

**REDACTED DECISION – DK# 10-456 RMFE – BY – GEORGE V. PIPER,
ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on JANUARY 4,
2011 – ISSUED ON JUNE 30, 2011**

SYNOPSIS

MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the taxpayer to show that it is entitled to the refund. *See* W. Va. Code Ann. § 11-10A-10(e) [West 2010].

MOTOR FUEL EXCISE TAX -- LIMITATION ON FILING CLAIM FOR REFUND -- West Virginia Code Section 11-14C-31(c)(3) provides that a claim for refund filed by the United States or any agency thereof for the immediately preceding fiscal year that ends on June 30 must be filed on or before August 31 of the year on which the fiscal year ends.

MOTOR FUEL EXCISE TAX -- LIMITATION ON FILING CLAIM FOR REFUND -- The West Virginia Office of Tax Appeals has no authority to disregard the express statutory requirement specifying the date by which a claim for refund must be filed.

FINAL DECISION

On September 13, 2010, Petitioner, filed a claim for refund of motor fuel excise tax in the amount of \$____ for gasoline, for the fiscal year ending June 30, 2010. The Fuel Tax Administration Unit of the Internal Auditing Division (the Division) of the West Virginia State Tax Commissioner's Office (Respondent), by letter dated September 16, 2010, denied the entire claim. The reason stated for the total denial was that the refund claim for the period at issue was not timely filed, that is, it was filed after August 31, 2010, in violation of West Virginia Code Section 11-14C-31(c)(3).

Thereafter, by mail postmarked November 15, 2010, received in the office of the West Virginia Office of Tax Appeals on November 17, 2010, the Petitioner timely filed with this tribunal a petition for refund, pursuant to West Virginia Code Sections 11-10A-8(2) & 11-10A-9(a)-(b). The Petitioner waived its right to an evidentiary hearing and requested that the matter be submitted on the basis of documents. The State Tax Commissioner having no objection to the matter being submitted on documents and because no factual issues are in dispute this tribunal submitted the matter on documents on January 4, 2011.

FINDINGS OF FACT

1. For the period July 1, 2009, and ending June 30, 2010, the Petitioner, purchased 7,917 gallons of gasoline, on which it paid motor fuel excise tax in the amount of \$_____.

2. On September 16, 2010, Respondent having reviewed the Petitioner's motor fuel refund return denied the refund in its entirety because the last acceptable date to claim the refund was August 31, 2010.

3. On November 10, 2010, Petitioner corresponded with Respondent to the effect that the motor fuel refund application was late due to the acceptance of mail delivery within the Petitioner's office. More particularly, a third party agency that assembles its motor fuel transactions and sends out quarterly statements, forwarded it to Petitioner late, resulting in a late submission of its refund.

DISCUSSION

The portions of Article 14C of Chapter 11, at issue in this matter, are clear and unambiguous. Generally, all motor fuel sold, delivered, imported or otherwise brought into West Virginia has an excise tax levied upon it, which is comprised of two components, a flat rate and a variable component. Certain entities may claim an exemption from the tax, such as the United States Government, but those entities must first pay the tax and then request a refund. The deadline to request such a refund is set by statute.

West Virginia Code Section 11-14C-9 provides, in relevant part:

(c) Refundable exemptions from flat rate component of tax. -- Any person having a right or claim to any of the following exemptions from the flat rate component of the tax levied by section five [§ 11-14C-5] of this article shall first pay the tax levied by this article and then apply to the Tax Commissioner for a refund: . . . (1) The United States or any agency thereof. . .

(d) *Refundable exemptions from variable rate component of tax.* – Any of the following persons may claim an exemption from the variable rate component of the tax levied by section five [§ 11-14C-5] of this article on the purchase and use of motor fuel by first paying the tax levied by this article and then applying to the Tax Commissioner for a refund: . . . (1) The United States or any agency thereof . . .

W.Va. Code Ann. § 11-14C-9 (West 2010).

West Virginia Code Section 11-14C-31 provides, in relevant part:

The right to receive any refund under the provisions of this section is not assignable and any assignment thereof is void and of no effect. No payment of any refund may be made to any person other than the original person entitled to claim the refund except as otherwise expressly provided in this article. The commissioner shall cause a refund to be made under the authority of this section only when the claim for refund is filed with the commissioner within the following time periods: . .

. . (3) A petition for refund under subsection (c) or (d), section nine [§ 11-14C-9] of this article shall be filed with the commissioner on or before the last day of January, April, July and October for purchases of motor fuel during the immediately preceding calendar quarter: Provided, That any application for refund made under authority of subdivision (15), subsection (c) of said section when the motor fuel is used to operate tractors and gas engines or threshing machines for agricultural purposes shall be filed within twelve months from the month of purchase or delivery of the motor fuel: *Provided, however, That all persons authorized to claim a refundable exemption under the authority of subdivisions (1) through (6), inclusive, subsection (c), section nine of this article and subdivisions (1) through (6), inclusive, subsection (d) of said section shall do so no later than the thirty-first day of August for the purchases of motor fuel made during the preceding fiscal year ending the thirtieth day of June.*

W.Va. Code Ann. § 11-14C-31(c) (West 2010). (Emphasis added.).

West Virginia Code Section 11-14C-31 further provides “Any petition for a refund not timely filed is not construed to be or constitute a moral obligation of the State of West Virginia for payment”

W.Va. Code Ann. § 11-14C-31(d) (West 2010).

It is not disputed that the Petitioner failed to file its claim for refund on or before August 31, 2010. As such, the Petitioner's claim for refund was not timely. However, it asks this tribunal to consider the extenuating circumstances that contributed to its failure to timely file its claim, and to award it the refund to which it would be entitled had it timely filed its claim for refund.

Petitioner argues that due to the processing time of multiple claims for the second quarter of 2010, leniency should be granted in this case. However, West Virginia Code Section 11-14C-31(c)(3) provides a definite date by which the United States or any agency thereof must file its claim for refund with the State Tax Commissioner. The statute specifies no grounds upon which the date certain set forth in the statute may be waived or disregarded. The statute makes no provision for any late filing of a claim for refund based on extenuating circumstances. On the contrary, by its use of the word "shall" the West Virginia Legislature has clearly indicated that the deadlines contained in Section 31(c)(3) are mandatory and West Virginia law on this point is well settled:

This Court has repeatedly said that the term "shall" as used by the Legislature, makes the statutory requirement mandatory rather than directory. *See*, Syl. Pt. 1, *Nelson v. West Virginia Public Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1992) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."). *Accord* *State ex rel. Stump v. Johnson*, 217 W. Va. 773, 619 S.E.2d 246, 255 (2005). *See also* *State ex rel. Brooks v. Zakaib*, 214 W.Va. 253, 264-65, 588 S.E.2d 418, 429-30 (2003) ("Ordinarily, the word 'shall' has a mandatory, directory connotation." (citations omitted)); *State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." citations omitted)).

Helton v. Reed, 219 W. Va. 557, 563 638 S.E.2d 160, 166 (2006) (Benjamin concurring).

The Petitioner has not provided this Tribunal with any contrary authority in support of its position. This tribunal must follow the clear and express statutory requirements and has no authority to disregard the same.

Neither the State Tax Commissioner nor this tribunal may extend the time for filing a claim for refund due to extenuating circumstances. Consequently, the petition for refund filed by Petitioner must be denied.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W.Va. Code Ann. § 11-1-2 (West 2010).

2. All motor fuel sold, delivered, imported or otherwise brought into West Virginia has an excise tax levied upon it, which is comprised of two components, a flat rate and a variable component. *See* W.Va. Code Ann. § 11-14C-5(a) (West 2010); W.Va. Code Ann. § 11-15-18b(a) (West 2010); W.Va. Code Ann. § 11-15A-13a(a) (West 2010).

3. The United States or any agency of the same may, after paying the flat and variable tax on motor fuel, apply to the Tax Commissioner for a refund. *See* W.Va. Code Ann. § 11-14C-9(c)(1) & (d)(1) (West 2010).

4. All refund requests made pursuant to subsections (c) and (d) of Section Nine, Article Fourteen C, Chapter Eleven , for the fiscal year ending on the thirtieth day of June, must be filed with the Tax Commissioner no later than the thirty-first day of August of the following fiscal year . *See* W.Va. Code Ann. § 11-14C-31(c)(3) (West 2010).

5. Any petition for a refund not timely filed is not construed to be or does not constitute a moral obligation of the State of West Virginia for payment. *See* W. Va. Code Ann. §11-14C-31(d).

6. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the taxpayer to show that it is entitled to the refund. *See* W. Va. Code Ann. § 11-10A-10(e) [West 2010].

7. By filing its claim for refund with the State Tax Commissioner on September 13, 2010, the Petitioner failed to comply with West Virginia Code Section 11-14C-31(c)(3), which requires that a claim for refund filed by the United States or any agency thereof for the immediately preceding fiscal year that ends on June 30, must be filed on or before August 31 of the year on which the fiscal year ends.

8. The term “shall” as used by the Legislature, makes the statutory requirement mandatory rather than directory. Helton v. Reed, 219 W. Va. 557 638 S.E.2d 160 (2006) (Benjamin concurring)

9. The West Virginia Office of Tax Appeals has no authority to disregard the express statutory requirement specifying the date by which a claim for refund must be filed.

10. Petitioner has failed to carry its burden of showing that it is entitled to a refund.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the Petitioner’s petition for refund of \$ ____ of motor fuel excise tax, for the period of June 1, 2009, through June 30, 2010, should be and is hereby **DENIED**.