STATE OF NORTH CAROLINA | **BEFORE THE SECRETARY OF REVENUE**

COUNTY OF WAKE

IN THE MATTER OF:	)	
	)	
The Proposed Motor Fuels Kerosene Refund Assessment issued August 26, 2003 by the North Carolina Secretary of Revenue in the amount of $20,170.46	)	
	)	
vs	)	**FINAL DECISION**
	)	Docket No. 2004-18
[Taxpayer]	)	

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on February17, 2004. [Corporate Treasurer] appeared at the hearing representing Taxpayer. Representing the Motor Fuels Tax Division were Heather Davis, Motor Fuels Tax Investigator and Christopher E. Allen, General Counsel.

ISSUE

Whether the Division properly assessed Taxpayer for refunds paid on claims for taxpaid (undyed) kerosene presumably sold for nonhighway use where it was shown that taxpayer failed to comply with the requirements of G.S. 105-449.105A for monthly refunds.

EVIDENCE

The following items were introduced into evidence by the Division.

1. ITAS screen print of Taxpayer's license information.

2. Division's Amended Field Audit Report completed July 2, 2003.

3. Notice of penalty assessment dated August 26, 2003 for $20,170.46.

4. Letter from Taxpayer to the Division appealing the assessment proposed by the Division.

5. Letter from Eugene J. Cella to Taxpayer dated January 15, 2004 scheduling the administrative hearing of this matter for February 3, 2004.

6. Facsimile letter from Taxpayer to Eugene J. Cella dated January 30, 2004 requesting that the hearing be rescheduled to February 17, 2004.

7. Letter from Eugene J. Cella to Taxpayer dated February 2, 2004 scheduling the hearing of this matter for February 17, 2004.

8. Memorandum dated May 16, 2001 by E. Norris Tolson, Secretary of Revenue, delegating to Eugene J. Cella the authority to conduct hearings required or allowed under Chapter 105 of the General Statutes.

The Division submitted a brief for hearing with attached exhibits.

The Taxpayer introduced the following into evidence at the hearing:

TP-1. Color photograph of a retail outlet serviced by taxpayer.

FINDINGS OF FACT

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

1. At all times relevant to the audit and assessment herein, Taxpayer was a distributor licensed with the Motor Fuels Tax Division pursuant to G.S. 105-449.67.

2. Taxpayer sold kerosene to various retail outlets, and applied to the Division for refunds of taxes paid on undyed kerosene sold for off-road use.

3. G.S. 105-449.105A provides that a distributor may obtain a refund for the excise tax paid on kerosene sold to a retailer if the fuel is dispensed into a storage facility marked for nonhighway use.

4. G.S. 105-449.105A(a)(2) requires that the storage facility be marked with the phrase "Undyed, Untaxed Kerosene, Nontaxable Use Only" or a similar phrase clearly indicating that the fuel is not to be used to operate a highway vehicle.

5. This statute also requires that the storage facility either has a dispensing device that is not suitable for use in fueling a highway vehicle or is kept locked by the retailer and must be unlocked by the retailer for each sale of kerosene.

6. The investigator inspected all of the retail outlets to which Taxpayer delivered kerosene.

7. Taxpayer serviced approximately ten (10) retail outlets in North Carolina during the audit period.

8. The investigator determined that two (2) outlets that Taxpayer serviced were not in compliance with the marking requirement of G.S. 105-449.105A.

9. These included [two outlets].

10. Specifically, the pumps at these locations did not bear the labeling "Undyed, Untaxed Kerosene, Nontaxable Use Only" or similar phrase clearly indicating that the fuel is not to be used to operate a highway vehicle, as required by G.S. 105-449.105A.

11. The refund claims for [an outlet] were denied for the full three (3) year statutory period.

12. The refund claim presented for [an outlet] were denied for six (6) months.

13. Taxpayer presented maintenance records establishing that the kerosene pump at the latter location had undergone repairs during a substantial portion of the audit period and was, at times, not operational.

14. The Division investigator first reviewed Taxpayer's kerosene refund claims (Form GAS-1210) and the corresponding bills of ladings for kerosene deliveries to all retail outlets during the audit period. (*See* Summaries of claims, Field Audit Report, Exhibit 2).

15. The investigator then verified the deliveries made to the noncompliant stations.

16. These gallons were deducted from Taxpayer's refund claims for the periods and the Division then issued an assessment based upon adjustments made to Taxpayer's Form GAS-1210 refund claims on August 26, 2003 for tax, penalty, and interest totaling $20,170.46.

17. Taxpayer timely filed an objection to the proposed assessment, citing the fact that the majority of K-1 kerosene was sold during the winter months as evidence that this fuel was used for heating purposes and not for highway use.

18. Since issuing the assessment the Division has applied subsequent Taxpayer's refunds to the outstanding tax liability, reducing the total liability to zero ($0.00).

19. Because this matter remains unresolved, it was referred to the Secretary for an administrative tax hearing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the undersigned entered the following conclusions of law:

1. Taxpayer was at all times relevant to this proceeding a kerosene distributor licensed pursuant to G.S. 105-449.67, and filed for kerosene refunds using the Divisions form GAS-1210.

2. Division investigators discovered during routine retail station inspections that two (2) of ten (10) retail outlets that taxpayer delivered kerosene to in this State were not in compliance with G.S. 105-449.105A.

3. Specifically, these outlets had storage facilities and dispensing devices that were not clearly marked with the phrase "Undyed, Untaxed, Kerosene, Nontaxable Use Only" or a

similar phrase clearly indicating that the fuel is not to be used on the highway, as required by G.S. 105-449.105A.

4. Each of the requirements of G.S. 105-449.105A are absolute, and it is incumbent upon a kerosene distributor to comply with each of the requirements of the statute in order to qualify for refunds of taxes paid on kerosene presumably used off road.

5. Taxpayer failed to show that it was compliant with the refund statute in all respects, and has not established its entitlement to refunds received from the Division during the audit period.

6. The proposed assessment of taxes in the amount of $16,446.73 and applicable interest should therefore be sustained.

7. For good cause shown, the assessment of the negligence penalty in the amount of $1,598.51 and the failure to pay penalty of $1,644.67 should be waived.

DECISION

A distributor is allowed a monthly refund of the excise tax paid on kerosene sold to a retailer if the marking requirements of G.S. 105-449.105A are met. In the course of her investigation, the Division investigator determined that Taxpayer failed to comply with these labeling requirements at two (2) of the retail outlets that it services. Although the pumps at issue were compliant in all other respects, Taxpayer admits that they did not fully adhere to the marking requirements of the refund statute. It is nearly axiomatic that refunds are analogous to exemptions from taxation, and the burden is upon taxpayers to bring themselves within the exemption or exclusion. *See Henderson v. Gill*, 229 N.C 313, 49 S.E.2d 754 (1948). Taxpayer has not demonstrated compliance with the necessary statutory requirements for refunds of taxes paid on its kerosene deliveries. The assessment must therefore be affirmed.

WHEREFORE, based upon the above findings of fact and conclusions of law, the undersigned Assistant Secretary of Revenue **HEREBY AFFIRMS** the proposed assessment of road tax in the amount of $16,446.73, plus accrued interest in the amount of $2,654.31, for a total liability of $19,101.04. Penalty assessed by the Division is **HEREBY WAIVED**. Interest continues to accrue at the statutory rate of $2.25 per day until paid.

This the 17st day of May 2004.

Signature_____

Eugene J. Cella
Assistant Secretary of Revenue