

STATE OF NORTH CAROLINA  
WAKE COUNTY

BEFORE THE SECRETARY  
OF REVENUE

IN THE MATTER OF: )  
)  
The Proposed Denial of Refund of the )  
Motor Fuels Dyed Diesel Civil Penalties )  
Issued September 12, 2003 and )  
December 4 2003 previously paid, )  
)  
And )  
)  
The Proposed Motor Fuels Bulk User )  
Tax Amended Assessment Issued )  
February 24, 2003 by the Secretary of )  
Revenue of North Carolina in the )  
Amount of \$2,031.24 )  
)  
Against )  
)  
[Taxpayer] )

FINAL DECISION  
(Docket No. 2004-308)

---

This matter was conducted before the undersigned Assistant Secretary for Administrative Hearings, Eugene J. Cella, in Raleigh, North Carolina on May 17, 2004. by written communication at the request of Taxpayer. Owner appeared *pro se*, and Christopher E. Allen, General Counsel, Motor Fuels Tax Division, represented the Motor Fuels Tax Division.

**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 two (2) \$1,000.00 civil penalties assessment issued September 12 and December 4, 2003.**

**II.**

**Whether the Division properly calculated the taxpayer's nonhighway fuel consumption resulting in the proposed amended assessment for tax, penalty, and interest pursuant to G.S. §§ 105-449.87(b) and 105-241.1 totaling \$2,031.24 plus subsequently accruing interest.**

## **EVIDENCE**

The Division introduced the following documents into the record:

1. Dyed fuel information sheet dated September 12, 2003 for a 1996 Dodge truck with [Vehicle Identification Number] bearing N.C. license [plate #].
2. North Carolina Department of Agriculture and Consumer Services, analytical record of sample taken, dated September 24, 2003.
3. Notice of civil penalty assessment dated September 12, 2003 in the amount of \$1,000.00.
4. Dyed fuel information sheet dated September 12, 2003 for a 1970 Jeep Hydro with [VIN No.] bearing N.C. license [plate #].
5. North Carolina Department of Agriculture and Consumer Services, analytical record of sample taken, dated September 24, 2003.
6. Notice of civil penalty assessment dated December 4, 2003 in the amount of \$1,000.00.
7. Letter dated December 15, 2003 from Taxpayer to the Division objecting to the civil penalty assessments.
8. Division field audit report dated February 9, 2004.
9. Notice of tax assessment dated February 24, 2003.
10. Letter dated July 22, 2004 from Eugene J. Cella to taxpayer scheduling an administrative tax hearing for August 19, 2004.
11. 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.
12. Notice of tax assessment dated March 24, 2004 in the amount of \$2,071.44.
13. Copy of check submitted by Taxpayer dated March 11, 2004 in the amount of \$2,071.44.

Taxpayer introduced the following into the record:

- TP-1. Letter dated September 8, 2004 to Eugene J. Cella containing an equipment list and information regarding fuel use which is also included in Exhibit 7 above.

## **FINDINGS OF FACT**

From the evidence of record, the undersigned Assistant Secretary for Administrative Tax Hearings enters the following findings of fact:

1. On September 12, 2003, investigators with the Motor Fuels Tax Division (hereinafter "Division") discovered the presence of dyed diesel fuel in the supply tank of Taxpayer's 1996 Dodge truck bearing license [plate number].
2. The vehicle was parked near Leicester Highway, Leicester, North Carolina.
3. Visual inspection of the fuel in the vehicle's supply tank revealed that it was red in color, and preliminary roadside screening using a Petrospec indicated that the fuel contained 2.4 parts-per-million (PPM) of red dye, or nonhighway, non-taxed fuel.
4. Motor Fuels Investigator Heather Davis withdrew a sample of fuel from the supply tank of the 1996 Dodge truck bearing license [plate number], sealed the container, and forwarded the sample to the State Department of Agriculture and Consumer Services for further testing.
5. Subsequent laboratory analysis revealed that the sample contained 3.4 PPM of red dye.
6. The Division issued a civil penalty assessment on September 12, 2003 for \$1,000.00 pursuant to N.C.G.S. 105-449.117.
7. On September 12, 2003, investigators with the Division discovered the presence of dyed diesel fuel in the supply tank of Taxpayer's 1970 Jeep bearing license [plate number].
8. The vehicle was parked near Leicester Highway, Leicester, North Carolina.
9. Visual inspection of the fuel in the vehicle's supply tank revealed that it was red in color, and preliminary roadside screening using a Petrospec indicated that the fuel contained .9 parts-per-million (PPM) of red dye, or nonhighway, non-taxed fuel.
10. Motor Fuels Investigator Heather Davis withdrew a sample of fuel from the supply tank of the 1970 Jeep bearing license [plate number], sealed the container, and forwarded the sample to the State Department of Agriculture and Consumer Services for further testing.
11. Subsequent laboratory analysis revealed that the sample contained 2.2 PPM of red dye.
12. The Division issued a civil penalty assessment on December 4, 2003 for \$1,000.00 pursuant to N.C.G.S. 105-449.117.
13. Taxpayer paid the two (2) one thousand dollar (\$1,000.00) assessments under protest, and by letter dated December 15, 2003 requested a hearing on the dyed diesel penalty assessments.

14. The Division placed the matter on hold pending the outcome of the resultant audit of taxpayer's bulk fuel operation.
15. It appears that the Division properly issued both penalty assessments.
16. The Taxpayer's dyed diesel violations resulted in a bulk fuel audit pursuant to N.C.G.S. § 105-449.87(b). This Section states in pertinent part that

[I]f the Secretary determines that a bulk-end user...used untaxed dyed fuel to operate a highway vehicle when the fuel is dispensed from a storage facility or through a meter marked for nonhighway fuel use, all fuel delivered into that storage facility is presumed to have been used to operate a highway vehicle.
17. An audit of Taxpayer's operation was scheduled and commenced October 13, 2003 comprising the period from October 10, 2000 through September 12, 2003.
18. The audit revealed that taxpayer owned and operated three (3) IFTA-qualified licensed diesel trucks and one (1) non-qualified licensed diesel truck during the audit period.
19. The qualified vehicles included the 1970 Jeep, a 1978 Mack and a 1997 Mack, while the non-qualified vehicle was the aforementioned 1996 Ford pick-up with dyed diesel fuel.
20. Taxpayer purchased all of his off-road fuel from [Supplier] during the audit period, and purchased his highway fuel from various retail outlets in the area.
21. Taxpayer stored his off-road fuel in two (2) bulk storage tanks; one a 500-gallon tank located at Taxpayer's business, and the other 75-gallon tank was mounted on the back of his Ford pick-up truck.
22. The latter tank was fitted with a nozzle but no throughput meter.
23. In addition to his highway vehicles, taxpayer operated seven (7) pieces of off-road equipment, including three (3) tractors, two (2) dozers, a backhoe and a track hoe.
24. The investigator reviewed taxpayer's bulk fuel purchase receipts for the entire audit period, and properly determined that he purchased 15,489 gallons of nonhighway fuel between October 13, 2000 and September 12, 2003.
25. Although taxpayer maintained no withdrawal records, the investigator allowed a credit of approximately fifty percent (50%) for fuel used in off-road equipment during the period.
26. Thus the Division assessed Taxpayer for 7,738 gallons of off-road, nontaxed fuel presumed pursuant to G.S. §§ 105-449.87(b) to have been used on the highways of this State.

27. Although the investigator determined that additional penalty assessments were warranted, no penalties were assessed in the audit.
28. The Division properly issued a proposed notice of tax assessment on February 24, 2004 in the amount of \$2,071.44.
29. Taxpayer paid the assessment of tax and accrued interest through March 31, 2004 for a total payment of \$2,071.44 on March 19, 2004.
30. This matter thereafter became a refund proceeding pursuant to G.S. 105-266.1.

### **CONCLUSIONS OF LAW**

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

1. N.C.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."
2. As noted above, Taxpayer's vehicles were licensed, bearing license [plate numbers], respectively.
3. Taxpayer's use of dyed diesel fuel in his licensed vehicles is not exempt under the Code.
4. Testing conducted by the North Carolina Department of Agriculture, Motor Fuels Testing Laboratory conclusively determined that the fuel samples contained red dye in a concentrate of 3.4 and 2.2 Parts-Per-Million (PPM), respectively.
5. The Taxpayer's request for a refund of the penalty previous paid must be denied.
6. Taxpayer presented no withdrawal records or other information documenting off-road use for the audit conducted by Division investigators, and no credit was allowed for such fuel in the initial review.
7. However, based upon the array of off-road diesel-powered equipment operated during the audit period, the investigator properly allowed a 50% reduction in Taxpayer's audited taxable gallons.
8. The Division did not assess a 25% negligence penalty, although such a penalty may have been warranted under the law and the facts.

9. The Division has granted Taxpayer a substantial credit in the amended audit for off-road use based upon its equipment inventory.
10. Taxpayer has not demonstrated its entitlement to any additional relief.
11. It appears to the undersigned Assistant Secretary for Administrative Hearings that the assessment must be affirmed in all respects, and the refund of tax and interest previously paid should be denied.

**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 assessments of \$1,000.00 each, issued on September 12 and December 4, 2003, respectively and previously paid. Therefore, Taxpayer's demand for refund of same is **HEREBY DENIED**. The undersigned Assistant Secretary **AFFIRMS** the assessment of tax and interest in the amount of \$2,031.24 issued February 24, 2004. Taxpayer paid \$2,071.44 on March 19, 2004 representing the assessed tax and interest through March 31, 2004, and refund of same is **HEREBY DENIED**.

This the 17th day of December 2004.

---

Eugene J. Cella  
Assistant Secretary of Revenue