

**MF 07-10**

**Tax Type: Motor Fuel Use Tax**

**Issue: Dyed-Undyed Diesel Fuel (Off Road Usage)**

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

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<b>THE DEPARTMENT OF REVENUE</b>	)	No.:	00 ST 0000
<b>OF THE STATE OF ILLINOIS</b>	)		
	)	NTL Nos.:	00-000000 0
	)		00-000000 0
v.	)		00-000000 0
	)	Acct. No.:	00-000000
	)		
<b>ABC COAL,</b>	)	Julie-April Montgomery	
<b>Taxpayer</b>	)	Administrative Law Judge	

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** John Doe (President) and Jim Doe (Vice President) for ABC Coal; Gary Stutland, Special Assistant Attorney General, for the Illinois Department of Revenue.

**Synopsis:**

The Department of Revenue (“Department”) issued three Notices of Penalty for Dyed Diesel Fuel Violations (“Notices”) to ABC Coal (“Taxpayer”). Two of the Notices alleged that Taxpayer operated licensed motor vehicles with dyed diesel fuel in their ordinary attached fuel tanks in violation of the Motor Fuel Tax Act (“Act”). 35 ILCS 505/1 *et seq.* The third Notice alleged that Taxpayer failed to display the required dyed diesel language on its dyed diesel sales invoices. Taxpayer timely protested the Notices. A hearing was held during which the Taxpayer presented testimony and exhibits on its behalf. Following the submission of all evidence and a review of the record, it is

recommended that this matter be resolved in favor of the Department. In support thereof, I make the following findings of fact and conclusions of law:

**Findings of Fact:**

1. Taxpayer is an Illinois licensed motor fuel supplier. Dept. Gr. Ex. No. 1; Tr. p. 15.
2. On April 12, 2007, Senior Special Agent Gary May of the Department inspected two of Taxpayer's trucks for compliance with the Act. Agent May visually observed that the fuel in both vehicles' gas tanks was pink, so he utilized a tetra-spec dyed diesel fuel analyzer to determine if dyed diesel was present in the tanks. Tr. pp. 14, 19, 22, 79.
3. Agent May's testing of both trucks' gas tanks indicated the presence of dyed diesel fuel. Taxpayer's 1995 Ford truck, license plate number XXXXX, contained a dye concentration of 2.0 parts per million, and its 2002 International delivery truck, license plate number XXXXX, contained a dye concentration of 2.7 parts per million. Tr. pp. 20, 22-23; Dept. Gr. Ex. No. 1.
4. Agent May also determined that Taxpayer's sales invoices failed to display the required dyed diesel language that such purchases were for non-taxable use. Tr. pp. 23-24; Dept. Gr. Ex. No. 1.
5. On April 20, 2007, the Department issued three Notices. Two of the Notices showed a penalty due of \$2,500 (per Notice) for operation of licensed motor vehicles that had dyed diesel fuel in their tanks on April

12, 2007. The third Notice showed a penalty due of \$500 for the Taxpayer's failure to display the required language that "Dyed Diesel Fuel, Non-taxable Use Only, Penalty For Taxable Use" on dyed diesel fuel sales invoices. These Notices were admitted into evidence under the certification of the Director of the Department. Dept. Gr. Ex. No. 1.

**Conclusions of Law:**

Paragraph 15 of section 15 of the Act provides in relevant part as follows:

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  
35 ILCS 505/15.

Subsection (b) of the Department's regulation concerning civil penalties for dyed diesel fuel violations states that a penalty of \$2,500 shall be imposed if a licensed motor vehicle is found to have dyed diesel fuel within the ordinary fuel tank. 86 Ill. Admin Code Sec.

500.298(b). Subsection (g) of this 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 Sec. 500.298(g).

Section 4e of the Act requires:

A legible and conspicuous notice stating "Dyed Diesel Fuel, Non-taxable Use Only, Penalty For Taxable Use" must appear on all bills of lading and invoices accompanying any sale of dyed diesel fuel. 35 ILCS 505/4e.

Subsection (d) of the Department regulation regarding this violation provides a penalty of \$500 shall be imposed if such conspicuous notice is lacking. 86 Ill. Admin. Code Sec. 298(d).

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 establishes its *prima facie* case, the burden of proof shifts to the taxpayer to prove, by sufficient documentary evidence, that the penalty assessed is incorrect. Mel-Park Drugs, Inc. Department of Revenue, 218 Ill. App. 3d 203, 217 (1<sup>st</sup> Dist. 1991); Lakeland Construction Co., Inc. v. Department of Revenue, 62 Ill. App. 3d 1036, 1039 (2<sup>nd</sup> Dist. 1978).

In the present case, the Department's *prima facie* case was established when the Department's certified copies of the Notices were admitted into evidence. Once the Notices were admitted into evidence, the Department's position is legally presumed to be correct.

In response, the Taxpayer did not present any evidence to indicate that dyed diesel fuel was not present in its trucks. Taxpayer argues that "[t]here [are] always going to be traces" (Tr. p. 58) of dyed diesel in clear diesel because clear diesel fuel "comes out of the same spigot" as dyed diesel when received at the refinery loading terminal where one purchases diesel fuel. Tr. pp. 58-59. Taxpayer believes that the refinery hoses which deliver diesel fuel to fuel tanks are not cleaned between the deliveries of clear and dyed diesel fuel loadings. Tr. p. 43. Taxpayer reasons that because of the refinery's unclean

hoses contamination of all clear diesel fuel loadings at refineries will occur and lead to “traces” of dyed diesel in loadings of clear diesel. Tr. pp. 58-59. Moreover, Taxpayer believes such contamination is even greater because the injection system used at refineries to deliver dyed diesel into one’s tank can possibly inject dyed diesel into a clear diesel load if the clear diesel load is to be filled subsequent to the filling of a dyed diesel load—a type of accidental spillover. Tr. pp. 44-47, 59. Aside from these statements, Taxpayer presented no documentary evidence to substantiate these points. Taxpayer merely provided oral testimony that it believed such “spillovers” and unclean hoses were the reasons for the presence of dyed diesel being found in gas tanks. These arguments are attempts to explain the existence of dyed diesel in Taxpayer’s gas tanks; however, such arguments are also an admission, by Taxpayer, that its vehicles contained dyed diesel.

Taxpayer’s evidentiary presentation consisted of two bottles that contained alleged diesel fuel that it claimed it obtained from an Indiana refinery one week after receipt of the Department’s Notices, or approximately two weeks after Agent May’s inspection. Tr. pp. 41, 50, 63-64. One bottle contained a wine color liquid alleged to be dyed diesel fuel (Taxpayer Ex. No. 1) and the other bottle contained a deep golden color liquid alleged to represent what the mixture of 300 gallons of diesel would look like when clear diesel included 40 gallons of dyed diesel. Tr. p. 50; Taxpayer Ex. No. 5. Taxpayer also presented a third bottle of yellow colored liquid it alleged to be “diesel oil for trucks” (Tr. p. 49; Taxpayer Ex. No. 4) that it claimed it obtained from the same Indiana refinery months after receipt of the Department’s Notices. Tr. pp. 69, 76. In

addition, Taxpayer presented a fourth bottle containing a golden color liquid alleged to be fuel taken from its 1995 Ford truck the day after Agent May's inspection. Tr. pp. 41, 61; Taxpayer Ex. No. 2. In sum, three of the bottles contained liquids that were not from the Taxpayer's vehicles, but a refinery, and such liquids were obtained weeks/months after the April 12, 2007 inspection. The fourth bottle contained a liquid allegedly drawn from one of Taxpayer's trucks but its contents were obtained after the inspection. Hence, the value of this presentation to the issue of whether or not the Taxpayer's vehicles contained dyed diesel in violation of the Act is of no probative value, and as such, is irrelevant.

Taxpayer believes that only when one has nothing but dyed diesel in a tank, as opposed to any mixture of dyed and clear diesel fuels, can one be held accountable for a violation of the Act. Because of this "all or nothing" argument, Taxpayer offers that it cannot be held in violation for any so called trace amounts of dyed diesel found in its tanks. Actually, the Department agrees that trace amounts in a tank will not be deemed a violation. However, it should be noted that the Department has defined trace amounts to be less than .1 part per million. Anything below this defined threshold would be the "leeway" given for trace amounts and any amount above would be deemed a violation of the Act.

Inasmuch as Taxpayer presented no documentary evidence to substantiate its arguments and did not deny nor refute the presence of dyed diesel in the tanks of its trucks, it must be found that Taxpayer did not sustain its burden of overcoming the Department's *prima facie* case. The evidence confirms that dyed diesel was present in the gas tanks of Taxpayer's trucks in violation of Illinois law.

Taxpayer presented no documentary or other supporting evidence with respect to the Notice issued for failure to display the required language on sales receipts of dyed diesel, and as such, the Department's *prima facie* case as to this issue is not refuted.

**WHEREFORE**, for the reasons stated above, it is recommended that the Department's Notices be affirmed.

October 31, 2007

Julie-April Montgomery  
Administrative Law Judge