

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE SECRETARY
OF REVENUE

IN THE MATTER OF:)
)
The Proposed Motor Fuels (Kerosene))
Refund Assessment issued February 19,)
2003, By the North Carolina Secretary of)
Revenue in the amount of \$27,583.56)
)
Against)
)
[Taxpayer])

FINAL DECISION
(Docket No. 2004-313)

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on September 9, 2004 at the request of Taxpayer. Corporate principals represented Taxpayer, and representing the Motor Fuels Tax Division was Heather Davis, Motor Fuels Tax Investigator and Christopher E. Allen, General Counsel.

ISSUE

Whether the Division properly assessed Taxpayer for refunds paid on claims for tax paid (undyed) kerosene presumably sold for nonhighway use where it was shown that taxpayer failed to comply with the requirements of G.S. 105-449.105A for monthly refunds.

EVIDENCE

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

1. ITAS screen print of Taxpayer's license information.

2. Division's Amended Field Audit Report dated February 9, 2004.
3. Notice of Tax Assessment dated February 24, 2004 for \$27,583.56 inclusive of tax, penalty and interest.
4. Letter dated May 4, 2004 from the Division to Taxpayer.
5. Letter dated May 21, 2004 from Taxpayer to the Division.
6. Letter dated August 4, 2004 from Eugene J. Cella to Taxpayer scheduling a hearing of the matter for September 14, 2004.
7. Letter dated August 9, 2004 from Taxpayer to Eugene J. Cella requesting that the hearing be rescheduled.
8. Letter dated August 16, 2004 from Eugene J. Cella to Taxpayer rescheduling the hearing of the matter for September 9, 2004.
9. ITAS screen print indicating that the tax liability, with accrued interest, is \$28,049.19 through September 9, 2004.
10. Notice of penalty assessment for failure to pay dated April 13, 2004 in the amount of \$2,012.67.
11. Memorandum dated May 16, 2001 by E. Norris Tolson, Secretary of Revenue, delegating to Eugene J. Cella the authority to conduct hearings required or allowed under Chapter 105 of the General Statutes.

Taxpayer introduced the following exhibits into the record at the hearing:

- TP-1. Photograph of retail kerosene pump.
- TP-2. Signed statements from eleven (11) employees of [retail outlet] operated by Taxpayer.
- TP-3. Photograph of retail kerosene pump.
- TP-4. Signed statements from nine (9) employees of [retail outlet] operated by Taxpayer.
- TP-5. Copies of inspection reports from the North Carolina Department of Agriculture Standards Division for [retail outlet], together with reports from the Department of Environment and Natural Resources.

TP-6. Copies of inspection reports from the North Carolina Department of Agriculture Standards Division for [retail outlet], together with reports from the Department of Environment and Natural Resources.

FINDINGS OF FACT

From the evidence presented, the undersigned Assistant Secretary entered the following findings:

1. At all times relevant to the audit and assessment herein, Taxpayer was a distributor licensed with the Motor Fuels Tax Division pursuant to G.S. § 105-449.67.
2. Taxpayer sold kerosene to various retail outlets, and applied to the Division for refunds of taxes paid on undyed kerosene presumptively sold for off-road use.
3. G.S. § 105-449.105A(2) provides that a distributor may obtain a refund for the excise tax paid on kerosene sold to a retailer if the fuel is dispensed into a storage facility that meets both of the following conditions:
 - a. It is marked with the phrase “Undyed, Untaxed Kerosene, Nonhighway Use Only” or a similar phrase clearly indicating that the fuel is not to be used to operate a highway vehicle; and
 - b. It either has a dispensing device that is not suitable for use in fueling a highway vehicle or is kept locked by the retailer and must be unlocked by the retailer for each sale of kerosene.
4. The auditor surveyed two (2) out of three (3) retail outlets that Taxpayer delivered kerosene fuel, and found two stations out of compliance, [retail outlet] and [retail outlet].
5. The retail pump at the [***] location was improperly marked, while the [***] retail pump was not marked at all.
6. Taxpayer admitted that these two (2) locations were not in compliance with the relevant refund statutes.
7. On September 8, 2003 the investigator went to [retail outlet] and found that retail kerosene pump in full compliance with all relevant statutes.
8. Based upon the documented noncompliance at the two retail outlets, the investigator reviewed taxpayer’s Form Gas 1210 refund claims from October 2000 through May 2003.

9. The investigator adjusted Taxpayer's refunds downward by deducting from taxpayer's refund claims all fuel deliveries to the two noncompliant retail stations during the audit period.
10. The Division issued an assessment for \$27,583.56 including applicable penalty and interest on February 24, 2004.
11. Taxpayer apparently sent an untimely notice of appeal to the Division on March 30, 2004, but the Division has no record of this correspondence.
12. Nevertheless, the Division placed the matter on administrative hold, and referred the matter to the Secretary of Revenue for an administrative hearing.
13. Taxpayer sent the Division a letter dated May 21, 2004 detailing its objections to the assessment.
14. Taxpayer contends that as evidenced by photographs, the pumps were adequately blocked, and further, power to the pumps was turned off and they were not turned on until the store clerk verified that the fuel was properly used.
15. Taxpayer stated that it relied upon its vendors to install and mark the pumps, stating that they "could only assume that the installer knew how to properly label the dispensers."
16. Taxpayer also stated that the State Department of Agriculture Standards Division performs an annual inspection at each location and did not report any violations.
17. It appears that the assessment should be affirmed.
18. Taxpayer has a record of good compliance with the State revenue laws.

CONCLUSIONS OF LAW

From the above findings of fact, the Assistant Secretary enters the following conclusions of law:

1. Taxpayer was at all times relevant to this proceeding a kerosene distributor licensed pursuant to G.S. § 105-449.67, and filed for kerosene refunds using the Division's form GAS-1210.
2. Division investigators discovered during routine retail station inspections that two (2) of three (3) of the retail outlets that taxpayer delivered kerosene to were not in compliance with G.S. § 105-449.105A.

3. Specifically, these outlets had storage facilities and dispensing devices that were not clearly marked with the phrase “Undyed, Untaxed, Kerosene, Nontaxable Use Only” or a similar phrase clearly indicating that the fuel is not to be used on the highway, as required by G.S. § 105-449.105A.
4. Each of the requirements of G.S. § 105-449.105A are absolute, and it is incumbent upon a kerosene distributor to comply with each of the requirements of the statute in order to qualify for refunds of taxes paid on kerosene presumably used off road.
5. Taxpayer admitted that the retail kerosene pumps were not properly marked as required by statute.
6. Taxpayer failed to show that it was compliant with the refund statute in all respects, and has not established its entitlement to refunds received from the Division during the audit period.
7. It is axiomatic that refunds are analogous to exemptions from taxation, and the burden is upon a taxpayer to bring themselves within the expressly stated exemption or exclusion. *See Henderson v. Gill*, 229 NC 313, 49 S.E.2d 754 (1948).
8. The proposed assessment of taxes and applicable interest should therefore be sustained.
9. For good cause shown, the assessment of penalties should be waived.

WHEREFORE, the undersigned **HEREBY AFFIRMS** the proposed assessment for taxes previously refunded to Taxpayer in the amount of \$20,126.68 and accrued interest of \$3,757.25, for a total liability of \$23,883.93. The penalty previously assessed is **HEREBY WAIVED**, for good cause shown. Interest accrues at a rate of \$.2.75 per day until paid.

This the 8th day of December 2004.

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

