

**REDACTED DECISION -- 07-106 MFE -- BY GEORGE V. PIPER, ALJ --
SUBMITTED for DECISION on July 11, 2007 -- ISSUED on July 19, 2007**

SYNOPSIS

MOTOR FUEL EXCISE TAX -- DYED DIESEL FUEL IMPROPERLY USED ON HIGHWAY -- TAXPAYER'S FAILURE TO CARRY BURDEN OF PROOF -- The failure of the taxpayer to articulate adequate grounds in its petition for reassessment justifying its claim, combined with its failure 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]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

FINAL DECISION

The Criminal Investigation "Division" of the West Virginia State Tax Commissioner's Office ("the Commissioner") issued an assessment for the improper use of untaxed motor fuel against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. The assessment was an incident which occurred on January 31, 2007, for a civil penalty. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked February 7, 2007, received in the offices of this tribunal, the West Virginia Office of Tax Appeals, on February 9, 2007, the Petitioner timely filed a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9 (a)-(b) [2005].

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

FINDINGS OF FACT

1. In his petition for reassessment, the Petitioner asserted that, because his older diesel suburban was stalling in cold weather, he was advised by a mechanic that using off-highway diesel fuel would correct the problem.

2. In his petition for reassessment, the Petitioner admitted that he did in fact fill his tank with off-highway diesel fuel at a service station on January 31, 2007, and that he was then stopped and cited by Respondent's investigator for doing same after a specimen of his fuel was analyzed.

3. The grounds articulated by the Petitioner are inadequate to show that the assessment is erroneous, unlawful, void or otherwise invalid.

4. 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 the assessment was erroneous, unlawful, void or otherwise invalid.

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

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 reassessment, the burden of proof is upon the Petitioner to show that the assessment for the improper use of untaxed motor fuel against him is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. The Petitioner in this matter has failed to carry its burden of proving that the assessment of the civil penalty against him is erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the civil penalty for the improper use of untaxed motor fuel issued against the Petitioner for the incident which occurred in January of 2007, should be and is hereby **AFFIRMED**.