

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:)
)
The Motor Fuels Civil Penalty)
Assessment issued June 24, 2003)
by the North Carolina Secretary of)
Revenue in the amount of \$1,250.00)
)
and)
)
The proposed Special Fuels Bulk User)
Assessment Issued November 11, 2003 in)
the amount of \$2,061.00 by the North)
Carolina Secretary of Revenue)
)
against)
)
[Taxpayer])

FINAL DECISION
Docket No. 2004-49

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on February 18, 2004. [Owner] appeared on behalf of Taxpayer. Representing the Motor Fuels Tax Division were Juley S. Powell, Motor Fuels Tax Investigator, and Christopher E. Allen, General Counsel.

ISSUES

- I. **Whether the use of dyed (nontaxpaid) diesel fuel in Taxpayer's licensed vehicles are unlawful, subjecting it to \$4,500.00 in civil penalty assessments issued June 14, 2003 and June 24, 2003 pursuant to G.S. 105-449.117 and 105-449.118.**
- II. **Whether the Division properly calculated the taxpayer's nonhighway fuel consumption based upon G.S. 105-449.87, resulting in the proposed assessment for tax, penalty, and interest issued November 11, 2003 totaling \$23,331.63 plus accruing interest.**

EVIDENCE

The Division introduced the following items into evidence:

1. Dyed Fuel Information Sheet dated June 11, 2003.

2. Receipt of Dyed Diesel Fuel Sample dated June 11, 2003.
3. Dyed Fuel Chain of Custody Control Document dated June 11, 2003.
4. Analytical Record of Sample Taken, including supporting documentation dated June 19, 2003.
5. Civil Penalty Assessment dated June 24, 2003 in the amount of \$1,250.
6. Dyed Fuel Information Sheet dated June 11, 2003 and DMV records.
7. Receipt of Dyed Diesel Fuel Sample dated June 11, 2003.
8. Dyed Fuel Chain of Custody Control Document dated June 11, 2003.
9. Analytical Record of Sample Taken dated June 19, 2003.
10. Civil Penalty Assessment dated June 24, 2003 in the amount of \$1,250.
11. Dyed Fuel Information Sheet dated June 16, 2003.
12. Analytical Record of Sample Taken dated June 19, 2003.
13. Civil Penalty Assessment dated June 16, 2003.
14. Dyed Fuel Information Sheet dated June 16, 2003.
15. Analytical Record of Sample Taken and supporting documentation dated June 19, 2003.
16. Civil Penalty Assessment dated June 16, 2003.
17. Letter from Taxpayer dated July 17, 2003.
18. Field Audit Report completed July 31, 2003.
19. Special Fuels Bulk User Notice of Tax Assessment dated November 11, 2003 in the amount of \$36,868.99.
20. Letter dated January 30, 2004 from Eugene J. Cella to Taxpayer providing notice of an administrative tax hearing scheduled February 18, 2004.
21. Memorandum dated May 16, 2001 from E. Norris Tolson to Eugene J. Cella delegating authority to conduct administrative hearings pursuant to Chapter 105 of the General Statutes.

FINDINGS OF FACT

Based upon the forgoing evidence of record, the Assistant Secretary for Administrative Tax Hearings makes the following findings of fact:

1. On June 11, 2003, Officer J. P. Barnes of the North Carolina Highway Patrol Motor Carrier Enforcement Administration discovered [a 1996 truck] bearing [a N.C. license plate number] with [a VIN] operating on [a N.C. Highway] with dyed diesel fuel.
2. Officer Barnes withdrew a sample from the supply tank of this vehicle, which appeared red in color, and forwarded this sample bearing [a license plate number] to the Department of Agriculture and Consumer Services Motor Fuels testing Laboratory for analysis.
3. Laboratory analysis performed by State Chemist Anthony Winborne on the sample bearing [a license plate number] revealed red dye in a concentration of 3.3 Parts-Per-Million (PPM).
4. Based upon this analysis, the Division issued a civil penalty assessment in the amount of \$1,000.00 for highway use of dyed diesel fuel and \$250.00 for dispensing non-tax-paid motor fuel into a highway vehicle.
5. Officer Barnes followed [the truck] to Taxpayer's place of business, a lumberyard, to inspect other vehicles on the yard.
6. He inspected a parked [1965 truck] bearing [a license plate number] with [a VIN #]
7. This vehicle, although licensed and inspected, was not roadworthy according to statements made by [Owner], and was used only on the lumberyard and never driven on the highway.
8. These statements made on behalf of Taxpayer were collaborated by Investigator Shearin.
9. Officer Barnes withdrew a sample from the supply tank of this vehicle, which appeared red in color, and forwarded this sample bearing [a license plate number] to the Department of Agriculture and Consumer Services Motor Fuels testing Laboratory for analysis.
10. Laboratory testing using spectrophotometer sulfur and dye analysis performed by State Chemist Anthony Winborne on the sample bearing [a license plate number] revealed red dye in a concentration of 15.9 Parts-Per-Million (PPM).
11. The Division issued a civil penalty assessment in the amount of \$1,000.00 for highway use of dyed diesel fuel and \$250.00 for dispensing non-tax-paid motor fuel into a highway vehicle.
12. As a result of the discovery of dyed fuel in Taxpayer's vehicles, Division Investigator Rick Shearin conducted another inspection at the lumberyard on June 16, 2003, and found two (2) additional instances of dyed fuel in the supply tanks of licensed vehicles.

13. Investigator Shearin inspected [a 1993 truck] bearing [a license plate number] with [a VIN #] that was parked at Taxpayer's place of business.
14. Investigator Shearin withdrew a sample of fuel from the supply tank, which appeared red in color, and performed a field test using [a portable testing device].
15. The field test revealed a dye content of 1.6 Parts-Per-Million (PPM).
16. The investigator forwarded a sealed fuel sample with [State reference number] taken from the vehicle bearing [a license plate number] to the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory.
17. State Chemist Anthony Winborne performed spectrophotometer sulfur and dye testing on the submittal, determining that the sample contained 2.4 PPM red dye concentration.
18. The Division issued a civil penalty assessment in the amount of \$1,000.00 to Taxpayer on June 16, 2003.
19. Taxpayer stated that the license plate for this vehicle was removed prior to Investigator Shearin's inspection, and was turned in to DMV the day after the citation was issued.
20. On June 16, 2003 Investigator Shearin also inspected [a 1996 truck] bearing [a license plate number] with [a VIN] parked at the premises.
21. This was the same vehicle noted *Supra* that Officer Barns cited five days earlier [in North Carolina].
22. Investigator Shearin withdrew a sample of fuel from the supply tank, which appeared red in color, and performed a field test using [a portable testing device].
23. The field test revealed a dye content of 2.2 Parts-Per-Million (PPM).
24. The investigator forwarded a sealed fuel sample with [State reference number] taken from the vehicle bearing [a N.C. license plate number] to the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory.
25. However, State Chemist Anthony Winborne performed spectrophotometer sulfur and dye testing on the submittal, and determined that the sample contained 17.06 PPM red dye concentration.
26. The Division issued a civil penalty assessment in the amount of \$1,000.00 to Taxpayer on June 16, 2003.
27. N.C. Gen. Stat. § 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."
28. The Division issued four (4) civil penalty assessments pursuant to G.S. 105-449.117 on June 16, 2003 and June 24, 2003 for the unlawful use of dyed diesel fuel in its registered highway vehicles.

29. The Division also issued an additional \$750.00 in penalties for dispensing nontaxpaid motor fuel into a highway vehicle.
30. Taxpayer responded by letter dated July 17, 2003 paying the penalties under protest, objecting to the imposition of the penalties, and requesting a hearing.
31. Because this matter is not resolved, the matter was referred to the Secretary's Office for an administrative hearing for refund at the request of taxpayer.
32. N.C. Gen. Stat. § 105-449.87(b) (Backup Tax and liability for the tax) states in pertinent part that

If 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.*"

(Emphasis added).

33. After discovering that Taxpayer's licensed vehicles were operating in this State with dyed diesel fuel, Investigator Julye Powell performed a special fuels audit of Taxpayer's operation, which was completed July 31, 2003.
34. The Division investigator determined that during the audit period, Taxpayer owned four (4) diesel-powered trucks and nine (9) pieces of off-road equipment.
35. Taxpayer (a logging operation) share the same yard with a related corporation (a lumber mill), and also share bulk fuel storage facilities on the premises.
36. [Taxpayer's representative] specifically requested that the two companies be audited separately in recognition that each company operated independently, and each paying for fuel used.
37. Located on the premises are three (3) stationary tanks that supply vehicles; 4,000, 6,000, and 1,000 gallon tanks, respectively.
38. Also located on the premises is one 4,000-gallon tank that supplies fuel exclusively to the sawmill generator.
39. In addition to these storage tanks, Taxpayer also has several 250-gallon tanks on pickup trucks that alternately contain nonhighway fuel and hydraulic fluid/fuel, and one 1500-gallon tank on the [1993 truck] serving as a fuel supply for the jobsites.
40. A review of fuel receipts from Taxpayer's nine (9) fuel suppliers revealed that Taxpayer purchased 116,123 gallons of fuel during the relevant audit period.
41. Taxpayer was unable to provide the investigator with any withdrawal records or other information to substantiate off-road usage of nontaxpaid fuel.

42. The Division issued a proposed assessment of tax, penalty, and interest totaling \$36,868.99 based upon the total nonhighway diesel fuel purchases charged to taxpayer during the audit period.
43. Taxpayer objected to the imposition of road tax, penalty and interest, and the matter was consolidated with Taxpayer's June 16, 2003 request for hearing on civil penalties previously paid.
44. The Division referred both matters to the Assistant Secretary for Administrative Hearings, as they remain unresolved.

CONCLUSIONS OF LAW

1. Officer J. P. Barns properly inspected, withdrew, and submitted for analysis a sample of fuel taken from Taxpayer's [1996 truck] bearing [a N.C. license plate number] on June 11, 2003.
2. The fuel sample was properly marked, sealed, and forwarded to the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory for subsequent analysis.
3. The record discloses that there was a proper chain of custody of the fuel sample taken from the vehicle bearing [a license plate number].
4. Laboratory analysis disclosed the presence of dye in the fuel sample.
5. The quantity of dye in the sample taken from the vehicle was sufficient to establish that off-road fuel was used in a licensed highway vehicle.
6. Officer J. P. Barns properly inspected, withdrew, and submitted for analysis a sample of fuel taken from Taxpayer's [1965 truck] bearing [a N.C. license plate number] on June 11, 2003.
7. The fuel sample was properly marked, sealed, and forwarded to the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory for subsequent analysis.
8. The record discloses that there was a proper chain of custody of the fuel sample taken from the vehicle bearing [a license plate number].
9. Laboratory analysis disclosed the presence of dye in the fuel sample.
10. The quantity of dye in the sample taken from the vehicle was sufficient to establish that off-road fuel was used in a licensed highway vehicle.
11. However, this vehicle was not road-worthy, was driven only on the lumberyard, and not operated on the highway.
12. Based upon this evidence, a waiver of the penalty issued by the Division is proper.

13. Officer J. P. Barns properly inspected, withdrew, and submitted for analysis a sample of fuel taken from Taxpayer's [1996 truck] bearing [a N.C. license plate number] on June 11, 2003.
14. The fuel sample was properly marked, sealed, and forwarded to the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory for subsequent analysis.
15. The record discloses that there was a proper chain of custody of the fuel sample taken from the vehicle bearing [a license plate number].
16. Laboratory analysis disclosed the presence of dye in the fuel sample.
17. The quantity of dye in the sample taken from the vehicle was sufficient to establish that off-road fuel was used in a licensed highway vehicle.
18. Investigator Shearin properly inspected, withdrew, and submitted for analysis a sample of fuel taken from Taxpayer's [1993 truck] bearing [a N.C. license plate number] on June 16, 2003.
19. The fuel sample was properly marked, sealed, and forwarded to the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory for subsequent analysis.
20. The record discloses that there was a proper chain of custody of the fuel sample taken from the vehicle bearing [a license plate number].
21. Laboratory analysis disclosed the presence of dye in the fuel sample.
22. The quantity of dye in the sample taken from the vehicle was sufficient to establish that off-road fuel was used in a licensed highway vehicle.
23. However, testimony offered at the hearing indicated that the license plate was removed prior to the inspection of this vehicle, and was turned in to DMV the next day.
24. Based upon this evidence, a waiver of the penalty issued by the Division is proper.
25. Investigator Shearin properly inspected, withdrew, and submitted for analysis a sample of fuel taken from Taxpayer's [1996 truck] bearing [a N.C. license plate number] on June 16, 2003.
26. The fuel sample was properly marked, sealed, and forwarded to the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory for subsequent analysis.
27. The record discloses that there was a proper chain of custody of the fuel sample taken from the vehicle bearing [a license plate number].
28. Laboratory analysis disclosed the presence of dye in the fuel sample.

29. According to analysis, the quantity of dye in the sample taken from the vehicle was 1.6 Parts-per-million, sufficient to establish that off-road fuel was used in a licensed highway vehicle.
30. However, this was the same use that was penalized five (5) days earlier, and a waiver of this second penalty is warranted.
31. 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...."
32. Moreover, G.S. 105-449.87(b) provides for a presumption that when nontaxpaid fuel is used on roads of this State, the Secretary may consider that all fuel delivered to Taxpayer's storage facility was used improperly.
33. It is incumbent upon a Taxpayer to then establish through withdrawal records or other information that the fuel was not improperly used.
34. Here Taxpayer failed to maintain adequate records to overcome this presumption. Additionally, the assessment initially imposed November 11, 2003 and subsequently amended is proper.
35. Taxpayer has not presented any verifiable documentation to overcome the strong presumption contained in N.C. Gen. Stat. 105-449.87(b), that Taxpayer's use of nonhighway fuel was taxable.
36. The assessment of the tax assessment proposed by the Division, including applicable interest assessed in the audit is affirmed.
37. The Division has previously waived the penalty previously assessed.

DECISION

WHEREFORE, based upon the above findings of fact and conclusions of law, the undersigned Assistant Secretary of Revenue **HEREBY AFFIRMS** in its entirety the proposed civil penalty assessment of \$1,250.00 issued herein June 24, 2003 and previously paid. All other civil penalty assessments are **HEREBY WAIVED**. Consequently, Taxpayer's demands for refund **ARE ALLOWED**. Taxpayer is entitled to a refund of penalties previously paid totaling \$3,250.00. The proposed amended assessment of \$20,416.44 and applicable interest of \$3,228.21 for a total balance due of \$23,644.65, plus interest accruing at the rate of \$2.80 per day until paid is also **AFFIRMED**.

This the 9th day of June 2004.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue