

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:)
)
The Motor Fuels Civil Penalty)
Assessments Issued February 3, 2003)
and February 24, 2003 by the Secretary)
of Revenue of North Carolina, totaling)
\$2,000.00)
)
vs)
)
[Taxpayer])

FINAL DECISION
Docket No. 2003-174

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on June 23, 2003. [The business owners] represented Taxpayer. Also appearing on behalf of Taxpayer was [a State Representative from a County]. Representing the Motor Fuels Tax Division were Martin Barrow, Investigations Supervisor; Heather Liddic Davis, Investigator; and Christopher E. Allen, General Counsel.

ISSUES

- I. **Whether the civil penalty assessment of \$1,000.00 issued by the Division on February 2, 2003 pursuant to N.C.G.S. § 105-449.118A against Taxpayer for refusing to allow Division investigators to take a fuel sample was proper.**
- II. **Whether the civil penalty assessment of \$1,000.00 issued by the Division on February 23, 2003 pursuant to 105-449.117 against Taxpayer for the unlawful use of dyed diesel fuel was proper.**

EVIDENCE PRESENTED BY THE DIVISION

1. Motor Fuels Tax Division Status Report prepared by Heather Liddic (now Davis).
2. DMV General Vehicle Detail showing Taxpayer as the registered owner of the [1989 diesel truck].
3. Civil Penalty Assessment dated February 3, 2003 in the amount of \$1,000.00.
4. Dyed Fuel Information Sheet dated February 24, 2002.

5. N. C. Department of Agriculture and Consumer Services Analytical Record of Sample Taken dated March 20, 2003, and supporting documentation.
6. Civil Penalty Assessment dated February 24, 2003 in the amount of \$1,000.00.
7. Letter dated February 28, 2003 to the Division and received March 18, 2003 from Taxpayer requesting a hearing.
8. Letter dated March 31, 2003 from Eugene J. Cella, Assistant Secretary of Revenue to Taxpayer scheduling a hearing for April 15, 2003.
9. Letter dated April 17, 2003 from Christopher E. Allen, Division General Counsel to Taxpayer.
10. Letter dated May 29, 2003 from Eugene J. Cella to Taxpayer rescheduling the hearing for June 23, 2003.
11. Letter dated May 16, 2001 from Secretary Tolson to Mr. Eugene J. Cella authorizing Mr. Cella to conduct administrative tax hearings.

Oral testimony of Stephen Benjamin, Director of the Motor Fuels Testing Laboratory, N.C. Department of Agriculture and Consumer Services.

The Division also presented a brief for tax hearing with exhibits 1 through 11 attached.

EVIDENCE PRESENTED BY TAXPAYER

1. Printed [repair order] dated June 17, 2003 from [a business].
- 2 - 6. Color photographs of Taxpayer's off-road fuel tank, equipment, and pickup truck.
7. Letter dated July 23, 2003 to Eugene Cella from Taxpayer together with affidavit signed by [an employee of a business] notarized by [a notary public], received by the Secretary's Office July 30, 2003.

Oral testimony of [a witness] on behalf of 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. On February 3, 2003, Motor Fuels Tax Division ("Division") Investigator Heather Liddic (now Davis) and Investigations Supervisor Martin Barrow stopped at a construction site in [a county] on [a North Carolina highway] to inspect diesel trucks.

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. Investigators Barrow and Davis identified themselves, and the site supervisor granted permission to inspect all diesel trucks on the construction site.
4. Upon completing the inspections, the investigators proceeded to check another truck across the parking lot.
5. The registered owner of that vehicle, Taxpayer, admitted to investigators that he had dyed fuel in the front tank of the truck.
6. This vehicle had a [vehicle identification number] and bore [a North Carolina license plate].
7. Taxpayer pointed to a specially fitted nozzle and hose on the back of the vehicle that he used to supply fuel from the tank to his off-road equipment.
8. Taxpayer also stated that he had spent \$350.00 to fit the tank with the hose, and that he intended to continue to use the tank to fuel his off-road equipment.
9. Investigator Barrow, using a pipette (a long, slender plastic tube) confirmed that the tank contained red-colored fuel.
10. Investigator Barrow left to retrieve equipment from his vehicle to draw a fuel sample from the tank of Taxpayer's truck.
11. Investigator Davis continued to speak with Taxpayer, who refused to provide his name or answer any questions, stating that she was "going to have to earn her money."
12. Taxpayer also refused to accept a copy of the Taxpayer's Bill of Rights issued by the Department of Revenue or the investigator's business card.
13. Taxpayer simply packed up his tools and left before Investigator Barrow could return to draw a fuel sample.
14. Investigator Davis then issued a penalty citation of \$1,000 for refusing to allow the taking of a motor fuel sample pursuant to G.S. § 105-449.118A.
15. The next day, on February 4, Investigator Davis visited Taxpayer's residence in [North Carolina] and inspected another diesel truck registered to Taxpayer.
16. This vehicle did not have dyed diesel fuel in its supply tank.
17. On February 23, 2003, Investigator Davis and Officer Jeff Ellis of the North Carolina Highway Patrol went back the construction site on [a North Carolina highway] to inspect Taxpayer's [truck] bearing [a North Carolina license plate].
18. Investigator Davis spoke with the site supervisor, who called Taxpayer off the building.

19. Before Investigator Davis could inspect the vehicle, Taxpayer stated that the front tank was disconnected, and that it contained dyed fuel.
20. Investigator Davis withdrew a fuel sample, which appeared red in color.
21. The fuel sample with [a North Carolina license plate] was then forwarded to the North Carolina Department of Agriculture Motor Fuels Laboratory for analysis.
22. The results of this analysis revealed that the fuel contained a concentration of 12.3 parts per million (PPM) of red dye and 0.133 percent of sulfur by weight.
23. Pursuant to the N.C. Administrative Code, 17 NCAC 12B .0503, the presence of dye in a fuel sample constitutes a violation of G.S. § 105-449.117.
24. Investigator Davis issued a penalty assessment for \$1,000.00 for the use of dyed fuel in a highway vehicle pursuant to G.S. § 105-449.117.
25. By letter to the Division dated February 28, 2003 and received March 6, 2003, Taxpayer requested a hearing concerning the penalties issued February 3, 2003.
26. For purposes of the hearing, both penalty assessments were combined and the matter was referred to the Office of the Secretary of Revenue for hearing.
27. By letter dated March 31, 2003, Eugene J. Cella, Assistant Secretary of Revenue, notified Taxpayer of the hearing of this matter scheduled April 15, 2003.
28. Initially, Taxpayer did not pay the penalty assessments pursuant to G.S. 105-449.119, and the matter was not ripe for hearing.
29. However, the Division and Taxpayer reached an agreement providing for payment of both assessments the day of hearing, thereby allowing the proceeding to go forward.
30. By letter dated May 29, 2003, Eugene J. Cella notified Taxpayer that the hearing was rescheduled for June 23, 2003.

CONCLUSIONS OF LAW

Based upon the evidence of record, the undersigned enters the following conclusions of law:

1. During all, times relevant to the assessments issued herein, taxpayer maintained a [diesel-powered truck] registered in his name with [a vehicle identification number] bearing [a North Carolina license plate].
2. Taxpayer willfully departed from the construction site parking area knowing that Division investigators were about to take a sample of fuel from his vehicle.
3. His statement to the investigator that "you are going to have to earn your money," together with his act of simply driving away after packing his tools, is sufficient evidence of "refus[ing] to allow the taking of a motor fuel sample."

4. The act of departing from the scene knowing that Division investigators are about to take a fuel sample from a highway vehicle, and after stating that the investigator was "going to have to earn her money" constitutes a violation of G.S. §105-449.118A.
5. This refusal necessitated the Division investigator later having to revisit, along with a State Highway Patrol officer, the construction site to obtain a sample of fuel from Taxpayer's vehicle.
6. Testing conducted by the North Carolina Department of Agriculture of the fuel sample determined that it contained red dye, verifying the Division investigator's visual roadside observations that the sample was red in color.
7. Laboratory analysis of the fuel sample taken on the second visit revealed a concentration of 12.3 PPM, indicating nontaxpaid diesel fuel.
8. The presence of dye in a fuel sample constitutes a violation of G.S. § 105-449.117 (See N.C. Administrative Code, 17 NCAC 12B .0503) subjecting the registered owner to a civil penalty of \$1,000.00.
9. Taxpayer presented a post-hearing affidavit attesting that the tank was disconnected from the engine on February 8, 2003, but does not state that the tank was disconnected from the engine on February 24, 2003, the date of the penalty.
10. Taxpayer's use of dyed diesel fuel in the licensed highway vehicle at issue was improper, subjecting him to a civil penalty assessment.
11. The Division's assessment of a civil penalty of \$1,000.00 on February 3, 2003 for refusing to allow the investigator to take a fuel sample from the licensed vehicle pursuant to G.S. § 105-449.118A was proper.
12. The Division's assessment of a civil penalty of \$1,000.00 on February 24, 2003 for using dyed diesel fuel in a highway vehicle pursuant to G.S. § 105-449.117 was proper.

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 civil penalty assessment of \$1,000.00 issued on February 3, 2003 and previously paid. Likewise, the undersigned Assistant Secretary **AFFIRMS** the civil penalty assessment of \$1,000.00 issued on February 24, 2003 and previously paid.

This the 21st day of October 2003.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue