

**REDACTED DECISION – 06-464 MFE – BY GEORGE V. PIPER, ALJ –
SUBMITTED for DECISION ON MARCH 27, 2007 – ISSUED on APRIL 4, 2007**

SYNOPSIS

MOTOR FUEL EXCISE TAX – BURDEN OF PROOF -- 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 § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

MOTOR FUEL EXCISE TAX – BURDEN OF PROOF NOT MET FOR VACATING CIVIL PENALTY- Because the provisions of W. Va. Code § 11-14C-34(a) require that no person shall transport a motor fuel in this state unless that person has a machine-generated shipping document, and because Petitioner's request, pursuant to that W. Va. Code Section 34(a), to issue other than a machine-generated shipping document was neither requested by Petitioner nor approved by Respondent before the citations were written against Petitioner for having improper bills of lading, such hand-written invoices or bills of lading constitute incomplete shipping documents pursuant to § 11-14C-34(f), thereby mandating that the civil penalties be upheld.

FINAL DECISION

The Criminal Investigation Division of the State Tax Commissioner's Office ("the Commissioner" or "the Respondent") issued a notice of assessment against the Petitioner. Charge one of the assessment stated that Petitioner was cited for having an improper bill of lading (hand-written) in violation of §11-14C-34(f), which carried a civil penalty of \$____. Charged two stated that Petitioner was cited for having an improper bill of lading (hand-written), in violation of §11-14C-34(f), which imposed a civil penalty of \$_____.

Thereafter, by mail postmarked August 15, 2006, the Petitioner timely filed a petition for reassessment with this tribunal, the West Virginia Office of Tax Appeals. 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 both the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. On July 26, 2006, Respondent issued a notice of assessment against Petitioner, charging that on July 1, 2006, and again on July 6, 2006, Petitioner had transported motor fuel in this state, using improper bills of lading (hand-written instead of machine generated). See State's Exhibit No. 1.

2. The bills of lading dated July 1, 2006 and July 6, 2006, consisted of the typed name and address of the Petitioner with all the required information being handwritten thereon, in the appropriate spaces, for example, customer's name with location code, quantity in gallons, base price, federal tax amount, state tax amount, total price, total amount and customer's check number and customer's signature evidencing the fact that shipment was received in good condition and in the quantities indicated. See State's Exhibit No. 2.

3. On June 27, 2006, Respondent sent a letter to Petitioner advising it that as of January 1, 2004, all motor fuel licensed accounts must obtain authorization from Respondent to issue other than machine printed shipping documents and specifying that the failure to do so would mandate a civil penalty of five thousand dollars for a first violation and a civil penalty of ten thousand dollars for all subsequent violations. See State's Exhibit No. 3.

4. On the same day (July 26, 2006) that Petitioner was issued the notice of assessment detailing the two charges (citations) for having improper bills of lading (hand-written), Petitioner sent a fax to Respondent, consisting of a cover letter and two (2) handwritten forms used by Respondent when delivering invoices to retail locations, and requested that said forms be approved by Respondent as valid bills of lading. This request to issue other than machine printed shipping documents was approved by Respondent by return letter on July 26, 2006.

DISCUSSION

At the evidentiary hearing, Petitioner's counsel argued that, because it had received a waiver or approval from Respondent to use hand-written invoices or bills of lading, instead of the required machine-generated ones on July 26, 2006, the same day that it was issued the notice of assessment, the assessment is not valid.

Petitioner's counsel discounts the fact that the citations were issued previously, and argues that only the notice of assessment really matters, because it incorporates what gave rise to its issuance, as would a signed contract between the parties which embodies the terms and conditions which are contained therein.

W. Va. Code 11-14C-34 provides, in relevant part:

*(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: Provided, That in the event a terminal operator or operator of a bulk plant does not have installed on the first day of January, two thousand four, an automated machine that will print machine-generated shipping documents, the commissioner may authorize the terminal operator or operator of a bulk plant to issue manually prepared shipping documents: Provided, however, That in the event of an extraordinary unforeseen circumstance, including an act of God, that temporarily interferes with the ability to issue an automated machine-generated shipping document, a manually prepared shipping document that contains all of the information required by subsection (b) of this section shall be substituted for the machine-generated shipping document. A terminal operator or operator of a bulk plant shall give a shipping document to the person who operates the barge, watercraft, railroad tank car or transport vehicle into which motor fuel is loaded at the terminal rack or bulk plant rack.*

(all emphasis added)

Although neither side developed the evidence concerning whether Respondent's approval for Petitioner to use manually prepared shipping documents occurred prior to the issuance of the notice of assessment, it is clear that the date of the assessment is not controlling, because

Petitioner was already on constructive notice, by virtue of the statute, on July 1, 2006, and then again on July 6, 2006, about its failure(s) to have proper shipping documents.

It should be noted that Petitioner's faxed waiver request did not pre-date the issuance of the assessment, but rather took place on the same day as the notice of assessment, which further shows that Petitioner did not have the waiver in place prior to the issuance of the notice of assessment.

As to Petitioner's argument that to have made the waiver request prior to the issuance of any citation would have been an admission of guilt or wrong doing, any fair reading of W. Va. Code § 11-14C-34(a) leads to the conclusion that the waiver must pre-date the event for which the waiver is sought.

Accordingly, because Petitioner did not comply with the shipping document waiver provision, it could not legally use something other than machine-generated shipping documents prior to July 1, 2006, which was the date of the first violation.

The only remaining issue argued by Petitioner's counsel is whether, because Petitioner and Respondent agree that the handwritten bills of lading shown to Respondent's investigation staff on July 1, 2006, and then again on July 6, 2006, contained all of the information required by statute, there is no statutory provision under which Respondent may impose any civil penalties in this case.

W. Va. Code 11-14C-34(a) states that a manually prepared shipping document shall contain all of the information required by section (b), to wit:

(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;*

(5) In the case of aviation jet fuel, the shipping document shall be marked with the phrase "Aviation Jet Fuel, Not for On-road Use" or a similar phrase;

(6) *In the case of dyed diesel fuel, the shipping document shall be marked with the phrase "Dyed Diesel Fuel, Nontaxable Use Only, Penalty for Taxable Use" or a similar phrase; and*

(7) If the document is issued by a terminal operator, the invoiced gallons loaded and a statement indicating the name of the supplier that is responsible for the tax due on the motor fuel.

* * * *

(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.

(5) Civil penalties prescribed under this section are assessed, collected and paid in the same manner as the motor fuel excise tax imposed by this article.

(all emphasis added)

West Virginia Code § 11-14C-34(f) provides four statutory violations which may result in the imposition of a civil penalty:

- (1) Transporting motor fuel without a shipping document;
- (2) Transporting motor fuel with a false shipping document;
- (3) Transporting motor fuel with an incomplete shipping document; or
- (4) Delivering motor fuel to a destination state other than the destination state shown in the shipping document.

Petitioner's counsel argues that, if the information required by W. Va. Code § 11-14C-34(b) is provided on something other than a machine-generated shipping document, it cannot be deemed as incomplete under section (f) and, therefore, no civil penalty may be imposed.

As this tribunal concluded above, Petitioner was required to have a machine-generated shipping document on July 1, 2006 and again on July 6, 2006, to avoid the issuance of those citations (waiver provision not applicable). Therefore, this tribunal concludes as a matter of law that, if the Petitioner did not have a machine-generated shipping document on those dates, anything else shown to Respondent, whether it be a filled-in invoice from the business office or merely notations on a legal pad, constitute an incomplete shipping document under W. Va. Code § 11-14C-34(f).

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 it 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 is liable for the civil penalty provided for by W. Va. Code § 11-14C-34(f) because it transported motor fuel in the State of West Virginia without the required machine-generated shipping document prescribed by W. Va. Code § 11-14C-34(a) & (b).

3. The Petitioner failed to meet its burden of showing that it is not liable for the civil penalty provided for by W. Va. Code § 11-14C-34(f), because it failed to show that a handwritten bill of lading, rather than a machine-generated shipping document, was not an incomplete shipping document.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax money penalty assessment issued against the Petitioner for two separate violations of W. Va. Code § 11-14C-34(f), which occurred on July 1, 2006 and July 6, 2006, in the total amount of \$____, should be and is hereby **AFFIRMED**.