

**REDACTED DECISION – 07-150 MFE – BY GEORGE V. PIPER, ALJ –  
SUBMITTED for DECISION on APRIL 17, 2007 – ISSUED on APRIL 19, 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 not approved by Respondent before the citation was written against Petitioner for having improper bills of lading, such a hand-written invoice or bill of lading constitutes an incomplete shipping document pursuant to § 11-14C-34(f), thereby mandating that the civil penalty be upheld.

**FINAL DECISION**

On January 23, 2007, 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 on January 16, 2007, 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 \$\_\_\_.

Thereafter, by mail postmarked February 13, 2007, 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].

In due course the presiding administrative law judge determined that the matter should be decided on documents only, in lieu of the parties appearing at an administrative hearing in person, because their appearances in person were not necessary for this independent tribunal to

render a decision on the merits (no disputed material facts alleged by either party, so no need for live testimony; well-settled question of law).

### **FINDINGS OF FACT**

1. On January 23, 2007, Respondent issued a notice of assessment against Petitioner, charging that on January 16, 2007, Petitioner had transported motor fuel in this state, using improper bills of lading (hand-written instead of machine generated).

2. The bill of lading was a hand-written invoice which the driver prepared and completed as the delivery day progressed. More specifically, after the driver receives his schedule of accounts for the day and reaches his destination, he “sticks” the tank to determine how much of the ordered product the tank will hold. He then fills in the gallons next to the product dropped on his hand-written invoice.

3. When the driver returns to the office at the end of his “run” or day the results are then entered into the computer system with the gallons turned in along with the price of the fuel and the computer tracks the excise or sales taxes and totals the invoice which is later sent to the customer.

4. On February 9, 2007, weeks after the date of the citation on January 16, 2007, Petitioner received a fax from Respondent stating that Petitioner’s request for a hand-written shipping document waiver had been granted.

### **DISCUSSION**

Although Petitioner argues in its petition for reassessment that its drivers carry “hand-written” invoices that have been “waivered,” the facts tell a different story in that Petitioner’s

request for a waiver to use the aforesaid hand-written shipping document was granted after (and not before) the citation was written.

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)

Because Petitioner did not comply with the shipping document waiver provision, it could not legally use something other than a machine-generated shipping document prior to January 16, 2007, which was the date of the violation in this case. Therefore, it is determined that Petitioner was correctly cited on January 16, 2007 for having incomplete shipping documents.

### 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).

#### **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 violation of W. Va. Code § 11-14C-34(f), which occurred on January 16, 2006, in the amount of \$\_\_\_\_\_, should be and is hereby **AFFIRMED**.