REDACTED DECISION -- 08-005 MFE -- BY GEORGE V. PIPER, ALJ -- SUBMITTED for DECISION on JULY 3, 2008 -- ISSUED on AUGUST 21, 2008

SYNOPSIS

1. MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- ON TAXPAYER -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a 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. MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- PREPONDERANCE OF EVIDENCE -- To satisfy its burden of proof in a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, a taxpayer must prove that the assessment is incorrect and contrary to law, in whole or in part, by a preponderance of the evidence.

3. MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- FIRST AND SECOND VIOLATIONS -- A taxpayer who uses/stores dyed diesel fuel for which the motor fuel excise tax has not been paid for use in a licensed vehicle is subject to a civil penalty in the amount of $10.00 per gallon to the maximum capacity of the fuel tank in which said fuel is stored, or $1,000.00, whichever is greater, for each of the first two such violations. W. Va. Code § 11-14C-36(a)(1) & (b) [2003].

4. MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- THIRD VIOLATION -- A taxpayer who uses/stores off-road fuel for on-road use is subject to a civil penalty in the amount of $15.00 per gallon to the maximum capacity of the storage tank in which said fuel is found, or $2,000.00, whichever is greater. W. Va. Code § 11-14C-36(a) (1) & (b) [2003].

5. MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- NOT CARRIED BY PETITIONER -- In a case where the State Tax Commissioner has shown during the presentation of its *prima facie* case that, during its surveillance, certain of Petitioner's vehicles were observed leaving the premises nightly for the purpose of conducting business; traveled on-highway to customer locations in the Kanawha Valley and elsewhere; and subsequently were found with off-road dyed diesel fuel supplied from the only storage tank available to the Petitioner; the preponderance of evidence standard which must be met by Petitioner involves a much greater showing than would be required if the State Tax Commissioner had shown no pattern of suspicious conduct and had the storage tank on Petitioner's property not been the only supply tank available to Petitioner for its use.

FINAL DECISION

On November 8, 2007, two “Investigators” with the Criminal Investigation “Division” of the State Tax “Department” issued three motor fuel excise tax civil penalty assessments against the Petitioner. All three assessments were 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 first assessment was for using dyed diesel in a highway vehicle that was licensed with the State of West Virginia in violation of W. Va. Code § 11-14C-36 [2003]. The fuel in question was stored in the fuel tank of a licensed vehicle. The amount of the civil penalty assessment was $______, for a first violation in accordance with W. Va. Code § 11-14C-36(b) [2003]. Written notice of this assessment was served on the Petitioner as required by law.

The second assessment was also for using dyed diesel in a highway vehicle that was licensed with the State of West Virginia, in violation of W.Va. Code §11-14C-36 [2003]. The fuel in question was stored in the fuel tank of a second licensed vehicle. The amount of the civil penalty assessment was $______, for a second violation in accordance with W. Va. Code § 11-14C-36(b) [2003]. Written notice of this assessment was served on the Petitioner as required by law.

The third assessment was issued for storing/using off road fuel for on road use in violation of W. Va. Code §11-14C-36 [2003]. The fuel in question was found in a storage tank located on the Petitioner’s premises. The amount of the civil penalty assessment was $______, based upon $______ per gallon, based on the maximum capacity of the storage tank, for a third violation in accordance with W.Va. Code § 11-14C-36(b) [2003]. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked January 7, 2008, 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) [2007] and 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10[2002] and W.Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003)

It should be noted that at the evidentiary hearing held on April 2, 2008, only the Petitioner's two attorneys of record appeared. The Petitioner itself did not appear (via its employees) and neither did the witness that Petitioner had subpoenaed on its behalf.

Respondent's two (2) "criminal investigators," who issued the three (3) assessments in this matter and who were also subpoenaed by Petitioner, were present at the evidentiary hearing and offered the only sworn testimony.

FINDINGS OF FACT

1. Untaxed, dyed diesel fuel was present on November 8, 2007 in the fuel tank of the vehicle cited in Assessment 230.

2. The vehicle cited in assessment 230 is a GMC Service Vehicle ("Street Sweeper") with West Virginia Division of Motor Vehicles License No. _________.

3. Untaxed, dyed diesel fuel was present on November 8, 2007 in the fuel tank of the vehicle cited in Assessment 229.

4. The vehicle cited in Assessment 229 is a Ford Pick-Up Truck with West Virginia Division of Motor Vehicles License No. _________.

5. Untaxed, dyed diesel fuel was present on November 8, 2007 in the storage tank cited in Assessment 110.

6. Both the vehicles in Assessment 229 and Assessment 230 were present on the Petitioner's premises on November 8, 2007, along with the fuel storage tank listed in Assessment 110.

7. Respondent's witnesses testified that based upon a confidential informant they initiated surveillance upon Petitioner's place of business and its vehicles to determine if Petitioner was in fact using off-road dyed diesel fuel in its on-road licensed vehicles.

8. Respondent's witnesses further testified that the surveillance determined that Petitioner had on its property a storage tank marked with the words, "Dyed Diesel Fuel Non-Taxable Use Only - - Not legal for Motor Vehicle Use" and that during the course of said surveillance, one (1) of Respondent's investigators followed one (1) of Petitioner's street sweepers which traveled on highways to various parking lots in an area of a certain county in West Virginia, and observed same being utilized to clean parking lots, while Respondent's other investigator followed another of Petitioner's street sweepers via the interstate, all the way to a certain city in Ohio.

9. Respondent's investigators also testified that at the time that all three (3) assessments were issued to Petitioner, there were no-off road diesel storage tanks available for use by Petitioner from which to fill his vehicles other than the storage tank located on Petitioner's property and that at no time, during their surveillance, did the criminal investigators observe Petitioner's vehicles going to any place that sold fuel for the purpose of filling any of Petitioner's vehicles.

10. Respondent's witnesses did not observe any of Petitioner's employees actually placing untaxed, dyed diesel fuel in any vehicle, including the two (2) vehicles cited in this matter, and they did not observe any of Petitioner's employees actually removing untaxed dyed diesel fuel from the storage tank on Petitioner's property and placing same in said vehicle.

11. Respondent's investigators finally testified that they were not aware of any test that could prove that the fuel in the Petitioner's vehicles which was cited by Respondent was the exact same fuel which came from the storage tank located on the Petitioner's premises.

DISCUSSION

The **ONLY** issue presented for determination in this case is whether Petitioner has shown that one or more of the assessments are 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). Any petitioner/taxpayer must satisfy the burden of proof requirement by the preponderance of the evidence and not by some higher standard, such as beyond a reasonable doubt, which is the standard in a criminal proceeding.

We must now, of course, apply the preponderance of evidence standard in light of the statute under which Petitioner was cited and assessed, which is as follows. Chapter 11, Article 14C, Section 36 of the West Virginia Code, enacted in the year 2003, defines the improper sale or use of untaxed motor fuel as follows:

> (a) Any person who commits any of the following violations is subject to the civil penalty specified in subsection (b) of this section:
>
> > (1) Sells or stores any dyed diesel fuel use in a highway vehicle that is licensed or required to be licensed as such, unless that use is allowed under the authority of 26 U.S.C. §4082;
> >
> > (2) Willfully alters or attempts to alter the strength or composition of any dye or marker in any dyed diesel fuel;
> >
> > (3) Uses dyed diesel fuel in a highway vehicle unless that use is allowed under the authority of 26 U.S. C. §4082;
> >
> > (4) Acquires, sells, or stores any motor fuel for use in a watercraft, aircraft, or highway vehicle that is licensed or

> required to be licensed unless the tax levied by section five of this article has been paid; or
>
> (5) Uses any motor fuel in a watercraft, aircraft, or highway vehicle that is licensed or required to be licensed unless the tax levied by section five of this article has been paid.
>
> (b) The amount of the civil penalty for the first two violations of this section in a calendar year, as described in subsection (a) of this section, is ten dollars per gallon of motor fuel based upon the maximum capacity of the motor fuel storage tank, container or storage tank of the highway vehicle, watercraft or aircraft in which the motor fuel is found or one thousand dollars, whichever is greater. Provided, That for each subsequent violation in the same calendar year, the penalty is fifteen dollars per gallon based upon the maximum capacity of the motor fuel storage tank, container or storage tank of the highway vehicle, watercraft or aircraft in which the motor fuel is found or two thousand dollars whichever is greater.

To be specific, the Petitioner was cited for: (1) "using dyed diesel in highway vehicle," with respect to both the GMC Service Vehicle (road sweeper) and the Ford Pick-Up Truck and for (2) storing/using off-road fuel for on-road use which was found in a storage tank on Petitioner's property.

Petitioner's counsel correctly argues that, although the burden of proof always rests with the Petitioner, the Tax Commissioner must at least present a *prima facie* case by going forward with sufficient evidence, rather than mere speculation, that an offense(s) occurred.

Petitioner's counsel then pivots by arguing that because no one with the Respondent actually saw Petitioner's employees remove the off-road diesel fuel from Petitioner's storage tank and put it into the vehicles in question and because there is no specific test available to prove that the off-road diesel in Petitioner's storage tank on its property is the same fuel as found in the two (2) vehicles, this entire case is mere speculation and nothing more and, therefore, Respondent has failed to make a *prima facie* case.

To bolster its argument, Petitioner cites three (3) Decisions issued by this tribunal. The first is in Docket No. 03-351 U, issued on March 15, 2004. That decision does set forth the general

principle that the Tax Commissioner in certain types of cases must present evidence sufficient to make a *prima facie* case; however, the issue in that case was the imposition of additions to tax involving a finding of negligence, an issue which obviously is not applicable to this matter.

The other two (2) citations, first, in Docket No. 06-604 MFE, issued on July 16, 2007, and, second, in Docket No. 07-182 MFE, issued on January 24, 2008, do pertain to off-road dyed diesel fuel, but Petitioner's failure here to present any credible evidence in this proceeding not only makes those cases unpersuasive but actually has the opposite effect.

Specifically, in Decision No. 06-604 MFE, that petitioner proved that the storage tank on its property was not the only source from which its employees could have obtained off-road dyed diesel fuel, because its employees did in fact purchase, as shown by documentary evidence, substantial quantities of both on-road and off-road fuel from retailers (service stations) located both near their work sites and near that Petitioner's place of business. Those facts are in stark contrast to the Respondent's uncontested showing in this case which was, that at the time that the citations were issued to the Petitioner, there were no off-road diesel storage tanks available to the Petitioner for its use other that the storage tank located on Petitioner's property. Moreover, during Respondent's surveillance, Petitioner's employees were never observed going to any retailers (service stations) for the purpose of buying fuel of any kind.

Petitioner's counsel cites Decision No. 07-182 MFE for the proposition that, under the particular circumstances there, one (1) illegal sale of dyed diesel fuel on that petitioner's property, plus mere suspicion that more of the same may have occurred, was not sufficient evidence to sustain that storage tank assessment, because there was not, in that case, a *prima facie* showing of knowledge, on the part of the seller, that the sale was "for use" on road.

The facts in this case are, however, overwhelmingly, in favor of the Respondent because Petitioner's vehicles were observed nightly leaving Petitioner's property (not an isolated incident) and were on one (1) occasion even followed along the roadways of this state to locales within and without the State of West Virginia for the purpose of conducting business.

Two (2) of Petitioner's vehicles were then tested shortly thereafter and found to have off-road diesel fuel in their tanks in contravention of state law, and Petitioner had no explanation to counter that finding.

In discussing proof by "a preponderance of the evidence," the West Virginia Supreme Court has stated, "[P]roof by a preponderance of the evidence requires, only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence." *Jackson v. State Farm Mut, Auto Inc., Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See also *Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 165 W. Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980). *Black's Law Dictionary* 1201 (7th ed. 1999) defines "preponderance of the evidence" as:

> The greater weight of the evidence; superior evidentiary weight that, though not sufficient to free mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in a civil trial, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Again, Respondent's investigators have proven that there was untaxed dyed diesel fuel found in two vehicles that are licensed for use on the highways of West Virginia, by the West Virginia Division of Motor Vehicles. Respondent's investigators have also shown that a fuel storage tank containing untaxed, dyed diesel fuel was located on the same premises as the two vehicles. Petitioner asserts that because the investigators did not see Petitioner or its employees

physically put the untaxed, dyed diesel fuel in the vehicles from the storage tank, that an assessment for improperly storing that fuel is incorrect.

However, this is not consistent with the applicable evidentiary standard. The Petitioner was required to prove that the chain of events it proposes was more likely to have occurred than the chain of events proposed by the State Tax Commissioner. The Petitioner failed to do so.

Conversely, because Petitioner presented no probative evidence to support its case, we must, and do hereby, find that it is more likely than not that the dyed diesel fuel in the cited vehicles did come from the storage tank located on the Petitioner's premises, because no other source for the fuel was available at that time and none was shown to have been purchased from other sources.

Accordingly, it is determined that all three assessments must be upheld in their entirety, because Petitioner has failed to show that any of the assessments are erroneous, unlawful, void, or otherwise invalid.

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 a 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. To satisfy it's burden of proof in a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, a taxpayer must prove that the assessment is incorrect and contrary to law, in whole or in part, by a preponderance of evidence.

3. A taxpayer who stores dyed diesel fuel for which the motor fuel excise tax has not been paid for use in a licensed vehicle is subject to a civil penalty in the amount of $10.00 per gallon to the maximum capacity of the fuel tank in which said fuel is stored, or $1,000.00, whichever is greater, for each of the first two such violations. W. Va. Code § 11-14C-36(a) (1) & (b) [2003].

4. A taxpayer who stores dyed diesel fuel for which the motor fuel excise tax has not been paid for use in a licensed vehicle is subject to a civil penalty in the amount of $15.00 per gallon to the maximum capacity of the fuel tank in which said fuel is stored, or $2,000.00, whichever is greater, for each of the third and subsequent violations. W. Va. Code § 11-14C-36(a) (1) & (b) [2003].

5. The Petitioner has not proven by a preponderance of the evidence that it did not violate W. Va. § 11-14C-36(a)(3) [2003], by using dyed diesel in highway vehicles, and did not violate W. Va. Code § 11-14C-36(a)(1) [2003] by storing dyed diesel fuel in the storage tank at the Petitioner's place of business for use in a licensed vehicle.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax civil penalty assessment issued against the Petitioner on November 8, 2007, for using dyed diesel in a highway vehicle in violation of W. Va. Code § 11-14C-36(a)(3) [2003], in the amount of $______, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the second motor fuel excise tax civil penalty assessment issued against the Petitioner on November 8, 2007, for using dyed diesel fuel in a highway vehicle in violation of

W.Va. Code § 11-14C-36(a)(3) [2003], in the amount of $______, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the third motor fuel excise tax civil penalty assessment issued against the Petitioner on November 8, 2007, for storing/using off road fuel for on road use in violation of W.Va. Code § 11-14C-36(a) (1) [2003], in the amount of $______, should be and is hereby **AFFIRMED**.