June.

4. The refund for which the Petitioner has petitioned is permitted by each of W. Va. Code § 11-14C-9(c) and W. Va. Code § 11-14C-9(d).³

5. The claim for refund filed by the Petitioner was not filed with the State Tax Commissioner on or before August 31, 2004, the date by which the statute requires such action to be taken.

6. A statute creating a procedure for claiming a refund of taxes paid to the State creates an exclusive remedy that may be used to obtain such refund. *See* Syl. pt. 3, *State v. Penn Oak Oil & Gas, Inc.*, 128 W. Va. 212, 36 S.E.2d 595 (1945).

7. In filing a claim for refund in accordance with a statute providing a procedure for the same, a taxpayer must comply with each and every requirement of the statute allowing said refund, especially objective time requirements expressly set forth in said statute.

8. The Petitioner, having failed to file its claim for refund by the date expressly set forth in W. Va. Code § 11-14C-31(c)(3), is not entitled to the refund claimed.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the requested refund of motor fuel excise tax must be and is **DENIED**.

³ It is not clear whether the Petitioner is claiming the refund under subsection (2), (3) or (5) of each of these subsections.