

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:)
)
The Motor Fuels Civil Penalty)
Assessment issued March 22, 2003,)
by the North Carolina Secretary of)
Revenue in the amount of \$1,000.00.)
)
and)
)
The proposed Special Fuels Bulk User)
Assessment Issued July 21, 2003 in the)
amount of \$3,794.21 by the North)
Carolina Secretary of Revenue)
)
against)
)
[Taxpayer])

FINAL DECISION
Docket No. 2003-301

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

ISSUES

- I. Whether Taxpayer's use of dyed (nontaxpaid) diesel fuel in his licensed vehicle on the public highway is unlawful pursuant to G.S. 105-449.117, subjecting him to the \$1,000.00 civil penalty assessment issued March 22, 2003.
- II. Whether the Division properly calculated the Taxpayer's nonhighway fuel consumption based upon G.S. 105-449.87, resulting in the proposed assessment for tax, penalty, and interest issued July 21, 2003 totaling \$3,773.98 plus accruing interest.

EVIDENCE

The following items were introduced into evidence by the Division.

1. Dyed diesel information sheet dated March 22, 2003 for [a 2000 truck] with [a VIN number] bearing [a N.C. license plate number].
2. North Carolina Department of Agriculture and Consumer Services analytical record of sample taken dated March 24, 2003 showing dye concentrate of 1.1 Parts Per Million.
3. Civil penalty assessment for \$1,000.00 dated March 22, 2003.
4. Handwritten undated letter from Taxpayer to the Division requesting a hearing.
5. Field audit report dated May 17, 2003 in the amount of \$3,735.53.
6. Notice of tax assessment dated July 21, 2003 in the amount of \$3,773.98.
7. Letter dated July 1, 2003 from Eugene J. Cella to Taxpayer scheduling an administrative hearing for September 24, 2003
8. Letter dated August 12, 2003 from Eugene J. Cella to Taxpayer scheduling an administrative hearing for October 13, 2003.
9. 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.

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 March 22, 2003, during a special project known as "Red Alert," Division investigators, along with Motor Carrier Enforcement officers of the State Highway Patrol stopped Taxpayer's vehicle, [a 2000 truck] bearing [a N.C. license number] on [a North Carolina Highway].
2. 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.
3. Investigations Supervisor Martin Barrow of the Motor Fuels Tax Division ("Division") performed a roadside inspection and withdrew a fuel sample from the supply tank.
4. Preliminary visual inspection of the supply tank of the subject vehicle by Investigations Supervisor Barrow revealed the presence of red-colored fuel in Taxpayer's vehicle.
5. The sample was then tested using [a roadside-testing device] used to analyze diesel fuel.

6. The sample tested positive for red dye, registering 2.7 parts-per-million (PPM) on the [testing device].
7. Mr. Barrow forwarded the sample to the Department of Agriculture and Consumer Services Motor Fuels Laboratory for additional testing.
8. Subsequent laboratory analysis of the fuel sample determined dye content of 1.1 PPM in the fuel, indicating the use of nontaxpaid fuel on the State's highways.
9. The Division issued a civil penalty assessment for \$1,000.00 on March 22, 2003 pursuant to G.S. 105-449.117.
10. 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."
11. 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.
12. The Division issued the civil penalty assessment of \$1,000.00 pursuant to G.S. 105-449.117 on March 22, 2003 for the unlawful use of dyed diesel fuel in a registered highway vehicle bearing [a North Carolina license plate number].
13. Taxpayer responded by undated handwritten letter requesting a hearing on the penalty assessment, together with payment of the penalty.
14. Upon determining that Taxpayer was improperly operating a licensed vehicle with dyed diesel fuel on the highways of this State, Motor Fuels Tax Investigator R. S. Shearin performed a special fuels audit of Taxpayer's operation.
15. The investigator completed this audit on May 17, 2003.
16. Taxpayer owned and operated three (3) licensed diesel-powered trucks and four (4) farm tractors during the audit period.
17. However, only Taxpayer's [2000 truck] had dyed fuel in the supply tank.
18. Taxpayer maintained an above ground 1000-gallon nonhighway diesel storage tank supplied by [a fuel company], who delivered 11,489 gallons of fuel during the audit period.
19. Taxpayer maintained no fuel records for the audit period, and could provide no withdrawal records documenting nontaxable (nonhighway) use of fuel; therefore, the investigator could not allow credit for any off-road fuel usage.
20. The storage tank was properly marked as containing nonhighway fuel and was fitted with a pump, but the dispensing device had no throughput meter.
21. 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 that storage facility is presumed to have been used to operate a highway vehicle."

22. The Division issued an assessment based upon the audit on July 21, 2003 on \$3,773.98.
23. Because this matter remained unresolved, the Division referred it to the Secretary for an administrative hearing.
24. At the close of the hearing, the Division and Taxpayer discussed a possible resolution of the matter by allowing certain credits for off-road use of fuel.
25. The Division adjusted the diesel road tax assessment to \$910.14, interest to \$124.14, and waived the assessed penalty.
26. The amended assessment as of October 14, 2003 thereby totaled \$1,034.28. (See Exhibit 10).

CONCLUSIONS OF LAW

1. Division investigators had authority to inspect the fuel supply tank of the vehicle bearing [a N.C license plate number] 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 by Taxpayer is not allowed under Section 4082 of the Code.
4. Visual inspection of the sample taken from the supply tank of the vehicle revealed an indication of red- colored (dyed) diesel fuel, which if confirmed would constitute a violation of G.S. 105-449.117.
5. Roadside analysis of the fuel sample taken indicated 2.7 parts-per-million (PPM) of red dye in the fuel sample, and thus a violation of the Motor Fuels Tax Laws.
6. Following stated Division procedures, investigators forwarded the sample of the red-colored fuel taken from Taxpayer's vehicle bearing [a N.C. license plate number] 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 1.1 PPM red dye in the fuel sample bearing [a N.C. license plate number], 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. 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).
10. Taxpayer maintained no fuel or withdrawal records for the audit period documenting nontaxable (off road) use of fuel.
11. Following the hearing of this matter the Division and Taxpayer discussed a proposed resolution of this matter, and the Division adjusted the proposed assessment by allowing certain credits for off-road use of dyed diesel fuel.
12. The Division issued an assessment for tax and interest totaling \$1,034.28 by letter from Division Counsel by letter dated October 14, 2003.
13. The assessment of the civil penalty of \$1,000.00 for the improper use of dyed diesel fuel is proper and must be sustained.
14. The assessment of tax and applicable 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 sample of fuel taken from Taxpayer's vehicle on March 22, 2003. The fuel sample was marked, sealed, and forwarded to the Department of Agriculture and Consumer Services motor fuels testing laboratory for subsequent analysis. The record discloses that there was a proper chain of custody of the fuel sample taken from the vehicle bearing [a N.C. license plate number]. Laboratory analysis disclosed the presence of dye in the fuel sample. The quantity of dye in the sample taken from the vehicle was sufficient to establish that off-road fuel was used in a licensed highway vehicle. 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...." Moreover, G.S. 105-449.87(b) provides for a presumption that when nontaxpaid fuel is used on roads of this State, all fuel delivered to Taxpayer's storage facility is used improperly. It is incumbent upon a Taxpayer to then establish through withdrawal records and other information that the fuel was not improperly used. Here, Taxpayer failed to

maintain adequate records to overcome this presumption. The assessment of the civil penalty and the tax, including applicable interest assessed in the audit is affirmed.

WHEREFORE, based upon the above findings of fact and conclusions of law, the undersigned Assistant Secretary of Revenue **HEREBY AFFIRMS** in its entirety the proposed civil penalty assessment of \$1,000.00 issued herein March 22, 2003 and previously paid. Adjusted tax and interest totaling \$1,034.28 is also **AFFIRMED**.

This the 29th day of January, 2004.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue