REDACTED DECISION -- 07-334 MFE -- BY ROBERT W. KIEFER, JR., ALJ -- SUBMITTED for DECISION on SEPTEMBER 25, 2007 -- ISSUED on JANUARY 10, 2008

SYNOPSIS

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- The term "subsequent violation," as used in W. Va. Code 11-14C-35 [2003], requires that there be a "first violation" as a predicate to an assessment of the enhanced civil penalty permitted by statute.

FINAL DECISION

On or about April 24, 2007, the Fuel Tax Administration Unit Supervisor with the Internal Auditing Division of the State Tax Commissioner's Office ("the Respondent" or "the Commissioner") issued an assessment for a civil penalty in the amount of $10,000.00 against the Petitioner. 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 purportedly for a second violation of the provisions W. Va. Code § 11-14C-35, failure to obtain an import confirmation number. The violation purportedly occurred during the period ending March 31, 2007. Written notice of this assessment was served on the Petitioner some time after April 24, 2007 and on or before April 27, 2007.

Thereafter, by mail postmarked April 27, 2007, and received in the offices of this tribunal, the West Virginia Office of Tax Appeals, the Petitioner timely filed a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] & 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 § 11-10A-10 [2002].

FINDINGS OF FACT

The parties have entered in to the following stipulations of fact:

1. Petitioner is an out-of-state corporation. ([Out-of-state] Secretary of State Webpage printout, attached [to the Stipulation of Facts] as Ex. A.)

2. On October 24, 2006[,] Petitioner imported a load of fuel from a . . . facility [located in another state outside West Virginia] into West Virginia and failed to obtain an import confirmation number from the West Virginia State Tax Department (hereinafter "Tax Department"). (Nov. 28, 2006 Importer Schedule, attached [to the Stipulation of Facts] as Ex. B.)

3. On March 19, 2007[,] Petitioner imported a load of fuel from [this same out-of-state] facility into West Virginia and failed to obtain an import confirmation number from the Tax Department. (Apr. 17, 2007 Importer Schedule, attached [to the Stipulation of Facts] as Ex. C.)

4. The [out-of-state] facility is not listed on the Tax Department's website as a "supplier" or a "permissive supplier" as defined by West Virginia Code § 11-14C-2(74) [&] (61).

The West Virginia Office of Tax Appeals also makes the following findings of fact:

1. On or about December 27, 2006, the Fuel Tax Administration Unit Supervisor with the Internal Auditing Division of the State Tax Commissioner's Office issued an assessment for a civil penalty in the amount of $5,000.00 against the Petitioner. *See* Joint Exhibit "A".

2. 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, purportedly for a first violation of the provisions W. Va. Code § 11-14C-35 [2003], specifically W. Va. Code § 11-14C-35(b)(1) [2003], for the alleged failure to obtain an import confirmation number. *See* Joint Exhibit "A".

3. The violation purportedly occurred during the period ending October 31, 2006. *See* Joint Exhibit “A”.

4. By letter dated January 2, 2007, signed by its President, the Petitioner stated that when it filed the applicable return, it reported an import confirmation number.

5. In its letter of January 2, 2007, the Petitioner requested a waiver of the civil penalty assessed against it for the period ending October 31, 2006.

6. By letter dated January 11, 2007, signed by the Unit Supervisor, Internal Auditing Division, Fuel Tax Administration Unit, of the State Tax Commissioner agreed in essence to withdraw the civil penalty assessment for the period ending October 31, 2006.

7. The January 11, 2007 letter stated that the withdrawal applied solely to the period in question and did not constitute precedent for any subsequent taxable periods.

8. The civil penalty assessment issued on or about April 24, 2007, being in the amount of $10,000.00, is clearly intended to be a penalty for a “subsequent” violation, as provided by W. Va. Code § 11-14C-35 (b)(2) [2003].

DISCUSSION

The sole issue to be decided in this matter is whether the civil penalty assessment issued on April 24, 2007, constitutes an assessment for a second violation of W. Va. Code § 11-14C-35 [2003]. For the reasons more fully set forth below, this Office concludes that it does not.

West Virginia Code § 11-14C-35 [2003] provides, in relevant part:

> (a) The commissioner may require an importer who acquires motor fuel for import from a person who is not a supplier or a permissive supplier to obtain an import confirmation number from the commissioner before importing the motor fuel. The importer shall write the import confirmation number on the shipping document issued for the motor fuel. If required by the commissioner, the importer shall obtain a separate import confirmation number for each delivery of motor fuel into West Virginia.

(b) An importer who does not obtain an import confirmation number when required by this section 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.

The civil penalty assessed by the State Tax Commissioner is in the amount of \$10,000.00. The amount of the assessment makes it clear that the assessment is intended to be for a subsequent violation, that is, at least a second violation of the statute.

The Tax Commissioner argues that the first violation is the one that was issued for the purported violation that occurred for the period ending October 31, 2006. He maintains that he withdrew the assessment for reasons having nothing to do with whether or not the Petitioner, as a factual matter, committed a violation of the statute. He further maintains that, although he withdrew the assessment for the first violation and did not enforce the initial civil penalty in the amount of \$5,000.00, the Petitioner must be held to account for the first violation and is, therefore, subject to the enhanced penalty for the second violation.

On the other hand, the Petitioner maintains that it cannot lawfully be charged with a second or subsequent violation of the statute, when it has neither acquiesced in nor been adjudicated liable for a first violation of the statute.

The language of the statute does not provide and express answer to the issue presented. The civil penalty is incurred where there is a "violation" of the statute. There is no statutory definition for the term "violation." *See* W. Va. Code § 11-14C-2 [2003]. The Commissioner takes the position that the term "violation" means, in essence, the occurrence of a state of facts that constitutes a transgression of the statute, regardless of whether or not there is a final adjudication of a violation, or some agreement or other acquiescence by the taxpayer thereto. In other words, the Tax Commissioner maintains that if, as a factual matter, a taxpayer has engaged in conduct that violates the statute and been assessed therefore, the assessment constitutes a violation of the statute for the purpose of enhancing future penalties, even if said assessment never becomes final. The Petitioner maintains that taxpayer must agree to or acquiesce in the assessment, or it must be pursued to finality if contested.

This Office is of the opinion that an assessment issued for a purported violation must become final in order to constitute a "violation" that may result in enhancement of any subsequent civil penalty. Withdrawal or abatement of an assessment which is then used to enhance a future penalty places the taxpayer in one of two situations, both of which cause the taxpayer problems if it is subsequently charged with a second violation that could result in an enhanced penalty. One possibility is that when the assessment is withdrawn or abated there remains no case or controversy to be decided and the taxpayer has no opportunity to challenge the assessment. Therefore, treating the withdrawn or abated assessment as a first violation burdens the taxpayer with a presumption of guilt, while providing no opportunity to disprove guilt. Admittedly, there is no immediate penalty or other consequence. However, the potential for a future enhanced penalty means there is a consequence, albeit inchoate, for the withdrawn or abated assessment. In this circumstance, denying a taxpayer the opportunity to unburden itself of this presumption of guilt violates its right to due process of law, as it has no opportunity to be heard. Certainly it is not fair to the taxpayer.

The second situation would be to give the taxpayer the opportunity to challenge the "first violation" of the statute only upon being charged with a second violation. The statute gives no indication that the first violation ever expires. Consequently, a second violation may be based on a violation that occurred years before. Under these circumstances, it might be years before a taxpayer has an opportunity to present a defense to the first violation. The taxpayer would be subject any number of impediments in preparing and presenting its defense to the first assessment. One problem is that witnesses' memories can fade over time. This can be a problem for the taxpayer's employees, employees of those with whom it engages in business, employees of the Tax Commissioner, or bystanders who may have witnessed some occurrence in passing. Another potential problem is that witnesses can die, or the parties can lose track of witnesses over time. Still another problem is the potential for the disappearance or destruction of documentary and other tangible evidence. Documents or other tangible evidence can be lost or misplaced. They can be destroyed, either in the normal conduct of business or as a result of accidental destruction brought about by human activity or by natural calamity. They may be lost through deterioration. Documentary evidence and other tangible evidence may be destroyed or lost through the actions of the taxpayer's employees, employees of those with whom it transacts business, by the employees of the Tax Commissioner or by unrelated third parties. Loss or destruction of such evidence may be accidental or intentional, but in either event the effect on the taxpayer's ability to defend itself is the same. Requiring a taxpayer to defend against a first statutory violation the after the issuance of a second violation deprives a taxpayer of a full and complete defense against the first assessment. This may well deprive the taxpayer of its right to due process. Certainly it is unfair to the taxpayer.

This Office concludes that enhancement of the civil penalty for a "subsequent violation" of the statute reasonably requires a "first violation" of the statute that becomes final as a result of acquiescence on the part of the alleged violator or which becomes final as a result of adjudication. In the situation presented in this matter, the purported first violation which forms the basis of the enhanced penalty, does not constitute a "violation" under the statute. Therefore, the violation that the Petitioner admits it committed, the purported "subsequent violation," is in fact a "first violation." Consequently, the Petitioner is subject only to a civil penalty of $5,000.00, not $10,000.00 as assessed by the State Tax Commissioner.

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 Petitioners 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 term "subsequent violation," as used in W. Va. Code § 11-14C-35 [2003], requires that there be a "first violation" as a predicate to an assessment of the enhanced civil penalty permitted by statute.

3. The first assessment issued by the State Tax Commissioner against the Petitioner having been withdrawn or abated, there is no predicate "first violation" against the Petitioner on which a "subsequent violation" resulting in an enhanced civil penalty may be based.

4. The Petitioner in this matter has carried its burden of proving that the assessment against it is contrary to statute, and therefore unlawful, insofar that the civil penalty assessed was in the amount of $10,000.00 for a "subsequent violation" of W. Va. Code § 11-14C-35 [2003], instead of the $5,000.00 civil penalty which should properly have been assessed for a "first violation" of said statute.

5. The assessment in this matter must be reduced so as to reflect the $5,000.00 amount that should have been properly assessed for a "first violation" of W. Va. Code § 11-14C-35 [2003].

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuels excise tax civil penalty assessment issued against the Petitioner on April 24, 2007, in the amount of $10,000.00 should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for a **revised** civil penalty in the amount of $5,000.00.