

**REDACTED DECISION – DK# 19-049**

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE  
SUBMITTED FOR DECISION ON APRIL 28, 2020  
ISSUED ON OCTOBER 28, 2020**

**FINAL DECISION**

On January 14, 2019, a Criminal Investigator with the Criminal Investigation Division of the West Virginia Tax Department issued several assessments against the Petitioner. All assessments were for failure to obtain a diversion number, in violation of West Virginia Code Section 11-14C-34(d). The assessments were for several violations of Subsection (d) that allegedly occurred between the dates of August 9, 2018, and December 31, 2018. Pursuant to West Virginia Code Section 11-14C-34(f)(3)&(4), the first assessment was a \$\_\_\_\_\_ penalty and the other eight (8) were a \$\_\_\_\_\_ penalty each, for a total assessment of \$\_\_\_\_\_. On February 11, 2019, the Petitioner timely filed with this Tribunal its petition of appeal. Two evidentiary hearings were held, one on November 13, 2019, and the second on December 11, 2019. At the conclusion of these hearings the parties filed legal briefs, and thereafter the matter became ripe for a decision.

## FINDINGS OF FACT

1. The Petitioner is a North Carolina corporation, with its principal place of business in a city, North Carolina.

2. The Petitioner's business is liquid bulk transport, primarily petroleum products, and some chemicals. Tr.#1 P37 at 19-22.

3. As part of its regular business the Petitioner's employees routinely fill up their tanker transport trucks at a bulk fuel terminal in a city in Virginia operated by a third party.

4. When a driver employed by the Petitioner arrives at the third-party facility to fill up their tanker trucks they provide information to the terminal employees such as what type of fuel they are there to pick up, how many gallons, and where the fuel is being transported to. This information is contained in what the Petitioner calls driver reports. *See* Petitioner's Ex. 1.

5. When the Petitioner's drivers fill their trucks up with fuel for transport, they are provided a bill of lading from the third party's employees. Each bill contains various information, such as the type of fuel loaded, the amount, and the destination. *See* Petitioner's Ex. 2

6. On several occasions between August 2018, and December 2018, the Petitioner's employees arrived at the terminal to transport fuel to a city in West Virginia. However, on each of these occasions, the bill of lading generated by the third party incorrectly identified the final destination state of the fuel as Virginia as opposed to West Virginia. *See* Petitioner's Ex. 2.

7. On some of these occasions, if not all, the Petitioner's drivers pointed out the error to the third party's employees. The drivers were assured that the third party's computer system had the correct information i.e., that the destination state was showing as West Virginia. Tr.#1 P18 at 5-12. During these conversations, the third party's employees assured the Petitioner's

drivers that they did not need to obtain what is colloquially called a “diversion number”. Tr.#1 P25 at 10-13.

8. Due to the errors regarding the wrong destination state, on some of these occasions, the Petitioner’s drivers would hand write the correct destination state on the bills of lading. *See* Petitioner’s Ex. 2.

9. Sometime in January of 2019, a representative of the Petitioner discussed via email the problems with the bills of lading and confirmed that West Virginia had in fact received the taxes due on the fuel that was transported to a city. *See* Petitioner’s Ex. 3.

10. Also in January of 2019, an employee of the Tax Department’s Criminal Investigation Division reviewed the bills of lading at the gas station in a city where the loads of fuel that form the subject of this matter were delivered. Tr.#2 P19. It was the discovery that the bills identified the destination state as Virginia, and that the correct destination had been handwritten in by the drivers that led to the assessments being issued.

## **DISCUSSION**

The parties in this matter agree which statutory provisions control, and neither party argues that they are ambiguous.

- (a) A person shall not transport in this state any motor fuel by barge, watercraft, railroad tank car or transport vehicle unless the person has a machine-generated shipping document. W. Va. Code Ann. § 11-14C-34(a) (West).

- (b) The shipping document issued by the terminal operator or operator of a bulk plant shall contain the following information and any other information required by the commissioner: . . .(4) Destination state of the motor fuel as represented by the purchaser of the motor fuel or the purchaser's agent. . W. Va. Code Ann. § 11-14C-34(b) (West).

- (c) In the event that either the terminal operator, bulk plant operator, purchaser or transporter determines prior to the shipment of motor fuel leaving the terminal or bulk plant that the destination state indicated on the shipping document is incorrect, the diversion procedure provided in subdivision (3), subsection (d) of this section shall be used to obtain authorization to deliver the motor fuel to a different state. W. Va. Code Ann. § 11-14C-34(c) (West).

- (d) A person to whom a shipping document was issued shall: . . . (3) Deliver motor fuel to the destination state printed on the shipping document unless the person: (A) Notifies the commissioner before transporting the motor fuel into a state other than the printed destination state that the person has received instructions after the shipping document was issued to deliver the motor fuel to a different destination state; (B) Receives from the commissioner a confirmation number authorizing the diversion; and (C) Writes on the shipping document the change in destination state and the confirmation number for the diversion; and (4) Gives a copy of the shipping document to the person to whom the motor fuel is delivered. . W. Va. Code Ann. § 11-14C-34(d) (West).

- (f) Any person who transports motor fuel in a barge, watercraft, railroad tank car or transport vehicle . . . delivers motor fuel to a destination state other than the destination state shown on the shipping document, is subject to the following civil penalty. . . . (3) The amount of the civil penalty for a first violation is five thousand (\$5,000) dollars. (4) The amount of the civil penalty for each subsequent violation is ten thousand dollars. W. Va. Code Ann. § 11-14C-34(f) (West).

The Petitioner in this matter is in a tough spot, and this Tribunal is cognizant of that. Its drivers noticed the errors on the bills of lading and pointed it out to the terminal employees. The terminal employees stated that it was just an error with their bills of lading print out. The terminal

employees assured the drivers that somewhere in the computer system everything was proper, and West Virginia was the true and proper destination state, and as such, no diversion number was needed. It is this mistaken reliance on the advice of the terminal employees that led to the \$\_\_\_\_\_ penalties complained of. If the Petitioner's drivers had, out of an abundance of caution, simply called the West Virginia Tax Department and pursuant to West Virginia Code Section 11-14C-34(d), obtained a diversion number, then obviously no penalties would have been assessed.

The Petitioner first argues that no diversion number was necessary because there was no diversion, and on this point the Petitioner is correct. Unfortunately for the Petitioner, our analysis cannot end there, because Section 34 contains both Subsections (c) and (d). The Petitioner is correct that its drivers were not in a situation where, after leaving the terminal, they receive instructions to divert to another state, as addressed in Subsection (d). The Petitioner's predicament comes from Subsection (c), which directly addresses what transpired in this matter, namely the realization before transport that the shipping document identified the wrong destination state. In those circumstances, the West Virginia Legislature has clearly and unambiguously mandated what needs to occur, namely the same need to obtain a diversion number as when there has been an actual diversion in transit. By its use of the word shall, the Legislature has connotated a mandatory duty, not a discretionary one. *See e.g. Foster Foundation v. Gainer* 228 W.Va. 99, 110, 717 S.E.2d 883, 894 (2011); Syl. pt. 1, *E.H. v. Matin*, 201 W.Va. 463, 498 S.E.2d 35 (1997) (The word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.).

The Petitioner next argues that the amount of the penalty it was assessed is too high. Specifically, it argues that a \$\_\_\_\_\_ penalty is contrary to the rational for such penalties and does not accomplish the goals of the Legislature when Section 34 was enacted. The Petitioner also

argues that “violation” is an undefined term, and because the facts of each failure to obtain a diversion number were identical, there was in effect, only one violation. The West Virginia Legislature does not create a legislative history like that created by the House of Representatives and the Senate in Washington, D.C. Specifically, there are not recordings of what transpires in committee meetings or the speeches made on the floor in support or opposition to a particular piece of legislation. In a way, that makes the work of this Tribunal easier, because we do not have to delve into matters such as the rationale for, or the goals of Section 34. Instead, we have basically two tasks, if a statute is clear and unambiguous we apply it as written. If a statute is ambiguous, we utilize the rules of statutory construction.

We do not have any specifics regarding the Legislature’s rationale or goals, aside from the plain language of Section 34. Subsection (f) states:

(f) Any person who transports motor fuel in a barge, watercraft, railroad tank car or transport vehicle without a shipping document or with a false or an incomplete shipping document, or delivers motor fuel to a destination state other than the destination state shown on the shipping document, is subject to the following civil penalty

W. Va. Code Ann. § 11-14C-34 (West). This Tribunal is of the opinion that just because “violation” is not one of the terms listed in the definitions Section of Article 14C, that does not mean it is an undefined term. Subsection (f) clearly and unambiguously lays out what actions will subject a transporter to a civil penalty, including delivery to a state other than what is shown on the shipping document. The first time a shipper does this, the fine is \$5,000. Thereafter, each time a shipper does so, the fine is \$10,000. In this case, it is undisputed that on a number of occasions between August 9, 2018, and December 31, 2018, the Petitioner picked up motor fuel at a terminal in Virginia and transported it to a gas station in a city in West Virginia. On each of those occasions, the bill of lading showed the destination state as Virginia, and each time the Petitioner’s driver

failed to obtain a diversion number. The Petitioner is unable to persuade us that the Tax Commissioner has committed an error by issuing the civil money penalties in this case. Finally we should note that the Petitioner **is not** arguing that the relevant language in Section 34 grants the Tax Commissioner discretion, or that he has abused his discretion in issuing the penalties.

### 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) A person shall not transport in this state any motor fuel by barge, watercraft, railroad tank car or transport vehicle unless the person has a machine-generated shipping document. W. Va. Code Ann. § 11-14C-34(a) (West).

4. (b) The shipping document issued by the terminal operator or operator of a bulk plant shall contain the following information and any other information required by the commissioner: . . .(4) Destination state of the motor fuel as represented by the purchaser of the motor fuel or the purchaser's agent. . W. Va. Code Ann. § 11-14C-34(b) (West).

5. (c) In the event that either the terminal operator, bulk plant operator, purchaser or transporter determines prior to the shipment of motor fuel leaving the terminal or bulk plant that the destination state indicated on the shipping document is incorrect, the diversion procedure provided in subdivision (3), subsection (d) of this section shall be used to obtain authorization to deliver the motor fuel to a different state. W. Va. Code Ann. § 11-14C-34(c) (West).

6. (d) A person to whom a shipping document was issued shall: . . . (3) Deliver motor fuel to the destination state printed on the shipping document unless the person: (A) Notifies the commissioner before transporting the motor fuel into a state other than the printed destination state that the person has received instructions after the shipping document was issued to deliver the motor fuel to a different destination state; (B) Receives from the commissioner a confirmation number authorizing the diversion; and (C) Writes on the shipping document the change in destination state and the confirmation number for the diversion; and (4) Gives a copy of the shipping document to the person to whom the motor fuel is delivered. . . W. Va. Code Ann. § 11-14C-34(d) (West).

7. (f) Any person who transports motor fuel in a barge, watercraft, railroad tank car or transport vehicle . . .delivers motor fuel to a destination state other than the destination state shown on the shipping document, is subject to the following civil penalty. . . . (3) The amount of the civil penalty for a first violation is five thousand dollars. (4) The amount of the civil penalty for each subsequent violation is ten thousand dollars. W. Va. Code Ann. § 11-14C-34(f) (West).

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 number of assessments issued against it on January 14, 2019, 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 number of assessments issued against the Petitioner on January 19, 2019, in the cumulative amount of \$\_\_\_\_\_, are hereby **AFFIRMED**.

**WEST VIRGINIA OFFICE OF TAX APPEALS**

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

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Date