

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE SECRETARY
OF REVENUE

IN THE MATTER OF:)
)
The Proposed Denial of Refund of Motor)
Fuels Dyed Diesel Civil Penalty dated)
June 4, 2003 Previously Paid,)
)
And)
)
The Proposed Motor Fuels Bulk User)
Tax Amended Assessment Issued)
March 30, 2004 by the Secretary of)
Revenue of North Carolina in the)
Amount of \$3,599.19)
)
Against)
)
[Taxpayer])

FINAL DECISION
(Docket No. 2004-312)

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on August 26, 2004. [President] appeared on behalf of Taxpayer. Martin Barrow, Chief Motor Fuels Tax Investigator, and Christopher E. Allen, General Counsel, Motor Fuels Tax Division, appeared representing the Division.

ISSUES

I.

Whether Taxpayer's use of dyed (nontaxpaid) diesel fuel in his licensed vehicle on the public highway is unlawful pursuant to G.S. §105-449.117, subjecting him to the \$1,000.00 civil penalty assessment issued June 3, 2003.

II.

Whether the Division properly calculated the taxpayer's nonhighway fuel consumption resulting in the proposed amended assessment issued March 30, 2004 pursuant to G.S. §§ 105-449.87(b) and 105-241.1 for tax and interest totaling \$3,599.19 plus accruing interest.

EVIDENCE

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

1. Dyed diesel information sheet dated June 4, 2003 for a 2000 Dodge with [VIN] bearing [N.C. license plate number].
2. North Carolina Department of Agriculture and Consumer Services analytical record of sample taken dated June 9, 2003 showing dye concentrate of 14.7 Parts Per Million.
3. Civil penalty assessment for \$1,000.00 dated June 4, 2003.
4. Field audit report dated March 14, 2004 in the amount of \$3,599.19, including accrued interest through March 22, 2004
5. Notice of tax assessment dated March 30, 2004 in the amount of \$3,599.19.
6. Letter dated April 21, 2004 from taxpayer to the Division requesting a hearing on the tax assessment.
7. Letter dated July 9, 2004 from Eugene J. Cella to Taxpayer scheduling an administrative hearing for May 17, 2004.
8. 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.

The Division also presented a brief at the hearing. Taxpayer did not present any evidence.

FINDINGS OF FACT

From the evidence presented at the hearing, the Assistant Secretary draws the following findings of fact:

1. On June 4, 2003, during a routine check for dyed diesel violations, Heather Davis, Investigator with the Motor Fuels Tax Division (hereinafter "Division"), stopped a 2000 Dodge truck operated by [an employee] bearing North Carolina [license plate #] on Highway 64 near Lexington.
2. Visual inspection of the fuel in the vehicle's supply tank revealed that it was red in color, and preliminary roadside screening using a Petrospec indicated that the fuel contained 10.1 Parts-Per-Million (PPM) of red dye, or nonhighway, non-taxed fuel.
3. Motor Fuels Investigator Heather Davis withdrew a sample of fuel from the supply tank of the 2000 Dodge truck bearing [license plate number], sealed the container, and forwarded the sample to the State Department of Agriculture and Consumer Services for further testing.
4. Subsequent laboratory analysis revealed that the sample contained 14.7 PPM of red dye.
5. The Division issued a civil penalty assessment on June 4, 2003 for \$1,000.00 pursuant to N.C.G.S. 105-449.117.
6. Motor Fuels 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.
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 unless that use is allowed under section 4082 of the Code."
8. A violation of this section subjects the registered owner of the vehicle to a \$1,000.00 civil penalty.
9. The Division issued an assessment for \$1,000.00 pursuant to N.C.G.S. 105-449.117 on June 4, 2003.
10. Taxpayer has paid this assessment under protest.
11. After determining that Taxpayer was operating a vehicle with dyed diesel fuel on the highways of this State, Division Investigator D. R. Farmer performed a special fuels audit of Taxpayer's operation pursuant to G.S. §105-449.87(b).
12. This Subsection provides that the Secretary may presume that all fuel delivered to a bulk storage facility was used on the roads upon a determination that dyed fuel is found in a highway vehicle.

13. Investigator Farmer completed this audit on March 10, 2004, determining that Taxpayer owed \$3,577.79 in road and inspection taxes and interest.
14. The investigators recommended penalties, but the Division did not assess penalties in the proposed assessment issued March 30, 2004.
15. Taxpayer, through its representative, contacted the Division by letter dated April 21, 2004 requesting a hearing.
16. The investigator determined in the course of the audit that taxpayer purchased bulk fuel from [two suppliers] during the audit period.
17. Taxpayer maintained a five hundred (500) gallon tank during the audit period. None of the fuel receipts provided by Taxpayer for purchases from [supplier] indicated gallon amounts.
18. Based upon the records from [supplier], the investigator determined that taxpayer purchased 18,265 gallons of off-road, dyed diesel fuel.
19. Taxpayer operated four (4) pieces of off-road equipment during the audit period, including 1 1998 Timberjack Skidder, a Barko loader, a 1996 John Deere Feller Buncher and a 1994 Grapple skidder.
20. In addition to the 2000 Dodge truck, Taxpayer operated two (2) road tractors during the relevant period.
21. However, Taxpayer did not make these vehicles available for inspection.
22. Taxpayer maintained no withdrawal records or logs for the bulk fuel during the audit period.
23. Based upon the documented use of off-road fuel in nonhighway vehicles, the investigator allowed a twenty-five percent (25 %) credit for fuel used off-road to the 18,265 gallons of fuel purchased during the audit period.
24. Thus 13,698 gallons of bulk fuel purchased during the examination period was applied to the audit, resulting in an assessment of road tax, inspection tax, and applicable interest totaling \$3,577.79 on March 30, 2004, plus accruing interest.
25. Because this matter was not resolved, it was referred to the Assistant Secretary for an administrative hearing.

CONCLUSIONS OF LAW

Based on the above findings of fact, the undersigned Assistant Secretary 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].
3. Taxpayer's highway use of dyed diesel fuel in its licensed vehicle was not exempt under the Code.
4. Testing conducted by the North Carolina Department of Agriculture Motor Fuels Laboratory determined that the fuel sample contained red dye in a concentrate of 14.7 Parts-Per-Million (PPM).
5. The North Carolina Administrative Code provides that the Secretary may assess the \$1,000.00 penalty whenever the presence of dye is detected in the supply tank of a diesel-powered vehicle. (*See* Title 17 NCAC 12B 0.0503).
6. The Taxpayer's request for a refund of the penalty previous paid must be denied.
7. Taxpayer presented no withdrawal records documenting off-road use or other accounting of its off-road fuel.
8. The investigator properly determined the number of gallons of nontaxpaid fuel delivered to the storage tank, and then allowed credit a 25% credit for such fuel based upon the off-road diesel-powered equipment operated during the audit period.
9. The assessment thus computed was properly issued March 30, 2004 in the amount of \$3,599.19, plus accrued interest.
10. Taxpayer has not presented any records or other evidence demonstrating its entitlement to further relief.
11. The assessment of tax and interest stemming from the bulk audit must be affirmed.

WHEREFORE, based upon the above findings of fact and conclusions of law, the undersigned Assistant Secretary of Revenue **HEREBY AFFIRMS** in its entirety the civil penalty assessment of \$1,000.00 issued on August 29, 2003, and taxpayer's request for a refund of same is **DENIED**. Likewise, the assessment of tax in the amount of \$3,257.28 and interest of \$435.11, for a total liability of \$3,692.39 is **AFFIRMED**, including accruing interest at the rate of \$.45 per day until paid.

This the 23rd day of November 2004.

Eugene J. Cella
Assistant Secretary of Revenue

STATE OF NORTH CAROLINA

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WAKE COUNTY

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 Fuels Dyed Diesel Civil Penalty dated)
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**The Proposed Motor Fuels Bulk User)
 Tax Amended Assessment Issued)
 March 30, 2004 by the Secretary of)
 Revenue of North Carolina in the)
 Amount of \$3,599.19)
)
 Against)
)
**Curry Lumber Company, Inc.)
 1405 Bowers Road)
 Lexington, North Carolina 28675)******

**FINAL DECISION
(Docket No. 2004-312)**

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