

**REDACTED DECISION -- 06-322 MFE -- BY GEORGE V. PIPER, ALJ --  
SUBMITTED for DECISION on July 11, 2007 -- ISSUED on July 19, 2007**

**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 and without meeting the exception set forth in W.Va. Code § 11-14C-34(d)(3) 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**

The Excise Tax Unit of the Internal Auditing “Division” of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued an assessment for a diversion penalty respecting the motor fuel excise tax, against the Petitioner. This 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 for the period ending April 30, 2006, for a diversion penalty in the amount of \$ \_\_\_\_\_. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked May 18, 2006, 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 (a)-(b) [2005].

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 § 11-10(A)-10 [2002].

**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, distributor and supplier, and the destination state, etc. *See* W. Va. Code 11-14C-34(d) (3).

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

3. At the hearing Petitioner's representative testified that the dispatcher was confused, in that a load that was destined for West Virginia was inadvertently diverted to another state without first informing the State of West Virginia.

4. Respondent's counsel noted for the record that this was in fact a second violation of the diversion statute, in that Petitioner had earlier delivered a load to West Virginia which was destined for another state without prior authorization.

### **DISCUSSION**

The only issue to be decided is whether Petitioner has met its 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)(3), which is not applicable to them.

W.Va. Code § 11-14-34(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 \$5,000.00 civil penalty for a first offense and \$10,000.00 for each subsequent violation.

Notwithstanding the plain language of the statute, Petitioner argues that the penalties should be waived because of extenuating circumstances, namely, dispatcher error.

This tribunal has scoured Article 14C of the West Virginia Code to find any statutory avenue of relief for the Petitioner. However, the four corners of the statute make crystal clear that, if fuel is transported without the proper shipping documentation and without the exception being applicable, 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 against the Petitioner.

It should be 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 the petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or part.. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has failed to carry its burden of proof with respect to its contention that, based upon the evidence, its 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 April 30, 2006, for a civil penalty of \$\_\_\_\_\_, must be and is hereby **AFFIRMED**.