

**REDACTED DECISION -- 07-589 MFE -- BY GEORGE V. PIPER, ALJ -- SUBMITTED for DECISION on JULY 28, 2008 -- ISSUED on SEPTEMBER 30, 2008**

## **SYNOPSIS**

**1. MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- ON TAXPAYER** -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the taxpayer to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

**2. MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- PREPONDERANCE OF EVIDENCE** -- To satisfy its burden of proof in a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, a taxpayer must prove that the assessment is incorrect and contrary to law, in whole or in part, by a preponderance of the evidence.

**3. MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- NOT CARRIED BY PETITIONER** -- Where Petitioner has not rebutted, by a preponderance of the evidence, Respondent's presentation of its *prima facie* case that Petitioner violated W. Va. Code § 11-14C-36(a)(3) [2003] in that it used untaxed, dyed diesel fuel in a mobile machinery highway vehicle for a taxable use upon the highways of West Virginia, the civil penalties associated with that violation must be upheld because Petitioner failed to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9(a)-(b) [2005].

## **FINAL DECISION**

On November 5, 2007, an investigator with the Criminal Investigation "Division" of the Respondent West Virginia State Tax Commissioner's Office issued a motor fuel excise tax civil penalty assessment 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, as amended. This assessment was for using untaxed, dyed diesel fuel on a public highway in this State in violation of W. Va. Code § 11-14C-36 [2003]. The

amount of the civil penalty was \$ \_\_\_\_\_. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by facsimile transmission, received on November 16, 2007, the Petitioner timely filed with this tribunal, the West Virginia Office of tax Appeals, a petition for reassessment. *See* W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W.Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

### **FINDINGS OF FACT**

1. Petitioner is a Pennsylvania based driller of natural gas wells which owns and operates a drilling platform (“platform”) headquartered in Pennsylvania.

2. On November 5, 2007, Petitioner moved the platform into the State of West Virginia for the purpose of drilling a natural gas well. During its crossing into West Virginia, the platform carried dyed diesel fuel purchased in Pennsylvania.

3. The drilling platform is self-propelled and has a single fuel tank which is used to power both the motor that turned the axles used to transport the platform as well as the motor that powered the drill.

4. At the time that the citation was issued to the driver of Petitioner’s drilling platform the same was being driven on Interstate 79 in the State of West Virginia.

5. The platform was moved pursuant to a “Special Permit for Single Trip” issued by the Maintenance Division of the West Virginia Department of Transportation (Petitioner’s Exhibit 1). The origin of the trip was the Pennsylvania line and the destination was a certain location within West Virginia. The platform is eighty-four feet in length, ten feet and five inches in width and weighs one hundred and five thousand pounds, while utilizing five axles.

6. The notice of assessment charged Petitioner with using dyed diesel on the highway, in violation of W. Va. Code § 11-14C-36 [2003].

## DISCUSSION

The only issue presented for determination in this case is whether the Petitioner has shown that the assessment 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). Any petitioner must satisfy the burden of proof requirement by a preponderance of the evidence and not some higher standard, such as beyond a reasonable doubt, which is the standard in a criminal proceeding.

We must now, of course, apply the preponderance of evidence standard in light of the statute under which Petitioner was cited and assessed, which is as follows. Chapter 11, Article 14C, Section 36 of the West Virginia Code [2003] defines the improper sale, storage, or use of untaxed motor fuel:

(a) Any person who commits any of the following violations is subject to the civil penalty specified in subsection (b) of this section:

(1) Sells or stores any dyed diesel fuel for use in a highway vehicle that is licensed or required to be licensed as such, unless that use is allowed under the authority of 26 U.S.C. §4082;

(2) Willfully alters or attempts to alter the strength or composition of any dye or marker in any dyed diesel fuel;

(3) Uses dyed diesel fuel in a highway vehicle [emphasis added] unless that use is allowed under the authority of 26 U.S.C. §4082;

(4) Acquires, sells, or stores any motor fuel for use in a watercraft, aircraft, or highway vehicle that is licensed or required to be licensed unless the tax levied by section five of this article has been paid; or

(5) Uses any motor fuel in a watercraft, aircraft, or highway vehicle that is licensed or required to be licensed unless the tax levied by section five of this article has been paid.

(b) 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 aircraft in which the motor fuel is found or one thousand dollars, whichever is greater. *Provided*, that for each subsequent violation in the same calendar year, the penalty is fifteen dollars per gallon 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 two thousand dollars whichever is greater.

(c) Each violation is subject to a separate civil penalty.

(d) Civil penalties prescribed under this section shall be assessed, collected and paid in the same manner as the motor fuel.

A “highway vehicle” mentioned in W. Va. Code § 11-14C-36(a)(3) [2003] is defined by W. Va. Code § 11-14C-2(47) [2006] to mean, “any self-propelled vehicle . . . that is designed or used for transporting persons or property over the public highway, and includes [not “is limited to” and not “means”] [emphasis added] all vehicles subject to registration under” Article 3 of Chapter 17A of the West Virginia Code. Thus, the transporting chassis hauling the attached drilling equipment in this matter is within the definition of “highway vehicle” set forth in W. Va. Code § 11-14C-2(47) [2006], even though “special mobile equipment,” as defined in W. Va. Code § 17A-1-1(r) [2004] is involved (the latter Code provision explicitly includes “well-drillers”), and even though W. Va. Code § 17A-3-2(a)(6)-(7) [2004] excepts such “special mobile equipment” from the general motor vehicle registration requirements. Stated another way, the definition of a “highway vehicle” in W. Va. Code § 11-14C-36(a)(3) [2003] is broader than just motor vehicles requiring registration, and clearly includes the transporting chassis/drilling equipment in this matter.

The applicable W.Va. Code § 11-14C-36(a)(3) [2003] states that it is a violation if a person uses dyed diesel fuel in a highway vehicle, unless that use is allowed under the authority

of 26 U.S.C. §4082. Section 4082(b)(3) makes clear, however, that the term “non-taxable use” does not include any use described in section 26 U.S.C. § 6421 (e)(2)(C).

26 U.S.C. § 6421(e)(2)(C)(iii)(I) lists, as a taxable use, the use of motor fuel in “mobile machinery” consisting of a chassis to which is, “permanently mounted . . . machinery or equipment to perform . . . drilling . . . or similar operation if the operation of the machinery or equipment is unrelated to transportation on or off the public highways.” Therefore, by explicit definition, tax-paid motor fuel must be used in mobile machinery such as that involved in this matter.

In addition, the Internal Revenue Service has issued a bulletin that specifically states that after October 22, 2004, untaxed, dyed diesel fuel cannot lawfully be used in mobile machinery. Instead, tax-paid motor fuel must be used.

With respect to Petitioner’s argument that the Respondent’s *Publication TSD-401* allows the use of dyed diesel fuel in mobile equipment such as a drill rig because the same is not registered with the West Virginia Department of Motor Vehicles, that publication makes clear that the, “only way mobile equipment could transport dyed diesel fuel, would be in a separate tank used strictly to operate the . . . drill rig . . . off the highway.” Because the supply tank in this case powered both the motor that turned the axles of the transporting chassis, as well as the motor that powered the drill, *Publication TSD-401* does not help the Petitioner here. If a separate tank supplies the drilling or other off-road machinery, the tax paid on such use would be refundable.

Accordingly, because Petitioner used untaxed, dyed diesel fuel in mobile machinery for a taxable use during transportation upon the highways of West Virginia, such use was in violation of W.Va. Code § 11-14C-36(a)(3) [2003] and, accordingly, that violation mandates that the civil penalties be upheld as assessed.

This tribunal notes that W. Va. Code § 11-14-1 *et seq.*, known as the “Gasoline and Special Fuel Excise Tax,” was repealed by the West Virginia Legislature in 2003 for all tax periods beginning on and after January 1, 2004. W. Va. Code § 11-14-31 [2003]. Therefore, this tribunal will not further discuss that repealed statute or any of the Petitioner’s arguments relating to it.

### **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 a taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. To satisfy its burden of proof in a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, a taxpayer must prove that the assessment is incorrect and contrary to law, in whole or in part, by a preponderance of evidence.

3. The Petitioner has not proven by a preponderance of the evidence that it did not violate W.Va. Code § 11-14C-36(a)(3) [2003], by using untaxed, dyed diesel in a highway vehicle, the use of which is not allowed under the authority of 26 U.S.C. § 4082.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax civil penalty assessment issued against the

Petitioner on November 5, 2007, for using dyed diesel in a highway vehicle in violation of W.Va. Code § 11-14C-36(a)(3) [2003], in the amount of \$\_\_\_\_\_, should be and is hereby **AFFIRMED**.