

**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. 2004-50

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 Julie 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 vehicle on the public highway is unlawful, subjecting it to the \$1,000.00 civil penalty assessment issued November 11, 2003 pursuant to G.S. 105-449.117.**
- II. Whether the dispensing of dyed (nontaxpaid) diesel fuel into taxpayer's licensed vehicle was unlawful, subjecting it to a \$250.00 civil penalty pursuant to G.S. 105-449.118**
- III. 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 18, 2003 totaling \$2,061.00 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 dated June 11, 2003, and supporting documentation.
5. Civil Penalty Assessment dated June 24, 2003, totaling \$1,250.00.
6. Letter dated December 2, 2003, from Taxpayer to the Division.
7. Field Audit Report dated July 31, 2003, indicating a balance due of \$2,028.43.
8. Field Audit Report dated July 31, 2003 indicating a balance due of \$62,355.32.
9. Special Fuels Bulk user Notice of Tax Assessment dated November 11, 2003 totaling \$2,061.82.
10. Letter dated January 30, 2004 from Eugene J. Cella to Taxpayer scheduling the hearing of this matter for February 18, 2004.
11. 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 1988 truck] bearing [a N.C license plate number] with [a VIN] with dyed diesel fuel parked at taxpayer's business.
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 15.2 Parts-Per-Million (PPM).

4. The Division issued a civil penalty assessment in the amount of \$1,000.00 for highway use of dyed diesel fuel.
5. 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."
6. The Division issued a civil penalty assessment pursuant to G.S. 105-449.117 on for the unlawful use of dyed diesel fuel in its registered highway vehicles.
7. The Division also issued a \$250.00 penalty for dispensing nontaxpaid motor fuel into a highway vehicle.
8. N.C. Gen. Stat. § 105-449.118 states in pertinent part that "[a] person who dispenses non-tax-paid motor fuel into the supply tank of a highway vehicle or who allows non-tax-paid motor fuel to be dispensed into the supply tank of a highway vehicle is subject to a civil penalty of two hundred fifty dollars (\$250.00) per occurrence."
9. Taxpayer or one of Taxpayer's employees fueled the subject vehicle with dyed diesel fuel.
10. Taxpayer paid the penalty and responded by letter dated December 2, 2003 requesting a hearing, and the matter was referred to the Secretary's Office for an administrative hearing for refund at the request of taxpayer.
11. N.C. Gen. Stat. § 105-449.87(b) (Backup tax and liability for the tax) states in pertinent part that:

[i]f 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).

12. After discovering that one of Taxpayer's licensed vehicles was 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.
13. The investigator determined that during the audit period, Taxpayer owned one (1) diesel-powered truck and twenty-four (24) pieces of off-road equipment.
14. Taxpayer (a timber manufacturing plant) shared the same yard with [a logging operation] and share bulk fuel storage facilities on the premises.
15. [Taxpayer's representative] specifically requested that each company be audited separately in recognition that they operated independently and paid for fuel used by Taxpayer.

16. Located on the premises are three (3) stationary tanks that supply vehicles; 4,000, 6,000, and 1,000 gallon tanks, respectively.
17. Also located on the premises is one 4,000-gallon tank that supplies fuel exclusively to the sawmill generator.
18. An initial review of fuel receipts from Taxpayer's nine (9) fuel suppliers revealed that Taxpayer purchased 225,892 gallons of fuel during the relevant audit period.
19. Taxpayer was credited with 31,009 gallons of fuel withdrawn to operate off-road equipment, leaving a balance of 194,843 taxable gallons, resulting in a total tax liability of \$62,335.32.
20. The Division subsequently amended this audit to reflect additional off-road usage, and the fact that taxpayer's one (1) licensed vehicle was used primarily off road.
21. The amended audit also reflected only the gallons attributed to this Taxpayer.
22. Upon completion of the audit, Taxpayer turned the license plate bearing [a number] in to the State DMV.
23. The Division issued a proposed assessment based upon 1/25 of the nonhighway diesel fuel purchases charged to Taxpayer during the audit period.
24. This amended proposed assessment totaled \$2,061.80.
25. Taxpayer objected to the imposition of road tax, penalty and interest by letter dated December 2, 2003, and the matter was consolidated with Taxpayer's request for hearing on the civil penalty assessment previously paid.

### **CONCLUSIONS OF LAW**

Based upon the above findings of fact, the undersigned Assistant Secretary enters the following conclusions of law:

1. 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."
2. The subject vehicle was licensed, bearing a valid North Carolina license plate.
3. Testing conducted by the North Carolina Department of Agriculture Motor Fuels Laboratory determined that the fuel sample contained red dye in sufficient concentrations to reveal the presence of red dye.
4. This laboratory analysis verified the Division investigators' roadside conclusion that the supply tank of the subject vehicle improperly contained dyed diesel fuel.
5. The North Carolina Administrative Code states in pertinent part that "[t]he penalties set out in G.S. 105-449.117 for using dyed diesel fuel in a highway vehicle that is licensed or

required to be licensed may be assessed whenever the presence of dye is detected in a sample taken from the fuel tank of the vehicle.”

6. Taxpayer 's use of dyed diesel fuel in its licensed vehicle was unlawful, subjecting it to a civil penalty assessment pursuant to G.S. 105-449.117.
7. Taxpayer unlawfully dispensed dyed diesel fuel into the licensed vehicle bearing [a plate number] subjecting it to a \$250.00 civil penalty pursuant to G.S. 105-449.118.
8. The Division then performed an audit of taxpayer’s bulk fuel usage.
9. G.S. 105-449.87(b) allows the Secretary, when if he determines that a bulk-end user has used untaxed dyed diesel fuel to operate a licensed vehicle to presume that all the fuel delivered to that storage facility was used to operate highway vehicles during the audit period.
10. During the course of the audit, Taxpayer presented no withdrawal records establishing use of the fuel off-road.
11. However, the auditor allowed Taxpayer credit for fuel receipts for highway purchases in the audit.
12. As noted above, the original assessment totaled \$62,335.32, but was substantially reduced by the gallons attributed to another related company.
13. The auditor allowed further credit for off-road equipment use in the subsequent audit further reducing the earlier assessment, thus reducing the taxable gallons in the amended audit.
14. Thus the Division properly issued an assessment for all fuel delivered to the storage tanks during the audit period for which Taxpayer was financially responsible, totaling 116,123 gallons, and then reducing that amount by allowing for certain credit for off-road use, representing a reduction to 1/25 of the total taxable gallons.
15. Taxpayer presented no other verifiable documentation to overcome the statutory presumption that the remaining fuel attributed to Taxpayer was used on the roads of this State.
16. The amended assessment appears proper in all respects.

### **DECISION**

Officer J. P. Barns properly inspected, withdrew, and submitted for analysis a sample of fuel taken from Taxpayer's vehicle on June 11, 2003. The fuel sample was marked, sealed, and forwarded to the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory for subsequent analysis. The record discloses that there was a proper chain of

custody of the fuel sample taken from the vehicle bearing [a license plate number]. Laboratory analysis disclosed the presence of dye in the fuel sample. 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. 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...."

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. It is incumbent upon a Taxpayer to then establish through withdrawal records and other information that the fuel was not improperly used. Here Taxpayer failed to maintain adequate records to overcome this presumption. Additionally, the assessment initially imposed November 11, 2003 and subsequently amended is proper. 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. The assessment of the civil penalty and the substantially amended tax assessment, including applicable interest assessed in the audit is 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 proposed civil penalty assessment of \$1,250.00 issued herein June 24, 2003 and previously paid. Consequently, Taxpayer's demand for refund is **DENIED**. The proposed amended tax assessment of \$1,861.67 and applicable interest of \$246.53, for a total balance due of \$2,108.20, plus interest accruing at the rate of \$ .26 per day until paid is also **AFFIRMED**.

This the 9<sup>th</sup> day of June 2004.

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Eugene J. Cella  
Assistant Secretary of Revenue