

**REDACTED DECISION – DOCKET # 08-172 RGC – BY ROBERT W. KIEFER, JR.,
ALJ – SUBMITTED FOR DECISION on DECEMBER 1, 2008 – ISSUED on MARCH 19,
2009.**

SYNOPSIS

MOTOR FUEL EXCISE TAX – BURDEN OF PROOF -- 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. See W. Va. Code § 11-10A-10(e) [2002].

MOTOR FUEL EXCISE TAX – LIMITATION ON FILING OF REFUND CLAIM -- Pursuant to the provisions of W. Va. Code § 11-14C-31(c)(3) [2005], the Petitioner is required to file its claim for refund on or before the last day of April, 2008.

MOTOR FUEL EXCISE TAX – LIMITATION ON FILING OF REFUND CLAIM – A refund claim required to be filed with the State Tax Commissioner on or before the last day of April, which is not filed until July 2, is untimely and must be rejected.

FINAL DECISION

On or about July 2, 2008, the Petitioner, filed a claim for refund of motor fuel excise tax in the amount of \$ ____ for the period of January 1, 2008, through March 31, 2008. The Fuel Tax Administration Unit of the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or the “Respondent”), by letter dated July 10, 2008, denied the claim on the grounds that it was not timely filed, that is, it was filed after April 30, 2008, in violation of W. Va. Code § 11-14C-31(c)(3) [2005].

Thereafter, by mail postmarked July 22, 2008, received on July 24, 2008, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund. W. Va. Code §§ 11-10A-8(1) [2007] and 11-10A-9 [2005]. The Petitioner requested that the matter be heard on documents, which request was granted. The matter was then set down for

decision on briefs to be filed by the parties. The Petitioner filed a brief. The Respondent did not file a brief in response.

FINDINGS OF FACT

1. The Petitioner apparently sold clear kerosene for home heating use.
2. The Petitioner believed it was entitled to a refund of tax in the same manner as it was apparently entitled to a refund for prior and subsequent quarters.
3. According to its brief, the Petitioner prepared its refund claim documents for the months of January, February and March of 2008 (“the first quarter”) on or prior to April 17, 2008, the date on which its refund claims were notarized.
4. According to the Petitioner’s petition for refund, due to oversight on the part of one of its employees, its refund claims were placed in the Petitioner’s file rather than mailed or otherwise forwarded to the State Tax Commissioner’s office.
5. According to its petition for refund, upon preparing the Petitioner’s refund claims for April, May and June of 2008, one of the Petitioner’s employees discovered that she had not mailed or otherwise forwarded its refund claims for the first quarter of 2008.
6. According to the letter denying the claim for refund, the Petitioner’s refund claim for the first quarter, dated July 1, 2008, was postmarked July 2, 2008.
7. At the time that it filed its claim for refund for the first quarter, the Petitioner admitted that its claim was not timely filed, but requested that the State Tax Commissioner grant its refund anyway.
8. By letter dated July 10, 2008, signed by a Unit Supervisor, the State Tax Commissioner denied the Petitioner’s claim for refund for the first quarter of 2008 in the amount of \$____, on the grounds that the refund claim was not timely filed.

DISCUSSION

The issue presented by this matter is whether the Petitioner is entitled to a refund for the first quarter of 2008, in spite of the fact that its claim for refund was not timely filed. The Petitioner admits that it did not timely file its claim for refund. It contends that the tax should be refunded because its failure to timely file its claim is the result of a clerical error. It maintains that the clerical error results in a windfall to the State of West Virginia, which error is disproportionate to the clerical mistake.

W. Va. Code § 11-14C-31(c) provides, in relevant part

(c) . . . The Commissioner shall cause a refund to be made under the authority of this section only when the claim for refund is filed with the Commissioner within the following time periods:

* * * *

(3) A [claim] for refund under subsection (c) or (d), [W. Va. Code § 11-14C-9] shall be filed with the Commissioner on or before the last day of January, April, July and October for purchases of motor fuel during the immediately preceding calendar quarter:¹

The statute uses the mandatory “shall,” in lieu of the permissive “may.” Consequently, the claim for refund must be filed within the specified time, in this case, by the last day of April. The mandatory language is not tempered by any language that permits filing subsequent to the last day of April by reason of some contingency, such as late filing due to a clerical error or the fact that late filing results in a windfall that benefits the State. It is true that the Petitioner will not receive \$____ to which it appears that it would otherwise be entitled, and that the State will receive a windfall of said amount. The result is unfortunate, but it is the result mandated by statute. Accordingly, the Petitioner’s claim for refund must be denied.

¹ Subsection (c)(3) states that a “petition” for refund must be filed within the specified time, but it is clear from the context that it is the “claim” for refund must be filed within the time specified.

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. *See* W. Va. Code § 11-10A-10(e) [2002].
2. Pursuant to the provisions of W. Va. Code § 11-14C-31(c)(3) [2005], the Petitioner was required to file its claim for refund on or before the last day of April, 2008.
3. The Petitioner did not file its claim for refund until July 2, 2008.
4. The Petitioner in this matter has failed to carry its burden of showing that it is entitled to a refund.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of \$10,275.67 of tax, for the period of January 1, 2008, through March 31, 2008, is hereby **DENIED**.