

REDACTED DECISION – DK#'S 22-005

**BY: CRYSTAL S. FLANIGAN, DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON FEBRUARY 27, 2024
ISSUED ON MAY 21, 2024**

NOTE: THIS ADMINISTRATIVE DECISION WAS APPEALED BEYOND THE OFFICE OF TAX APPEALS

FINAL DECISION

On November 12, 2021, and November 15, 2021, the Compliance Division of the West Virginia State Tax Commissioner's Office ("the Tax Department" or "the Respondent") issued nine refund denials to the Petitioner, AAA, ("AAA" or "Petitioner"). The Petitioner is a trucking company. These refund denials were issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq*, of the West Virginia Code. The refund denials stated that the Petitioner did not qualify for an off-highway use refund because the fuel tax was paid in BBB and claimed in an IFTA return in Utah. These nine refund denial letters stated this same reason in each letter. The refund denial letters included the following tax periods: September 30, 2019, for the amount of \$XX; December 31, 2019, for the amount of \$XX; March 31, 2020, for the amount of \$XX; June 30, 2020, for the amount of \$XX; September 30, 2020, for the amount of \$XX; December 31, 2020, for the amount of \$XX; March 31, 2021, for the amount of \$XX; June 30, 2021, for the amount of \$XX; and September 30, 2021, for the amount of \$XX. As each refund request was denied for the same reason and for purposes of judicial economy, the parties agreed to use one tax period, September 30, 2021, at the hearings to represent all tax periods at issue.

Petitioner indicated in its Petition for Appeal that it received copies of the refund denials on November 16, 2021, and November 18, 2021. The Petitioner timely filed its Petition for Appeal with this Tribunal on January 10, 2022. Subsequently, notice of a hearing on the petition was sent

to the parties and in accordance with the provisions of West Virginia Code Section 11-10A-10, a hearing was held on August 31, 2023, and October 26, 2023. Thereafter, the parties submitted briefs, with the evidence closed on February 27, 2024, and the matter became ripe for decision at that time.

FINDINGS OF FACT

1. The Petitioner operates a trucking business in 49 states, including West Virginia and BBB, and its base jurisdiction is Utah. Tr. 34, 63.

2. The Petitioner filed for refunds for motor fuel purchased in BBB, which were denied by the Respondent. Tr. 30, 107.

3. The Petitioner purchases all fuel for the trucks relevant to this case in BBB. Tr. 92-93.

4. The Petitioner does not purchase any fuel in West Virginia and does not pay West Virginia tax. Tr. 38, 40, 92, 98.

5. The Petitioner pays the BBB Motor Fuel Tax when purchases of fuel are made in BBB. Tr. 12.

6. The Petitioner's trucks pick up raw coal, transport the coal to a processing plant in BBB, and then transport the processed coal to a power plant in CCC, West Virginia. This truck route is repeated daily. Tr. 10, 85-90, Pet'r's Ex. No. 2.

7. The Petitioner's trucks travel on highways in BBB and West Virginia. Tr. 86-87, 91.

8. The Petitioner's trucks also travel off-road in West Virginia. Tr. 86.

9. The Petitioner's refund request was for the fuel consumed during the off-road portions of these routes in West Virginia. Tr.91-92.

10. The off-road portions of the Petitioner's miles are the only portion at issue in this matter. Tr. 71-72, 90-91.

11. The Petitioner's filings contained estimated, instead of actual gallons purchased. Tr. 54, 97.

12. The Respondent has been providing refunds to the Petitioner for the past several years for motor fuel tax. Tr. 109.

13. The Respondent is no longer providing refunds to the Petitioner. Tr. 107, 109.

14. The Respondent is not seeking reimbursement of the prior refunds from the Petitioner. Tr. 118.

DISCUSSION

The issue in this matter is whether the Petitioner is entitled to the refunds from West Virginia for motor fuel tax that was paid by the Petitioner on motor fuel purchased in BBB for miles used off-road in West Virginia. The International Fuel Tax Agreement (hereinafter "IFTA") and the West Virginia Motor Fuel Tax for non-highway, i.e., off-road use in West Virginia are the controlling laws in this matter. The Petitioner argues that they should be entitled to continue receiving refunds. The Respondent argues that neither statute applies to the Petitioner and thus, the Petitioner is not entitled to a refund from West Virginia.

In this case, the Petitioner is only seeking a refund for off-road use in West Virginia. The Petitioner argues that it is entitled to receive refunds pursuant to the West Virginia Motor Fuel Excise Tax and IFTA, that it has been receiving these refunds for several years and should continue to receive them, and should be able to file corrected tax returns to properly represent motor fuel purchased.

The controlling law regarding the issue of whether the Petitioner is entitled to a refund of motor fuel tax falls under West Virginia Code Section 11-14C-9(c) of the West Virginia Motor Fuel Excise Tax, which states:

(c) Refundable exemptions from flat rate component of tax. -- A person having a right or claim to any of the following exemptions from the flat rate component of the tax levied by section five of this article shall first pay the tax levied by this article and then apply to the Tax Commissioner for a refund:

The exemption for non-highway use is discussed in West Virginia Code Section 11-14C-9(c)(15) (West 2020) as follows:

(15) All gallons of motor fuel purchased in quantities of 25 gallons or more for use as a motor fuel for internal combustion engines not operated upon highways of this state;

W. Va. Code Ann. § 11-14C-9(c)(15) (West 2020).

To receive a refund under the West Virginia Motor Fuel Excise Tax, the taxpayer must meet two requirements, which are: 1) the taxpayer must first pay the tax in West Virginia; and 2) then, apply to the West Virginia State Tax Commissioner for a refund of motor fuel taxes paid. *See W.Va. Code 11-14C-9(c)*. A refundable exemption exists for non-highway or off-road use for motor fuel purchased in quantities of 25 gallons or more used as motor fuel for internal combustion engines not operated upon the highways of this state. *See W.Va. Code § 11-14C-9(c)(15)*.

The Petitioner purchased all fuel at issue in BBB and argues that all the nontaxable miles were driven in West Virginia. The Petitioner is only seeking refunds for non-highway use. DDD, an accountant for the Petitioner, confirmed during the evidentiary hearing that no motor fuel had been purchased in West Virginia for the tax periods at issue. This stand-alone fact clearly negates the Petitioner's ability to receive a refund pursuant to West Virginia Code Section 11-14C-9(c). The Petitioner simply did not purchase motor fuel in West Virginia and therefore, did not pay any

motor fuel excise tax in West Virginia. By not meeting this first requirement of 11-14C-9(c), the Tax Commissioner cannot provide the Petitioner with a refund for taxes not received.

The Petitioner argues that an exemption exists for off-road use in West Virginia and that it is entitled to it. The Petitioner is correct about an exemption existing for off-road use in West Virginia pursuant to West Virginia Code Section 11-14C-9(c)(15). However, as discussed above, motor fuel must be purchased in West Virginia in order to qualify for this exemption. The Respondent can reimburse the taxes at issue under West Virginia Code Section 11-14C-9(c) when the motor fuel was purchased in West Virginia. Accordingly, this article of the West Virginia Code does apply to this set of facts and the Petitioner is not entitled to these refunds. The Petitioner believes that because it purchased motor fuel in BBB and drove the off-road miles in West Virginia, it is entitled to refunds because of IFTA. By applying West Virginia Code Section 11-14B-1 *et seq.*, (i.e., the IFTA statute) to the Motor Fuel Excise Tax statute, the Petitioner entangles these two articles to meet their goal of obtaining refunds. However, these are two separate articles of the West Virginia Code and should not be entangled together.

A brief explanation of IFTA and its purpose is helpful in understanding IFTA's national function and how it operates among the states. IFTA is an agreement between the forty-eight (48) contiguous U.S. states and the ten (10) Canadian provinces that facilitates and simplifies the way for truckers pay fuel taxes. What is IFTA and how does IFTA Fuel Tax Work (trucklogics.com). IFTA was created for truckers who frequently cross state borders on their routes. *Id.* Apart from the benefits of IFTA to trucking businesses, the agreement also makes sure jurisdictions are properly compensated for the use of their roads by heavy commercial vehicles. What is IFTA - everything you need to know | Motive (gomotive.com). Under IFTA, carriers only need to report inter-jurisdictional fuel use to their base state. *Id.* The state will collect the taxes on net fuel use,

process fuel tax returns, and distribute the funds to all the other states. *Id.* The base state is also responsible for enforcing compliance through scheduled audits. *Id.* A fleet's total taxable miles are usually the same as the total miles driven in each jurisdiction. *Id.* However, certain jurisdictions allow mileage exceptions that don't count as taxable. *Id.* Each state that participates in the IFTA has its own exemptions. IFTA, Inc. International Fuel Tax Association (iftach.org). Upon review of the IFTA Association's website, there are no exemptions for West Virginia from the IFTA.

West Virginia Code Section 11-14B-1 *et seq.*, provides the framework for IFTA guidelines in West Virginia, including, but not limited to, the purpose of IFTA, the scope of the agreement, and administration and disposition of monies. Upon review of this entire article of the West Virginia Code, there are no exemptions in West Virginia.

The Petitioner appears to be arguing that IFTA requires West Virginia to refund the BBB taxes paid from the motor fuel purchased in BBB because it's driving on West Virginia off-roads under IFTA. To avoid confusion, there is an off-road exemption under the West Virginia Motor Fuel Excise Tax for fuel purchased in West Virginia, but not an exemption for off-road use under the West Virginia IFTA statute. Again, this Tribunal believes that the Petitioner has entangled these two statutes as to how they operate separately for off-road use in West Virginia. The Petitioner cannot obtain refunds for off-road use under West Virginia Code Section 11-14B-1 *et seq.*, because there simply is not an exemption for off-road use.

The Petitioner further argues that it should continue to receive these refunds from the Respondent because they have been receiving them for many years. The Respondent concedes that refunds were issued to the Petitioner in error for many years for a variety of reasons such as, lack of employees, insufficient training of the existing employees, and a computer system that was not

advanced enough to discover tax cross checking issues. The Respondent's witness testified to explain why this error was permitted for so long as follows:

ATTORNEY EEE: Did the taxpayer receive these particular types of refund requests in the past?

MS. FFF: They did. Can I explain why?

ATTORNEY EEE: Well, yeah, in just in second. Roughly for how many Years? I mean. I'm not asking exactly dates.

MS. FFF: I would say 10 years.

ATTORNEY EEE: Okay. So, for a substantial amount of time?

MS. FFF: Absolutely, yes.

ATTORNEY EEE: Okay. In your opinion, were those refunds valid?

MS. FFF: No.

ATTORNEY EEE: Okay. And if you could explain why you think they were not valid?

MS. FFF: West Virginia code 11-14C-9 requires the taxpayer to first pay the tax. Honestly, we had too few employees, and we didn't have a system that's as advanced as what we had when we found this issue. So with GenTax, we're constantly upgrading. It does more cross checking for us now, and that's what brought this up, an issue that we don't have anything saying the tax was paid, any kind of backup documentation or anything of that nature to say this tax was paid. So it kind of flagged it for us to look at -- to look at further because it was an oddity.

ATTORNEY EEE: Okay, so let's stop right there. So you said earlier that we didn't have enough people, that's the reason these were paid in the past for roughly 10 years or so was the department was understaffed.

MS. FFF: Absolutely.

ATTORNEY EEE: In that unit. And also that the GenTax system at the time was not ---.

MS. FFF: As advanced, I guess.

ATTORNEY EEE: Yeah, it wasn't advanced enough to essentially perform a computer audit of the return until recently. And whenever that upgrade occurred --- I have lost track of the times GenTax has been upgraded. I know we're on version 12 or 13 or something like that. So it's upgraded about every --- seems like about every 18 months, it gets upgraded with new and improved power and features. And your testimony was that in one of these upgrades, that type of additional firepower was added to GenTax and now it can kind of audit these returns for refunds a little bit more in depth. Is that true?

MS. FFF: Yes. And we also had cross training, I didn't add on that. But yeah, before in the unit, we did not have cross training in the whole entirety of motor fuels. So now we have --- we had cross training once we saw that we weren't doing this correctly. We started cross training in IFTA and motor carrier and understand that they're two separate taxes.

ATTORNEY EEE: Okay. And when you say IFTA and motor carrier, you mean motor fuel excise tax?

MS. FFF: Yes, I'm so sorry. Yes, motor fuel excise tax, not motor carrier.

Evidentiary Hearing Transcript, October 23, 2023, p.109, l. 9-23 - p.111, l. 1-3.

While the Petitioner receiving refunds for several years that it was not entitled to is not an ideal situation for either party, it is now being acknowledged and corrected by the Respondent. To the Tax Commissioner's credit, he acknowledges this error and is not seeking reimbursement for the prior refunds or issuing assessments, as he could under West Virginia Code Section 11-10-14(k).¹ The Petitioner's confusion about previous receipt of refunds coupled with the misapplication of the West Virginia statutes is understandable considering these facts. However, the Petitioner has failed to show under West Virginia law that it is entitled to these refunds.

¹ "If the Tax Commissioner believes that an erroneous refund has been made or an erroneous credit has been established, he or she may proceed to investigate and make an assessment within the period prescribed in § 11-10-15 of this code or institute civil action to recover the amount of the refund or credit, within two years from the date the erroneous refund was paid or the erroneous credit was established, except that the assessment may be issued or civil action brought within two years from the date if it appears that any portion of the refund or credit was induced by fraud or misrepresentation of a material fact." W. Va. Code Ann. § 11-10-14(k) (West 2019).

Finally, the Petitioner argues that it should be allowed to correct the tax filings in the assessment to accurately reflect fuel purchases. The Petitioner may amend its returns to correct any errors so that it may have accurate records. However, the Petitioner will be subject to any applicable statute of limitations for amended returns. Moreover, the outcome of this case will not be altered by filing amended returns. Upon review of this matter in its entirety, including the West Virginia Code, the hearing transcripts, the exhibits, and the post-hearing briefs, this Tribunal finds that the Petitioner has failed to meet its burden of proof.

CONCLUSIONS OF LAW

Based upon all the above, it **FINDS** and **CONCLUDES** that:

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. W.Va. Code Ann. § 11-1-2 (West 2010).

2. In a hearing before the Office of Tax Appeals on a petition for reassessment or refund, the burden of proof is on the petitioner to show the West Virginia State Tax Department's actions are erroneous, unlawful, void or otherwise invalid. W.Va. Code Ann. § 11-10A-10(e)(West 2021) and W.Va. Code R. § 121-1-63.1 (West 2003).

3. The West Virginia Tax Procedure and Administration Act applies to West Virginia Motor Fuel Excise Tax. *See* W.Va. Code Ann. § 11-10-3(a) (West 2019).

4. West Virginia Motor Fuel Excise Tax paid on fuel that is consumed on non-highways or off-road is refundable. *See* W.Va. Code Ann. § 11-14C-9(c)(15) (West 2020).

5. To receive a refund for off-road use, the taxpayer shall first pay the West Virginia Motor Fuel Excise Tax. *See* W.Va. Code Ann. § 11-14C-9(c) (West 2020).

6. The West Virginia IFTA statute does contain an exemption for off-road use. *See* W. Va. Code Ann. § 11-14B-1 *et seq.* (West).

7. If the Tax Commissioner believes that an erroneous refund has been made or an erroneous credit has been established, he or she may proceed to investigate and make an assessment. W. Va. Code Ann. § 11-10-14(k) (West 2019).

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the refund denials by Respondent are hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

Crystal S. Flanigan
Deputy Chief Administrative Law Judge

Date