

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

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

**IN THE MATTER OF:** )  
)  
The Motor Fuels Civil Penalty )  
Assessments Issued May 14, 2004 by the )  
North Carolina Secretary of Revenue in )  
the Amount of \$2,000.00 )  
)  
and )  
)  
The Proposed Special Fuels Bulk User )  
Assessment Issued August 26, 2003 in the )  
Amount of \$12,644.29 by the North )  
Carolina Secretary of Revenue )  
)  
against )  
)  
[Taxpayer] )

**FINAL DECISION**  
Docket No. 2003-294

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on February 12, 2004. At Taxpayer's request, the proceeding was conducted by teleconference. [Taxpayer's Representative] appeared on behalf of Taxpayer. Representing the Motor Fuels Tax Division were Martin Barrow, Investigations Supervisor; D. R. Farmer, Investigator; and Christopher E. Allen, General Counsel.

**ISSUES**

- I. Whether Taxpayer's use of dyed (nontaxpaid) diesel fuel in its licensed vehicles is unlawful pursuant to G.S. 105-449.117, subjecting him to two (2) \$1,000.00 civil penalty assessments issued May 14, 2003.**
- II. Whether the Division properly calculated the taxpayer's nonhighway fuel consumption based upon G.S. 105-449.87, resulting in the amended assessment for motor fuels tax, penalty, and interest proposed by the Division totaling \$8,122.61 plus accruing interest.**

## EVIDENCE

The following items were introduced into evidence by the Division.

1. Field Audit Report completed July 10, 2003 with copy of Special Fuels Bulk User/User Notice of Tax Assessment dated August 26, 2003.
2. Dyed Fuel Information Sheet dated May 14, 2003 for vehicle bearing [a license plate number].
3. Analytical Record of Sample Taken dated May 16, 2003 for [a State reference number] indicating a dye concentration of 17.1 PPM.
4. Civil penalty assessment dated May 15, 2003 in the amount of \$1,000.00.
5. Dyed Fuel Information Sheet dated May 14, 2003 for vehicle bearing [a license plate number].
6. Analytical Record of Sample Taken dated May 16, 2003 for [a State reference number] indicating a dye concentration of 16.8 PPM.
7. Civil penalty assessment dated May 15, 2003 in the amount of \$1,000.00.
8. Letter dated May 16, 2003 from Taxpayer to the Department.
9. Letter dated July 1, 2003 from Eugene J. Cella to Taxpayer providing notice of an administrative tax hearing scheduled September 16, 2003.
10. Letter dated September 16, 2003 from Eugene J. Cella to Taxpayer.
11. Letter dated September 17, 2003 from Eugene J. Cella to Taxpayer scheduling an administrative tax hearing for October 6, 2003.
12. Letter dated December 2, 2003 from Eugene J. Cella to Taxpayer rescheduling the hearing to February 12, 2004.
13. 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.

The Division presented a brief for hearing to the Assistant Secretary, with copy to Taxpayer

The following items were introduced into evidence by the Taxpayer:

- TP 1. Copy of the Division audit.
- TP-2. Copy of Certificate of Title from the Commissioner of Motor Vehicles of North Carolina for the [1983 truck], acquired by taxpayer on June 2, 2000.

TP-3. Copy of Certificate of Title from the Commissioner of Motor Vehicles of North Carolina for the [1973 truck] acquired on June 2, 2001.

TP-4. Schedule of Taxpayer's off-road diesel purchases from June through December, 2003.

Taxpayer presented a brief for hearing to the Assistant Secretary, with copy to the Division.

### **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 May 14, 2003, Investigators D. R. Farmer and Heather Davis of the Motor Fuels Tax Division ("Division") were conducting a routine inspection of Taxpayer's motor fuel operation to detect the illegal use of nontaxpaid (dyed) fuel on the highways of this State.
2. The Division previously discovered that one of Taxpayer's contractors improperly used dyed nontaxpaid fuel on the roads of this State.
3. Taxpayer's contractor stated that he had obtained the dyed diesel fuel found in his truck from Taxpayer's off-road bulk fuel storage tank.
4. Taxpayer owns and operates [a golf course located in North Carolina].
5. During the inspection, the investigators discovered that two (2) of the three (3) diesel-powered licensed vehicles owned and operated by Taxpayer contained dyed fuel.
6. Taxpayer's [1983 truck with a VIN number] bearing [a license plate number] was parked at Taxpayer's place of business.
7. Investigator Farmer withdrew a sample of fuel from the supply tank of the [1983 truck].
8. The fuel appeared red in color, and therefore Investigator Farmer performed a field test using [a portable testing device] used to analyze motor fuel to determine the presence of red dye.
9. The field test revealed a dye content of 13.6 Parts-Per-Million (PPM).
10. The investigator forwarded a sealed fuel sample with [a State reference number] taken from the vehicle bearing [a license plate number] to the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory for additional analysis.
11. Stephen Benjamin, laboratory manager, performed spectrophotometer sulfur and dye testing on the submittal, determining that the sample contained 17.1 PPM red dye concentration.
12. The Division issued a civil penalty assessment in the amount of \$1,000.00 to Taxpayer on May 14, 2003.

13. While at Taxpayer's job site on May 14, 2003, Investigator Davis inspected a [1973 truck with a VIN number] registered to Taxpayer bearing [a license plate number]
14. Investigator Davis withdrew a sample of fuel from the supply tank of the [1973 truck].
15. The fuel appeared red in color, and therefore Investigator Davis performed a field test using [a portable testing device].
16. This field test revealed a dye content of 12.4 PPM.
17. Investigator Davis forwarded a sealed fuel sample with [a State reference number] taken from the vehicle bearing [a license plate number] to the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory for additional analysis.
18. State Chemist Anthony Winborne performed spectrophotometer sulfur and dye testing on the submittal, determining that the sample contained 16.8 PPM red dye concentration. (Exhibit 6, Analytical Record of Sample Taken).
19. The Division issued a civil penalty assessment in the amount of \$1,000.00 to Taxpayer on May 14, 2003.
20. N.C. Gen. Stat. § 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."
21. Taxpayer's use of dyed diesel fuel in its licensed vehicles is not allowed under the Code.
22. Taxpayer, through its representative, admitted that it used dyed fuel in the subject vehicles, but this use was due to a misapprehension and/or misapplication of the relevant State Revenue Act statutes.
23. The Division issued two (2) civil penalty assessments of \$1,000.00 each to Taxpayer pursuant to G.S. 105-449.117 on May 14, 2003 for the unlawful use of dyed diesel fuel in its registered highway vehicles.
24. Taxpayer responded by letter dated May 16, 2003 paying \$2,000.00 under protest, objecting to the imposition of the penalties, and requesting a hearing.
25. N.C. Gen. Stat. § 105-449.87(b) (Backup Tax and liability for the tax) provides 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 that storage facility is presumed to have been used* to operate a highway vehicle."

(Emphasis added).
26. After discovering that Taxpayer's licensed vehicles were operating in this State with dyed diesel fuel, Investigator Davis performed a special fuels audit of Taxpayer's operation, which was completed July 10, 2003.

27. The investigator determined that during the audit period, Taxpayer owned three (3) diesel -powered trucks and three (3) pieces of off-road equipment.
28. Taxpayer admitted that the odometers on the vehicles were broken, therefore it is impossible to determine operational miles or miles per gallon during the audit period
29. A review of fuel receipts from [Taxpayer's two (2) suppliers] revealed that Taxpayer purchased 40,384 gallons of fuel during the relevant audit period.
30. Taxpayer was unable to provide the investigator with any withdrawal records or other information to substantiate off-road usage of nontaxpaid fuel.
31. Taxpayer provided a schedule of off-road diesel purchases from June through December 2003.
32. These purchases were made outside the audit period.
33. The Division issued a proposed assessment based upon the total gallons delivered to taxpayer during the audit period.
34. Taxpayer objected to the imposition of road tax, penalty and interest, and the matter was consolidated with Taxpayer's May 16, 2003 request for hearing.
35. The Division referred both matters to the Assistant Secretary for Administrative Hearings, as they remain unresolved.
36. Prior to the hearing of this matter, the Division administratively waived the 25% penalty assessed in the special fuels bulk user audit.
37. The Division subsequently allowed an additional 25% credit for fuel used in its off-road equipment.
38. Based upon the waiver of penalty and by allowing credit for the proper use of off-road fuel, the Division thereby administratively amended the assessment proposed herein.

### **CONCLUSIONS OF LAW**

1. Division investigators had authority to inspect the fuel supply tank of the vehicles bearing [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. The use of dyed fuel in licensed vehicles by Taxpayer is not allowed under Section 4082 of the Code.
4. Visual inspection of the sample taken from the supply tank of the subject vehicles revealed an indication of red-colored (dyed) diesel fuel, which if confirmed would constitute a violation of G.S. 105-449.117.

5. Worksite analysis of the fuel sample taken indicated 13.6 and 12.4 parts-per-million (PPM) of red dye in the respective fuel samples, and thus a violation of the Motor Fuels Tax Laws.
6. Following stated Division procedures, investigators forwarded the samples of the red-colored fuel taken from Taxpayer's vehicles to the Department of Agriculture and Consumer Services Motor Fuels Laboratory for more precise analysis.
7. Subsequent analysis by the Department of Agriculture revealed the presence of 17.1 and 16.8 PPM red dye in the respective fuel samples, thereby confirming that a violation of G.S. 105-449.117 had occurred.
8. 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.
9. The Division possessed information that one of Taxpayer's contractors had obtained dyed fuel from Taxpayer for use in his licensed highway vehicle.
10. It appears that there are insufficient grounds to allow Taxpayer's request for a waiver of the two (2) dyed diesel penalties assessed by the Division.
11. 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).
12. The Division allowed a 25 % reduction in the taxable gallons as determined in the audit, based upon the proper use of nontaxpaid fuel in off-road equipment used by Taxpayer during the audit period.
13. Taxpayer maintained no fuel or withdrawal records for the audit period documenting nontaxable (off road) use of fuel, and presented no evidence to support additional credit for the proper, off-road use of such nontaxable fuel.
14. The assessment of civil penalties of \$2,000.00 for the improper use of dyed diesel fuel is proper and must be sustained.
15. The denial of Taxpayer's request for a refund of \$2,000.00 in civil penalties previously paid is proper.
16. The amended assessment of tax and applicable interest in the amount of \$8,122.61, plus accruing interest based upon the audit of Taxpayer's bulk fuel use is proper and must be sustained.

## DECISION

Division investigators properly inspected, withdrew, and analyzed the samples of fuel taken from Taxpayer's vehicles on May 14, 2003. The fuel samples were marked, sealed, and forwarded to the Department of Agriculture and Consumer Services motor fuels testing laboratory for further analysis. The record discloses that there was a proper chain of custody of the each fuel sample taken from the vehicles, and laboratory analysis disclosed the presence of dye in these samples. 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...." Taxpayer does not contest the fact that the vehicles in question were being operated with dyed fuel, and has not shown that its use falls within any exemption provided under State of federal law. Thus, the unlawful use of dyed diesel subjects Taxpayer to the penalty imposed by G.S. 105-449.117. Taxpayer's refund claim must be denied.

Additionally, the assessment initially imposed and subsequently amended is proper. Taxpayer has not presented any verifiable documentation to overcome the strong presumption contained in N.C. Gen. Stat. § 105-449.87(b), that Taxpayer's use of nonhighway fuel was taxable. Prior to the audit, the Division discovered one of Taxpayer's contractors was using dyed fuel obtained from Taxpayer. The Division has administratively waived the 25% penalty assessed in the audit, and has allowed an additional 25% credit for fuel properly used in its off-road equipment. Taxpayer has not demonstrated its entitlement to any further relief.

**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 assessments totaling \$2,000.00 issued herein May 14, 2003 and previously paid, and **DENIES** Taxpayer's request to waive these penalties.

The undersigned also **HEREBY AFFIRMS** the assessment proposed by the Division and subsequently amended for tax and interest totaling \$8,122.61, with interest accruing at the rate of \$ .97 per day.

This the 12<sup>th</sup> day of May 2004.

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Eugene J. Cella  
Assistant Secretary of Revenue