REDACTED DECISION – DOCKET # 08-040 MFE – BY GEORGE V. PIPER, ALJ – SUBMITTED FOR DECISION on OCTOBER 20, 2008 – ISSUED on MARCH 25, 2009.

SYNOPSIS

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. C.S.R. § 121-1-63.1 (Apr. 20, 2003).

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.

MOTOR FUEL EXCISE TAX--*PRIMA FACIE* SHOWING NECESSARY FOR STATE TAX COMMISSIONER UNDER W. VA. CODE § 11-14C-36(a)(1) [2003]--To sustain a challenged civil penalty assessment against a seller of untaxed dyed diesel fuel for violating W. Va. Code § 11-14C-36(a)(1) [2003], by allegedly selling such fuel "for use" in a highway vehicle required to be licensed, the State Tax Commissioner must make at least a *prima facie* case by going forward with sufficient evidence to show that the seller either had actual knowledge of the violation(s) or constructive knowledge of the same, that is, the seller, under all of the circumstances, reasonably should have known that the fuel was being purchased by the seller's customer(s) "for use" in such a highway vehicle. The State Tax Commissioner need not, however, show a "willful" violation for such a civil offense.

MOTOR FUEL EXCISE TAX--BURDEN OF PROOF--CARRIED BY TAXPAYER--In a case where the State Tax Commissioner has shown during the presentation of its prima facie case that only one (1) incident took place at the taxpayer's place of business during which a customer inadvertently filled his on-highway vehicle with off-road dyed diesel fuel, the preponderance of evidence standard which must be met by the taxpayer is less than that required if the State Tax Commissioner had shown a pattern of numerous occasions when fuel was illegally or inadvertently purchased at the taxpayer's place of business.

FINAL DECISION

On January 9, 2008, an investigator with the Criminal Investigation Division of the West Virginia State Tax Commissioner's Office ("Commissioner" or "Respondent") issued an assessment for storing and selling dyed fuel for use in highway vehicles against Petitioner. This assessment for a civil penalty in the amount of $____, was issued pursuant to the authority of the State Tax Commissioner under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code for an incident which occurred on January 7, 2008. Written notice of this assessment was served on Petitioner as required by law.

Thereafter, by hand-delivery on March 6, 2008, 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) [2002] and 11-10A-9(a)-(b) [2005].

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

FINDINGS OF FACT

1. Petitioner owns and operates more than fifty franchise convenience stores in the State of West Virginia and conducts its operations under several trade names that have been registered with the West Virginia Secretary of State's Office.

2. The specific convenience store involved is located in the eastern part of West Virginia.

3. On January 7, 2008, Respondent's criminal investigator, received a telephone call from Mr. A, during which Mr. A claimed to have purchased dyed diesel fuel from the convenience store in the eastern part of West Virginia from a dispenser that was not marked as a dyed diesel fuel dispenser.

4. On January 9, 2008, the investigator visited Mr. A's home and obtained a sample of the fuel that Mr. A had purchased, together with a written statement from Mr. A concerning the purchase, and a written receipt from Mr. A showing that the dyed diesel fuel had been purchased at the convenience store.

5. After meeting with Mr. A, the investigator proceeded that same day to the convenience store where he observed the dispenser from which Mr. A claimed to have purchased the dyed diesel fuel.

6. The investigator took a sample from the dyed diesel fuel dispenser and, after obtaining the sample, entered the convenience store to speak with the manager.

7. After speaking with the manager, the investigator issued a notice of assessment to Petitioner for "stores and sold" dyed fuel for use in highway vehicles in violation of W. Va. Code § 11-14C-36 (a)(1), which carried a civil penalty in the amount of $____. The amount of

the civil penalty was based upon the assumption that the capacity of the underground tank was approximately five-thousand gallons.

8. At the hearing, Petitioner's compliance manager testified that because the dispensing pump in question had recently been converted from kerosene to off-road fuel and because Petitioner did not have the pre-printed sticker typically used to signify dyed diesel fuel, he and another employee placed a sticker on the pump and the other employee wrote in the white space above the green wording: "High-Sulfur, Off-Road Fuels Only".

9. The Petitioner's compliance manager further testified that at the time of Mr. A's purchase of the dyed diesel fuel, in addition to the hand-written phrase on the white border stating "High Sulfur, Off-Road Fuels Only", Petitioner had redacted or otherwise blacked-out the word "Highway" from the phrase on the sticker which now read, "Low-Sulfur [redact] Diesel Fuel" instead of "Low-Sulfur Highway Diesel Fuel".

10. Compliance Manager testified that the hand-marked and redacted sticker has now been replaced with the correct sticker, or one manufactured for that purpose, and that he was unaware that any violation such as this had occurred at any of the more than fifty locations owned and operated by Petitioner.

11. During her testimony, the store manager corroborated the compliance manager's testimony and added that on several occasions she marked over the redacted word "Highway" so that customers would not use the dyed diesel fuel in their highway vehicles.

12. The manager admitted that the dyed diesel pump in question cannot be readily seen by the store's clerks while operating the registers or otherwise conducting business, although the pump can be seen from outside the front door; however, she testified that most of the customers purchasing diesel are local repeat customers, such as farmers, whom they know,

and that she was not aware of any other sales of off-road fuel that went into on-road vehicles during her ten years of employment.

13. The manager also testified that at the time that the citation was written by Respondent, she was informed that the store was being penalized because the sticker showed that it was for highway diesel instead of off-road diesel.[1]

14. During rebuttal, Respondent's counsel placed into evidence the particulars of the statement given by Mr. A to the investigator, wherein Mr. A stated that upon entering the convenience store he confronted the clerk about the pump having dispensed dyed diesel fuel, was informed that they had similar complaints before, and that he was given a phone number by the clerk in case he was stopped for having purchased dyed diesel fuel.

DISCUSSION

The **ONLY** issue presented for determination in this case is whether Petitioner has shown that the assessment is erroneous, unlawful, void or otherwise invalid. See W. Va. Code § 11-10A-10(e) [2002]; W. Va. C.S.R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003). A petitioner must satisfy the burden of proof requirement by a preponderance of the evidence.

We apply the preponderance of evidence standard in light of the statute under which Petitioner was cited and assessed. West Virginia Code §11-14C-36(a)(1) makes subject to civil penalty any person who:

> (1) Sells or stores any dyed diesel fuel <u>for</u> 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 [emphasis added].

---

[1] During Petitioner's counsel's cross-examination of the investigator he acknowledged that Respondent is not entitled to assess a civil penalty on the basis that a gas pump is not correctly marked.

The following exchange took place between Petitioner's counsel and the investigator during counsel's cross-examination:

> Petitioner's lawyer: And let me ask you this, if Mr. A had pulled up and got the pump and had started it up and only one ounce of fuel had flowed into his tank, and then he saw that it was marked out or he saw that it was red and then stopped, do you think that that one ounce of fuel being pumped into an on-road vehicle with no prior knowledge of any other time that any on-road vehicle had ever gotten any gas or any fuel out of that tank would be sufficient to impose a fifty thousand dollar fine?
>
> Investigator: Based on the code, yes sir.

Earlier in his cross-examination, the investigator had acknowledged that: (1) the pump was not marked as clear diesel as Mr. A had said, (2) the investigator was not aware of any alleged improper sales at this location after the incident in question, and (3) the incident with Mr. A was isolated in that it was the first notification that Respondent ever received from that location.

Simply put, Respondent's evidence consists of one inadvertent sale of untaxed, off-road fuel to one individual, coupled with that individual's uncorroborated written statement that one of Petitioner's employees had told him that Petitioner had received similar complaints and that the employee was giving him a telephone number in case he was stopped by the authorities for having purchased dyed diesel fuel.

To accept Respondent's reasoning would mean, as the investigator testified, that even if a thimbleful of dyed diesel fuel turned up in one highway vehicle, the owner of the motor vehicle storage tank from which it came would always be subject to civil penalties based upon the capacity of the storage tank, regardless of the circumstances. We believe that such a conclusion goes far beyond what the legislature intended.

A civil penalty assessment against a seller of untaxed dyed diesel fuel for violating W.Va. Code § 11-14C-36(a)(1) [2003], by allegedly selling such fuel "for use" in a highway vehicle required to be licensed, requires that the State Tax Commissioner find that the seller either had actual knowledge of the violations or constructive knowledge of the same; that is, the seller, under all of the circumstances, reasonably should have known that the fuel was being purchased by the seller's customers "for use" in such a highway vehicle. In other words, the word "for" in the phrase "for use in a highway vehicle" requires some knowledge of the purpose for which the fuel is to be used. We do not conclude that the burden now rests upon the Respondent to prove "willful" intent on the part of the Petitioner, but more must be presented than a single inadvertent sale plus mere belief that other such incidents had previously taken place.

The circumstances before us are similar, in many respects, to those related last year in W. Va. Administrative Decision No. 07-182 MFE, which decision was affirmed by the Circuit Court of a county in West Virginia on October 17, 2008 by the Judge in Civil Action No. 08-AA-7. The Judge agreed that basing an assessment on the capacity of the holding tank where no showing was made that Petitioner had actual or even constructive knowledge that it was selling dyed fuel for use in a highway vehicle would lead to an absurd result not intended by the legislature.[2] The Judge concluded that the Tax Commissioner "did not prove that the company intentionally sold dyed fuel to Mr. B, nor did he show that the company had, at any other time, sold dyed fuel to a customer. It then follows that the company. was not storing dyed fuel for use in a highway vehicle."

---

[2] *Expedited Transportation Systems, Inc., v. Vieweg*, 207 W. Va. Code 90, 98, 529 S.E. 110, 118 (2000), stands for the proposition that, whenever possible, a court should avoid a result which leads to absurd, inconsistent or unreasonable results.

Respondent asserts that this tribunal erroneously construed the language of W. Va. Code § 11-14C-36(a)(1), suggesting that the West Virginia Legislature did not adopt a knowledge requirement of any kind in that statute, but rather a strict liability standard. Respondent argues that any sale whatsoever of dyed diesel fuel requires a fifty-thousand dollar civil penalty. We reject that interpretation, as did the Judge in the company mentioned above.

Respondent's counsel employs a secondary argument, asserting that even if W. Va. Code 11-14C-36(a)(1) does include an element of intent or knowledge, this Petitioner did have the requisite amount of intent or knowledge to allow Respondent to impose these civil penalties because Petitioner took no security measures to ensure that the dyed diesel fuel was being dispensed in a lawful manner before Mr. A's purchase, and that two days after being notified that such a sale had taken place, no additional steps had been taken to prevent a reoccurrence.

Although this tribunal agrees with the Respondent that Petitioner's security measures could be improved, we cannot say that Petitioner's measures were inadequate. The nature of Petitioner's business does not allow employees to observe each and every customer who purchases dyed diesel fuel. The evidence before us showed that Petitioner created a makeshift sign to indicate the fuel in question was for off-road vehicles only, which Petitioner displayed until securing an appropriate manufactured sign. The testimony elicited from the store manager to the effect that she was unaware that other sales of off-road fuel that went into on-road vehicles had taken place during her ten years of employment was credible. Inasmuch as there is no evidence that any other improper sales of dyed diesel fuel sales took place before or after Mr. A's inadvertent purchase, and there thus being no actual or constructive knowledge of such sales, we find for Petitioner.

CONCLUSIONS OF LAW

Based upon 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 on the petitioner 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. C.S.R. § 121-1-63.1 (Apr. 20, 2003).

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

3. Petitioner in this matter has carried the burden of proof with respect to the issue of whether it illegally sold five thousand gallons of off-highway dyed diesel fuel "for" highway use. See W.Va. C.S.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 civil penalty assessment issued against the Petitioner on January 9, 2008, for storing and selling dyed diesel fuel for highway use in violation of W. Va. Code § 11-14C-36(a)(1), in the amount of $_____, should be and is hereby **FULLY VACATED**.