

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

BEFORE THE  
SECRETARY OF REVENUE

IN THE MATTER OF: )  
)  
The Motor Fuels Civil Penalty )  
Assessments issued November 21, 2002 )  
by the North Carolina Secretary of )  
Revenue in the amount of \$2,000.00. )  
)  
and )  
)  
The proposed Special Fuels Bulk User )  
Assessment Issued May 8, 2003 in the )  
amount of \$4,324.56 by the North )  
Carolina Secretary of Revenue )  
)  
against )  
)  
[Taxpayer] )

**FINAL DECISION**  
Docket No. 2003-293

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on October 13, 2003. [Taxpayer and Taxpayer's wife] appeared *pro se*. Representing the Motor Fuels Tax Division were J. S. Powell, Investigator; and Christopher E. Allen, General Counsel.

**ISSUES**

- I. Whether Taxpayer's use of dyed (nontaxpaid) diesel fuel in his licensed vehicles on the public highway is unlawful pursuant to G.S. 105-449.117, subjecting him to two (2) \$1,000.00 civil penalty assessments issued November 21, 2002 and November 26, 2002.
- II. Whether the Division properly calculated the Taxpayer's nonhighway fuel consumption resulting in the proposed assessment for tax, penalty, and interest issued May 8, 2003 totaling \$5,911.16.

## EVIDENCE

The Division presented the following evidence at the hearing:

1. Dyed diesel information sheet dated November 21, 2002 for a [1983 truck] with [a VIN number] bearing [a N.C. license plate number].
2. Motor Fuels Tax Division/DMV Enforcement receipt of dyed diesel sample dated November 21, 2002 for a [1983 truck] with [a VIN number] bearing [a N.C. license plate number] signed by Julye Powell and marked "refused" by owner.
3. North Carolina Department of Agriculture and Consumer Services analytical record of sample taken, dated November 21, 2002, showing dye concentrate of 10.7 Parts Per Million.
4. Dyed diesel information sheet dated November 21, 2002 for a [1979 truck] with [a VIN number] bearing [a N.C. license plate number].
5. Motor Fuels Tax Division/DMV Enforcement receipt of dyed diesel sample dated November 21, 2002 for a [1979 truck] with [a VIN number] bearing [a N.C. license plate number] signed by Julye Powell and marked "refused" by owner.
6. North Carolina Department of Agriculture and Consumer Services analytical record of sample taken, dated November 21, 2002 showing dye concentrate of 1.3 Parts Per Million.
7. Letter dated November 26, 2002 from Julye S. Powell to Taxpayer.
8. Civil penalty assessment for \$1,000.00 dated November 21, 2002.
9. Civil penalty assessment for \$1,000.00 dated November 26, 2002.
10. Letter dated December 1, 2002 from Taxpayer to the N. C. Department of Revenue requesting that the Department waive or reduce the penalty.
11. Letter dated May 16, 2003 from Taxpayer to John Panza of the Motor Fuels Tax Division.
12. Field audit report dated May 27, 2003 in the amount of 5,911.16
13. Motor Fuels Tax Division Form Gas-1303, notice to bulk users.
14. Notice of tax assessment dated May 8, 2003 in the amount of \$5,911.16.
15. Letter dated July 1, 2002 from Eugene J. Cella to Taxpayer scheduling an administrative hearing for September 23, 2003
16. Letter dated August 12, 2003 from Eugene J. Cella to Taxpayer scheduling an administrative hearing for October 7, 2003 at 1:00 p.m. in Raleigh, N.C.

17. Memorandum dated May 16, 2001 from E. Norris Tolson, Secretary of Revenue to Eugene J. Cella delegating authority to hold hearings required or allowed under Chapter 105 of the General Statutes.

Taxpayer presented the following evidence at the hearing:

- TP-1. Statement of [Taxpayer's employee].
- TP-2. Fuel receipts purportedly documenting taxpaid fuel purchases.

### **FINDINGS OF FACT**

From the evidence submitted at the hearing, the trier of fact makes the following findings:

1. On November 21, 2002, Investigator J. S. Powell of the Motor Fuels Tax Division ("Division") visited Taxpayer's farm and inspected the registered vehicles present.
2. The investigator drew fuel samples from the supply tanks, and discovered that two (2) of the three (3) vehicles inspected during the audit contained dyed diesel fuel.
3. [A 1983 truck] bearing [a N.C. license plate number] was parked at the farm, and the investigator drew a sample from the supply tank and forwarded it to the Department of Agriculture and Consumer Services Motor Fuels Laboratory.
4. This testing, performed by H. W. Seymour, Staff Chemist, revealed a dye content of 10.7 Parts-Per-Million (PPM).
5. A second vehicle, [a 1979 truck] bearing [a N.C. license plate number], was inspected by Investigator Powell, who then took a fuel sample from the supply tank.
6. On site testing of the sample performed by Investigator Powell using [a testing device] disclosed 0.4 PPM dye.
7. Subsequent laboratory testing at the Motor Fuels Laboratory revealed a dye content of 1.3 PPM.
8. By letter dated November 26, 2003, Investigator Powell informed Taxpayer of the laboratory results and the actions of the Division in issuing a civil penalty assessment.
9. 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.
10. Preliminary visual inspection of the supply tank of the subject vehicles by Investigator Powell revealed the presence of red-colored fuel in two of Taxpayer's vehicles.
11. 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 two civil penalty assessments of \$1,000.00 each pursuant to G.S. 105-449.117 on November 21 and 26, 2002 for each unlawful use of dyed diesel fuel in a registered highway vehicle bearing [the N.C. license plate numbers].
13. Taxpayer responded by letter dated December 1, 2002 (stamped received May 22, 2003) requesting that Division waive or reduce the penalty.
14. G.S. 105-449.87(b) states in pertinent part that "if the Secretary determines that a bulk end user...used or sold untaxed dyed diesel fuel to operate a highway vehicle when the fuel is dispensed from a storage facility or through a meter marked for highway use, all fuel delivered into that storage facility is presumed to have been used to operate a highway vehicle."
15. By letter dated May 16, 2003, Taxpayer requested a hearing on the assessment based upon the bulk fuel audit.
16. After determining that two (2) out of three (3) vehicles registered to Taxpayer were operating on the highways of this State with dyed diesel fuel, Investigator Powell performed a special fuels audit of Taxpayer's operation, completing the audit on March 18, 2003.
17. Taxpayer owns and operates a 2,000-acre farm, producing corn, cotton and tobacco.
18. Taxpayer maintained a 10,000-gallon nonhighway diesel tank for off road equipment and a 28,000-gallon nonhighway tank for bulk curing barns on the farm.
19. [A North Carolina oil company] supplied these tanks.
20. In December 2002, Taxpayer installed a 500-gallon highway diesel tank, which was supplied by [another North Carolina oil company].
21. The investigator met with Taxpayer on February 18, 2003, and provided him with a copy of the Department's *Taxpayer's Bill of Rights*.
22. At that time, she again inspected the three vehicles for the presence of dye, and each had highway fuel in the supply tanks.
23. Taxpayer stated that he drained the fuel from the two trucks that had dyed diesel fuel in November, and admitted using dyed fuel in those trucks prior to that time.
24. During the course of the audit, the investigator obtained copies of fuel delivery records from [the two North Carolina oil companies] spanning the period from April 1, 2000 through December 31, 2002.
25. Taxpayer provided some fuel purchase receipts for the audit period but stated that he paid cash or wrote checks for many purchases without obtaining receipts.
26. The [1983 truck] licensed for 27,000 was the only truck registered to Taxpayer that had an operational odometer, therefore, he did not maintain mileage records as required by 17 NCAC 12B .0502 and the Notice to Bulk Users, Form Gas 1303.

27. Taxpayer also failed to maintain withdrawal records to support his off-road fuel usage.
28. Because the only records that Taxpayer could produce were bulk fuel delivery tickets, the investigator could not allow credit for any on-road fuel usage.
29. Taxpayer was informed that if he presented mileage information for the registered highway vehicles, that the audit would be adjusted.
30. Because this matter remains unresolved, it was referred to the Secretary for an administrative hearing.
31. During the hearing, Taxpayer presented fuel purchase receipts documenting purchases of taxpaid fuel.
32. After reviewing these receipts, the Division did not allow any credit for these purchases, since the investigator had previously reviewed these documents and allowed credit where appropriate.
33. Taxpayer paid \$4,941.21 for tax and accrued interest by check dated October 27, 2003 and the Division credited this payment to his account on November 11, 2003.
34. Taxpayer's payment was made under protest, and this proceeding thereby became one for refund under G.S. 105-266.1.

### **CONCLUSIONS OF LAW**

Based upon the foregoing findings of fact, the undersigned enters the following conclusions of law:

1. Motor Fuels Tax Division investigators had authority to inspect the fuel supply tanks of the vehicles bearing [the N.C. license plate numbers] pursuant to G.S. 105-449.121(b).
2. 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."
3. Section 4082 of the Code does not allow for the use of dyed fuel in Taxpayer's licensed highway vehicles.
4. Section 17 NCAC 12B .0503 of the North Carolina Administrative Code provides that the penalties set out in G.S. 105-449.117 may be assessed whenever the presence of dye is detected in a sample taken from the supply tank of a highway vehicle.
5. Visual inspection of the sample taken from the supply tanks of the subject vehicles revealed red- colored (dyed) diesel fuel, which if confirmed would constitute a violation of G.S. 105-449.117.
6. Laboratory analysis of the fuel sample taken from the vehicle parked at Taxpayer's farm on November 21, 2002 with [a N.C. license plate number] indicated 10.7 parts-per-

million (PPM) of red dye in the fuel sample, and thus a violation of the Motor Fuels Tax Laws.

7. The Division properly issued an assessment on a civil penalty assessment of \$1,000.00 on November 21, 2002, which must be sustained.
8. Laboratory analysis of the fuel sample taken from the vehicle parked at Taxpayer's farm on November 21, 2002 with [a N.C. license plate number] indicated 1.3 parts-per-million (PPM) of red dye in the fuel sample, and thus a violation of the Motor Fuels Tax Laws.
9. The Division properly issued an assessment on a civil penalty assessment of \$1,000.00 on November 26, 2002, which must be sustained.
10. G.S. 105-449.87(b) states in pertinent part that "[i]f the Secretary determines that a bulk-end user or retailer used or sold untaxed dyed diesel fuel to operate a highway vehicle when the fuel is dispensed from a storage facility or through a meter marked for nonhighway use, *all fuel delivered into the storage facility is presumed to have been used to operate a highway vehicle.*" (Emphasis added).
11. Taxpayer maintained no fuel or withdrawal records for the audit period documenting nontaxable (off road) use of fuel, and presented no evidence tending to refute the statutory presumption that all of the nontaxpaid fuel was used to operate a highway vehicle.
12. The assessment of tax and applicable interest based upon the audit of Taxpayer's bulk fuel use is proper and must be sustained.
13. The assessment of penalty in the amount of \$1,081.13 assessed in the bulk fuel audit is hereby waived.
14. The assessment of the civil penalties totaling \$2,000.00 for the improper use of dyed diesel fuel is proper and must be sustained.
15. Taxpayer's claim for refund of the civil penalty assessments previously paid must be denied.
16. Taxpayer's claim for refund of tax, penalty and interest totaling \$4,941.21 paid on November 11, 2003 must be denied.

### **DECISION**

**WHEREFORE**, based upon the above conclusions of law and findings of fact in support thereof, Taxpayer's demand for refund of civil penalty assessments of \$2,000.00 previously paid is **DENIED**. Taxpayer's claim for refund of tax and interest totaling \$4,941.21 is also **DENIED**.

This the 30<sup>th</sup> day of January, 2004.

Signature \_\_\_\_\_

Eugene J. Cella  
Assistant Secretary of Revenue