

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE SECRETARY
OF REVENUE

IN THE MATTER OF:)
)
The Motor Fuels Civil Penalty)
Assessments Issued April 23, 2003 and)
November 6, 2003 by the Secretary of)
Revenue of North Carolina,)
)
 v.)
)
[Taxpayer])
)

FINAL DECISION

(Docket No. 2003-300)

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina by written communication at the request of Taxpayer. [Attorney], Attorney at Law, represented Taxpayer, and Christopher E. Allen, Division General Counsel, represented the Motor Fuels Tax Division.

ISSUE

Whether the \$1,000.00 civil penalty assessments issued by the Division on April 23, 2003, and November 6, 2003, pursuant to G.S. 105-449.117 against Taxpayer for the unlawful use of dyed diesel fuel were proper.

EVIDENCE

The Division introduced the following items into evidence:

1. Dyed Fuel Information Sheet dated April 23, 2003.
2. Chain of Custody Control Document dated April 23, 2003.
3. N. C. Department of Agriculture and Consumer Services Analytical Record of Sample Taken dated May 1, 2003.

4. Civil Penalty Assessment dated April 23, 2003, for \$1,000.00.
5. Letter from [Attorney] to Julian W. Fitzgerald, Sr. dated May 21, 2003, requesting a hearing.
6. Letter from Eugene J. Cella to [Attorney], scheduling a hearing of the matter for July 1, 2003.
7. Letter from [Attorney] to Mr. Cella agreeing to have the proceeding conducted via written communication.
8. Letter from Mr. Cella to [Attorney] confirming that the hearing will proceed via written communication.
9. Dyed Fuel Information Sheet dated November 6, 2003.
10. Internal Revenue Service End User survey dated September 16, 2003.
11. IRS Chain of Custody Control Document dated October 8, 2003.
12. N. C. Department of Agriculture and Consumer Services Analytical Record of Sample Taken dated October 10, 2003.
13. Civil Penalty Assessment dated November 6, 2003, for \$1,000.00.
14. Letter from [Attorney] to Mr. Fitzgerald requesting a hearing on the penalty assessment and requesting that all matters be consolidated.
15. Field Audit Report dated December 2, 2003.
16. Notice of Tax Assessment dated December 17, 2003, totaling \$202.79.
17. Screen prints from the Department's Integrated Tax Administration System (ITAS).
18. Letter dated May 16, 2001 from Secretary Tolson to Mr. Eugene J. Cella, authorizing Mr. Cella to conduct administrative tax hearings.

FINDINGS OF FACT

From the above evidence entered into the record, the undersigned Assistant Secretary makes the following findings of fact:

1. On April 23, 2003, while performing a routine inspection of a paving plant where diesel vehicles operated, Motor Fuels Tax Division (“Division”) Investigator Heather Davis inspected a 1983 Mack truck with [VIN #], bearing [N.C. License plate number] and belonging to the above-referenced taxpayer.
2. The subject vehicle was located on the parking lot of Taxpayer’s paving plant near [City], N.C.
3. 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.
4. Preliminary visual inspection of the supply tank of the subject vehicle by Investigator Davis revealed the presence of red-colored fuel.
5. Investigator Davis then pulled a sample of fuel from the vehicle with [plate number], assigning to the sample State Reference Number 315687.
6. Investigator Davis subsequently forwarded the sealed sample container bearing State Reference Number 315687 to the State Department of Agriculture and Consumer Services Motor Fuels Laboratory for analysis, where State Chemist M. D. Cox performed sulfur and dye analysis on the fuel sample.
7. Testing of the sample revealed that the fuel contained 13.7 parts per million (PPM) dye and 0.155 percent sulfur by weight, confirming that a violation of G.S. 105-449.117 had occurred.
8. This Section 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.” N.C.G.S. § 105-449.117.
9. Investigator Davis issued a civil penalty assessment of \$1,000.00 pursuant to G.S. § 105-449.117 on April 23, 2003, for the unlawful use of dyed diesel fuel in a registered highway vehicle bearing [license plate number].
10. Taxpayer paid the penalty assessment and timely requested a hearing of this matter, contending that irrespective of the license and registration, the vehicle was used on the lot or otherwise off-road and that there was no intent to use the vehicle on the roads.
11. Because this matter remained resolved, it was referred to the Assistant Secretary for Administrative Tax Hearings for further proceedings.
12. On September 16, 2003, IRS Fuel Compliance Officer (FCO) Mitzi Beck collected a sample of fuel while performing a routine inspection of a construction

site located in [County], referred to by Taxpayer as the [Project], where diesel vehicles operated.

13. FCO Beck inspected a 1998 diesel-powered Grade-All with [VIN #], bearing [N.C. license plate number] and belonging to the above-referenced taxpayer.
14. The subject vehicle was stopped at I-85 near Mariah Penn Hospital in Henderson, NC.
15. On October 8, 2003 Officer Beck conveyed the fuel sample to Division Investigator D. R. Farmer.
16. Investigator Farmer subsequently forwarded the sealed sample container bearing State Reference Number 315596 and [N.C. license plate number] to the State Department of Agriculture and Consumer Services Motor Fuels Laboratory for analysis, where State Chemist M. R. Spencer performed sulfur and dye analysis on the fuel sample.
17. Testing of the sample revealed that the fuel contained 3.8 parts-per-million (PPM) dye, confirming that a violation of N.C.G.S. 105-449.117 had occurred.
18. Investigator Farmer issued a civil penalty assessment of \$1,000.00 pursuant to G.S. § 105-449.117 on November 6, 2003, for the unlawful use of dyed diesel fuel in a registered highway vehicle bearing [license plate number].
19. Taxpayer paid the penalty assessment and timely requested a hearing of this matter, asking that this appeal be consolidated with the appeal of the April 23, 2003, penalty.
20. Both penalty issues were placed on administrative hold pending the outcome of the Division's bulk user audit.
21. Predicated upon the discovery of dyed fuel in Taxpayer's licensed vehicles, Division Investigator Farmer contacted Taxpayer to perform a bulk fuel audit of the operations at the [Project] on October 30, 2003.
22. Based upon Taxpayer's extensive and diverse business, the Division elected to examine only this location rather than Taxpayer's entire statewide operations.
23. The investigator determined that taxpayer purchased 35,223.6 gallons of fuel during the audit period, which extended from October 1, 2002 through September 16, 2003.
24. These purchases were from one supplier, [Company] in Henderson, N.C.

25. Taxpayer stored dyed diesel fuel on the construction site and operated a service truck with a 400-gallon tank, which was properly marked and fitted with a pump and metering device.
26. In addition to this service truck, Taxpayer operated 19 other diesel-powered vehicles and 47 pieces of off-road equipment.
27. All licensed vehicles were checked and none contained dyed fuel.
28. Investigator Farmer found that Taxpayer maintained very detailed withdrawal records of fuel from both the nontaxable bulk storage and the service truck.
29. The investigator determined that of the 35,224.6 total gallons of off-road fuel purchased, Taxpayer could account for 34,539 gallons, leaving only 1,728 audited taxable gallons.
30. The investigator completed the audit on November 12, 2003, finding that Taxpayer owed \$185.83 in diesel road tax and \$1.70 in diesel inspection tax based upon 1,728 undocumented taxable gallons.
31. The Division thereafter issued a proposed tax assessment for \$187.53 plus accrued interest on December 12, 2003, totaling \$202.79.
32. Taxpayer paid this assessment without protest on January 16, 2004, and payment was posted to Taxpayer's account on January 22, 2004.
33. Taxpayer does not dispute the fact that the vehicle with [license plate number] had dyed diesel fuel in the supply tank, conceding that the circumstances constitute a technical violation of N.C.G.S. § 105-449.117.
34. Taxpayer contends that the circumstances in which the fuel was placed in the tank warrant a waiver of the penalty in question.
35. Specifically, Taxpayer contends that the fuel was placed in the supply tank as a result of an employee's error and was not known or authorized by the company.
36. Additionally, Taxpayer argues that the use of fuel in the tank was contrary to company policy and practice, and moreover, was the only instance in the history of the company that it has been cited for nontaxpaid fuel use in a licensed vehicle.
37. Taxpayer further contends that the vehicle (a water truck) was never used on the highway but used exclusively in an off-road capacity, and furthermore, that it was transported to the job site by lowboy trailer.
38. Taxpayer presented similar arguments respecting the penalty assessment for the use of dyed diesel fuel in the licensed 1998 Grade-All.

CONCLUSIONS OF LAW

From the above finding of fact the 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...."
2. 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.
3. Taxpayer's vehicles were licensed, bearing [license plate numbers], respectively.
4. Such use is not allowed under the State Revenue Act, the federal Internal Revenue Code, or the Division's Administrative Code.
5. Testing conducted by the North Carolina Department of Agriculture determined that the fuel samples contained red dye, verifying investigators' visual roadside observations that the samples were red in color.
6. Taxpayer 's documented use of dyed diesel in its licensed vehicles was unlawful, subjecting it to civil penalty assessments for each occurrence.
7. It appears that Taxpayer's request for a refund of the penalties previously paid must be denied.

WHEREFORE, in light of the above enumerated findings of fact and the conclusions drawn therefrom, the undersigned Assistant Secretary Division **HEREBY AFFIRMS** the penalties previously assessed and collected by the Division, and **DENIES** Taxpayer's request for refund of same.

This the 6th day of October 2004.

Eugene J. Cella
Assistant Secretary for Administrative Hearings
North Carolina Department of Revenue