

MF 08-9

Tax Type: Motor Fuel Use Tax

Issue: Dyed/Undyed Diesel Fuel (Off Road Usage)

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**ABC & ASSOCIATES, INC.
Taxpayer**

**Docket # 07-ST-0000
Acct # DP-00000
NTL # 00-000000 0
NTL # 00-000000 0
NTL # 00-000000 0
NTL # 00-000000 0
NTL # 00-000000 0**

RECOMMENDATION FOR DISPOSITION

Appearances: Terry Shafer, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; B. Douglas Stephens, Attorney at Law, for ABC & Associates, Inc.

Synopsis:

The Department of Revenue (“Department”) issued five Notices of Penalty for Dyed Diesel Fuel Violations (“Notices”) to ABC & Associates, Inc. (“taxpayer”). The first Notice alleges that the taxpayer owes a \$500 penalty because the taxpayer failed to display the required notice “Dyed Diesel Fuel, Non-taxable Use Only” on its storage tank for dyed diesel fuel. The remaining Notices allege the taxpayer owes a total of \$10,000 in penalties for operating four licensed motor vehicles with dyed diesel fuel in their tanks. The taxpayer timely protested the Notices. Prior to the hearing, the taxpayer conceded

that it is liable for the \$500 penalty for failing to have the required notice on its dyed diesel fuel tank. The only issue presented at the hearing is whether the remaining four Notices should be dismissed because the taxpayer claims the red dye that was found in the fuel was from a fuel additive rather than dyed diesel fuel. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. The taxpayer is an excavating, demolition, and trucking company. (Tr. p. 9)
2. On March 14, 2007, an agent for the Department conducted a dyed diesel fuel inspection at one of the taxpayer's work sites. The fuel in the taxpayer's vehicle tested positive for dyed fuel with the amount of dye being 2.3 parts per million. (Dept. Ex. #10)
3. On March 14, 2007, two other agents for the Department conducted a dyed diesel fuel inspection at the taxpayer's premises and found three additional vehicles with dyed fuel in their tanks. (Dept. Ex. #10)
4. The Department's brochure entitled "Dyed Diesel Fuel Enforcement Program" provides examples of dyed diesel fuel violations and states that violations include the following:

to have tax-paid diesel fuel blended with transmission fluid and/or additives, which contain the dye Solvent Red 164, in the ordinary fuel tanks attached to a motor vehicle required to be registered for highway purposes or in the ordinary fuel tanks attached to a recreational-type watercraft on the waters of this state. (Dept. Ex. #4)
5. On March 30, 2007, the Department issued four Notices to the taxpayer, each showing a penalty due of \$2,500 for being the operator of a licensed motor vehicle that had dyed diesel fuel in its tank on March 14, 2007. The Notices were

admitted into evidence under the certification of the Director of the Department.
(Dept. Ex. #1)

6. On March 30, 2007, the Department issued a Notice to the taxpayer showing a penalty due of \$500 for failing to display the required notice “Dyed Diesel Fuel, Non-taxable Use Only” on a container, storage tank, or facility in which the taxpayer stores or from which the taxpayer distributes dyed diesel fuel. The Notice was admitted into evidence under the certification of the Director of the Department. (Dept. Ex. #1)

CONCLUSIONS OF LAW:

Paragraph 15 of section 15 of the Motor Fuel Tax Act (“Act”) (35 ILCS 505/1 *et seq.*) provides in relevant part as follows:

15. If a motor vehicle required to be registered for highway purposes is found to have dyed diesel fuel within the ordinary fuel tanks attached to the motor vehicle..., the operator shall pay the following penalty:

First occurrence.....	\$2,500
Second and each occurrence thereafter.....	\$5,000

(35 ILCS 505/15). Section 15 of the Act also includes the following paragraph after the numbered paragraphs:

For purposes of this Section, dyed diesel fuel means any dyed diesel fuel whether or not dyed pursuant to Section 4d of this Law.¹ (35 ILCS 505/15).

Subsection (b) of the Department’s regulation concerning penalties for dyed diesel fuel violations reiterates that a penalty of \$2,500 shall be imposed if a licensed motor vehicle

¹ Section 4d provides in part that “all special fuel sold or used for non-highway purposes must contain only the dye Solvent Red 164 at a concentration spectrally equivalent to at least 3.9 pounds of the solid dye standard Solvent Red 26 per thousand barrels of special fuel....The dye must be added prior to removal from a terminal rack.” 35 ILCS 505/4d.

is found to have dyed diesel fuel within the ordinary fuel tank. Subsection (g) of the same regulation provides as follows:

The penalties imposed by subsections (b) and (e) of this Section will be imposed only when the special fuel contains the dye Solvent Red 164 in quantities greater than .1 part per million. 86 Ill. Admin. Code §500.298(g).

Section 21 of the Act incorporates by reference section 5 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Department's determination of the amount owed is *prima facie* correct and *prima facie* evidence of the correctness of the amount due. (35 ILCS 505/21; 120/5). Once the Department has established its *prima facie* case, the burden shifts to the taxpayer to prove by sufficient documentary evidence that the assessment is incorrect. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991); Lakeland Construction Co., Inc. v. Department of Revenue, 62 Ill. App. 3d 1036, 1039 (2nd Dist. 1978).

The taxpayer contends that it put a fuel additive, C-Tane Plus with Flow Improver and Red Dye (Taxpayer Ex. B), into the tanks of its trucks, and this changed the color of the tax-paid un-dyed fuel to a pinkish color. (Tr. pp. 21, 31, 45-46) The taxpayer provided a copy of a receipt showing it purchased C-Tane with Flow Improver and Green Dye (Taxpayer Ex. A), and the taxpayer claims the reference to green dye rather than red dye was a mistake on the invoice that was not noticed at the time of purchase. (Tr. pp. 41, 51) The taxpayer has been purchasing the C-Tane product for over 20 years to help its diesel engines start during cold weather. The taxpayer acknowledged that the product is dyed different colors, but contends it has only purchased the product with red dye. (Tr. p. 15) The taxpayer asserts it did not use a product with green dye in its un-dyed diesel fuel because the seller did not sell that product. The taxpayer believes the weight of the

evidence establishes that the source of the dye was from the additive rather than dyed diesel fuel, and the Act should not be interpreted in a manner that is too burdensome for the taxpayer. The penalties, therefore, should be dismissed.

The Department argues that allowing a taxpayer to avoid the penalty by asserting the dye in the fuel is from an additive would render the statute meaningless. The rule prohibits dyed fuel in the tank, and the Department's brochure specifically states that a violation occurs when an additive containing red dye is added to tax-paid fuel. The Department asserts that the taxpayer did not show that the fuel was not dyed and did not provide sufficient evidence to support its ill-fated argument that the dye was from a fuel additive. The receipt provided by the taxpayer shows the purchase of an additive with green dye rather than red dye. Even if the invoice showed the additive had red dye, the Department contends the fact that red dye was in the tank requires the penalty to be imposed.

Section 15 of the Act defines dyed diesel fuel as any dyed diesel fuel, whether or not it is dyed pursuant to the Act, and it imposes a penalty for having dyed diesel fuel in the tanks of the trucks in question. The Department's brochure states that it is a violation to blend an additive that contains red dye with tax-paid diesel fuel, and the taxpayer admitted that it put the additive with red dye into the fuel in its tanks. By the taxpayer's own admission, it has violated the Act.

Even if it is assumed, *arguendo*, that the source of the dye is relevant, the taxpayer has the burden of presenting evidence to overcome the Department's *prima facie* case, and the evidence does not support the taxpayer's argument that the red dye in its fuel was from an additive rather than dyed diesel fuel. The taxpayer claims the red

dye from the additive changed the fuel to a pinkish color, and the color change was hardly noticeable. (Tr. p. 73) The fuel sample taken from one of the taxpayer's trucks, however, indicated the amount of dye was 2.3 parts per million. This amount is substantially greater than the amount necessary for a violation, which is .1 part per million. Nevertheless, testimony that the taxpayer put the additive in the fuel is alone insufficient to overcome the Department's *prima facie* case. See Mel-Park Drugs, Inc., *supra*. The one invoice that the taxpayer claims supports its argument indicates that an additive with green dye, rather than red, was purchased. The taxpayer contends that it used a red additive because its supplier only offered red additives, but clearly additives with green dye are also available. The fact that the taxpayer may not have known that using the additive with red dye was inappropriate is not a basis, under the statute, for abating the penalties.

Recommendation:

For the foregoing reasons, it is recommended that all five Notices of Penalty for Dyed Diesel Fuel Violations be upheld.

Linda Olivero
Administrative Law Judge

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