STATE OF NORTH CAROLINA **BEFORE THE SECRETARY OF REVENUE**

COUNTY OF WAKE

IN THE MATTER OF:	)	
	)	
The Proposed Motor Fuels Kerosene	)	
Refund Assessment issued July 23, 2003	)	
by the North Carolina Secretary of	)	
Revenue in the amount of $$35,209.06	)	
	)	
Against	)	**FINAL DECISION**
	)	Docket No. 2003-414
[Taxpayer]	)	

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on December 1, 2003. [Taxpayer's COO & CFO] appeared at the hearing representing Taxpayer. Representing the Motor Fuels Tax Division were Julye Powell, Motor Fuels Tax Investigator and Christopher E. Allen, General Counsel.

ISSUE

Whether the Division properly assessed Taxpayer for refunds paid on claims for taxpaid (undyed) kerosene presumably sold for nonhighway use where it was shown that taxpayer failed to comply with the requirements of G.S. 105-449.105A for monthly refunds.

EVIDENCE

The following items were introduced into evidence by the Division.

1. ITAS screen print of Taxpayer's license information.

2. Division's Amended Field Audit Report completed May 19, 2003.

3. Taxpayer's Kerosene Claim for Refund for January 2003 dated February 17, 2003.

4. Taxpayer's Kerosene Claim for Refund for February 2003 dated March 19, 2003.

5. Notice of penalty assessment dated July 21, 2003 for $35,218.06

6. Letter dated August15, 2003 from Taxpayer to the Division appealing the assessment proposed by the Division.

7. ITAS screen prints indicating offsets allowed by the Division dated October 8, 23, and 27, 2003.

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

The Division submitted a brief for hearing with attached exhibits.

The Taxpayer introduced the following into evidence at the hearing:

TP-1. A brief with four (4) attachments, including photographs of kerosene dispensers upon which the assessment in part was based.

FINDINGS OF FACT

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

1. At all times relevant to the audit and assessment herein, Taxpayer was a distributor licensed with the Motor Fuels Tax Division pursuant to G.S. § 105-449.67.

2. Taxpayer sold kerosene to various retail outlets, and applied to the Division for refunds of taxes paid on undyed kerosene presumably sold for off-road use.

3. G.S. § 105-449.105A provides that a distributor may obtain a refund for the excise tax paid on kerosene sold to a retailer if the fuel is dispensed into a storage facility "marked with the phrase 'Undyed, Untaxed Kerosene, Nontaxable Use Only' or a similar phrase" and has a dispensing device that is not suitable for use in fueling a highway vehicle or is kept locked.

4. After reviewing Taxpayer's December 2002 Kerosene Claim for refund (Form GAS 1210), the investigator surveyed thirty-three (33) retail outlets that Taxpayer delivered kerosene fuel, and found twelve (12) stations out of compliance, including both stations owned by Taxpayer and those outlets that it sold fuel on a consignment basis, and are listed below:

    1. [A North Carolina Station]
    2. [A North Carolina Station]
    3. [A North Carolina Station]
    4. [A North Carolina Station]
    5. [A North Carolina Station]
    6. [A North Carolina Station]
    7. [A North Carolina Station]
    8. [A North Carolina Station]
    9. [A North Carolina Station]
    10. [A North Carolina Station]
    11. [A North Carolina Station]
    12. [A North Carolina Station]

5. The Division investigator met with Taxpayer's staff accountant on March 25, 2003 to discuss the results of her continuing investigation, and provided to Taxpayer a list of surveyed stations at that meeting.

6. The investigator also determined that Taxpayer was not complying with the requirement of G.S. § 105-449.115(e) that shipping documents (bills of lading) be maintained at each retail outlet for ninety (90) days from the date of delivery.

7. However, the investigator did not recommend, and the Division did not issue an assessment stemming from these shipping document violations as all bills of lading were maintained at Taxpayer's home office in Wilmington, and were made available to the investigator for inspection.

8. Taxpayer presented no evidence that the subject pumps were marked as required at any time during the audit period.

9. A number of the subject pumps at the affected retail outlets were blocked and locked, and were otherwise in compliance with the requirements of G.S. § 105-449.105A for refunds of taxes paid on kerosene fuel used off-road.

10. Subsequent post-audit follow-up inspections of the above-referenced outlets revealed that they were in full compliance with the marking requirements for fuel dispensing devices.

11. The investigator reviewed Taxpayer's monthly refund claims (Form GAS 1210) for the three-year audit period, and discovered that each of the above-referenced retail outlets were included in the monthly refund claims.

12. These twelve (12) stations were therefore excluded from the GAS 1210 refunds, and the gallons reflected by these sales were then adjusted downward in the audit.

13. The investigator also reviewed GAS 1210 refund claims filed for January and February 2003 and adjusted these claims by excluding the gallons sold to the referenced stations.

14. The Division issued an amended assessment for $25,062.55 plus applicable penalty and interest totaling $35,218.06 on July 21, 2003.

15. Taxpayer sent a timely notice of appeal to the Division, and the Division subsequently allowed certain set-offs in Taxpayer's favor, thereby reducing the amount of assessed tax.

16. Because of the additional set offs that the Department subsequently applied to the assessed tax, the outstanding liability is reduced to $12,566.88, including interest through March 1, 2004.

17. Taxpayer has presented good cause for a waiver of the assessed penalty of $6,681.68.

CONCLUSIONS OF LAW

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

1. Taxpayer was at all times relevant to this proceeding a kerosene distributor licensed pursuant to G.S. § 105-449.67, and filed for kerosene refunds using the Divisions form GAS-1210.

2. Division investigators discovered during routine retail station inspections that twelve (12) of thirty-three (33) of the retail outlets that taxpayer delivered kerosene to were not in compliance with G.S. § 105-449.105A.

3. Specifically, these outlets had storage facilities and dispensing devices that were not clearly marked with the phrase "Undyed, Untaxed, Kerosene, Nontaxable Use Only" or a similar phrase clearly indicating that the fuel is not to be used on the highway, as required by G.S. § 105-449.105A.

4. Each of the requirements of G.S. § 105-449.105A are absolute, and it is incumbent upon a kerosene distributor to comply with each of the requirements of the statute in order to qualify for refunds of taxes paid on kerosene presumably used off road.

5. Taxpayer failed to show that it was compliant with the refund statute in all respects, and has not established its entitlement to refunds received from the Division during the audit period.

6. The proposed assessment of taxes and applicable interest should therefore be sustained.

7. For good cause shown, the assessment of penalties should be waived.

DECISION

A distributor is allowed a monthly refund of the excise tax paid on kerosene sold to a retailer if the marking requirements of G.S. § 105-449.105A are met. In the course of her investigation, the Division investigator determined that Taxpayer failed to comply with these labeling requirements at nearly one-third of the retail outlets that it services. Although the pumps at issue were compliant in all other respects, Taxpayer admits that they did not fully adhere to the marking requirements of the refund statute. It is nearly axiomatic that refunds are analogous to exemptions from taxation, and the burden is upon taxpayers to bring themselves within the exemption or exclusion. *See Henderson v. Gill*, 229 N.C 313, 49 S.E.2d 754 (1948).

Taxpayer has not demonstrated compliance with the necessary statutory requirements for refunds of taxes paid on its kerosene deliveries. The assessment must therefore be affirmed.

WHEREFORE, based upon the above findings of fact and conclusions of law, the undersigned Assistant Secretary of Revenue **HEREBY AFFIRMS** the proposed assessment of $25,062.55, plus accrued interest issued herein on July 23, 2003. Penalty assessed by the Division is hereby **WAIVED**. Due to certain set-offs and amounts subsequently collected, the adjusted proposed tax liability and accrued interest to date, totaling $12,549.70 is **AFFIRMED.** Interest continues to accrue at the statutory rate of $1.71per day until paid.

This the 1st day of March, 2004.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue