

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. 2004-271)

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.

ISSUE

Whether the two (2) \$1,250.00 civil penalty assessments issued by the Division on October 15, 2003, pursuant to N.C.G.S. §§ 105-449.117 and 105-449.118 against Taxpayer for the unlawful use and dispensing of dyed diesel fuel in its licensed highway vehicles were proper.

EVIDENCE

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

1. Dyed Fuel Information Sheet dated October 6, 2003.
2. Receipt of Dyed Fuel Sample dated October 10, 2003.
3. N. C. Department of Agriculture and Consumer Services Analytical Record of Sample Taken dated October 7, 2003.

4. Civil Penalty Assessment dated October 10, 2003, for \$1,250.00.
5. Dyed Fuel Information Sheet dated October 15, 2003.
6. N. C. Department of Agriculture and Consumer Services Analytical Record of Sample Taken dated October 15, 2003.
7. Civil Penalty Assessment dated October 15, 2003, for \$1,250.00.
8. Dyed Fuel Information Sheet dated October 15, 2003.
9. N. C. Department of Agriculture and Consumer Services Analytical Record of Sample Taken dated October 15, 2003.
10. Civil Penalty Assessment dated October 15, 2003, for \$1,250.00.
11. Notice of Appeal of the October 15, 2003 penalty assessment from Taxpayer dated November 14, 2003 for the 1990 Freightliner.
12. Notice of Appeal of the penalty assessment from Taxpayer dated November 14, 2003 for the 1996 Volvo truck.
13. Letter dated November 14, 2003 from taxpayer to the Division including notices of appeal for the assessments issued October 15, 2003.
14. Letter dated June 7, 2004 from Eugene J. Cella to Taxpayer scheduling the hearing of this matter for June 24, 2003.
15. Memorandum 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 10, 2003, State Highway Patrol Motor Carrier Enforcement Officer R. S. Miller stopped a 1990 Freightliner registered to Taxpayer and bearing license plate number [plate #] on NC 11.
2. Investigators have the authority pursuant to N.C.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 Officer Miller revealed the presence of red-colored fuel.
4. Officer Miller then pulled a sample of fuel from the vehicle with plate number [plate #], assigning State Sample Reference number [#] to the fuel sample.
5. Motor Fuels Investigator J. S. Powell subsequently met Officer Miller, took possession of the sealed sample and forwarded the sealed container bearing license plate number [plate #] to the State Department of Agriculture and Consumer Services, Motor Fuels Laboratory, for analysis.
6. State Chemist M. R. Spenser performed sulfur and dye analysis on the fuel sample.
7. Testing of the sample revealed that the fuel contained 13.52 parts-per-million (PPM) red dye, indicating a violation of N.C.G.S. § 105-449.117.
8. 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."
9. Investigator Powell issued a civil penalty assessment of \$1,000.00 pursuant to N.C.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 10, 2003, bearing license plate number [plate #].
10. On October 15, 2003, after Officer Miller's discovery of dyed fuel in Taxpayer's vehicle, Investigator Powell inspected other vehicles located on taxpayer's job site.
11. Preliminary visual inspection of the supply tank of Taxpayer's 1990 Freightliner bearing license plate number [plate #] by Investigator Powell on October 12, 2003 revealed the presence of red-colored fuel, and field-testing using a petrospec indicated that the fuel contained 2.2 PPM of red dye.
12. Investigator Powell then pulled a sample of fuel from the vehicle with plate number [plate #], assigning State Sample Reference number [#] to the fuel sample, and forwarded the sample to the State Motor Fuels Testing laboratory for further analysis.
13. State Chemist Anthony Winborne performed sulfur and dye analysis on the fuel sample.
14. Testing of the sample revealed that the fuel contained 5.0 parts-per-million (PPM) red dye, indicating a violation of N.C.G.S § 105-449.117.

15. 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 pursuant to N.C.G.S. § 105-449.118 for dispensing nontaxpaid fuel into a highway vehicle on October 15, 2003, bearing license plate number [plate #].
16. While on Taxpayer's job site, Investigator Powell also inspected a 1996 Volvo truck registered to [Taxpayer] and bearing license plate number [plate #].
17. Preliminary visual inspection of the supply tank of this vehicle by Investigator Powell revealed the presence of red-colored fuel, and field testing using a petrospec indicated that the fuel contained 3.0 PPM of red dye.
18. Investigator Powell then pulled a sample of fuel from the vehicle with plate number [plate #], assigning State Sample Reference number [#] to the fuel sample, and forwarded the sample to the State Motor Fuels Testing laboratory for further analysis.
19. State Chemist Anthony Winborne performed sulfur and dye analysis on the fuel sample.
20. Testing of the sample revealed that the fuel contained 4.6 parts-per-million (PPM) red dye, indicating a violation of N.C.G.S § 105-449.117.
21. On October 15, 2003, Investigator Powell issued a civil penalty assessment of \$1,000.00 pursuant to N.C.G.S. § 105-449.117 for the unlawful use of dyed diesel fuel in a registered highway vehicle, and \$250.00 pursuant to G.S. § 105-449.118 for dispensing nontaxpaid fuel into a highway vehicle bearing license plate number [plate #].
22. Taxpayer paid each of the \$1,250.00 penalty assessments outlined *supra*, and filed a timely notice of appeal for two (2) of the assessments issued to [Taxpayer].
23. Taxpayer has not appealed the first \$1,250.00 penalty assessment issued on October 10, 2003.

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. The North Carolina Administrative Code Section 17 NCAC 12B .0503 provides that the penalties set out in N.C.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.
3. As noted above, both of Taxpayer's vehicles were licensed, bearing license plate numbers [plate #] and [plate #].
4. Testing conducted by the North Carolina Department of Agriculture determined that all three (3) fuel samples contained the presence of dye, sufficient under the APA to constitute a violation in each instance.
5. This testing verified the Division investigator's visual roadside observations and preliminary test results indicating that the samples contained red dye.
6. Taxpayer 's use of dyed diesel fuel in its licensed vehicles was unlawful, subjecting it to each of the assessed civil penalties.
7. The fact that the 1990 Freightliner was cited twice is not an impediment to the Division's second assessment.
8. This vehicle was discovered two times over a period of nine (9) days, during which Taxpayer operated the vehicle over the roads using nontaxpaid fuel.
9. Moreover, another licensed vehicle operated by a closely related company on Taxpayer's job site and owned by Taxpayer was also found to be using nontaxpaid fuel.
10. Taxpayer's two (2) requests for refund of the penalties issued October 15, 2003 and previous paid must be denied.

CONCLUSION

In light of the above-enumerated conclusions of law and the findings of fact drawn therefrom, the undersigned concludes that each penalty assessment is proper. Taxpayer has not contested the fact that the vehicles in question were being operated with dyed fuel, and has not shown that its use falls within the exemption provided by Section 4082 of the Code. Thus, the unlawful use of dyed diesel subjects Taxpayer to the penalty

imposed by N.C.G.S. § 105-449.117 in each instance, and the unlawful dispensing of fuel in licensed vehicles likewise subjects Taxpayer to the penalties imposed under N.C.G.S. § 105-449.118. Each assessment must be affirmed in all respects.

WHEREFORE, Taxpayer's request for refund of penalties previously paid is **HEREBY DENIED**.

This the 8th day of October 2004.

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