

**SANITIZED DECISION – 06-064 MFE – BY GEORGE V. PIPER, ALJ –
SUBMITTED for DECISION on SEPTEMBER 8, 2006 – ISSUED on
SEPTEMBER 21, 2006**

SYNOPSIS

**MOTOR FUEL EXCISE TAX—BURDEN OF PROOF NOT MET FOR
VACATING CIVIL PENALTY** – Because the provisions of W.Va. Code § 11-14C-34(a) – (f) make crystal clear that the predicate act of transporting fuel without the proper shipping documentation mandates that the civil penalty shall be payable by the person in whose name the shipping document was issued, this limited-jurisdiction, executive-branch tribunal does not have the statutory authority to waive or abate the penalty.

FINAL DECISION

On December 12, 2005, the Accounts Monitoring Unit of the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued a motor fuel excise tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code, for the period ended December 31, 2005, for a civil penalty in the amount of \$. Written notice of the assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked January 24, 2006, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002] and 11-10A-9(a)-(b)[2002].

In due course the presiding administrative law judge contacted both the Petitioner and the Respondent, advising them that the matter was to be submitted for decision on documents only, in lieu of holding a hearing in person, because he determined that their appearances in person were not necessary in order to render a decision on the merits. Both sides were further advised that, by September 11, 2006, they were to send to this tribunal detailed written arguments which support their respective positions concerning the motor fuel excise tax assessment.

FINDINGS OF FACT

1. In December, 2004, and April, 2005, all motor fuel licensees, including the Petitioner, were sent a memo entitled, “West Virginia Motor Fuel Registration System – Important Notice – Effective June 1, 2005,” advising all concerned that every person transporting fuel by barge, water craft, railroad tank car, or transport truck was required to deliver the motor fuel in the destination state printed on the shipping document, unless the person to whom the shipping document was issued:

(A) Notifies the Tax Commissioner, **BEFORE** transporting the motor fuel into a state other than the destination state printed on the shipping document, that he or she has received instructions, after the shipping document was issued, to deliver the fuel to a different destination state;

(B) Receives from the Tax Commissioner a confirmation number authorizing the diversion;

(C) Writes on the shipping document the change in destination state and the confirmation number for the diversion; and

(D) Gives a copy of the revised shipping document to the person to whom the motor fuel is delivered. This document does not need to show the gallons delivered to each location. This document is used to verify proper licensing of the importer, transporter, distributor and supplier, and the destination state, etc. *See* W.Va. Code § 11-14C-34(d) (A) – (D).

2. Specifically, Petitioner was notified of its failure to register a diversion on the West Virginia Register by certified mail dated November 8, 2005 (received November 15, 2005) for a diverted shipment which occurred on November 7, 2005.

3. Petitioner admits that it transported fuel without the proper shipping documentation.

4. In its petition for reassessment, as well as its documentary evidence, Petitioner states that this is only its first violation and that its drivers have all been warned concerning the importance of choosing the proper destination for any fuel delivery, but that its drivers do make mistakes and that there was no intent to circumvent the law.

DISCUSSION

The only issue to be decided is whether Petitioners have met their burden of proof by showing that the civil penalty imposed pursuant to W.Va. Code §11-14C-34 is not applicable.

W.Va. Code §11-14C-34 (d) explicitly states that 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 meets the exception in 34(d)(A) – (D), which is not applicable to Petitioner.

W.Va. Code §11-14C-34(f) then provides that any person who transports motor fuel to a destination state other than the destination state shown on the shipping document is subject to a \$ civil penalty for a first offense and \$ for each subsequent violation.

Notwithstanding the plain language of the statute, Petitioner argues that the penalties should be waived because of extenuating circumstances, namely, that this is really the fault of the driver(s) and because this is only its first offense.

Respondent's representative argues that the circumstances of these cases do not matter as a matter of law; only that the Petitioner transported fuel without the proper

shipping documentation; and that intent is, therefore, irrelevant, regardless of whether this is only Petitioner's first offense.

This tribunal has scoured Article 14C of the West Virginia Code to find any statutory avenue of relief for the Petitioners. However, the four corners of the statute make crystal clear that, if fuel is transported without the proper shipping documentation, the civil penalty shall be payable by the person in whose name(s) the means of conveyance is registered. See W.Va. Code §11-14C-34(f) (1).

Because there is no provision in the statute to waive or abate the civil penalty for any such extenuating circumstances, this tribunal has no option but to affirm the civil penalty as issued against the Petitioner.

It should be finally noted that because this limited-jurisdiction, executive-branch tribunal does not have the statutory authority to sit essentially as a court of "equity," we must apply the law as written and may not deviate from that obligation under any circumstances.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to its contention that based upon the evidence, the company did not violate

the motor fuel excise tax diversion statute. *See* W. Va. Code St. R. § 121-1-69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax assessment issued against the Petitioner, for the period ended December 31, 2005 for a civil penalty of \$ must be and is hereby **AFFIRMED**.