

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE SECRETARY
OF REVENUE

IN THE MATTER OF:)
)
The Proposed Penalty for Failure to)
Obtain a Transporter’s License Issued)
March 14, 2003 by the North Carolina)
Secretary of Revenue in the Amount of)
\$6,250.00)
)
and)
)
The Proposed Penalty for Failure to File)
Informational Returns issued March 14,)
2003 by the North Carolina Secretary of)
Revenue in the Amount of \$3,000.00)
)
Against)
)
[Taxpayer])

FINAL DECISION
Docket Number 2003-194

This matter was conducted before the undersigned Assistant Secretary for Administrative Tax Hearings, Eugene J. Cella, in Raleigh, North Carolina on June 23, 2004. The matter was held open for an additional thirty (30) days for the submission of post-hearing evidence. [Taxpayer] and [Son] appeared on behalf of Taxpayer. Representing the Motor Fuels Tax Division was Mr. Ron Ben-Dov, Motor Fuels Tax Auditor, Ms. Patricia Thompson, Licensing and Bonding Specialist, and Christopher E. Allen, General Counsel.

ISSUES

I.

Whether the Division properly assessed Taxpayer penalties in the amount of \$6,250.00 for failure to obtain a motor fuels transporters license pursuant to G.S. §§ 105-449.65(a)(7) and 105-236(2).

II.

Whether the Division properly assessed taxpayer penalties in the amount of \$3,000.00 for failure to file monthly motor fuels transporter informational returns pursuant to G.S. §§ 105-449.101 and 105-236(10) c.

EVIDENCE

The Division introduced the following into the record at the hearing:

1. Facsimile letter dated February 9, 2001 from [Supplier] to Peggy Norris, N.C. Motor Fuels Tax Division.
2. Facsimile transmission dated November 6, 2001 from [Supplier] to Ron Ben-Dov detailing Taxpayer's motor fuel purchases during 2001.
3. Letter dated February 14, 2002 from Patricia Thompson, Motor Fuels Tax Division to Taxpayer.
4. Letter dated November 4, 2002 from Christopher E. Allen, Motor Fuels Tax Division to Taxpayer, sent certified mail, return receipt requested.
5. Return envelope stamped [City], NC dated November 6, 2002 marked "Unclaimed," received by the Division November 27, 2002.
6. Letter dated January 7, 2003 from Mr. Allen to Taxpayer, sent via hand delivery.
7. Field Audit Report dated December 18, 2002 indicating the amount of G.S. § 105-236(2) penalties assessed in the amount of \$6,250.00 and G.S. § 105-236(10) penalties assessed in the amount of \$3,000.00.
8. Notice of Tax Assessment dated March 14, 2003 for civil penalties totaling \$9,250.00.
9. Letter dated March 24, 2003 from [Attorney], counsel for Taxpayer to Patti Thompson.
10. Letter dated February 28, 2003 from [Supplier]; "To Whom It May Concern."
11. Letter dated March 24, 2003 from [Attorney] to Patti Thompson.
12. Undated statement by First Sergeant M. A. Prichard, North Carolina Highway Patrol, Motor Carrier Enforcement, "To Whom It May Concern."

13. Letter dated April 1, 2003 from [Attorney] to Julian W. Fitzgerald, Sr., received by the Division April 8, 2003.
14. Letter Dated April 1, 2003 from [Attorney] to E. Norris Tolson, Secretary of Revenue.
15. Letter dated April 10, 2003 from Mr. Allen to [Attorney] responding to the correspondence to the Secretary of Revenue.
16. Letter dated April 9, 2003 from Mr. Allen to [Attorney] stating that the matter was referred to the Secretary's Office for an administrative tax hearing.
17. Letter dated April 14, 2003 from Eugene J. Cella to [Attorney] scheduling the matter for hearing on June 19, 2003.
18. Letter dated May 15, 2003 from [Attorney] to Mr. Cella stating that Taxpayer would like to settle the matter without a hearing.
19. Letter dated May 19, 2003 from Mr. Cella to [Attorney].
20. Letter dated June 5, 2003 from [Attorney] to Mr. Cella regarding the hearing date, and requesting a postponement of the hearing.
21. Letter dated June 17, 2003 from Mr. Allen to [Attorney] offering to have a pre-hearing conference to share and exchange information.
22. Letter dated June 20, 2003 from Mr. Cella to [Attorney] rescheduling the hearing of this matter for September 2, 2003.
23. Letter dated September 3, 2003 from Mr. Cella to [Attorney] continuing the hearing of this matter pursuant to G.S. § 105-241(c).
24. Letter dated April 29, 2004 from Mr. Cella to [Attorney] rescheduling this matter for May 24, 2004.
25. 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.
26. Application for Motor Fuels Transporter License, Form GAS 1301A.
27. Terminal records evidencing product liftings by Taxpayer with handwritten notations.

28. Terminal records provided by out-of-state terminal operator evidencing liftings of product on Taxpayer's own account from 1998 through 2001 totaling 2,278,784 gallons during the four-year period.

The Division presented oral testimony of Ron Ben-Dov, Motor Fuels Tax Auditor and Patti Thompson, Motor Fuels Licensing and Bonding Specialist.

The Division also submitted a brief for the hearing conducted June 23, 2004.

Taxpayer introduced the following into the record, both during the hearing and after:

- TP-1. 2003 Legislative changes bulletin dated September 2003, prepared and sent to motor fuels taxpayers by the Division.
- TP-2. Statement dated June 23, 2004 from terminal operator.
- TP-3. Statement dated June 29, 2004 together with "Permanent Lease Agreement."
- TP-4. Letter dated August 27, 2004 from Taxpayer to Eugene J. Cella, replying to the Division's post-hearing response.
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The Division submitted a post-hearing response to Taxpayer's submittals.

FINDINGS OF FACT

From the above documents of record, the undersigned Assistant Secretary of Revenue makes the following findings of fact:

1. While performing an International Fuel Tax Agreement (IFTA) audit of Taxpayer's motor fuels operation, Ron Ben-Dov, Motor Fuels Tax Auditor, discovered that Taxpayer was not licensed with the Motor Fuels Tax Division.
2. The Division received notification on February 9, 2001 from [Supplier], a terminal operator and Taxpayer's supplier, that Taxpayer routinely loaded motor fuel product from [Supplier's] terminal in [City], Virginia for delivery to various North Carolina destinations.
3. Additional information obtained from [Supplier] on November 6, 2001 demonstrated that Taxpayer obtained, under the account of [Taxpayer], the following:
 - 217,589 gallons – Low Sulfur Diesel

- 170,521 gallons – Unleaded Regular
 - 2,959 gallons – Unleaded Regular (other)
 - 1,318 gallons – Midgrade
 - 21,369 gallons – Premium
4. These documented liftings occurred from January 1, 2001 through November 6, 2001, the date of the facsimile transmission from [Supplier].
 5. By letter dated February 14, 2002, the Division notified Taxpayer that he was required to obtain a license to transport motor fuel into this State.
 6. Division personnel had repeated discussion with Taxpayer, informing him of his obligations to obtaining licensing and file informational returns.
 7. Additionally, the Division informed Taxpayer of the statutory bond requirement, that he was required to post a bond in the amount of \$17,000.00, and included a bond application for Taxpayer's convenience.
 8. The Division also informed Taxpayer that he was to provide a bond no later than March 1, 2002.
 9. By certified letter dated November 4, 2002, the Division informed Taxpayer that he was not in compliance with the statutory license and bond requirements, and that it was taking the following actions:
 - Notifying the Commissioner of Motor Vehicles
 - Pursue criminal prosecution
 - Revoke his IFTA License
 - Pursue any other civil or criminal remedy available to the Secretary
 10. This letter was returned unopened and marked "unclaimed" on November 27, 2002.
 11. The Division subsequently arranged to again have this letter, now dated January 7, 2003, hand-delivered to Taxpayer by Rick Shearin, Motor Fuels Tax Investigator.
 12. The Division auditor assigned to this matter completed a field audit on December 18, 2002, detailing the specific penalties for failure to obtain a transporter's license.
 13. Using supplier returns, the auditor determined that Taxpayer, under his account, had lifted product from the supplier's Virginia terminal since 1998.

14. Additionally, the auditor found that Taxpayer transported the product from Virginia into this State as a transporter, distributor, or importer without a license as required by the State Revenue Act.
15. N.G.G.S. § 105-449.65(a) provides that a motor fuel transporter may not engage in that business in this State unless the Secretary of Revenue has issued an authorizing license.
16. N.C.G.S. § 105-449.101 states that a motor fuel transporter must file monthly informational returns.
17. Taxpayer has never obtained a license to transport motor fuel into this State or filed any informational returns.
18. The auditor assessed Taxpayer, pursuant to G.S. § 105-236 (2), penalties for the failure to obtain a license in the amount of \$5.00 per day as a separate offense.
19. The auditor calculated the penalties based upon 250 business days in a year, for a total of \$1,250.00 per year from 1998 through 2002.
20. The penalties for the failure to obtain a license totaled \$6,250.00.
21. The auditor also assessed Taxpayer for the failure to file informational returns pursuant to G.S. §§ 105-449.101 and 105-236(10).
22. These penalties were calculated on a monthly basis of \$50.00 per month, or \$600.00 per year for the five-year period, for a total of \$3,000.00 for the failure to file informational returns.
23. The amount of penalties assessed in the audit totaled \$9,250.00, and the Division sent Taxpayer a notice of proposed tax assessment on March 14, 2003 for that amount.
24. Taxpayer responded by letter from his attorney dated March 24, 2003 advising the Division that Taxpayer was not in the “oil business,” that his truck was under lease to [Retailer], and that [Retailer] was the purchaser of the fuel.
25. As evidence of his position, counsel presented the Division with a letter from the supplier dated January 28, 2003 stating that [Retailer] “has been a customer of [Supplier] since 1998.”
26. By letter also dated March 24, 2003, Taxpayer contends that he was in full compliance, as evidenced by a signed statement from M. A. Pritchard, North Carolina Highway Patrol, Motor Carrier Enforcement.

27. In this undated statement, Officer Pritchard states that Mr. Smith “has been stopped on a number of occasions I have always found him to be very cooperative and always complies with any infraction or safety equipment violations.”
28. Taxpayer also stated that he was a “one-truck operator and this truck is leased to [Retailer].”
29. Taxpayer also states, through his attorney, that Taxpayer transports fuel for another, and does not need a distributor’s license, but also concludes that he does not need a transporters license.
30. By letter dated April 1, 2003 to Julian W. Fitzgerald, Sr., Taxpayer again requested a hearing on the proposed \$9,250.00 penalty assessment.
31. The Division responded to this letter on April 9, 2003, stating that the matter was being referred to the Secretary of Revenue for hearing, and pointing out that Taxpayer purchased 148,840 gallons of gasoline and 133,903 gallons of diesel fuel on his own account during 2001, which formed the basis for the assessments.
32. During all times relevant to the matter herein, Taxpayer transported fuel obtained on his own account and on account of others into this State.
33. Taxpayer submitted a statement dated June 29, 2004 from James Phelps stating that:

“[a]s of April 1998 [Taxpayer’s] truck was leased to us to haul our gasoline. The lease expired on December 31, 2003. William T. Smith was hired as the truck driver only to drive our truck.”
34. Taxpayer submitted a copy of the purported “Permanent Lease Agreement” rather than the original document to the Secretary.
35. This document reveals that the term of lease commenced on January 1, 2003 and apparently terminates on December 31, 2010, well outside the relevant audit period.
36. In the “Agreement” the lessee certifies that the equipment, a Kenworth road tractor, was placed into service on January 1, 2003.
37. Again, this date is well after the end of the audit period noted above and cast some doubt upon the June 29, 2004 statement of Mr. Phelps.
38. Taxpayer contends that this lease establishes that the fuel purchased during the relevant period belonged to the Lessee, who was operating a retail outlet for motor fuel.

39. However, Taxpayer clearly purchased fuel on his own account in 2001.
40. Taxpayer submitted a document from the oil company indicating product lifting by the retail outlet from 1998 through June 1999, however, Taxpayer wrote on this document in his handwriting in parentheses "... *carrier only*" indicating that he was engaged in the business of transporting motor fuel product into this State.
41. For this activity the Legislature, through G.S. §§ 105-449.65 and .101, both prescribes a license and requires informational returns as a transporter.
42. Based upon the plain language of the multi-activities licensing statute, a person engaged in transporting fuel for another must obtain a license for that activity.
43. Terminal records provided by the oil company establish that Taxpayer purchased fuel on his own account from 1998 through 2001.
44. An examination of the oil company's supplier schedule of terminal rack removals indicate the following amounts of motor fuel products, including gasoline and low sulfur undyed diesel fuel were purchased on the account of [Taxpayer] from 1998 through 2001:
 - 1998 317,903 gallons
 - 1999 459,296 gallons
 - 2000 1,089,684 gallons
 - 2001 411,901 gallons
45. Taxpayer purchased a total of 2,278,784 gallons of motor fuel products from the out-of-state oil company in the span of four (4) years.
46. The records noted above, namely the schedule of terminal rack removals, establish the origin and intended destination state of the product.
47. These documents show, by date, each incidence of purchase.
48. In each instance, the origin state was Virginia, and the intended destination state was North Carolina, clearly demonstrating that Taxpayer made regular and systematic trips out of State to receive and import this fuel into North Carolina.
49. It appears from the record that Taxpayer was actively engaged in the business of transporting motor fuel into this State.
50. Taxpayer did not obtain a license to engage in the business of transporting motor fuel into this State or file informational returns as required by as contemplated by G.S. §§ 105-449.65(7) and .101 of the State Revenue Act.

51. Taxpayer contended at the hearing and in post-hearing submittals that Division personnel instructed him that he was not required to obtain a license for his business activities.
52. Taxpayer was given additional time to submit written evidence of such representations, but failed to do so.

CONCLUSIONS OF LAW

From the above findings of fact the undersigned Assistant Secretary enters the following conclusions of law:

1. A person may not engage in business in this State as an importer or a motor fuel transporter "unless the person has a license issued by the Secretary authorizing the person to engage in that business." G.S. 105-449.65((4) and (7).
2. The term "import" is defined by G.S. § 105-449.60(19) to mean "bring[ing] motor fuel into this State by any means of conveyance other than in the fuel supply tank of a highway vehicle."
3. The licensing criteria for importers is established under G.S. § 105-449.66(1), (2), and (3)
4. However, Taxpayer does not meet the licensing criteria as an importer under G.S. 105-449.66, since he is neither a bonded importer nor an occasional importer, and he operates a transport truck rather than a tank wagon. *See* G.S. § 105-449.66(1), (2), and (3).
5. Under the multiple activity component of G.S. § 105-449.65, a person holding a higher license is not required to obtain a license for a lower-level activity.
6. Thus, a person licensed as a supplier need not obtain a license from the Secretary for any other motor fuels activity requiring a license.
7. A person is not required to obtain a license as a distributor (*See* G.S. § 105-449.67), however, a person that is licensed as a distributor or a blender is not required to obtain a separate license as a motor fuel transporter if the distributor does not transport motor fuel for others for hire.
8. Conversely, if a person is transporting fuel into this State, he must obtain a transporter's license if he is not a licensed distributor.
9. It is clear that this Taxpayer was operating as a motor fuel transporter during the relevant audit period.

10. Taxpayer's counsel recognizes Taxpayer's status in his letter of March 24, 2003 to Patti Thompson when he writes "'[s]ince Mr. Smith does not purchase fuel for himself and all the fuel he *transports* is purchased by [Retailer], we are of the opinion that Mr. Smith does not need a License Distributor License.'" (Sic) (Emphasis added).
11. Taxpayer ignores the fact (*See* Findings of Fact 3, 30, and 33) noted above that in the year 2001 alone, he purchased and transported into this State over four hundred thousand (400,000) gallons of fuel on his account.
12. The Motor Fuel Tax Laws impose a requirement upon this Taxpayer to obtain a license for this activity.
13. If Taxpayer were a licensed distributor, it would be unnecessary for him to obtain a separate license as a motor fuel transporter pursuant to G.S. 105-449.65(a).
14. However, Taxpayer was not a licensed distributor, nor did he hold a license for any other activity contemplated by the motor fuels tax statutes.
15. Therefore, he was required to obtain (at no cost) a transporter's license from the Secretary of Revenue, and this he failed to do, despite repeated efforts by the Division to effectuate compliance.
16. The legislature has imposed, through G.S. § 105-236(2), a penalty of not less than \$5.00 for the failure to obtain a license.
17. N.C. Gen. Stat. § 105-235 mandates that the failure to "perform any duty enjoined by this Subchapter...for each day such failure, refusal, or neglect continues, shall constitute a separate and distinct offense."
18. The Division properly assessed Taxpayer the prescribed minimum amount imposed pursuant to G.S. § 105-236(2) for each day for the five-year audit period, exclusive of weekends and holidays that Taxpayer operated as a transporter.
19. Thus Taxpayer was properly issued a penalty for 250 days, or \$1,250 per year for the audit period, for a total of \$6,250.00 in penalties for failure to obtain a transporter's license, although the Division could have assessed the penalty for 365 days per year.
20. N.C. Gen. Stat. § 105-449.101(a) imposes upon a person transporting motor fuel into this State a requirement that they file a monthly informational return with the Secretary showing fuel received or delivered by the transporter.
21. By operation of this Section, the return is due by the 25th day of the month, and must include the information specified in Subsection (b) of that statute.

22. This statutorily required information includes the name and address of each person from whom the transporter received fuel outside the State for delivery in this State, the amount and date the fuel was received, and the destination State of the fuel. See G.S. § 105-449.101(b).
23. Taxpayer refused to comply with Division attempts to obtain transporter monthly informational returns.
24. N.C. Gen. Stat. 105-236(10)c imposes a \$50.00 penalty for the failure to file a return required by Article 36C or 36D of this Chapter by the date the return is due.
25. The auditor properly assessed Taxpayer the \$50.00 penalty for each month during the audit period, or \$600.00 per year for the five-year period.
26. The total penalties assessed for the failure to file informational returns equals \$3,000.00.
27. The total amount of penalties assessed by the Division for the failure to obtain a license and the failure to file informational returns totals \$9,250.00.
28. The Division properly assessed Taxpayer \$9,250.00 in penalties for failure to comply with the specific licensing and reporting requirements of the Motor Fuels Tax Laws of North Carolina.

CONCLUSION

A person may not engage in business in this State as an importer or a motor fuel transporter "unless the person has a license issued by the Secretary authorizing the person to engage in that business." G.S. 105-449.65(4) and (7). The term "import" is defined by statute to mean "bring[ing] motor fuel into this State by any means of conveyance other than in the fuel supply tank of a highway vehicle." G.S. § 105-449.60(19). However, Taxpayer does not meet the licensing criteria as an importer under G.S. 105-449.66. He is neither a bonded importer nor an occasional importer, and he operates a transport truck rather than a tank wagon. See G.S. § 105-449.66(1), (2), and (3).

Under the multiple activity component of G.S. § 105-449.65, a person holding a higher license is not required to obtain a license for a lower-level activity. See generally,

G.S. § 105-449.65(b). Thus, a person licensed as a supplier need not obtain a license from the Secretary for any other motor fuels activity requiring a license. A person is not required to obtain a license as a distributor. *See* G.S. § 105-449.67. However, a person licensed as a distributor or a blender is not required to obtain a separate license as a motor fuel transporter if the distributor does not transport motor fuel for others for hire. Conversely, if a person is transporting fuel into this State, he must obtain a transporter's license if he is not a licensed distributor.

It is clear that this Taxpayer operated as a motor fuel transporter. Taxpayer's counsel recognizes Mr. Smith's status in his letter of March 24, 2003 to Patti Thompson when he writes "'[s]ince Mr. Smith does not purchase fuel for himself and *all the fuel he transports* is purchased by [Retailer], we are of the opinion that Mr. Smith does not need a License Distributor License.'" (Sic) (Emphasis added). Taxpayer ignores the fact noted above that in the year 2001 alone, he purchased over four hundred thousand (400,000) gallons of fuel on his own account.

The Motor Fuel Tax Laws impose a requirement upon this taxpayer to obtain a license for this activity. If Taxpayer were a licensed distributor, it would be unnecessary for him to obtain a separate license as a motor fuel transporter pursuant to G.S. 105-449.65(a). However, Taxpayer is not a licensed distributor, nor does he hold a license for any other business activity contemplated by the motor fuels statutes. Therefore, he must obtain (at no cost) a transporter's license from the Secretary of Revenue, and this he failed to do, despite repeated efforts by the Division to effectuate compliance.

The legislature has imposed, through G.S. § 105-236(2), a penalty of not less than \$5.00 for the failure to obtain a license. N.C. Gen. Stat. § 105-235 mandates that the

failure to “perform any duty enjoined by this Subchapter...shall, for each day such failure, refusal, or neglect continues, constitute a separate and distinct offense.” The Division assessed Taxpayer the prescribed minimum amount imposed pursuant to G.S. § 105-236(2) for each day for the five-year audit period, exclusive of weekends and holidays that Taxpayer operated as a transporter. Thus Taxpayer was issued a penalty for 250 days, or \$1,250 per year for the audit period, for a total of \$6,250.00 in penalties for failure to obtain a transporter’s license.

N.C. Gen. Stat. § 105-449.101(a) imposes upon a person transporting motor fuel into this State a requirement that they file a monthly informational return with the Secretary showing fuel received or delivered by the transporter. This report is due by the 25th day of the month, and must include the information specified in Subsection (b) of that statute. This statutorily required information includes the name and address of each person from whom the transporter received fuel outside the State for delivery in this State, the amount and date the fuel was received, and the destination State of the fuel. *See* G.S. § 105-449.101(b).

Taxpayer steadfastly refused to comply with statutory requirements, despite Division attempts to obtain transporter monthly informational returns. N.C. Gen. Stat. 105-236(10)c imposes a \$50.00 for the failure to file a return required by Article 36C or 36D of this Chapter by the date the return is due. The auditor assessed taxpayer the \$50.00 penalty for each month during the audit period, or \$600.00 per year for the five-year period. The total penalties assessed for the failure to file informational returns equals \$3,000.00.

The penalties assessed herein are proper. Taxpayer was engaged in the systematic transportation of over two (2) million gallons of motor fuel products into this State during the relevant audit period without any license from the Secretary to engage in that business. Further, Taxpayer filed no informational return whatsoever during the five-year period covered by the audit, again despite repeated efforts by Division personnel to bring him into compliance with the State Revenue Laws. Moreover, Taxpayer changed his statements to Division personnel numerous times, alternately stating that he owned the fuel in question and sold it on consignment, was merely delivering the fuel owned by another, or that his truck was leased to the purchaser. He has never presented any records or information to corroborate these statements. In fact, the documents provided by his supplier support quite the opposite conclusion, that he owned the product being transported, and sold it to a retailer.

For this activity the statutes required Taxpayer, at minimum, to be licensed as a transporter under the multiple licensing statute (G.S. § 105-449.65). The Division properly seeks to collect penalties for his failure to obtain a transporter's license, a lesser licensing classification under the current statutory scheme, and for his failure to file informational returns.

WHEREFORE, the proposed assessment for failure to obtain a transporter's license pursuant to G.S. §§ 105-449.65 and 236(2) in the amount of \$6,250.00 is **HEREBY AFFIRMED**.

The proposed assessment for failure to file informational returns pursuant to G.S. §§ 105-449.101 and 236(10)c in the amount of \$3,000.00 is **ALSO AFFIRMED**.

The total assessed liability is \$9,250.00.

This the 25th day of October 2004.

Eugene J. Cella
Assistant Secretary for Administrative Tax Hearings
North Carolina Department of Revenue