

07-0017
Dyed Diesel Fuel Penalty
Signed 05/29/2007

BEFORE THE UTAH STATE TAX COMMISSION

| | | | |
|----------------------------|---|---------------|--------------------------|
| PETITIONER, |) | | |
| |) | ORDER | |
| |) | | |
| Petitioner, |) | Appeal No. | 07-0017 |
| |) | | |
| v. |) | Acct No. | ##### |
| |) | Tax Type: | Dyed Diesel Fuel Penalty |
| AUDITING DIVISION OF THE |) | Audit Period: | October 27, 2004 |
| UTAH STATE TAX COMMISSION, |) | | |
| |) | Judge: | Chapman |
| Respondent. |) | | |

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REPRESENTATIVE, dba PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on May 15, 2007.

On December 13, 2006, Auditing Division (“Division”) issued a Statutory Notice to the Petitioner, in which it imposed a \$\$\$\$ penalty for using dyed diesel fuel on the highways. The Division imposed the penalty after the Internal Revenue Service (“IRS”) gave the Division information that on October 27, 2004, the IRS found visible evidence of dye in fuel samples taken from a Dodge 3500 truck owned by the Petitioner’s son-in-law and used in the Petitioner’s business.

APPLICABLE LAW

Utah Code Ann. §59-13-320.5 provides that the use of dyed diesel fuel is prohibited from use on the highways except under certain circumstances and provides for the issuance of penalties for violating the prohibition, as follows in pertinent part:

- (1) A person may not operate a motor vehicle on a highway if a fuel supply tank of the motor vehicle contains dyed diesel fuel, unless:
 - (a) permitted under federal law;
 - (b) (i) the motor vehicle is used on the highway only to travel from one parcel of land owned or operated by the owner to another parcel of land owned or operated by the owner; and
(ii) the motor vehicle's travel on the highway is necessary for furtherance of agricultural purposes; or
 - (c) the motor vehicle is special mobile equipment, as defined in Section 41-1a-102, including off-road motorized construction or maintenance equipment, that is only incidentally operated or moved on a highway in connection with a construction project.
- (2) A person who violates Subsection (1) shall pay a penalty assessed by the commission as follows:
 - (a) the greater of \$500 or \$5 per gallon of dyed diesel fuel within each fuel supply tank of the motor vehicle, based on the maximum storage capacity of each fuel supply tank; or
 - (b) for a second and subsequent offense, the greater of \$1,000 or \$10 per gallon of dyed diesel fuel within each fuel supply tank of the motor vehicle, based on the maximum storage capacity of each fuel supply tank.
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- (4) Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise the penalty imposed under this section.

DISCUSSION

PETITIONER REPRESENTATIVE, who now lives in STATE, did business as PETITIONER in 2004 and is the Petitioner in this matter. The Petitioner admits that he ordered one of his former employees, EMPLOYEE, to put between one to two gallons of dyed diesel fuel in his son-in-law's Dodge 3500 because it had run out of fuel at a worksite in CITY 1, Utah. The Petitioner's son-in-law was also an employee of the Petitioner, and his truck was used to haul equipment to the Petitioner's worksites. The Petitioner states, however, that the IRS had never found dyed diesel fuel for use on highways in any of its vehicles prior to October 27, 2004, even though it had checked the business's vehicles approximately 10 times prior to that date. Because it was the Petitioner's first violation and because the Petitioner claims it was necessary to use the dyed diesel fuel to get the vehicle to a gas station under these circumstances, the Petitioner asks the Commission to reduce the penalty to an amount of no more than \$\$\$\$\$.

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The Commission recognizes that an individual other than the Petitioner owned the truck in which the dyed diesel fuel was found. Nevertheless, the Commission finds that the Petitioner is a “person” who “operated” the Dodge 3500 for purposes of the offense described and the penalty authorized under Section 59-13-320.5, not only because the truck was used in the Petitioner’s business but also because PETITIONER REPRESENTATIVE had sufficient control over the vehicle so that he ordered his employee to put the dyed diesel fuel in it. For these reasons and because it is undisputed that the vehicle contained dye diesel fuel for use on the highways, the Commission finds that the Division properly imposed the \$\$\$\$ penalty upon the Petitioner for a first offense under Section 59-13-320.5.

Although the \$\$\$\$ penalty was properly imposed, the Commission is authorized under Section 59-13-320.5 to “waive, reduce, or compromise the penalty” upon a showing of “reasonable cause.” The Petitioner believes it would be reasonable to reduce the penalty to an amount of no more than \$\$\$\$ under the circumstances. The Division, however, argues that a penalty imposed under this statute should only be waived or reduced if the use of the dyed diesel fuel on the highways occurred due to extreme circumstances, such as a rescue or a life-or-death situation. The Petitioner points out that the penalty exists to discourage persons from using dyed diesel fuel to operate their vehicles on the highway. Because the Petitioner could have sent another vehicle to the Petitioner’s worksite with enough regular fuel to get the Dodge 3500 to a gas station, the Petitioner asks the Commission to sustain the \$\$\$\$ penalty in its entirety.

The Division also proffers an IRS report that contains statements made by the IRS Dyed Fuel Compliance Officer who inspected the Dodge 3500 and found it to contain dyed diesel fuel. The report indicates that the IRS officer inspected the vehicle while it was parked on a paved road at a worksite in CITY 2, not in CITY 1 as the Petitioner contends. The IRS officer also noted that the truck’s fuel gauge showed its gas tank to be just over ¼ full, which the Division contends would disprove that the Petitioner’s employee put less than two gallons of dyed diesel fuel into the vehicle’s empty gas tank. Furthermore, the report shows that the fuel from the Dodge 3500, when tested, showed a dye concentration of 19 parts-per-million (“ppm”), which

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is higher than the dye concentration of 11 ppm that the fuel manufacturer puts into dyed diesel fuel. The Division suggests that the higher concentration found in the truck's gas tank is due to dye residue "build-up" caused by dyed fuel being put in the tank multiple times. The Division believes that these facts support the Commission finding that no reasonable cause exists to reduce or waive the penalty.

The Petitioner maintains that the truck was inspected in CITY 1, regardless of the IRS officer's statements that were contained in the IRS report. The Petitioner also states that the truck's fuel gauge was broken at the time of inspection and that the IRS officer failed to discover this fact. Finally, the Petitioner states that the dyed diesel fuel found by the IRS was transferred to the truck from a separate tank kept on the worksite to supply fuel to equipment used on the worksite. Because dyed diesel fuel kept in this tank was frequently replenished, the Petitioner states that one would expect the tank to have significant amounts of dye residue and that the fuel transferred from the tank to the Dodge 3500 would contain higher concentrations of dye. The Petitioner reasserts that he did not regularly use dyed diesel fuel on the highways as implied and asks the Commission to waive or reduce the penalty.

The Commission believes that the circumstances causing a person to decide to use dyed diesel fuel on the highways must be more dire than those described by the Petitioner before they rise to the level of reasonable cause to waive or reduce the penalty at issue. The Commission notes that the Petitioner was not in an unpopulated area when the Dodge 3500 ran out of fuel and that the Petitioner could have had undyed fuel delivered to the vehicle instead of using the dyed diesel fuel. For these reasons, the Commission denies the Petitioner's request.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the \$\$\$\$ dyed diesel fuel penalty that the Division assessed. The Petitioner's appeal is denied. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written

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request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2007.

Kerry R. Chapman
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2007.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

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