

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:)
)
The Motor Fuels Tax Assessment)
Proposed Against)
)
[Taxpayer])

FINAL DECISION
Docket No. 2002-485

This matter was heard before the undersigned Assistant Secretary of Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on October 9, 2002 upon application for hearing by [Taxpayer's Owner/President]. Taxpayer timely protested the proposed assessment of tax, penalty, and interest for the period April 1, 1998 through March 31, 2001. The hearing was conducted pursuant to G.S. 105-241.1 and G.S. 105-260.1. [Taxpayer's Owner/President] represented Taxpayer. Representing the Motor Fuels Tax Division (hereinafter "Division") were Julye S. Powell, Investigator and Christopher E. Allen, Division Counsel.

The Division investigator completed a field audit report on August 2, 2001, posted the assessment on September 19, 2001 and issued an assessment on September 23, 2001 in the amount of \$4,206.47. Taxpayer was previously assessed two (2) dyed diesel penalties for improper use of non-taxpaid fuel in highway vehicles which are not associated with this matter. Taxpayer timely filed written objection to the assessment on October 12, 2001. Predicated upon additional information tendered by Taxpayer, the Division issued an amended assessment June 20, 2002. Taxpayer timely filed written objection to the assessment on July 16, 2002. On August 7, 2002, the Division notified Taxpayer that it was referring the matter to the Secretary of Revenue for hearing. The Secretary notified Taxpayer by letter dated August 14, 2002 that the hearing was scheduled for October 9, 2002. The undersigned conducted the hearing on that date.

ISSUE

Whether the Motor Fuels Tax Division properly calculated Taxpayer's operational miles and fuel consumption resulting in the proposed assessment for tax, penalty, and interest for the stated audit period.

EVIDENCE

1. Screen print from the Division's VISTA system showing Taxpayer's account information.
2. Screen-print from the Division's VISTA system showing Taxpayer's application and effective license date of date of November 11, 1998.

3. Motor Fuels Tax Division Field Audit Report dated August 2, 2001 and posted to the Department of Revenue ITAS system on September 19, 2001.
4. Letter dated October 12, 2001 from [Taxpayer's Owner/President] to the Department of Revenue, received by the Division October 19, 2001.
5. Letter dated November 5, 2001 from Christopher E. Allen to [Taxpayer's Owner/President] acknowledging the receipt of Taxpayer's objection to the assessment and request for hearing, requesting additional information, and mutually agreeing to postpone the hearing pending receipt of additional records.
6. Letter dated November 8, 2001 from [Taxpayer's Owner/President] to Christopher Allen received November 15, 2001 asserting that Taxpayer's vehicle operated at a higher MPG than that included in the audit, and promising to send additional records.
7. Amended Field Audit Report dated June 20, 2002 and posted to ITAS June 24, 2002 and notice of amended tax assessment dated July 23, 2002 of \$4,175.89.
8. Letter dated August 7, 2002 from Christopher Allen to [Taxpayer's Owner/President] stating that the additional records received July 16, 2002 was forwarded to the auditor for review, and notice that the matter was referred to the Secretary's Office for hearing.
9. Letter dated August 14, 2002 from Eugene J. Cella to [Taxpayer's Owner/President] containing notice of the hearing for October 9, 2002 at 2:00 pm.
10. Memorandum dated May 16, 2001 from E. Norris Tolson to Eugene J. Cella delegating authority to conduct administrative tax hearings pursuant to G.S. 105-260.1.
11. Civil Penalty Assessment dated December 27, 2000; DMV Vehicle Information Sheet Dated September 14, 2000 for 1999 [truck]; Receipt of Dyed Fuel Sample dated September 14, 2000.
12. Civil Penalty Assessment dated December 27, 2000; DMV Vehicle Information Sheet Dated September 14, 2000 for 1982 [truck]; Receipt of Dyed Fuel Sample dated September 14, 2000.

The Division also submitted a Brief for Tax Hearing signed by Julian W. Fitzgerald, Sr., Director, Motor Fuels Tax Division.

TP-1 Mileage Chart for Fuel, submitted by Taxpayer at the hearing, showing fuel and MPG factors for vehicles derived from records maintained from November 2001 through February 2002.

Testimony of [Taxpayer's Owner/President].

Testimony of Julye S. Powell, Investigator for the Motor Fuels Tax Division.

FINDINGS OF FACT

1. Taxpayer was, during all times relevant to the audit and assessment herein, a "bulk-end user" as defined by G.S. 105-449.60(3).
2. Taxpayer was properly registered with the Division pursuant to G.S. 105-449.47 as an intrastate motor carrier.
3. Taxpayer was engaged in the business of hauling and disposing of waste products, operating for over fifteen (15) years.
4. Taxpayer operated four (4) diesel-powered vehicles during the audit period.
5. The Division issued a civil penalty assessment against Taxpayer on December 27, 2000 for \$1,000.00 pursuant to G.S. 105-449.117 for highway use of dyed diesel fuel in Taxpayer's [1999 truck].
6. This civil penalty assessment was previously paid and is not a part of the matter herein.
7. The Division issued a civil penalty assessment against Taxpayer on December 27, 2000 for \$1,000.00 pursuant to G.S. 105-449.117 for highway use of dyed diesel fuel in Taxpayer's [1982 truck].
8. This civil penalty assessment was previously paid and is not a part of the matter herein.
9. Taxpayer has a history of unlawful and improper use of non-taxpaid fuel.
10. The audit period covered July 1, 1998 through March 31, 2001.
11. Taxpayer provided odometer readings for all but one (1) licensed vehicles obtained from service records as of February 7, 2001.
12. The remaining vehicle, the [1982 truck] was previously owned and [Taxpayer] stated that the odometer was broken and had never worked, but was driven approximately 6,000 miles during the three-year period.
13. Taxpayer provided vehicle logs and mileage information on all vehicles, and installed a hubometer on the [1982 truck] at the suggestion of the Division investigator.
14. The hubometer confirmed mileage as indicated in Taxpayer's logs with respect to the [1982 truck] and the mileage was accepted by the Division as accurate.
15. The Division investigator, using the odometer readings and vehicle mileage logs supplied by Taxpayer and applying sample months of readings, computed total projected operational miles for the audit period.
16. The investigator then applied standard MPG factors for the various weight classifications for Taxpayer's vehicles to determine the total gallons required for Taxpayer's operation during the audit period.

17. The investigator determined that the total amount of fuel required to sustain Taxpayer's operation during the audit period was 39,003 gallons.
18. Taxpayer maintained two (2) 500-gallon storage tanks, and fueled highway vehicles and off-road equipment from these tanks during the audit period.
19. Taxpayer provided invoices from its supplier for the three-year audit period purportedly showing all fuel deliveries.
20. The investigator found a shortage of 13,824 gallons of fuel in the initial audit.
21. The investigator gave credit in the amended audit for all fuel tickets and records that met the published criterion for allowable receipts pursuant to G.S. 105-449.37 and 17 NCAC .091 .0201.
22. The investigator allowed Taxpayer credit in the fuel audit for some fuel purchases that did not meet published criterion for allowable receipts.
23. Taxpayer provided some receipts for outside purchases for which the investigator allowed credit in the amended audit.
24. After Taxpayer supplied additional records, the audited fuel shortage was 12,375 gallons.
25. Taxpayer did not maintain throughput meters on its storage tanks, therefore it had no withdrawal records for the highway vehicles.
26. Because of the absence of Taxpayer's records, the investigator could not establish how much fuel went into each vehicle to compute actual MPG factors for vehicles in each respective weight classification.
27. The final amended audit prepared by the Division investigator reveals a shortage of 11,638 gallons of fuel.
28. Taxpayer submitted evidence at the hearing of this matter relating to MPG factors of its vehicles based upon records maintained after the close of the audit period and during the winter months of November 2001 through February 2002.
29. Taxpayer submitted evidence of total business revenue during and after the audit period, which was unrelated to its operational miles and fuel usage in its vehicles during the audit period.

CONCLUSIONS OF LAW

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

1. Taxpayer was during all times relevant to the matter herein an intrastate motor pursuant to G.S 105-449.47.

2. Taxpayer was during all times relevant to the matter herein a bulk-end user as defined in G.S. 105-449.60(3).
3. As a bulk-end user, Taxpayer was required to keep proper fuel purchase and use records to determine its motor fuel transactions pursuant to G.S. 105-449.121, but failed to do so.
4. Taxpayer failed to maintain proper vehicle odometer readings or other mileage records necessary to establish fuel usage in its highway vehicles.
5. Taxpayer unlawfully used dyed diesel in its highway vehicles in violation of G.S. 105-449.117.
6. The Division properly calculated Taxpayer's operational miles and fuel consumption resulting in the proposed assessment for tax, penalty, and interest for the stated audit period using the best information available pursuant to G.S. 105-241.1(a).
7. Taxpayer was properly assessed \$2,754.55 tax, \$688.65 penalty and \$857.69 accrued interest through October 9, 2002, for a total of \$4,299.49.
8. Additional interest of \$37.04 has accrued from October 9, 2002 through December of 2002 for a total now due of \$4,336.53.
9. The assessment continues to accrue interest at a rate of six-percent (6 %) or \$.69 per day.

DECISION

During all times relevant to the audit and proposed assessment herein, Taxpayer was required, as an intrastate carrier and a bulk-end user, to maintain records of its fuel purchases and use. See G.S. 105-449.121. Taxpayer's representative, [Taxpayer's Owner/President], admitted during the hearing that he did not maintain records during the audit period as required. Additionally, on two occasions Taxpayer was found using dyed diesel fuel (non-taxed) in its highway vehicles in violation of state law. See G.S. 105-449.117.

Taxpayer contends that mileage records maintained post-audit reveal that its highway vehicles obtained higher MPG (Miles Per Gallon) factors than those used by the Division investigator. However, taxpayer compiled these records from November 2001 through February 2002, well after the audit period of April 1, 1998 through March 31, 2001 had expired. Taxpayer also contended that its revenue during the period could not support the level of fuel usage as

determined by the investigator to sustain its operation. In absence of vehicle mileage records and fuel usage, Taxpayer failed to establish a correlation between business income and fuel usage for purposes of the road tax.

The deficiencies in records maintained by Taxpayer, coupled with its documented misuse of dyed diesel fuel, support the Division's contentions that there existed a shortage of tax-paid fuel to sustain Taxpayer's vehicle operations. The Motor Fuels Tax Division properly calculated Taxpayer's operational miles and fuel consumption resulting in the proposed assessment for tax, penalty, and interest for the stated audit period using the best information available pursuant to G.S. 105-241.1(a). The assessment is without error.

Wherefore, the undersigned Assistant Secretary of Revenue hereby affirms in its entirety the proposed assessment for tax of 2,754.55, penalty of \$688.65 and interest of \$893.33 through this date for a total of \$4336.53, plus accrued interest at the rate of six percent (6%) or \$.69 per day thereafter.

This the 7th day of January, 2003.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue