

**STATE OF NORTH CAROLINA**

**BEFORE THE SECRETARY  
OF REVENUE**

**WAKE COUNTY**

**IN THE MATTER OF:** )

**The Motor Fuels Civil Penalty** )

**Assessments Issued July 23 and July 26,** )

**2004 by the Secretary of Revenue of** )

**North Carolina, totaling \$2,000.00** )

**against** )

**[Taxpayer]** )

**FINAL DECISION  
(Docket No. 2004-402)**

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This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on October 19, 2004. Neither Taxpayer nor anyone representing Taxpayer appeared. Representing the Motor Fuels Tax Division were Julye Powell, Motor Fuels Tax Investigator; and Christopher E. Allen, General Counsel.

**ISSUES**

**I.**

**Whether the civil penalty assessment of \$1,000.00 issued by the Division on July 26, 2004 pursuant to N.C.G.S. § 105-449.118A against Taxpayer for refusing to allow Division investigators to take a fuel sample was proper.**

**II.**

**Whether the civil penalty assessment of \$1,000.00 issued by the Division on July 23, 2004 pursuant to N.C.G.S. § 105-449.117 against Taxpayer for the unlawful use of dyed diesel fuel was proper.**

## **EVIDENCE PRESENTED BY THE DIVISION**

The Division introduced the following items into the record:

1. Motor Fuel User Profile prepared by Division investigator dated July 28, 2004.
2. Letter from Julye Powell to Taxpayer dated July 26, 2004.
3. Civil penalty Assessment for \$1,000.00 dated July 26, 2004.
4. Dyed Fuel Information Sheet dated July 23, 2004.
5. N.C. Department of Agriculture and Consumer Services analytical record of sample taken dated July 26, 2004.
6. Civil Penalty Assessment for \$1,000.00 dated July 23, 2004.
7. Letter from Taxpayer to E. Norris Tolson dated August 19, 2004 requesting a hearing.
8. Copy of check from Taxpayer to the Department of Revenue dated August 19, 2004 for \$2,000.00.
9. Letter dated September 16, 2004 from Eugene J. Cella to Taxpayer scheduling an administrative tax hearing for October 19, 2004.
10. 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.

## **FINDINGS OF FACT**

From the above items of record, the undersigned Assistant Secretary enters the following findings:

1. This matter arose as a result of a routine inspection of taxpayer's farming business by Motor Fuels Tax Division Investigator Julye Powell on July 22, 2004.
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. Investigator Powell initially entered taxpayer's property at 9:00 AM on July 22, 2004 to inspect several qualified vehicles.

4. She spoke with a family member (a niece) at the farm, gained permission to write down license plate numbers, and requested that the owner contact her upon his return.
5. Investigator Powell then returned to the farm that afternoon at 4:30 PM, requested permission to inspect a 1997 Ford truck bearing license plate number [plate #] registered to Taxpayer, but Taxpayer clearly and unequivocally denied permission and the inspection was not completed.
6. On the basis of this refusal and pursuant to N.C.G.S. § 105-449.118A, the Division issued a penalty for refusing to allow the taking of a motor fuel sample.
7. The next day, on July 23, 2004, Investigator Powell, along with Investigator D. R. Farmer, returned to location to inspect motor vehicles.
8. The subject vehicle was a 1997 Ford truck bearing license plate number [Plate #] registered to Taxpayer.
9. Investigator Powell performed an inspection of the vehicle and withdrew a fuel sample from the supply tank.
10. Preliminary visual inspection of the supply tank of the subject vehicle by Investigator Powell revealed the presence of red-colored fuel in Taxpayer's vehicle.
11. The sample then tested positive for red dye, registering 8.8 parts-per-million (PPM) on the Petrospec fuel analyzer.
12. Investigator Powell forwarded the sample to the Department of Agriculture and Consumer Services Motor Fuels Laboratory for additional testing.
13. Subsequent laboratory analysis of the sample determined a dye content of 9.0 PPM in the fuel, indicating the use of nontaxpaid fuel on the State's highways.
14. 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."
15. Section 17 NCAC 12B .0503 of the North Carolina Administrative Code 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.

16. The Division issued a civil penalty assessment for \$1,000.00 pursuant to N.C.G.S. 105-449.117 on July 23, 2004 for the unlawful use of dyed diesel fuel in a registered highway vehicle bearing North Carolina license plate number [Plate #].
17. Taxpayer responded by paying both assessments and requesting a hearing on the matters by letter dated August 24, 2004.
18. Taxpayer failed to appear at the hearing or present any information tending to refute the assessment.

### **CONCLUSIONS OF LAW**

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

1. Investigator Powell visited taxpayer's property twice on July 22, 2003, providing Taxpayer with more than adequate notice of her intent to inspect Taxpayer's vehicle bearing NC license plate number [Plate #].
2. On the second visit Investigator Powell informed Taxpayer of the consequences of a refusal to allow inspection of the subject vehicle.
3. Taxpayer's unwillingness to cooperate necessitated a third visit to taxpayer's farm the next day, this time with an additional Motor Fuels Investigator.
4. Taxpayer's refusal subjects him to the civil penalty for refusing to allow the taking of a sample pursuant to N.C.G.S. § 105-449.118A.
5. The civil penalty assessment for \$1,000.00 for refusing to allow the inspection of taxpayer's vehicle bearing NC license plate number [Plate #] is proper.
6. 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."
7. The North Carolina Administrative Code provides that the Division may assess a penalty whenever the presence of red dye is detected in a sample taken from the supply tank of a highway vehicle.
8. As noted above, Taxpayer's vehicle was licensed, bearing North Carolina license plate number [Plate#].
9. Moreover, testing conducted by the North Carolina Department of Agriculture determined that the fuel sample contained red dye in a concentrate of 9.0 Parts-Per-Million (PPM).

10. This verified the Division investigator's visual roadside observation and preliminary test result indicating that the sample contained red dye.
11. Taxpayer 's use of dyed diesel fuel in his licensed vehicle was unlawful, subjecting him to a civil penalty assessment.
12. Taxpayer failed to attend the hearing or present any evidence tending to refute either civil penalty assessed herein.
13. The Taxpayer's request for a refund of the penalty previous paid must be denied.

### **DECISION**

In light of the above conclusions of law and the findings of fact in support thereof, both assessments are proper. Taxpayer made a clear and unequivocal refusal to allow the Division Investigator to inspect the supply tank of his licensed vehicle after being informed of the consequences of such a refusal, thereby making it necessary for a second visit to his farm by an additional investigator. Additionally, taxpayer has not contested the fact that the vehicle in question was 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 G.S. § 105-449.117. Both assessments must be affirmed in all respects.

**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 assessments of \$1,000.00 each, issued on July 23 and 26, 2004 respectively and previously paid.

This the 26<sup>th</sup> day of October 2004.

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