

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:)
)
The Motor Fuels Civil Penalty)
Assessment issued July 7, 2003)
by the North Carolina Secretary of)
Revenue in the amount of \$1,000.00.)
)
and)
)
The Motor Fuels Civil Penalty)
Assessments issued May 8, 2003)
by the North Carolina Secretary of)
Revenue in the amount of \$2,000.00)
)
against)
)
[Taxpayer])

FINAL DECISION
Docket No. 2003-426

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

ISSUE

Whether Taxpayer's use of dyed (nontaxpaid) diesel fuel in his licensed vehicles on the public highway was unlawful pursuant to G.S. 105-449.117, subjecting him to the three (3) \$1,000.00 civil penalties assessments issued July 7, 2003 and May 8, 2003.

EVIDENCE

The following items were introduced into evidence by the Division.

1. Dyed Fuel Information Sheet dated April 30, 2003 prepared by [an Officer of the State Highway Patrol, Motor Carrier Enforcement].
2. Motor Fuels Tax Division/DMV Enforcement Receipt of Dyed Fuel Sample dated May 30, 2003 prepared by [the Officer] and signed by [Taxpayer's employee] for Taxpayer.

3. Internal Revenue Service chain of custody form for sample taken April 30, 2003 by [Officer] for [sample number].
4. N. C. Department of Agriculture and Consumer Services Analytical Record of Sample Taken dated May 16, 2003 for [a sample number], [N. C. license plate number].
5. Civil Penalty Assessment dated July 7, 2003 for \$1,000.00.
6. Dyed Fuel Information Sheet dated May 8, 2003 prepared by Investigator Davis for vehicle bearing [a N. C. license plate number].
7. N. C. Department of Agriculture and Consumer Services Analytical Record of Sample Taken dated May 26, 2003 for [a sample number].
8. Civil Penalty Assessment dated May 8, 2003 for \$1,000.00.
9. Dyed Fuel Information Sheet dated May 8, 2003 prepared by Investigator Davis for vehicle bearing [a N. C. license plate number].
10. N. C. Department of Agriculture and Consumer Services Analytical Record of Sample Taken dated May 16, 2003 for [sample number].
11. Civil Penalty Assessment dated May 8, 2003 for \$1,000.00.
12. Filed Audit Report dated July 10, 2003 with audit comments and attached exhibits.
13. Letter dated June 5, 2003 from Taxpayer to the Motor Fuels Tax Division protesting the penalties assessed May 8, 2003 and requesting a hearing.
14. Letter dated October 6, 2003 from Eugene J. Cella to Taxpayer scheduling the hearing of this matter for October 6, 2003.
15. Letter dated May 16, 2001 from Secretary Tolson to Mr. Eugene J. Cella authorizing Mr. Cella to conduct administrative tax hearings.

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 April 30, 2003, [an Officer of the State Highway Patrol, Motor Carrier Enforcement] stopped [a 2002 truck] at [a N. C. Highway weigh station] bearing [a N. C. license plate number] driven by [Taxpayer's employee].
2. Preliminary visual inspection of the supply tank of the subject vehicle by [the Officer] revealed the presence of red-colored fuel.
3. [The Officer] then pulled a sample of fuel from the vehicle with [a N. C. license plate number] and assigned to the sample [IRS reference number].

4. [Officer] subsequently forwarded the sealed sample container bearing [a N.C. license plate number] to the State Department of Agriculture & Consumer Services Motor Fuels Laboratory for analysis, where Melina Spencer performed sulfur and dye analysis on the fuel sample.
5. Testing of the sample revealed that the fuel contained 19.1 parts--per-million (PPM) dye and .129 percent sulfur by weight, indicating a violation of G.S. 105-449.117, which 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."
6. The Division issued a civil penalty assessment of \$1,000.00 pursuant to G.S. 105-449.117 on July 7, 2003 for the unlawful use of dyed diesel fuel in a registered highway vehicle bearing [a N. C. license plate number].
7. Because of the dyed diesel violation on April 30, 2003, Division Investigator Davis visited Taxpayer's premises on May 8, 2003 to inspect other registered vehicles. This inspection revealed two (2) additional violations.
8. Taxpayer's [2002 truck] bearing [a N. C. license plate number] was discovered to contain red-colored fuel.
9. Investigator Davis drew a sample from the supply tank and [a roadside analysis] determined that the sample contained 4.6 parts-per-million (PPM).
10. Upon delivery to the Motor Fuels Testing Laboratory, further testing revealed a dye concentration of 6.5 PPM, or roughly one-third of the dye concentration of the sample taken from this vehicle the previous week.
11. The Division issued a civil penalty assessment of \$1,000.00 pursuant to G.S. 105-449.117 on May 8, 2003 for the unlawful use of dyed diesel fuel in a registered highway vehicle bearing [a N. C. license plate number].
12. Taxpayer also had a third vehicle, a [1999 truck] bearing [a N. C. license plate number].
13. Investigator Davis drew a sample from the supply tank of this vehicle and forwarded the sample to the Motor Fuels Testing Laboratory for analysis.
14. This testing revealed a dye concentration of 19.8 PPM.
15. The Division then issued a civil penalty assessment of \$1,000.00 pursuant to G.S. 105-449.117 on May 8, 2003 for the unlawful use of dyed diesel fuel in a registered highway vehicle bearing [a N. C. license plate number].
16. As a result of the dyed diesel fuel violations, Investigator Davis performed a follow-up bulk fuel audit of Taxpayer's operation.
17. Taxpayer provided numerous fuel receipts from various retail stations [in-State and out-of-State].

18. Because Taxpayer had non-qualifying vehicles and had trip permits for his out-of-State travel, the Division investigator accepted these receipts, thereby allowing credit for taxpaid fuel in the audit.
19. Taxpayer recorded odometer readings on fuel tickets therefore these mileage records were accepted for purposes of the audit.
20. After reviewing Taxpayer's fuel receipts and mileage records, Investigator Davis determined that no shortage of taxpaid fuel existed, and that there was no additional tax due resulting from the bulk audit.
21. Taxpayer was personally informed on February 16, 2000 in the Division's Charlotte office that the use of dyed diesel fuel in its licensed vehicles was unlawful.

CONCLUSIONS OF LAW

1. State Highway Patrol Motor Carrier Enforcement Officers and Motor Fuels Tax Division investigators had authority to inspect the fuel supply tanks of the vehicles bearing [two 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 an indication of 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 with [a N. C. license plate number] on April 30, 2003 indicated 19.1 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 civil penalty assessment of \$1,000.00 on July 7, 2003, which must be sustained.
8. Laboratory analysis of the fuel sample taken from the vehicle with [a N. C. license plate number] on May 8, 2003 indicated 6.5 parts-per-million (PPM) of red dye in the fuel sample, which was substantially less than the sample taken one week earlier.
9. The dyed fuel in the supply tank was diluted by Taxpayer's subsequent purchase of taxpaid fuel, and such use was not a violation of the Motor Fuels Tax Laws.

10. The civil penalty assessment issued by the Division on May 8, 2003 for use of dyed fuel in the vehicle bearing [a N. C. license plate number] is not sustained.
11. Laboratory analysis of the fuel sample taken from the vehicle with [a N. C. license plate number] on May 8, 2003 indicated 19.8 parts-per-million (PPM) of red dye in the fuel sample, and thus a violation of the Motor Fuels Tax Laws.
12. The Division properly issued an assessment on civil penalty assessment of \$1,000.00 on May 8, 2003, which must be sustained.
13. 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).
14. The audit conducted by the Division investigator revealed no shortage of tax paid fuel and thus no additional taxes were due.
15. The assessment of the civil penalties totaling \$2,000.00 for the improper use of dyed diesel fuel is proper and must be sustained.

DECISION

WHEREFORE, based upon the above findings of fact and conclusions of law, the undersigned Assistant Secretary of Revenue **HEREBY AFFIRMS** the proposed civil penalty assessment of \$1,000.00 issued herein on July 7, 2003 for the improper use of dyed diesel fuel in the vehicle bearing [a N. C. license plate number]. The civil penalty assessment dated May 8, 2003 for the allegedly improper use of dyed diesel fuel in the vehicle bearing [a N. C. license plate number] is **NOT SUSTAINED**. The civil penalty assessment dated May 8, 2003 for the allegedly improper use of dyed diesel fuel in the vehicle bearing [a N. C. license plate number] is **AFFIRMED**.

It is **THEREFORE ORDERED** that the civil penalty assessment of \$1,000.00 issued May 8, 2003 for the use of dyed diesel fuel in vehicle bearing [a N. C. license plate number] paid under protest be refunded to Taxpayer. The remaining civil penalty assessments are affirmed.

This the 28th day of January, 2004.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue