

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:)
)
The Motor Fuels Civil Penalty)
Assessment issued March 22, 2003,)
by the North Carolina Secretary of)
Revenue in the amount of \$1,000.00.)
)
and)
)
The proposed Special Fuels Bulk User)
Assessment Issued July 21, 2003 in the)
amount of \$1,000.83 by the North)
Carolina Secretary of Revenue)
)
against)
)
)
[Taxpayer])

FINAL DECISION
Docket No. 2003-298

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on October 7, 2003. [Taxpayer] appeared *pro se*. Representing the Motor Fuels Tax Division were Martin Barrow, Investigations Supervisor; Rick Shearin, Investigator; and Christopher E. Allen, General Counsel.

ISSUES

- I. Whether Taxpayer's use of dyed (nontaxpaid) diesel fuel in his licensed vehicle on the public highway is unlawful pursuant to G.S. 105-449.117, subjecting him to the \$1,000.00 civil penalty assessment issued March 22, 2003.
- II. Whether the Division properly calculated the Taxpayer's nonhighway fuel consumption resulting in the proposed assessment for tax, penalty, and interest issued July 21, 2003, totaling \$1,000.83 was proper.

EVIDENCE

The following items were introduced into evidence by the Division.

1. Dyed diesel information sheet dated March 22, 2003 for a [1996 truck] with [a VIN number] bearing [a N.C. license plate number].
2. North Carolina Department of Agriculture and Consumer Services analytical record of sample taken dated March 24, 2003 showing dye concentrate of 10.0 Parts Per Million (PPM).
3. Civil penalty assessment for \$1,000.00 dated March 22, 2003.
4. Handwritten letter dated April 21, 2003 from Taxpayer to the Division requesting a hearing.
5. Field audit report dated July 11, 2003 in the amount of \$1,000.83.
6. Notice of tax assessment dated July 21, 2003 in the amount of \$1,000.83.
7. Letter dated July 1, 2003 from Eugene J. Cella to Taxpayer scheduling an administrative hearing for September 23, 2003
8. Letter dated August 12, 2003 from Eugene J. Cella to Taxpayer scheduling an administrative hearing for October 7, 2003.
9. 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

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

1. On March 22, 2003, during a special project known as "Red Alert," DMV officers stopped Taxpayer's vehicle, a [1996 truck] bearing [a N.C. license plate number] on [a N.C. road].
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. Investigations Supervisor Martin Barrow of the Motor Fuels Tax Division ("Division") performed a roadside inspection and withdrew a fuel sample from the supply tank.
4. Preliminary visual inspection of the supply tank of the subject vehicles by Investigator Supervisor Barrow revealed the presence of red-colored fuel in Taxpayer's vehicle.
5. The sample tested positive for red dye, registering 12.3 parts-per-million (PPM) pursuant to roadside testing using [a testing device].

6. Mr. Barrow forwarded the sample to the Department of Agriculture and Consumer Services Motor Fuels Laboratory and subsequent testing revealed a dye content of 10.0 PPM.
7. The Division issued the civil penalty assessment of \$1,000.00 pursuant to G.S. 105-449.117 on March 22, 2003 for the unlawful use of dyed diesel fuel in a registered highway vehicle bearing [a North Carolina license plate number].
8. Taxpayer responded by handwritten letter dated April 21, 2003 requesting a hearing.
9. After determining that Taxpayer was operating a vehicle with dyed diesel fuel on the highways of this State, Investigator Barrow performed a special fuels audit of Taxpayer's operation.
10. Taxpayer owns and operates one diesel-powered truck and four (4) farm tractors.
11. Taxpayer also maintained an above ground 1000-gallon nonhighway diesel storage tank, and installed a 280-gallon above-ground highway tank the week after being stopped by Mr. Barrow and DMV officers.
12. Taxpayer maintained no fuel records for the audit period, and purchased all of his fuel from [a North Carolina fuel company].
13. Mr. Barrow's review of Taxpayer's supplier records confirmed that he purchased 3,200 gallons of nonhighway diesel fuel during the audit period.
14. Taxpayer provided no withdrawal records documenting nontaxable (nonhighway) use of fuel; therefore, the investigator could not allow credit for any on-road fuel usage.
15. The dyed diesel penalty and the bulk audit assessment were consolidated for purposes of this proceeding.

CONCLUSIONS OF LAW

1. Division investigators had authority to inspect the fuel supply tank of the vehicle bearing [a N.C. license plate number] pursuant to G.S. 105-449.121(b).
2. 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."
3. The use of dyed fuel by Taxpayer is not allowed under Section 4082 of the Code.
4. Visual inspection of the sample taken from the supply tank of the vehicle revealed an indication of red- colored (dyed) diesel fuel, which if confirmed would constitute a violation of G.S. 105-449.117.
5. Roadside analysis of the fuel sample taken indicated 12.3 parts-per-million (PPM) of red dye in the fuel sample, and thus a violation of the Motor Fuels Tax Laws.

6. Following stated Division procedures, investigators forwarded the sample of the red-colored fuel taken from Taxpayer's vehicle bearing [a N.C. license plate number], to the Department of Agriculture and Consumer Services Motor Fuels Laboratory for more precise analysis.
7. Subsequent analysis by the Department of Agriculture revealed the presence of 10.0 PPM red dye in the fuel sample bearing [a N.C. license plate number], thereby confirming a violation of G.S. 105-449.117.
8. G.S. 105-449.87(b) 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 the storage facility is presumed to have been used to operate a highway vehicle.*" (Emphasis added).
9. Taxpayer maintained no fuel or withdrawal records for the audit period documenting nontaxable (off road) use of fuel.
10. The assessment of the civil penalty for the improper use of dyed diesel fuel is proper and must be sustained.
11. The assessment of tax and applicable interest based upon the audit of Taxpayer's bulk fuel use is proper and must be sustained.
12. The assessment of penalty in the amount of \$188.48 assessed in the bulk fuel audit is hereby waived.

DECISION

Division investigators properly inspected, withdrew, and analyzed the sample of fuel taken from Taxpayer's vehicle on March 22, 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 N.C 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, all fuel delivered to Taxpayer's storage facility is 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. The assessment of the civil penalty and the tax assessed in the audit is affirmed. However, the penalty assessed in the bulk fuel audit is hereby waived.

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 \$1,000.00 issued herein March 22, 2003. Tax of \$753.90 proposed July 21, 2003, and applicable interest of \$73.72, totaling \$827.62 is also **AFFIRMED**, including accrued interest at the rate of \$.103 per day from this day.

This the 13th day of January, 2004.

Eugene J. Cella
Assistant Secretary of Revenue