

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

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

**IN THE MATTER OF:** )  
 )  
The proposed Special Fuels Bulk User )  
Assessment Issued January 23, 2003 in )  
the amount of \$4,475.08 by the North )  
Carolina Secretary of Revenue )  
 )  
against )  
 )  
[Taxpayer] )

**FINAL DECISION**  
Docket No. 2003-427

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on October 28, 2003. Representing the Motor Fuels Tax Division were Martin Barrow, Investigations Supervisor; and Christopher E. Allen, General Counsel. Neither Taxpayer nor anyone representing Taxpayer appeared, and no evidence or argument was presented on behalf of Taxpayer.

**ISSUE**

Whether, in the absence of records, the Division properly calculated the taxpayer's bulk fuel consumption resulting in the proposed assessment for tax, penalty, and interest issued January 23, 2002 totaling \$4,475.08.

**EVIDENCE**

The following items were introduced into evidence by the Division.

1. Motor Fuels Tax Division Field Audit Report completed December 20, 2001.
2. Motor Fuels Tax Division civil penalty assessment for highway use of dyed diesel fuel in the amount of \$1,000.00 dated March 5, 2001.
3. Notice of final assessment for highway use of dyed diesel fuel in the amount of \$1,000.00 dated April 26, 2001.
4. Notice of Tax Assessment, special fuels bulk user/user, dated January 23, 2002 in the amount of \$4,475.08.
5. Undated letter from Taxpayer to the Motor Fuels Tax Division requesting a hearing.

6. Letter dated May 1, 2002 from Christopher E. Allen to Taxpayer, responding to Taxpayer's request, asking for additional information, and suggesting a prehearing conference.
7. Letter dated October 2, 2002 from J. Martin Barrow to Taxpayer, renewing the Division's offer to review additional information.
8. Letter dated October 6, 2003 from Eugene J. Cella to Taxpayer scheduling an administrative hearing for October 28, 2003 at 2:00 PM in Raleigh, N.C.
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.

Taxpayer failed to appear at the hearing and has offered no evidence refuting the proposed assessment.

### **FINDINGS OF FACT**

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

1. During all times relevant to the audit and proposed assessment herein, Taxpayer conducted a plumbing and pipe laying business, operating three (3) diesel-powered vehicles.
2. The Division issued a dyed diesel penalty to Taxpayer on January March 5, 2001, resulting in the audit conducted herein.
3. This civil penalty assessment became final on April 26, 2001, and to date remains
4. Taxpayer operated as an intra-state motor carrier during the audit period, until he opened an International Fuel Tax Agreement (IFTA) account on April 1, 2001.
5. During the initial telephone interview, [Taxpayer] stated to the investigator that he did not keep fuel records during the period covered by the audit, but he maintained records after April 1, 2001 when he became licensed as an IFTA carrier.
6. Division investigators met Taxpayer at a jobsite on December 19, 2001 to discuss the audit and review records.
7. Taxpayer stated that he forgot the records, and that they were at his home. In the course of the audit, investigators checked Taxpayer's [truck] for dyed fuel and recorded the odometer reading on the [truck].
8. [Taxpayer] then stated that he kept records after he registered for IFTA, but that he was unaware that he had to maintain records before being with IFTA.

9. The Division investigator conducted a second meeting at Taxpayer's home on December 20, 2001 to review mileage records and fuel receipts, but [Taxpayer] could supply no fuel purchase records for the audit period.
10. Investigators did obtain odometer records for [two of Taxpayer's other trucks].
11. Taxpayer also provided fuel receipts for the period beginning the second quarter of 2001, but presented nothing for the period ending March 31, 2001.
12. Investigators conducted the mileage audit based upon miles indicated at the time of vehicle purchase, treating these as beginning miles for audit purposes.
13. [One of the trucks] had 117 miles on the odometer the day of purchase, the [1999 truck] had 24,443 miles, and the [1990 truck] although previously leased, registered 82,000 miles on the day of purchase.
14. Investigators determined ending miles for purposes of the audit by actual readings taken the day of the audit.
15. Division agents also performed a miles-per-gallon (MPG) analysis on the subject vehicles. They used a standard MPG of 7.00 for the [1990 Truck], as no data was available for the audit.
16. The [truck] MPG, for purposes of the audit, was averaged over the second quarter of 2001, as this was the only quarter for which Taxpayer had fuel receipts.
17. Investigators averaged the MPG for the [1999 truck] over the second and third quarter, and determined it obtained 6.53 MPG.
18. Taxpayer provided no fuel receipts documenting road purchases; therefore, investigators allowed no credit in the audit.
19. Based upon the audit, the Division issued a proposed user assessment on January 22, 2002.
20. Taxpayer sent the Division an undated letter requesting a hearing stating that "there are some unanswered questions that I feel need to be discussed (sic)."
21. The Division responded by letter dated May 1, 2002, stating that the written request was not received within thirty (30) days after the assessment was imposed, but the Division would not deny him an opportunity for a hearing.
22. The Division also requested any additional information that Taxpayer wanted included in a review of the matter.
23. By letter dated October 2, 2002, the Division again offered to review any relevant material that Taxpayer wished to send, and offered to apply it appropriately.
24. Taxpayer failed to respond, and to date has not presented any records or information to refute the assessment and failed to appear at the proceeding herein.

**CONCLUSIONS OF LAW**

1. Pursuant to G.S. 105-241.1(a), a proposed assessment of the Secretary is presumed correct, therefore it is incumbent upon a Taxpayer to present sufficient information to refute the assessment.
2. Taxpayer received notice of the time and date of the proceeding herein, and failed to appear and present any argument or information to refute the assessment issued January 23, 2002.
3. The assessment for tax, penalty and interest issued January 23, 2002 totaling \$4,475.08, plus applicable interest accrued at the statutory rate must be sustained.

**DECISION**

**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 assessment issued herein January 23, 2002 for tax of \$3,144.35, penalty of \$786.08, and accrued interest of \$891.06 for a total present liability of \$4,821.49. Interest accrues upon this liability at the statutory rate of 6% per annum, or \$.514 per day.

This the 28<sup>th</sup> day of January, 2004.

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Eugene J. Cella  
Assistant Secretary of Revenue