

REDACTED DECISION – DKS# 21-034 & 21-070 MOTOR FUEL¹

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON FEBRUARY 28, 2022
DECISION ENTERED ON APRIL 25, 2022**

FINAL DECISION

On December 10, 2020, a Criminal Investigator with the Criminal Investigation Division of the West Virginia State Tax Department issued four (4) assessments against Alpha Company Inc. (hereinafter “Alpha Company”). The next day, a different investigator issued three (3) more assessments against Alpha Company. All seven (7) assessments were for “invalid shipping documents, in violation of West Virginia Code Section 11-14C-34(b).² The assessments were for seven (7) violations of Subsection (b) that allegedly occurred between the dates of October 30, 2020, and December 4, 2020. Pursuant to West Virginia Code § 11-14C-34(f)(3)&(4), the first assessment was a \$___ penalty and the other six (6) were a \$___ penalty each, for a total assessment of \$___. On February 2, 2021, the same two criminal investigators issued seven (7) new assessments, this time against Subsidiary Company, Inc. (hereinafter “Subsidiary Company”). These assessments concerned the same violations, with the same dates as the Alpha Company violations, except that now the assessments were for “improper” shipping documents. These seven (7) assessments also totaled \$___. On February 12, 2021, Alpha Company timely filed with this Tribunal its petition of appeal. Thereafter, on April 2, 2021, Subsidiary Company timely filed its petition of appeal with this Tribunal. The two (2) matters were consolidated, and an evidentiary hearing was held on October 26, 2021. At the conclusion of this hearing the parties filed legal briefs, and thereafter the matter became ripe for a decision.

¹ At the time Docket No. 21-034 was filed Dale W. Steager was Tax Commissioner and when 21-070 was filed Matthew Irby was acting Tax Commissioner.

² As will be discussed below, Subsection (b) does not address “invalid” shipping documents, but rather identifies what information must be in a shipping document to render it complete.

FINDINGS OF FACT

1. The Petitioner Alpha Company is a West Virginia C corporation, incorporated in 1977, with its principal place of business in Mountain Town, West Virginia. It operates in six states and is in the business of distributing petroleum products. Alpha Company has one wholly owned subsidiary, Subsidiary Company.
2. The Petitioner Subsidiary Company is a West Virginia C corporation, incorporated in 2015, with its principal place of business in Mountain Town, West Virginia. It operates in six (6) states and is in the business of transporting petroleum products.
3. Under West Virginia law, there are two (2) types of motor fuel storage and distribution facilities in the state, terminals and bulk plants. A terminal is a facility with a special identification number assigned by the Internal Revenue Service which gets its motor fuels by pipeline or marine vessel. *See* W. Va. Code Ann. § 11-14C-2(84) (West 2021). A bulk plant is a motor fuel storage and distribution facility that is not a terminal. *See* W. Va. Code Ann. § 11-14C-2(17) (West 2021).
4. Petitioner Alpha Company operates numerous bulk plants in West Virginia, including one in Mountain Town, West Virginia. Tr. P9 at 2-3 & Tr. P32 at 17-19 & Tr. P69 at 12-19.
5. Petitioner Subsidiary Company transports and delivers fuel for a variety of customers, including Petitioner Alpha Company. Tr. P31 at 1-5.
6. In November of 2019 a Tax Department employee sent a letter to terminal and bulk plant operators in the state, inquiring as to how the operators generated shipping documents, either manually or by machine. The letter asked the operators to provide sample shipping documents and reminded them that pursuant to West Virginia Code Section 11-14C-34,

operators who were not utilizing machine generated shipping documents needed to obtain special permission from the Tax Commissioner. *See* Respondents' Ex. 2

7. After this letter was received by the Petitioners,³ employees of the Tax Department had numerous telephone and email conversations with the Petitioners regarding the need to begin adhering to the requirement in Section 34 for machine generated shipping documents. Tr. P 203-204.
8. The same Tax Department employee sent a second letter to Petitioner Alpha Company dated October 1, 2020. This letter explained that the Tax Department's review of the Petitioner's shipping documents showed them to be non-compliant with Section 34. Attached to the letter was an example of a machine generated shipping document that the Tax Commissioner considered to be compliant. The letter also listed information the Tax Commissioner would require in all machine generated shipping documents, including Bill of Lading Number, Delivery date, Shipper name and address, Carrier information, Consignee/Ship to name and address and load information. *See* Respondents' Ex. 3.
9. In October, November, and December of 2020, Petitioner Subsidiary Company made the following fuel deliveries for Petitioner Alpha Company:
 - a. On October 30, 2020, gasoline from the [REDACTED] in [REDACTED], Kentucky to the [REDACTED] in [REDACTED], West Virginia. *See* Petitioners Ex. 4.
 - b. On October 30, 2020, gasoline from the [REDACTED] in Charleston, West Virginia to the [REDACTED] in [REDACTED], West Virginia. *See* Petitioners Ex. 3.

³ The letter was addressed to Petitioner Alpha Company. However, both Petitioners have the same President, and neither party has argued that the information in the letter was not communicated to Petitioner Subsidiary Company. Throughout the remainder of this decision we impute any knowledge of facts by one Petitioner to the other.

- c. On November 5, 2020, gasoline from the [REDACTED] in [REDACTED], Virginia to [REDACTED] in [REDACTED], West Virginia. *See* Petitioners Ex. 6.
 - d. On November 11, 2020, gasoline from the [REDACTED] in [REDACTED], Virginia to the [REDACTED] in Beckley, West Virginia. *See* Petitioners Ex. 5.
 - e. On November 16, 2020, gasoline from Petitioner Alpha Company bulk plant in Mountain Town, West Virginia to [REDACTED] in [REDACTED], West Virginia. *See* Petitioners Ex. 8.
 - f. On November 20, 2020, gasoline from Petitioner Alpha Company bulk plant in Mountain Town, West Virginia to [REDACTED] in [REDACTED], West Virginia. *See* Petitioners Ex. 9.
 - g. On December 4, 2020, gasoline from the [REDACTED] in [REDACTED], Virginia to the [REDACTED] in Beckley, West Virginia. *See* Petitioners Ex. 7.
10. When drivers for Petitioner Subsidiary Company fill their trucks up at the terminals either in [REDACTED], [REDACTED] or Charleston they receive a Bill of Lading (hereinafter “BOL”) that contains various information, including:
- a. Identification of the terminal where the fuel was loaded;
 - b. Date the fuel was loaded;
 - c. Invoiced gallons loaded;
 - d. Destination state of the fuel; and
 - e. Identity of the shipper. *See* Petitioners Ex 3-7 & Tr. P84-85.
11. When drivers for Petitioner Subsidiary Company fill their trucks at Petitioner Alpha Company bulk plant, they do not get a bill of lading containing the same information

as they receive at a terminal. Instead, they fill up their trucks and generate a ticket once the fuel is dispensed at the various delivery locations. *See* Petitioners Ex 8 & 9 and Tr. P84-85 & Tr. P87-88.

12. At various times throughout the year, criminal investigators with the West Virginia State Tax Department visit gas stations throughout the state to conduct what they call “retail fuel surveys.” Tr. P113 at 20-21. There are various purposes for these visits, including to check the bills of lading for fuel deliveries. *See e.g.* P113-114 at 22-2.
13. In November and December of 2020, two (2) investigators visited the five (5) retail locations listed in Finding of Fact number six (6) above. The purpose of the visits was to conduct retail fuel surveys. *See e.g.* Tr. P125 at 10-11 & Tr. P168 at 20-21.
14. During these visits the investigators did not find BOL’s for the seven (7) deliveries discussed in Finding of Fact number six (6) above. Instead, they found what they colloquially call “drop tickets.” These drop tickets are akin to a delivery slip, and came from Petitioner Alpha Company. They showed, among other things, how much fuel was delivered and the cost. *See* Respondents Ex 1.
15. As a result of the absence of BOLs for the seven (7) deliveries,⁴ both investigators wrote the assessments/violation tickets that form the basis of this appeal. Due to the fact that these drop tickets only contained the name of Petitioner Alpha Company, that is the entity that the investigators wrote the assessments against.

⁴ The record is not entirely clear if the violations were written because the investigators did not see BOLs, or if the investigators believed that the drop tickets were really BOLs that were not machine generated and had necessary information missing. As will be discussed below, whichever fact is correct, this Tribunal’s decision would remain the same.

16. At a later unidentified date, the investigators were informed by their supervisor that the entity that had transported the fuel was in fact Petitioner Subsidiary Company. This information caused them to write identical assessments/violation tickets against Petitioner Subsidiary Company. Tr. P131-132.
17. None of the Tax Commissioner's witnesses offered testimony as to why, once Petitioner Subsidiary Company was identified as the transporter of the deliveries in question, the assessments against Petitioner Alpha Company were not withdrawn.

DISCUSSION

The law of this case is contained almost entirely in Section 34 of Article 14C, Chapter 11 of the West Virginia Code. However, the Petitioners also argue that Section 34 does not apply to them. As such, some of the definitions contained in Section 2 of Article 14C are also relevant. Neither party argues that any of the statutory provisions are ambiguous.

Section 34 governs shipping documents, the transportation of motor fuel in West Virginia and penalties for violations of the Section, all under West Virginia's motor fuel excise tax. The relevant portions of Article 14C state as follows:

- ❖ “‘Motor fuel transporter’ means a person who transports motor fuel outside the bulk transfer/terminal system by means of a transport vehicle, a railroad tank car or a marine vessel.” W. Va. Code Ann. § 11-14C-2(62) (West 2004).
- ❖ “‘Distributor’ means a person who acquires motor fuel from a licensed supplier, permissive supplier or from another licensed distributor for subsequent sale or use.” W. Va. Code Ann. § 11-14C-2(32) (West 2004).
- ❖ “‘Terminal’ means a motor fuel storage and distribution facility to which a terminal control number has been assigned by the Internal Revenue Service, to which motor fuel is supplied

by pipeline or marine vessel and from which motor fuel may be removed at a rack.” W. Va. Code Ann. § 11-14C-2(84) (West 2004).

- ❖ “‘Bulk plant’ means a motor fuel storage and distribution facility that is not a terminal and from which motor fuel may be removed at a rack.” W. Va. Code Ann. § 11-14C-2(17) (West 2004).
- ❖ “‘Rack’ means a mechanism for delivering motor fuel from a refinery, terminal, marine vessel or bulk plant into a transport vehicle, railroad tank car or other means of transfer that is outside the bulk transfer/terminal system.” W. Va. Code Ann. § 11-14C-2(71) (West 2004).
- ❖ “Shipping documents; transportation of motor fuel by barge, watercraft, railroad tank car or transport truck; civil penalty.

(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, including applicable multiple copies thereof, for the motor fuel that complies with this section: . . . (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**: (1) Identification, including address, of the terminal or bulk plant from which the motor fuel was received; (2) Date the motor fuel was loaded; (3) Invoiced gallons loaded; (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 2004)(emphasis added).

“(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. (1) If the motor fuel is transported in a barge, watercraft or transport vehicle, **the civil penalty shall be payable by the person in whose name the means of conveyance is registered.** (2) If the motor fuel is transported in a railroad tank car, the civil penalty shall be payable by the person responsible for shipping the motor fuel in the railroad tank car. (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” *Id* (emphasis added).

We can immediately dispense with the seven (7) assessments issued against Petitioner Alpha Company. At the prehearing conference stage, counsel for the Tax Commissioners offered no legal authority for the proposition that civil penalties could be assessed against anyone other than a transporter, as that term is used in Article 14C. At hearing, the Tax Commissioners’ witnesses not only failed to offer such authority, they professed no knowledge whatsoever as to why the assessments against Petitioner Alpha Company were not withdrawn, once it was revealed that the transporter was Petitioner Subsidiary Company. In his post hearing brief, counsel for the Tax Commissioners again failed to offer any authority for the proposition. Therefore, the seven (7) assessments issued against Alpha Company are vacated.

Turning to the seven (7) assessments issued to Petitioner Subsidiary Company, we can just as quickly dispose of five (5) of them. Five (5) of the seven (7) deliveries at issue began with the motor fuel being picked up at a terminal, as that term is defined in West Virginia Code § 11-14C-2(84). Specifically, the deliveries in Findings of Fact 9a, b, c, d, and f above. At hearing, Petitioner Subsidiary Company introduced into evidence the BOLs for these deliveries. *See* Petitioner Subsidiary Company’s Exhibits 3-7. Neither party argues that these BOLs are missing any of the information required by West Virginia Code Section 11-14C-34(b). In similar

fashion to the assessments issued against Petitioner Alpha Company, no explanation was given at hearing as to why these five assessments were not withdrawn, once the BOLs were produced.

That brings us to the two remaining assessments, the deliveries from Petitioner Alpha Company's bulk plant in Mountain Town to [REDACTED], and [REDACTED], on November 16th and 20th 2020, respectively. At hearing, the Petitioner produced documents for these deliveries that were different from the drop tickets found by the investigators during their visits to the gas stations. *See* Petitioners Exhibits 8 & 9. There was much testimony regarding these documents, mostly centering on if they were machine generated, if it is acceptable for a machine generated document to contain hand written information, and if they contained all of the information required by West Virginia Code Section 11-14C-34(b). However, as will be discussed below, those arguments are not relevant to our decision.

Subsidiary Company argues that Section 34 of Article 14C does not apply to it. The Petitioner's argument in this regard is not the most concise, however, it essentially boils down to two (2) points. First, that Alpha Company was present during meetings with the Tax Department in 2003 and 2004 when West Virginia switched over to what is colloquially called a "rack tax." Prior to that point, fuel distributors such as Alpha Company did not have to pay tax when fuel was picked up at a terminal.

MR. [REDACTED]: The Rack Tax---I think what happened, prior to the Rack Tax going into effect, the West Virginia marketers were buying product, and we were buying untaxed product and we were storing it in our bulk plants. And we were also buying it at the terminals. But we didn't have to pay the West Virginia tax on it until the 25th of the following month. That's when the West Virginia state government got the money for the taxes. When the Rack Tax went into effect, we had to pay the shippers and the suppliers for their product up front. . . .

MR. [REDACTED]: The law that was produced --- passed from those meetings and discussions includes the statute that we're here about today. It talks about machine generated bills of lading, documentation like that. Do you recall participation in discussions

with the State Tax Department representatives about those aspects of the law?

MR. [REDACTED]: Yes. You see, the main impact for the West Virginia marketers was a cash assessment. The majority of the new policy that was used to make---to go into legislation involves the non-West Virginia bulk plants and the terminals. Because we wanted to make sure that the proper documentation was involved when they were shipping the documents, and that's --- therefore the legislature needed to have a machine --- they came up with a machine-generated shipping document that was produced by all the terminals **and all the bulk plants outside of West Virginia.**

Tr. P7 at 2-8 & P7-8 at 21-9. (emphasis added).

This testimony from one of the Petitioner's witnesses is the first basis for its argument that Section 34 does not apply to it, namely, its understanding that bulk plants in West Virginia would not need machine generated shipping documents. To reiterate, it came to this understanding due to its belief that the Legislature's/Tax Department's main concern was to ensure that taxes had been paid, and that once they were (at the terminal) then deliveries from bulk plants in West Virginia would not need machine generated documents.

The Petitioner also relies on Tax Department Administrative Notice 2005-02. In this Notice, the Tax Department issues guidance about the provisions of Section 34 regarding diversion numbers. Under Section 34, if a transporter has shipping documents that indicate destination State A, and then the load, or any part thereof is shipped to State B, the transporter must get permission from the Tax Commissioner, by obtaining a diversion number. In Notice 2005-02, the Tax Department stated that in a situation where a LPG/propane delivery truck is crossing in and out of West Virginia numerous times during the course of a delivery day, numerous diversion numbers would not be needed.

The Petitioner relies on the Notice because of the following language contained in it:

As demonstrated above, motor fuel is not to be transported in this state unless the person doing the transporting has a machine-

generated shipping document. **The purpose behind the shipping document requirement in W. Va. Code Ann. § 11-14C-34 is to assure that all motor fuel entering West Virginia has been accounted for and subjected to the appropriate taxes.** As a result, when the transport truck is loading from a bulk plant in West Virginia, appropriate taxes have been paid prior to loading the LPG and/or propane on the transport truck.

See Petitioner's Ex. 1 (emphasis added).

This Tribunal cannot rule that Section 34 does not apply to an in-state bulk plant, like Petitioner Alpha Company operates in Mountain Town, West Virginia, even if all the fuel located there has already been subjected to West Virginia's Motor Fuel taxes. The reason we cannot rule in such a manner has already been stated above, namely, because neither party argues that Section 34 is ambiguous. Section 34 clearly and unambiguously states "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 2004). The Petitioner would have us rewrite Subsection a to state "A person shall not transport in this state any motor fuel, **for which motor fuel taxes have not been paid**" However, as a *quasi judicial* tribunal, and part of the Executive branch, we are mandated to apply clear and unambiguous statutes as written, and to give the words therein their plain and ordinary meaning. See *e.g. Foster Found. v. Gainer*, 228 W. Va. 99, 717 S.E.2d 883 (2011) (Statutes whose language is plain must be applied as written, while those whose language is ambiguous must be construed before they can be applied). See also *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 582 S.E.2d 841, (2003) (it is not for courts arbitrarily to read into a statute that which it does not say).

This is not to say that this Tribunal is not sympathetic to the Petitioner's plight. We have no doubt that the Petitioner truly believed, after its meetings in 2003-2004 that it did not need machine generated shipping documents on fuel delivered from its bulk plants. The Tax Commissioner's statements in the Administrative Notice would have bolstered this opinion.

Unfortunately, this Tribunal is regularly confronted with Petitioners who are unpleasantly surprised when their "understandings" or "beliefs" do not match up with the words the Legislature has written. In 2013, we were confronted with Taxpayers who met with Tax Department representatives and Legislators regarding electric vehicle charging equipment. In 2016, it was the owner of a used flex fuel vehicle, who was told that she was eligible for an alternative fuel tax credit, even though the credit only applied to new vehicles. In 2018, it was an e-cigarette liquid manufacturer communicating with the Tax Department regarding a new excise tax on their product. In each of these cases, the Taxpayer came away from a meeting with a Tax Department employee, or a legislator, or a third party, with an "understanding". And in each case, this Tribunal ruled against them because the plain language of the statute did not match their understanding. In this matter, we are forced to do the same. The provisions of Article 14C clearly apply to both Petitioners. Petitioner Alpha Company is a distributor that operates bulk plants, and Petitioner Subsidiary Company is a transporter of motor fuels in West Virginia.

Finally, there is Petitioner Subsidiary Company's argument that the documents it left with [REDACTED] on November 16th and [REDACTED] on November 20th contain all the information required by Subsection (b) of Section 34. At first blush, the Petitioner's argument passes the straight face test, **if** one ignores the argument between the parties regarding if a "machine generated" document can contain handwritten information.⁵ A review of Petitioner's Exhibits 8 & 9 shows that they contain a mix of machine generated and handwritten information showing, 1) identification & address of the bulk plant where the fuel came from, 2) the date, 3) the invoiced gallons delivered, and 4) destination state of the motor fuel. This combination of machine generated and handwritten information covers everything required under Subsection (b). However, we are still unable to rule for the Petitioner on these two (2) remaining assessments. We

⁵ Due to the fact that we are ruling against Petitioner Subsidiary Company on other grounds, we are not ruling on the question of what constitutes a proper machine generated shipping document, pursuant to Article 14C of Chapter 11.

are unable to do so based upon the testimony of [REDACTED], a supervisor in the Tax Department's Fuel Tax Unit, and based upon Tax Commissioner's Exhibits 2 and 3. Ms. [REDACTED] testified regarding the two letters that were sent to Petitioner Alpha Company, in November of 2019 and October of 2020. The first letter informed the Petitioner that the Tax Department was conducting a survey of terminals and bulk plants to ascertain what type of shipping documents they were utilizing. The letter quoted the portion of Section 34 that discussed the need for machine generated documents. The second letter explained the Tax Department's determination that the sample shipping documents provided by the Petitioner did not comport with the requirements of Section 34. Attached to this October 2020 letter was a sample BOL that was identified as a suitable sample of one that was acceptable. However, for the purpose of this decision, the most important part of this letter is the following sentences: "[Y]ou may utilize any format for this document provided it contains the required information. **This includes** the Bill of Lading number, Delivery date, Shipper name and address, **Carrier information**, Consignee/Ship To name and address, and load information." See Tax Commissioners' Ex. 3 (emphasis added).

Ms. [REDACTED] also testified that there were numerous conversations between the Tax Department employees and representatives of the Petitioners.

ATTORNEY [REDACTED]: Now, the other two assessments. These get into the, what I'll call philosophical discussions, that you had with [REDACTED] and with [REDACTED]. Isn't that true? Where they were trying to explain to you that the statute, from their knowledge in the past and from [REDACTED]'s opinion, didn't relate to the sales of fuel from the [Alpha Company] bulk storage plant to its ultimate customers. That's what they were trying to advocate to you, were they not?

MS. [REDACTED]: Actually, they were---I had to explain to them that there's a difference between a bill of lading and a drop ticket. Because they didn't understand that. So, there was a huge misunderstanding with [REDACTED], and I cannot remember who was on the phone. I have it written down in my notes. But I know that whenever [REDACTED] was in the conversation. Because they were thinking this entire time that we were trying to say that the bill of---that the drop tickets were not correct. There's a

difference between the drop tickets and the bill of lading. And they weren't understanding that. So, this information on these tickets, no---

ATTORNEY [REDACTED]: So, what it comes down to is, you believe that for the fuel that is transferred from an [Alpha Company] bulk storage facility to an ultimate customer should have a machine-generated document, equivalent to the machine-generated document, which was page one of----

MS. [REDACTED]: Yes.

ATTORNEY [REDACTED]: --- Exhibits 3, 4, 5, 6, and 7?

MS. [REDACTED]: Yes.

ATTORNEY [REDACTED]: That's the crux of your position, correct?

MS. [REDACTED]: Yes.

ATTORNEY [REDACTED]: With regard to that position, is it not true that [REDACTED] [REDACTED] and [REDACTED] [REDACTED] were trying to share with you the fact that they had been relying upon a statement, an opinion, from the active State Tax Commissioner within a year after the law was passed. Did they not try to explain that to you?

MS. [REDACTED]: I don't know.

Tr. P216-217.

A review of the documents left by Subsidiary Company at [REDACTED] on November 16, 2020 and [REDACTED] on November 20, 2020, show that they do not contain any carrier information. By comparison, the BOLs for the other five (5) Subsidiary Company deliveries that originated from a terminal contain all kinds of carrier information, including Carrier name, driver name, and trailer number. Subsection (b) of Section 34 gives the Tax Commissioner discretion to request any information he or she sees fit to be included in motor fuel shipping documents. Here, the Tax Commissioner clearly communicated to Subsidiary Company that carrier information needed to be included. This renders the arguments regarding what constitutes a "machine generated" shipping document superfluous. The evidence clearly shows that for the two (2) deliveries at issue, none of the shipping documents contained carrier information. It is important

to note that Subsidiary Company is not arguing that the Tax Commissioners abused the discretion afforded to them by Subsection (b). We would note that it would be difficult to argue that requiring information about what entity is transporting motor fuel in this state would be arbitrary. Nor is Subsidiary Company arguing that it intended to comply with the Tax Department's letter, but it did not have enough time between receipt of the October 1, 2020, letter and the deliveries in question.⁶

Sadly, Ms. [REDACTED]'s testimony above, [coupled] with all of the other evidence, shows that until the assessments were issued (and beyond) there was a mistaken insistence on the part of the Petitioners that Section 34 just did not apply to them. However, the plain language of the Section shows that it does apply. Therefore, the assessments issued against Subsidiary Company, numbered 2254 and 2122 are affirmed. Due to the nature of our ruling, the November 16, 2020, assessment shall be considered a first violation, pursuant to West Virginia Code Section 11-14C-34(f)(3) and the November 20, 2020, assessment shall be considered a second violation.

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).

⁶ The Petitioners briefly complain that Section 34 does not contain a violation for "improper" or "invalid" shipping documents. Given the totality of the evidence in this matter, it is clear that the Petitioners knew precisely the nature of the violations issued against them.

3. “‘Motor fuel transporter’ means a person who transports motor fuel outside the bulk transfer/terminal system by means of a transport vehicle, a railroad tank car or a marine vessel.”

W. Va. Code Ann. § 11-14C-2(62) (West 2004).

4. “‘Distributor’ means a person who acquires motor fuel from a licensed supplier, permissive supplier or from another licensed distributor for subsequent sale or use.

W. Va. Code Ann.” § 11-14C-2(32) (West 2004).

5. “‘Terminal’ means a motor fuel storage and distribution facility to which a terminal control number has been assigned by the Internal Revenue Service, to which motor fuel is supplied by pipeline or marine vessel and from which motor fuel may be removed at a rack.” W. Va. Code

Ann. § 11-14C-2(84) (West 2004).

6. “‘Bulk plant’ means a motor fuel storage and distribution facility that is not a terminal and from which motor fuel may be removed at a rack.” W. Va. Code

Ann. § 11-14C-2(17) (West 2004).

7. “‘Rack’ means a mechanism for delivering motor fuel from a refinery, terminal, marine vessel or bulk plant into a transport vehicle, railroad tank car or other means of transfer that is outside the bulk transfer/terminal system.” W. Va. Code Ann. § 11-14C-2(71) (West 2004).

8. “‘Shipping documents; transportation of motor fuel by barge, watercraft, railroad tank car or transport truck; civil penalty.’”

9. “(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, including applicable multiple copies thereof, for the motor fuel that complies with this section: . . . (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: (1) Identification, including address, of the terminal or bulk plant from which the motor fuel was received; (2) Date the motor fuel was loaded; (3) Invoiced gallons loaded; (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 2004)(emphasis added).

10. “(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 2004).

11. Statutes whose language is plain must be applied as written, while those whose language is ambiguous must be construed before they can be applied. *See e.g. Foster Found. v. Gainer*, 228 W. Va. 99, 717 S.E.2d 883 (2011).

12. It is not for courts arbitrarily to read into a statute that which it does not say. *See e.g. Dunlap v. Friedman’s, Inc.*, 213 W. Va. 394, 582 S.E.2d 841 (2003).

13. West Virginia Code Section 11-14C-34(a) clearly and unambiguously states that persons who transport motor fuel in West Virginia, including from a bulk plant, must have a machine generated shipping document.

14. “(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: (1) Identification, including address, of the terminal or bulk plant from which the motor fuel was received; (2) Date the motor fuel was loaded; (3) Invoiced gallons loaded; (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 2004).

15. Subsection (b) of Section 34, Article 14C, Chapter 11 of the West Virginia Code grants the Tax Commissioner the discretion to determine what additional information must be contained in a shipping document.

16. Petitioner Alpha Company is not a transporter of motor fuel, as that term is used in Article 14C of Chapter 11.

17. Petitioner Alpha Company operates bulk plants in West Virginia, including one in Mountain Town, West Virginia.

18. By letter dated October 1, 2020, the West Virginia Tax Commissioner informed both Petitioners that henceforth all shipping documents for transporting motor fuel in this state must contain carrier information.

19. 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).

20. Petitioner Alpha Company has met its burden of showing that the seven (7) assessments issued against it on December 10 and 11, 2020, were erroneous, unlawful, void or otherwise invalid.

21. Petitioner Subsidiary Company has met its burden of showing that the following five (5) assessments issued against it were erroneous, unlawful, void or otherwise invalid:

- a. Assessment 2120, regarding an October 30, 2020, delivery of fuel to [REDACTED].
- b. Assessment 2121, regarding an October 30, 2020, delivery of fuel to [REDACTED].
- c. Assessment 2253, regarding a November 5, 2020, delivery of fuel to [REDACTED].
- d. Assessment 2251, regarding a November 11, 2020, delivery of fuel to [REDACTED].

e. Assessment 2255, regarding a December 4, 2020, delivery of fuel to [REDACTED].

22. Petitioner Subsidiary Company has not met its burden of showing that Assessment 2254, regarding a November 16, 2020, fuel delivery to [REDACTED] and Assessment 2122, regarding a November 20, 2020, fuel delivery to [REDACTED] 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:

1) The seven (7) assessments issued against Petitioner Alpha Company in the cumulative amount of \$65,000.00 are hereby **VACATED**.

2) The five (5) assessments issued against Petitioner Subsidiary Company, as discussed in Conclusion of Law Number 21 above are hereby **VACATED**.

3) The two (2) assessments issued against Petitioner Subsidiary Company, as discussed in Conclusion of Law Number 22 above are hereby **AFFIRMED**.

4) Assessment 2254 shall be considered a first violation, as that term is used in West Virginia Code Section 11-14C-34(f)(3)(West 2004), and shall be in the amount of \$5,000.00. Assessment 2122 shall be considered a second violation, and shall be in the amount of \$10,000.00, for a total assessment of \$15,000.00.

WEST VIRGINIA OFFICE OF TAX APPEALS

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

Date