

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:)
)
The Motor Fuels Civil Penalty)
Assessments Issued March 21, 2003)
And May 19, 2003 by the North Carolina)
Secretary totaling \$8,600.00)
)
and)
)
The Special Fuels Bulk User Tax)
Assessment Proposed by the Secretary)
Of Revenue June 3, 2003 in the amount)
Of \$29,875.04)
)
against)
)
[Taxpayer])

FINAL DECISION
Docket No. 2003-297

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on September 16, 2003. [Owner and Spouse] represented Taxpayer. Representing the Motor Fuels Tax Division were Martin Barrow, Investigations Supervisor; Julye Powell, Investigator; and Christopher E. Allen, General Counsel.

ISSUES

- I. **Whether the civil penalty assessments issued by the Division pursuant to G.S. 105-449.117 on March 21, 2003 and May 19, 2003 totaling \$8,600.00 against Taxpayer for the unlawful use of dyed diesel fuel was proper.**
- II. **Whether, in light of the absence of withdrawal records and Taxpayer's documented misuse of nontaxpaid fuel in its highway vehicles, the Division properly calculated the taxpayer's special fuels tax liability in the amount of \$29,875.04 in addition to accruing interest based upon deliveries to its nontaxpaid fuel storage tank during the audit period.**

EVIDENCE

Evidence submitted at the hearing included the following:

Evidence submitted by the Division:

1. Dyed Fuel Information Sheet dated March 21, 2003 for vehicle bearing [a N.C. license plate number]; Analytical Record of Sample Taken; Notice of Civil Penalty Assessment for highway use of dyed diesel fuel and for dispensing non-tax-paid motor fuel into a highway vehicle.
2. N.C. Department of Agriculture & Consumer Services, Motor Fuels Laboratory analytical record of sample taken dated March 24, 2003, Recording spectrophotometer results, red dye quantation for sample bearing [a license plate number].
3. Dyed Fuel Information Sheet dated March 21, 2003 for vehicle bearing [a N.C. license plate number]; Analytical Record of Sample Taken; Notice of Civil Penalty Assessment for highway use of dyed diesel fuel and for dispensing non-tax-paid motor fuel into a highway vehicle.
4. N.C. Department of Agriculture & Consumer Services, Motor Fuels Laboratory analytical record of sample taken dated March 24, 2003, Recording spectrophotometer results, red dye quantation for sample bearing [a license plate number].
5. Dyed Fuel Information Sheet dated March 21, 2003 for vehicle bearing [a N.C. license plate]; Analytical Record of Sample Taken; Notice of Civil Penalty Assessment for highway use of dyed diesel fuel and for dispensing non-tax-paid motor fuel into a highway vehicle.
6. N.C. Department of Agriculture & Consumer Services, Motor Fuels Laboratory analytical record of sample taken dated March 24, 2003, Recording spectrophotometer results, red dye quantation for sample bearing [a license plate number].
7. Dyed Fuel Information Sheet dated March 21, 2003 for vehicle bearing [a N.C. license plate number]; Analytical Record of Sample Taken; Notice of Civil Penalty Assessment for highway use of dyed diesel fuel and for dispensing non-tax-paid motor fuel into a highway vehicle.
8. N.C. Department of Agriculture & Consumer Services, Motor Fuels Laboratory analytical record of sample taken dated March 24, 2003, Recording spectrophotometer results, red dye quantation for sample bearing [a license plate number].
9. Dyed Fuel Information Sheet dated March 21, 2003 for vehicle bearing [a N.C. license plate number]. Analytical Record of Sample Taken; Notice of Civil Penalty Assessment for highway use of dyed diesel fuel and for dispensing non-tax-paid motor fuel into a highway vehicle.
10. N.C. Department of Agriculture & Consumer Services, Motor Fuels Laboratory analytical record of sample taken dated March 24, 2003, Recording spectrophotometer results, red dye quantation for sample bearing [a license plate number].

11. Dyed Fuel Information Sheet dated March 21, 2003 for vehicle bearing [a N.C. license plate number]. Analytical Record of Sample Taken; Notice of Civil Penalty Assessment for highway use of dyed diesel fuel and for dispensing non-tax-paid motor fuel into a highway vehicle.
12. N.C. Department of Agriculture & Consumer Services, Motor Fuels Laboratory analytical record of sample taken dated March 24, 2003, Recording spectrophotometer results, red dye quantation for sample bearing [a license plate number].
13. Letter from Taxpayer to the Division dated April 21, 2003 stating that payment of the penalties in the amount of \$7,600.00 issued March 21, 2003 is made under protest.
14. Division Field Audit Report dated May 23, 2003.
15. Notice of Tax Assessment for \$29,875.04 dated June 3, 2003
16. Dyed Fuel Information Sheet dated May 19, 2003 for vehicle bearing [a N.C. license plate number]. Analytical Record of Sample Taken; Notice of Civil Penalty Assessment for highway use of dyed diesel fuel.
17. N.C. Department of Agriculture & Consumer Services, Motor Fuels Laboratory analytical record of sample taken dated May 20, 2003, Recording spectrophotometer results, red dye quantation for sample bearing [a license plate number].
18. Letter from Taxpayer to the Division dated June 17, 2003 requesting a hearing on the tax assessment issued June 3, 2003.
19. Letter from Taxpayer to the Division dated June 19, 2003 protesting the penalty issued May 19, 2003.
20. Letter dated July 1, 2003 from Eugene J. Cella to Taxpayer scheduling the hearing of this matter for September 16, 2003.
21. Letter dated May 16, 2001 from Secretary Tolson to Mr. Eugene J. Cella authorizing Mr. Cella to conduct administrative tax hearings.

Evidence submitted by Taxpayer:

- TP-1. Signed statement of Taxpayer's employee dated September 10, 2003 and spreadsheet showing gallons used.
- TP-2. Fuel purchase tickets and invoices for highway fuel purchased.
- TP-3 - 6. Photographs of Taxpayer's bulk storage tanks and pumps.
- TP-7. List of Taxpayer's off-road equipment.
- TP-8. DMV Enforcement Section inspection report dated January 10, 2002.
- TP-9. State Highway Patrol citation and notice of assessment dated June 11, 2003.

FINDINGS OF FACT

From evidence submitted at the hearing, the Assistant Secretary makes the following findings of fact:

1. On March 21, 2003, Investigators D. R. Farmer, J. S. Powell, and R. S. Shearin of the Motor Fuels Tax Division ("Division") stopped and checked vehicles located at the farm owned and operated by the Taxpayer.
2. Division investigators inspected sixteen (16) vehicles located at Taxpayer's farm as a part of the Division's routine nonhighway bulk storage investigative program.
3. Investigators found six (6) licensed vehicles with elevated (greater than one part-per-million) dye content in fuel contained in the supply tanks as determined by analysis conducted by the Department of Agriculture and Consumer Services Motor Fuels Testing Laboratory.
4. These vehicles included the following:

Vehicle	License Plate #	Vehicle ID #	Dye Content (PPM)
[A vehicle]	[N.C. License Plate #]	[Vehicle Identification #]	13.6
[A vehicle]	[N.C. License Plate #]	[Vehicle Identification #]	10.9
[A vehicle]	[N.C. License Plate #]	[Vehicle Identification #]	3.4
[A vehicle]	[N.C. License Plate #]	[Vehicle Identification #]	13.4
[A vehicle]	[N.C. License Plate #]	[Vehicle Identification #]	9.4
[A vehicle]	[N.C. License Plate #]	[Vehicle Identification #]	10.0

5. The other vehicles had no current registrations, but were licensed previously, and each had dyed fuel in the supply tanks.
6. Dyed fuel in vehicles with lapsed registrations evinces a strong likelihood that they previously operated on the roads with dyed fuel.
7. The [vehicle] bearing [a license plate number] was inspected by Investigator Powell on March 21, 2003 and dyed fuel was discovered in the supply tank and a \$1,000.00 penalty was issued.
8. On May 19, 2003, Investigator Powell returned to Taxpayer's Farm to perform a bulk fuel audit, and while in the course of inspecting additional vehicles, Investigator Powell again discovered dyed diesel in the supply tank of the [vehicle] bearing [a license plate number].

9. The Division issued a second \$1,000.00 civil penalty assessment against Taxpayer for this vehicle.
10. Investigator Powell also issued \$1,500.00 in civil penalties for dispensing non-taxpaid fuel into a highway vehicle, and a \$100.00 civil penalty for not displaying a decal.
11. The Division issued a total of \$8,600.00 in civil penalties against Taxpayer.
12. Preliminary visual inspection of the supply tanks of the subject vehicles by Division investigators revealed the presence of red-colored fuel.
13. Investigators then pulled fuel samples from each of the subject vehicles and subsequently forwarded the sealed sample containers to the State Department of Agriculture & Consumer Services Motor Fuels Laboratory for analysis.
14. The Motor Fuels laboratory staff chemists then performed sulfur and dye analysis on each of the fuel samples.
15. Testing of the samples revealed that the fuel contained red dye, indicating violations of G.S. § 105-449.117 in each respect.
16. Division investigators issued civil penalty assessments of \$1,000.00 for each violation pursuant to G.S. § 105-449.117.
17. The Division issued a total of \$1,500.00 for allowing the dispensing of dyed fuel into a vehicle pursuant to G.S. § 105-449.118.
18. The Division issued a \$100.00 penalty for a decal violation pursuant to G.S. § 105-449.52.
19. Taxpayer sent a letter to the Division dated April 21, 2003 regarding his protest for the penalty assessments for the assessments issued March 21, 2003, stating that his check for \$7,600.00 would follow.
20. Taxpayer sent a second letter dated June 19, 2003 regarding the second dyed diesel fuel penalty issued May 19, 2003, stating that "[h]ad we known the dyed diesel was in the truck, we would have certainly made sure that the truck was not on the premises because we knew we were going to be checked that day."
21. On May 19, 2003, Motor Fuels Tax Investigator J. S. Powell met with Taxpayer at an opening conference to discuss the audit of Taxpayer's business resulting from the dyed diesel fuel violations discovered on March 19, 2003.
22. Investigator Powell discussed the audit process and provided Taxpayer a copy of the Taxpayer's Bill of Rights.
23. Taxpayer then informed the investigator that he had pulled most of the records and supplied maintenance records for the off-road equipment used at the farm.
24. Taxpayer operated two (2) irrigation pumps and nineteen (19) tractors.

25. However, Taxpayer maintained no withdrawal records from its 10,000-gallon nonhighway diesel fuel storage tank as required by NCAC 12B .0502 (Record-Keeping Requirements of Bulk-End Users).
26. Investigator Powell reviewed records of fuel purchases during the audit period, and found a total of 92,113 gallons of non-taxpaid diesel purchased available to Taxpayer's operations during the audit period.
27. Due to the absence of withdrawal records for equipment or vehicles, coupled with the Taxpayer's apparent pattern and practice of using dyed diesel in its highway vehicles, the Division issued an assessment for total fuel purchases for the subject period.
28. Investigator Powell completed the audit on May 23, 2003 and determined that Taxpayer owed tax, penalties, and interest of \$29,734.99.

CONCLUSIONS OF LAW

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

1. G.S. § 105-449.87(b) states in pertinent part that "[i]f the Secretary determines that a bulk-end user ... 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."
2. G.S. § 105-449.117 states 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."
3. 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.
4. G.S. § 105-449.118 provides that a person who dispenses non-tax-paid motor fuel into the supply tank of a highway vehicle or who allows such fuel to be dispensed into the supply tank is subject to a civil penalty of \$250.00.
5. G.S. §105-449.52 imposes upon a motor carrier who operates in this State a requirement that the motor vehicle carry a registration card or display an identification marker, and imposes a civil penalty of \$100.00 for the failure to comply.
6. Taxpayer 's use of dyed diesel in its licensed highway vehicles was unlawful, subjecting him to a civil penalty assessment for each occurrence.
7. Testing conducted by the North Carolina Department of Agriculture determined that all of the fuel samples contained red dye, verifying the Division investigator's visual on-site and roadside observations that the samples were red in color.

8. The presence of dyed fuel in a majority of Taxpayer's licensed and unlicensed vehicles (some unlicensed vehicles were not inspected) is a strong indication of a pattern and business practice of using non-taxpaid fuel on the State's roads.
9. The Taxpayer's request for a refund of the civil penalties in the amount of \$8,600.00 previously paid should be denied.
10. While Taxpayer had a number of off-road vehicles and other pieces of equipment, Taxpayer maintained no withdrawal records as required during the audit period.
11. The lack of withdrawal records to demonstrate off-road fuel usage, coupled with the documented misuse of dyed fuel, gives credence to the proposed special fuels bulk user assessment.
12. Additionally, G.S. §. 105-449.87(b) affords the Secretary the presumption that all fuel delivered to the non-taxpaid storage tank was for highway use.
13. The special fuels bulk user assessment of tax in the amount of \$21,860.89 and accrued interest should be affirmed in full.
14. The penalty imposed in the special fuels bulk user audit in the amount of \$5,465.22 should be waived in full.

DECISION

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...." As noted above, Taxpayer's vehicles were licensed, bearing valid license plates. Additionally, many of Taxpayer's vehicles were not registered, as he allowed the registrations to expire. However, many of these vehicles had dyed diesel in their supply tanks, indicating that they too, had previously operated on the highway. Testing conducted by the North Carolina Department of Agriculture and Consumer Services determined that all of the fuel samples submitted by the Division contained red dye, verifying the investigator's visual on-site and roadside observations that the samples were red in color. Moreover, the presence of dyed fuel in a majority of Taxpayer's licensed and unlicensed vehicles (some unlicensed vehicles were not inspected) is a strong indication of a pattern and business practice of using nontaxpaid fuel on the State's roads. The Taxpayer's request for a refund of the penalties previously paid must be denied.

Moreover, the assessment predicated upon Investigator Powell's audit should be affirmed. While Taxpayer had a number of off-road vehicles and several pieces of equipment, Taxpayer maintained no withdrawal records as required during the audit period. The lack of withdrawal records to demonstrate off-road fuel usage, coupled with the documented misuse of dyed fuel, gives credence to the proposed assessment. G.S. § 105-449.87(b) affords the Secretary the presumption that all fuel delivered to the non-taxpaid storage tank was for highway use. Taxpayer has presented nothing to refute that strong presumption.

WHEREFORE, in light of the above conclusions of law and the findings of fact in support thereof, the claim for refund of civil penalties in the amount of \$8,600.00 previously paid is **DENIED**. Penalty in the amount of \$5,465.22 proposed in the special fuels bulk user assessment is **WAIVED**. The special fuels bulk user tax assessment in the amount of \$32,556.71, including interest through December 15, 2003, plus interest at the rate of \$2.99 per day thereafter until paid is **HEREBY AFFIRMED**

This the 15th day of December 2003.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue