

**SANITIZED DECISION – 05-616 MFE – BY ROBERT W. KIEFER, JR., ALJ –
SUBMITTED for DECISION on FEBRUARY 7, 2006 – ISSUED on AUGUST 7, 2006**

SYNOPSIS

MOTOR FUEL EXCISE TAX – CIVIL PENALTY – In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the a taxpayer to show that any assessment of tax against him 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).

MOTOR FUEL EXCISE TAX – CIVIL PENALTY – There is no statutory provision permitting any waiver or abatement of the civil penalty imposed by the Tax Commissioner pursuant to W. Va. Code § 11-14C-38(a).

MOTOR FUEL EXCISE TAX – CIVIL PENALTY – There is no statutory provision establishing a standard for determining whether or not the civil penalty imposed by the Tax Commissioner pursuant to W. Va. Code § 11-14C-38(a) may be waived or abated.

MOTOR FUEL EXCISE TAX – CIVIL PENALTY – There is no statutory authority authorizing the West Virginia Office of Tax Appeals to waive or abate the civil penalty imposed by the Tax Commissioner pursuant to W. Va. Code § 11-14C-38(a).

MOTOR FUEL EXCISE TAX – CIVIL PENALTY – The West Virginia Office of Tax Appeals has no equitable jurisdiction that would permit it to waive or abate the civil penalty imposed by the Tax Commissioner pursuant to W. Va. Code § 11-14C-38(a).

FINAL DECISION

On November 7, 2005, an officer with the Criminal Investigation Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued an assessment against the Petitioner, in the amount of \$. The 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. The assessment was issued against the Petitioner because he was purportedly operating a truck in West Virginia without having obtained a business license as required by Chapter 11, Article 14C of the West Virginia Code, which is a violation of W. Va. Code § 11-14C-38. The assessment was in the amount of \$,

which is the amount of the civil penalty specified by W. Va. Code § 11-14C-38 for a first violation.

Thereafter, by mail postmarked November 9, 2005, received on November 16, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9 [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. The Petitioner is the owner of a trucking business located in, Pennsylvania.
2. The Petitioner owns three tractors and three trailers.
3. The Petitioner has operated trucks in West Virginia for approximately thirty (30) years.
4. The Petitioner's trucks transport, among other things, livestock, petroleum products and potato chips and other products.
5. The Petitioner has been hauling petroleum products since 1976, initially hauling petroleum products solely in the State of Pennsylvania.
6. On October 21, 2005, Petitioner was hired to haul fuel oil into West Virginia.
7. This was first time that the Petitioner ever hauled fuel into the State of West Virginia.
8. On November 9, 2005, one of the Petitioner's drivers was transporting petroleum products that belonged to another person into the State of West Virginia.
9. While in West Virginia, the Petitioner's driver was issued an assessment by a certain employee of the West Virginia State Tax Commissioner.

10. The assessment states that it was issued because the Petitioner was engaging in business in West Virginia without a fuel transporter license, in violation of W. Va. Code § 11-14C-18.

11. At the time that he was issued the assessment, the Petitioner did not have a motor fuel transporter's license.

12. The Petitioner testified that he was not aware that he was required to have a West Virginia motor fuel transporter's license.

13. At the time that he was issued the assessment, the Petitioner had apportioned license plates. *See* Petitioner's Exhibit No. 1.

14. At the time that the Petitioner obtained his apportioned plates from the State of Pennsylvania, he paid a fee to register his tractor with the State of Pennsylvania, and notified the State of Pennsylvania of any other states in which he intends to operate his tractor.

15. West Virginia was identified by the Petitioner as one of the states in which he wished to operate his vehicles and one that was identified on the Pennsylvania apportioned license. *See* Petitioner's Exhibit No. 1.

16. At the time that his truck was stopped, the Petitioner had been issued a Pennsylvania Fuel Transporter's Permit. *See* Petitioner's Exhibit No. 2.

17. The Petitioner testified that, as he now sees it, the Pennsylvania Fuel Transporter's Permit is the equivalent of the license that he was required to have from the State of West Virginia, and for which he was assessed for not having such license.

18. The Petitioner testified that to obtain the Pennsylvania Fuel Transporter's Permit and West Virginia fuel transporter's license, he was required to fill out a form for each state, each of which was nearly identical to the other.

19. At the time that he was issued the assessment, the Petitioner had the necessary IFTA registration. *See* Petitioner's Exhibit No. 3.

20. At that time, the Petitioner was registered with the United States Department of Transportation and the State of Pennsylvania to haul hazardous materials. *See* Petitioner's Exhibit No. 5.

21. The Petitioner testified that he has always attempted to register his vehicles and comply with every aspect of the law in every state in which he operates.

22. At the time that the Petitioner's driver received the assessment, the officer verbally informed the Petitioner's driver of the office that he needed to contact in order to obtain a fuel transporter's license.

23. The Petitioner's driver was also presented a document notifying him of whom he should contact in order to obtain a fuel transporter's license. *See* Petitioner's Exhibit No. 6.

24. On the same day that the assessment was issued, the Petitioner contacted a certain employee of the State Tax Commissioner, respecting obtaining a fuel transporter's license before the Petitioner's driver returned to his home base in Pennsylvania.

25. On the same day, via facsimile transmission, the Petitioner provided the necessary documentation to the State Tax Commissioner for issuance of a fuel transporter's license.

26. On November 8, 2005, the day after the assessment was issued to the Petitioner, he was issued a motor fuel transporter's license. *See* Petitioner's Exhibit No. 8.

27. Upon being made aware that he was operating without a license, the Petitioner immediately undertook to obtain the necessary license.

28. The State Tax Commissioner also provided the Petitioner forms upon which he reported the type and quantify of fuel he transported into the State of West Virginia.

29. Because of the timing of the stop, the Petitioner was able to file his report for October, 2005, in a timely manner.

30. At the hearing the Petitioner questioned the duty of the West Virginia State Tax Commissioner to disseminate information respecting new laws and how they apply to taxpayers affected by those laws.

31. The Petitioner testified that he has never attempted to run his vehicles “up and down the road” in violation of the law.

32. The Petitioner was unaware of the provision of West Virginia law that required him to have a fuel transporter’s license, and believed that he had complied with the provisions of West Virginia law and had complied with all of the provisions of West Virginia law necessary to operate in West Virginia.

33. Based on the testimony of the Petitioner, including his demeanor, and taking into account the fact that the Petitioner has apparently complied with every regulatory requirement of which he is aware, and taking into account that the Petitioner obtained a West Virginia motor fuel transporter’s license without any delay, this Office finds that the Petitioner’s operation of his trucks without the necessary license was not intentional or in flagrant violation of the law.

34. The Petitioner testified that he believes the civil penalty is excessive given the nature of the violation.

DISCUSSION

The issue presented by this matter is whether the civil penalty assessed against the Petitioner may and should be waived or abated.

W. Va. Code § 11-14C-10(a) requires that persons engaged in certain activities shall be required to have license to engage in those activities. It provides, in relevant part, “(a) A person

shall obtain the appropriate license or licenses issued by the commissioner before conducting the activities of: . . . (7) motor fuel transporter; . . .” The Petitioner does not dispute that he is required to have a motor fuel transporter’s license.

The West Virginia State Tax Commissioner assessed a civil penalty against the Petitioner for his failure to have a motor fuel transporter’s license. The basis of the assessment is West Virginia Code § 11-14C-38, which provides:

(a) Any person who engages in any business activity for which a license is required by this article without having first obtained and subsequently retained such a valid license is subject to the following civil penalty.

- (1) For the first violation the amount is five thousand dollars.
- (2) For each subsequent violation the amount is ten thousand dollars.

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

Since this was the Petitioner’s first offense, the Petitioner was assessed a civil penalty.

The Petitioner contends that the civil penalty should be waived or abated. He maintains that he neither intended nor attempted to evade the law, but that he was simply unaware of this provision of the statute. In support of his contention, he points to the fact that he had numerous other licenses, such as the Pennsylvania apportioned license, which permits him to operate in West Virginia; a Pennsylvania Fuel Transporter’s Permit; an IFTA license; and an authorization to haul hazardous waste issued by the United States Department of Transportation. He maintains that his compliance with these regulatory provisions demonstrates that it was not his intention to operate in flagrant disregard of the law. The Petitioner also maintains that, given his circumstances and the nature of his violation of the statute, that the civil penalty is so severe that it should, at the very least, be reduced.

There is nothing in Article 14C, Chapter 11 of the West Virginia Code that provides for the waiver or abatement of the civil penalty for transporting motor fuel in West Virginia without having first obtained a license to do so. Unlike W. Va. Code § 11-10-18(a), which provides that additions to tax may be waived upon a showing of reasonable cause and the absence of willful neglect on the part of the taxpayer, there does not appear to be any provision of the Code which permits waiver of the civil penalty, or which articulates some standard whereby waiver or abatement of such penalty may be measured. Absent some statutory authorization, which sets out a standard upon which it rationally can be determined whether or not the civil penalty should be waived, this Office is without the authority to waive or abate said penalty. Thus, the law does not provide the Petitioner with a remedy.

The Petitioner also contends that the Commissioner should have notified all persons or entities engaged in the business of transporting motor fuel of the new licensing requirement. He maintains that the failure to give notice justifies waiver or abatement of the penalty. However, the Commissioner is under no duty to give individual notice to each taxpayer. Passage of the statute, followed by the 90-day period between passage and the effective date, is all of the notice that the law requires. In any event, there is no statutory provision permitting waiver or abatement on these grounds.

The only remedy available to the Petitioner is in the nature of equitable relief. First, he seeks relief which is not provided by statute. He seeks relief which this Office is without authority to grant. Second, his contention that the civil penalty, as applied to him, is severe in light of the nature of his statutory violation is not one that is recognized by statute. The absence of statutory relief places the Petitioner in the position of asking for relief that is equitable in nature.

Article 8, § 6 of the Constitution of West Virginia provides that circuit courts of the State of West Virginia have original and general jurisdiction over all civil cases in equity. The relief sought by the Petitioner is of a nature that can only be granted by a circuit court, a part of the judicial branch of the government, or the Supreme Court in the exercise of its appellate jurisdiction.* This Office is part of the executive branch of the government. As such, it has no inherent authority to grant the equitable relief sought by the Petitioner.

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 the Petitioner to show that any assessment of tax against him 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).

2. The Petitioner in this matter has failed to carry his burden of showing that there is any statutory provision permitting any waiver or abatement of the civil penalty imposed by W. Va. Code § 11-14C-38(a).

3. The Petitioner in this matter has failed to carry his burden of showing that there is any statutory standard for determining whether or not the civil penalty imposed by W. Va. Code § 11-14C-38(a) may be waived or abated.

4. The Petitioner in this matter has failed to carry his burden of showing that there is any statutory authority permitting this Office to waive or abate the civil penalty imposed by W. Va. Code § 11-14C-38(a).

* This is not to imply that the judicial branch does have jurisdiction over this matter or that the judicial branch will grant the relief requested. It is merely to state that if the Petitioner is entitled to relief of the nature sought, that relief will have to come from the judicial branch.

5. The West Virginia Office of Tax Appeals has no equitable jurisdiction that would permit it to waive or abate the civil penalty imposed by the Tax Commissioner pursuant to W. Va. Code § 11-14C-38(a).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax civil penalty assessment in the amount of \$ issued against the Petitioner on November 9, 2005, must be and is hereby **AFFIRMED** by this tribunal.