

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

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

**IN THE MATTER OF:** )  
)  
**The proposed Dyed Diesel Civil Penalty** )  
**Assessment Issued October 15, 2003 and** )  
**Audit Assessment Issued November 18,** )  
**2003 by the Secretary of Revenue of the** )  
**State of North Carolina** )  
)  
**against** )  
)  
**[Taxpayer]** )  
)

---

**FINAL DECISION**  
**(Docket No. 2004-270)**

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on June 21, 2004 at the request of Taxpayer. [Employee of Taxpayer], represented Taxpayer as its Attorney-in-Fact, and Julye Powell, Motor Fuels Investigator, and Christopher E. Allen, General Counsel, represented the Motor Fuels Tax Division.

**ISSUES**

**I.**

**Whether the \$1,250.00 civil penalty assessment issued by the Division on October 15, 2003, pursuant to G.S. §§ 105-449.117 and 105-449.118 against Taxpayer for the unlawful use and dispensing of dyed diesel fuel in a licensed highway vehicle was proper.**

**II.**

**Whether the Division properly calculated the taxpayer's fuel consumption based upon G.S. § 105-449.87, resulting in the proposed assessment for tax and interest issued November 18, 2004, and subsequently amended totaling \$7,676.97 including accruing interest.**

## **EVIDENCE**

The Division introduced the following items into evidence at the hearing:

1. Dyed Fuel Information Sheet dated October 15, 2003.
2. N. C. Department of Agriculture and Consumer Services Analytical Record of Sample Taken dated October 15, 2003.
3. Civil Penalty Assessment dated October 15, 2003, for \$1,250.00.
4. Notice of Appeal dated November 14, 2003.
5. Letter from Taxpayer dated November 14, 2003 detailing specific penalty assessments under objection.
6. Field Audit Report dated November 11, 2004 totaling \$12,725.00.
7. Notice of Tax Assessment dated November 18, 2003 totaling \$12,781.05.
8. Notice of Appeal from Taxpayer dated December 2, 2003.
9. Letter dated June 7, 2004 from Eugene J. Cella to Taxpayer scheduling the hearing of this matter for June 24, 2003.
10. Letter dated May 16, 2001 from Secretary Tolson to Mr. Eugene J. Cella authorizing Mr. Cella to conduct administrative tax hearings.

## **FINDING OF FACT**

From the evidence presented at the hearing, the undersigned Assistant Secretary makes the following finding of fact:

1. On October 15, 2003, Investigator J. S. Powell of the Motor Fuels Tax Division ("Division") stopped a 1993 Dodge truck registered to Taxpayer and bearing license plate number [plate #] at Taxpayer's job site located on [address] in Duplin County.
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. Preliminary visual inspection of the supply tank of the subject vehicle by Investigator Powell revealed the presence of red-colored fuel.

4. Investigator Powell then pulled a sample of fuel from the vehicle with plate number [plate #], assigning State Sample Reference number [#] to the fuel sample.
5. Investigator Powell subsequently forwarded the sealed sample container bearing license plate number [plate #] to the State Department of Agriculture & Consumer Services Motor Fuels Laboratory for analysis, where State Chemist Anthony Winborne performed sulfur and dye analysis on the fuel sample.
6. Testing of the sample revealed that the fuel contained 15.6 parts per million (PPM) red dye, indicating a violation of N.C.G.S § 105-449.117.
7. 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."
8. Investigator Powell issued a civil penalty assessment of \$1,000.00 pursuant to G.S. 105-449.117 for the unlawful use of dyed diesel fuel in a registered highway vehicle, and \$250.00 for dispensing nontaxpaid fuel into a highway vehicle on October 15, 2003, bearing license plate number [plate #].
9. Two (2) other vehicles belonging to a related company were also found to have dyed fuel in the supply tanks.
10. Taxpayer paid the \$1,250.00 penalty assessment and filed a timely notice of appeal.
11. N.C.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."
12. On November 3, 2003, Investigator Powell met with Taxpayer at an opening conference to discuss the upcoming audit of Taxpayer's business resulting from the dyed diesel fuel violation discovered on October 15, 2003.
13. The investigator determined that Taxpayer purchased the majority of its fuel from [fuel supplier] in [city], N.C.
14. A review of the relevant purchase invoices revealed that taxpayer purchased 40,179 gallons of nontaxpaid fuel during the audit period, with credit allowed for withdrawal records.
15. Certain fuel receipts designated delivery to various pieces of off-road equipment, and these were treated as withdrawal records for purposes of credit in the audit.

16. Thus the audited nontaxpaid gallons attributed to on-road use was reduced to 39,987 gallons.
17. Taxpayer had a 1,000-gallon nonhighway diesel tank mounted on a trailer, and six (6) pieces of off-road diesel-powered equipment.
18. One diesel-powered licensed vehicle was registered to Taxpayer, and it contained dyed diesel, for which taxpayer was assessed the penalty noted *supra*.
19. Investigator Powell completed the audit on November 13, 2003, finding that Taxpayer owed tax, penalties, and interest of \$12,725.00.
20. Taxpayer operated several pieces of off-road equipment, including skidders, cut machines and a loader.
21. Based upon the obvious use of nontaxpaid fuel to operate this equipment, the Division amended the audit and proposed assessment herein to reflect this off-road use of a portion of the 39,987 gallons of off-road, nontaxpaid fuel assessed in the audit.
22. The Division allowed a credit of twenty-five percent (25%), thus reducing the taxable gallons contained in the audit.
23. Therefore, 29,990 gallons are taxable after credit for 25% of the delivered gallons is allowed, thus the assessment proposed herein is amended to \$7,141.41 tax, \$616.98 interest, plus applicable accruing interest from November 18, 2003.
24. The Division waived the penalty assessed in the bulk audit in light of the above-referenced penalty previously paid.

### **CONCLUSIONS OF LAW**

Based upon the above findings of fact, the undersigned 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 unless that use is allowed under section 4082 of the Code."
2. As noted above, Taxpayer's vehicle was licensed, bearing license plate number [plate #].

3. The North Carolina Administrative Code Section 17 NCAC 12B .0503 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.
4. Testing conducted by the North Carolina Department of Agriculture determined that the fuel sample contained red dye in a concentrate of 15.6 Parts-Per-Million (PPM).
5. This verified the Division investigator's visual roadside observation and preliminary test result indicating that the sample contained red dye.
6. Taxpayer 's use of dyed diesel fuel in his licensed vehicle was unlawful, subjecting him to a civil penalty assessment.
7. The Taxpayer's request for a refund of the penalty previous paid must be denied.
8. N.C.G.S. 105-449.87 provides that when the Secretary determines that a bulk-end user has used nontaxpaid fuel to operate a highway vehicle dispensed from a storage facility containing nonhighway fuel, he may presume that all deliveries to that storage facility was used to operate a highway vehicle.
9. However, Taxpayer operated several pieces of off-road equipment, including skidders, cut machines and a loader.
10. Taxpayer also presented fuel receipts for highway purchases totaling 192 gallons, but presented no other withdrawal records or information documenting off-road use, but the investigator could therefore not allow an additional credit for such fuel in the audit.
11. The Division properly amended the audit and proposed assessment herein to reflect the obvious off-road use of a portion of the 39,987 gallons of off-road, nontaxpaid fuel assessed in the audit.
12. The Division adjusted the assessment to reflect that 29,990 gallons are taxable after credit for 25% of the delivered gallons is allowed.
13. Therefore, the assessment proposed herein is amended to \$7,141.41 tax, \$616.98 interest, plus applicable accruing interest from November 18, 2003.
14. The Division also waived the penalty assessed in the bulk audit in light of the above-referenced penalty previously paid.

## **DECISION**

Taxpayer's use of dyed diesel fuel in his licensed vehicle was unlawful, subjecting IT to a civil penalty assessment. 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 unless that use is allowed under section 4082 of the Code." Moreover, the North Carolina Administrative Code Section 17 NCAC 12B .0503 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. As noted above, Taxpayer's vehicle was licensed, bearing license plate number [plate #]. Testing conducted by the North Carolina Department of Agriculture determined that the fuel sample contained red dye in a concentrate of 15.6 Parts-Per-Million (PPM). This verified the Division investigator's visual roadside observation and preliminary test result indicating that the sample contained red dye. The Taxpayer's request for a refund of the penalty previously paid must be denied.

The assessment predicated upon the audit should also be affirmed. As noted above, Taxpayer presented fuel receipts for highway purchases totaling 192 gallons, but presented no other withdrawal records or information documenting off-road use. The investigator could therefore not allow an additional credit for such fuel in the audit. N.C.G.S. 105-449.87 provides that when the Secretary determines that a bulk-end user has used nontaxpaid fuel to operate a highway vehicle dispensed from a storage facility containing nonhighway fuel, he may presume that all deliveries to that storage facility

was used to operate a highway vehicle. Taxpayer has presented no other documentation to refute this strong statutory presumption. The assessment must stand.

However, Taxpayer operated several pieces of off-road equipment, including skidders, cut machines and a loader. The Division properly amended the audit and proposed assessment herein to reflect the obvious off-road use of a portion of the 39,987 gallons of off-road, nontaxpaid fuel assessed in the audit. The Division properly asserts that 29,990 gallons are taxable after credit for 25% of the delivered gallons is allowed. Therefore, the assessment proposed herein is amended to \$7,141.41 tax, plus applicable accruing interest from November 18, 2003. The Division properly waived the penalty assessed in the audit in light of the above-referenced dyed diesel penalty previously paid.

### **CONCLUSION**

**WHEREFORE**, in light of the above enumerated findings of fact and the conclusions drawn therefrom, the undersigned Assistant Secretary Division **HEREBY AFFIRMS** the penalties of \$1,250.00 previously assessed and collected by the Division, and **DENIES** Taxpayer's request for refund of same. The undersigned also **AFFIRMS**, as amended, the proposed bulk-user assessment for \$7,141.41 tax, \$949.20 interest, plus applicable accruing interest. The Division properly waived the penalty previously assessed in the audit. The present total tax deficiency is \$8,090.61, and interest accrues at the rate of \$1.29 per day until satisfied.

This the 8<sup>th</sup> day of October 2004.

---

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