

**STATE OF NORTH CAROLINA**  
**COUNTY OF WAKE**

**BEFORE THE**  
**SECRETARY OF REVENUE**

**IN THE MATTER OF:** )  
)  
The Motor Fuels Civil Penalty )  
Assessment Issued May 1, 2002 in the )  
amount of \$1,000.00 by the North )  
Carolina Secretary of Revenue, )  
)  
and )  
)  
The Special Fuels Bulk User Tax )  
Assessment in the amount of \$669.56 )  
proposed July 23, 2002 by the North )  
Carolina Secretary of Revenue )  
)  
vs. )  
)  
[Taxpayer] )

**FINAL DECISION**  
Docket No. 2003-102

This matter was heard before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina at 9:00 am on July 8, 2003. [Owner] represented Taxpayer, and representing the Motor Fuels Tax Division were R. S. Shearin, Investigator; and Christopher E. Allen, General Counsel.

**ISSUES**

- I. **Whether Taxpayer's use of dyed (nontaxpaid) diesel fuel in a licensed vehicle on the public highway with mounted fertilizer spreading equipment is unlawful pursuant to G.S. §105-449.117, subjecting it to a \$1,000.00 civil penalty assessment.**
- II. **Whether the Division properly calculated the taxpayer's operational miles and fuel consumption resulting in the proposed assessment for tax, penalty, and interest issued July 16, 2002 totaling \$669.56.**

**EVIDENCE**

The following items were introduced into evidence by the Division.

- 1. Motor Fuels Vehicle Information Sheet dated April 18, 2002.

2. Receipt of Dyed Fuel Sample dated April 18, 2002.
3. Motor Fuels Laboratory Chain of Custody Form dated April 23, 2002; Daily maintenance record dated April 23, 2002 for [an inspection].
4. Analytical record of sample taken dated April 23, 2002.
5. Civil penalty assessment for highway use of dyed diesel fuel dated May 1, 2002 for \$1,000.
6. Letter dated May 20, 2002 from Taxpayer to the North Carolina Department of Revenue, together with color photographs 6a, b, and c.
7. Letter dated July 9, 2002 from Christopher E. Allen, General Counsel, Motor Fuels Tax Division to Taxpayer.
8. Letter dated September 5, 2002 received by the Division September 13, 2002.
9. Field audit report dated May 23, 2002; Notice of assessment dated July 23, 2002; DMV General Vehicle Detail.
10. Copy of IRC § 4082 (26 U.S.C. 4082, *Exemptions for diesel fuel and kerosene*).
11. Copy of 26 CFR 48.4061(a)-1 containing definitions of "highway vehicle."
12. IRS Publication 378, *Fuel Tax Credits and Refunds*.
13. IRS Publication 510, *Excise Taxes for 2002*.
14. Letter dated February 12, 2003 from Eugene J. Cella to Taxpayer scheduling an administrative tax hearing for April 3, 2003.
15. Letter dated March 26, 2003 from Eugene J. Cella to Taxpayer rescheduling an administrative tax hearing for April 17, 2003.
16. Letter dated May 29, 2003 from Eugene J. Cella to Taxpayer rescheduling an administrative tax hearing for July 8, 2003.
17. Memorandum dated May 16, 2001 from E. Norris Tolson to Eugene J. Cella delegating authority to conduct administrative hearings pursuant to Chapter 105 of the General Statutes.

### **FINDINGS OF FACT**

Based upon the forgoing evidence of record, the Assistant Secretary for Administrative Tax Hearings makes the following findings of fact:

1. On April 18, 2002, Investigator Rick Shearin of the Motor Fuels Tax Division ("Division") and DMV Enforcement Officer Perry were conducting an operation to detect the illegal use of nontaxpaid (dyed) fuel on the highways of this State.

2. In the course of the operation, they observed and stopped a [truck] bearing [a North Carolina license plate] operating on [a North Carolina highway].
3. [The driver] stated to investigators that the truck was fueled at the shop that morning from the only storage tank available, and the company's procedure was to fill the supply tank of the vehicle from that storage tank when needed.
4. Division investigators have the authority pursuant to G.S. 105-449.121 to stop a vehicle for inspection purposes and to take samples of fuel from supply tanks to determine the composition of the fuel.
5. Investigator Shearin's preliminary visual inspection of the supply tank of the subject vehicle revealed the presence of red-colored fuel.
6. He then withdrew a sample of fuel from the vehicle with [a North Carolina license plate].
7. Investigator Shearin subsequently forwarded the sealed sample container bearing [a North Carolina license plate] to the State Department of Agriculture & Consumer Services Motor Fuels Laboratory for analysis.
8. Doug Cox, a chemist employed by the Department of Agriculture and Consumer Services received the sample on April 23, 2002 and assigned [a sample inspection number] to the sample.
9. M. R. Spencer, a chemist employed by the Department of Agriculture and Consumer Services performed sulfur and dye analysis on the fuel sample bearing [a North Carolina license plate] and [a sample inspection number].
10. Laboratory analysis revealed that the fuel contained 15.5 parts per million (PPM) dye and .176 percent sulfur by weight.
11. N.C.G.S 105-449.117 states in pertinent part that "[i]t is unlawful to use dyed diesel fuel in a highway vehicle that is licensed or required to be licensed under Chapter 20 of the General Statutes unless that use is allowed under section 4082 of the Code."
12. The Division issued a civil penalty assessment of \$1,000.00 pursuant to G.S. 105-449.117 on May 1, 2002 for the unlawful use of dyed diesel fuel in a registered highway vehicle bearing [a North Carolina license plate].
13. Taxpayer responded by letter dated May 20, 2002, received by the Division May 28, 2002, alleging that use of dyed diesel in the subject vehicle was permitted under IRC § 4082 and the relevant regulations promulgated by the IRS.
14. Taxpayer also tendered with this letter three (3) color photographs of the subject vehicle.
15. The subject vehicle was employed to transport fertilizer and mounted equipment to spread fertilizer of crops and fields.
16. The Division responded by letter dated July 9, 2002, stating its position that fuel used to operate a vehicle on the highway and requiring State licensure is not exempted from the excise tax.

17. Taxpayer replied by letter dated September 5, 2002 (received by the Division September 13, 2002) asserting that the subject vehicle--bearing [a North Carolina license plate] is not a highway vehicle under relevant federal rules and regulations.
18. After determining that Taxpayer's vehicle was operating on the highways of this State with dyed diesel fuel, Investigator Shearin performed a special fuels audit of Taxpayer's operation, which was completed May 23, 2002.
19. During the course of the audit, the investigator determined that Taxpayer used all nonhighway fuel since purchasing diesel-powered vehicles, and had a 3500-gallon bulk storage tank which was used to fuel these vehicles.
20. Taxpayer had four (4) highway vehicles and twelve (12) farm tractors and combines.
21. The investigator allowed the standard miles-per-gallon (MPG) for each of the vehicles, and determined that taxpayer had a shortage of 2006 gallons in the mileage audit.
22. Taxpayer admitted that all fuel used in the four (4) vehicles during the audit period came from its nonhighway bulk storage tank.
23. Additionally, Taxpayer presented no fuel receipts documenting purchases of taxpaid fuel for highway purchases.
24. Since Taxpayer purchased no highway (taxpaid) fuel during the audit period, the investigator allowed no credit for fuel against the audited gallons required to sustain Taxpayer's operation.
25. The day after Investigator Shearin informed Taxpayer of the law respecting the use of dyed diesel fuel, Taxpayer purchased a 450-gallon highway tank and drained and flushed all highway vehicles and began using highway fuel.
26. Taxpayer remitted payment of tax, penalty, and interest to the Division on August 9, 2002 and by letter dated September 5, 2002 demands a refund.
27. Because this matter has not been resolved, it was referred to the Secretary's Office for an administrative refund at the request of Taxpayer.

### **CONCLUSIONS OF LAW**

Based upon the above findings of fact, the undersigned Assistant Secretary enters the following conclusions of law:

1. N.C.G.S. 105-449.117 states in pertinent part that "[i]t is unlawful to use dyed diesel fuel in a highway vehicle that is licensed or required to be licensed under Chapter 20 of the General Statutes unless that use is allowed under section 4082 of the Code."
2. Taxpayer's vehicle was licensed, bearing [a North Carolina license plate].

3. Testing conducted by the North Carolina Department of Agriculture determined that the fuel sample contained red dye in a concentrate of 15.5 Parts-Per-Million (PPM), verifying the Division investigator's visual roadside observations that the sample was red in color.
4. IRS Reg. Section 48.4061 explains that the term *highway vehicle* as used in the Internal Revenue Code means "any self-propelled vehicle... designed to perform a function of transporting a load over public highways, whether or not it is also designed to perform other functions, but does not include ... certain specially designed mobile machinery for non-transportation functions."
5. A self-propelled vehicle is not a highway vehicle if it: (1) consists of a chassis to which there has been permanently mounted machinery or equipment to perform [an operation] if the operation of the machinery or equipment is unrelated to transportation; (2) the chassis has been specially designed to serve *only as a mobile carriage and mount for the equipment involved*; and (3) because of the design, the chassis could not be used as a component of a vehicle designed to perform a function of transporting *any load other than that particular equipment* or similar machinery or equipment. (See IRS Reg. § 48.4061).
6. The subject vehicle was designed to both carry a load on the highway and the equipment used to spread the load upon delivery.
7. IRS Publication 378, *Fuel Tax Credits and Refunds* specifically states that "you do not use fuel on a farm for farming purposes when you use it...off the farm, such as on the highway...."
8. IRS Publication 510, *Excise Taxes for 2002*, also makes clear that diesel fuel is *not used for farming purposes* if it is used off the farm, such as on the highway, even if the fuel is used in transporting livestock, feed, crops, or equipment. (Emphasis added).
9. The vehicle at issue does not meet the federal requirements for nonhighway vehicle classification, and IRC Section 4082 does not allow the use of dyed diesel fuel in this vehicle.
10. Since Taxpayer's use of dyed diesel fuel was not exempted under Section 4082 of the Code, its use in a licensed highway vehicle was unlawful pursuant to N.C.G.S. 105-449.117.
11. The Division's assessment of a civil penalty of \$1,000.00 on May 1, 2002 for using dyed diesel fuel in a highway vehicle pursuant to G.S. § 105-449.117 was proper.
12. The Division properly calculated Taxpayer's operational miles and fuel consumption resulting in the proposed assessment for tax, penalty, and interest issued July 16, 2002 totaling \$669.56.

### **DECISION**

Taxpayer 's use of dyed diesel fuel in a licensed vehicle was unlawful, subjecting him to a civil penalty assessment. N.C.G.S. 105-449.117 states in pertinent part that "[i]t is unlawful to

use dyed diesel fuel in a highway vehicle that is licensed or required to be licensed under Chapter 20 of the General Statutes unless that use is allowed under section 4082 of the Code." As noted above, Taxpayer's vehicle was licensed, bearing [a North Carolina license plate]. Moreover, testing conducted by the North Carolina Department of Agriculture determined that the fuel sample contained red dye in a concentrate of 15.5 Parts-Per-Million (PPM), verifying the Division investigator's visual roadside observations that the sample was red in color. The Taxpayer's request for a refund of the penalty previously paid must be denied.

Taxpayer contends that Section 4082 of the Code allows its use of dyed diesel fuel in the subject vehicle and is therefore proper under G.S. § 105-449.117. Taxpayer cites IRS Publication 378 as authority for its use of dyed diesel to operate the vehicle on the highway. (See Exhibit 8, September 5, 2002 letter). Taxpayer also cites IRS Reg. § 48.4041(a) - (d) as additional authority to support its position that the subject vehicle is not a highway vehicle.

However, IRC 4082 does not provide for the operation of a farm-type vehicle on the road using dyed diesel fuel. The term *highway vehicle* means "any self-propelled vehicle... designed to perform a function of transporting a load over public highways, whether or not it is also designed to perform other functions, but does not include ... certain specially designed mobile machinery for non-transportation functions." (Exhibit 11, IRS Reg. Section 48.4061). A self-propelled vehicle is not a highway vehicle if it: (1) consists of a chassis to which there has been permanently mounted machinery or equipment to perform [an operation] if the operation of the machinery or equipment is unrelated to transportation; (2) the chassis has been specially designed to serve *only as a mobile carriage and mount for the equipment involved*; and (3) because of the design, the chassis could not be used as a component of a vehicle designed to perform a function of transporting *any load other than that particular equipment* or similar machinery or equipment. (Emphasis added).

IRS Publication 378, which deals with the rules respecting fuel tax credits and refunds and cited by Taxpayer, is particularly instructive. Specifically, it states that "you do not use fuel

on a farm for farming purposes when you use it...off the farm, such as on the highway...."

(Exhibit 12, Publication 378, *Fuel Tax Credits and Refunds*, p. 4). A self-propelled vehicle is not a highway vehicle if *both* of the following apply: (1) The vehicle is designed primarily to carry a specific kind of load *other than over the public highway*, and; (2) The vehicle's use in carrying this load over the public highway is *substantially limited or impaired* because of its design. (Emphasis added).

In making the determination of whether or not a vehicle is a highway vehicle, the finder of fact may take into account whether it can travel at regular highway speeds, requires special permits for highway use, is overweight, overheight, or overwidth for regular highway speed. It is noteworthy that the subject vehicle was operating on the highway, at regular highway speed, and without any special permits. IRS Publication 510, *Excise Taxes for 2002*, also makes clear that diesel fuel is *not used for farming purposes* if it is used off the farm, such as on the highway, even if the fuel is used in transporting livestock, feed, crops, or equipment. (Exhibit 13, IRS Publication 510, *Excise Taxes for 2002*, p. 15).

Finally, Revenue Ruling 78-342 dealing with concrete mixers is especially instructive. A truck chassis designed to permanently mount only a concrete mixer that is exempt from tax is a highway vehicle. Although the concrete mixers perform a non-transportation mixing operation, they also transport a load. The chassis in question is specially designed for use only with the concrete mixers and cannot be used to transport other loads without substantial structural modifications. However, concrete mixers do not come within the exemption provided in section 48.4061(a)-1(d)(2)(l) of the regulation. The permanently mounted equipment, the mixer, serves a purpose related to transportation, that of transporting the concrete over the highway. Likewise, diesel-powered trucks doubling as fertilizer spreaders cannot fall under the rubric of non-highway vehicles.

The vehicle *sub judice* does not meet the federal requirements for nonhighway vehicle classification, and Section 4082 does not allow the use of dyed diesel fuel in this vehicle.

Taxpayer's licensed vehicle bearing [a North Carolina license plate] was discovered operating on the highway. This was a use of dyed fuel not contemplated by either North Carolina or federal law, and Taxpayer's refund claim of the \$1,000.00 dyed diesel penalty previously paid must be denied.

Additionally, the assessment predicated upon Investigator Shearin's audit should be affirmed. Taxpayer admitted that all fuel used in the four (4) vehicles during the audit period came from its nonhighway bulk storage tank. (*See generally*, Exhibit 9, Audit Comments). Moreover, as noted above, Taxpayer presented no fuel receipts for highway purchases, and the investigator could not allow credit for such fuel in the audit.

**WHEREFORE**, based upon the above findings of fact and conclusions of law drawn therefrom, the undersigned Assistant Secretary of Revenue **HEREBY AFFIRMS** in its entirety the proposed civil penalty assessment of \$1,000.00 issued herein on May 1, 2002, and **AFFIRMS** in its entirety the assessment proposed July 16, 2002 in the amount of \$669.56. Taxpayer's refund claims are **DENIED**.

This the 5<sup>th</sup> day of November, 2003.

Signature \_\_\_\_\_

Eugene J. Cella  
Assistant Secretary of Revenue