

10-2491
AUDIT
TAX YEAR: 2010
SIGNED: 08-03-2011
COMMISSIONERS: M. JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: R. JOHNSON

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER d/b/a
PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 10-2491

Account No. #####

Tax Type: Special Fuel

Tax Year: 2010

Judge: Marshall

Presiding:

Jan Marshall, Administrative Judge

Appearances:

For Petitioner: TAXPAYER

For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Director, Auditing Division
RESPONDENT REP. 3, Auditing Division
RESPONDENT REP. 4, Auditing Division

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5, on February 8, 2011. Petitioner ("Taxpayer") is appealing a penalty in the amount of \$\$\$\$ assessed by the Respondent ("Division") for using dyed diesel fuel on the highway.

APPLICABLE LAW

Utah Code Ann. §59-13-320.5 prohibits the use of dyed diesel fuel on highways, and imposes penalties as follows:

- (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.
- (3) The penalty imposed under this section:
- (a) is in addition to any other taxes, interest, or penalties imposed under this chapter; and
 - (b) shall be deposited in the Transportation Fund.
- (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.

Utah Code Ann. §59-1-1417 provides, “[i]n a proceeding before the commission, the burden of proof is on the petitioner...”

DISCUSSION

On or about March 21, 2010, a 2007 Chevrolet truck (License Plate No. #####-2) owned by the Taxpayer was stopped at the Utah/STATE 1 border and tested for dyed diesel fuel. Evidence of dye was found in the fuel samples taken, and on August 31, 2010, the Division issued a Statutory Notice assessing a \$\$\$\$ penalty.

The Taxpayer stated that at the time, the company had several projects in STATE 2 and had employees drive the truck from STATE 2 to Utah when needed, and then fly the driver back to STATE 2. He testified that all of their vehicles have COMPANY 1 gas cards, that a pre-paid CREDIT CARD was given to the employee driving the truck for other expenses, and denied the employee was instructed to use dyed fuel in the truck. He stated the employee was fired, and asked to have the penalty waived.

The Division's representative argued the penalty assessment should be upheld because the use of dyed fuel on the highways results in a multi-million dollar loss of revenue to Utah and other states every year. He proffered that the IRS monitors the use of dyed fuel, but that there are only three agents monitoring four states, making enforcement difficult. He noted a study in STATE 1 that found 60% of trucks were using dyed fuel on the highway, and a similar study in STATE 3 that found the state lost \$\$\$\$ per year in fuel tax revenue from the use of dyed fuel. The Division's representative also proffered that the STATE 1 report indicates the driver of the truck acknowledged he used dyed diesel fuel, and was instructed to do so because he did not have money

to fill up the tank. The Division's representative argued that the amount of money saved on fuel taxes greatly outweighs the penalty if an operator is rarely caught.

Taxpayer is the owner of the truck in which dyed diesel fuel was found. While a "person" other than the Taxpayer was operating the vehicle at the time the dyed fuel was found, the Taxpayer is the owner of the truck, which was used for business purposes. The operator of the vehicle was the Taxpayer's employee, and was acting within the scope of his employment when the tank of the truck was tested for dyed diesel fuel. Therefore, the Division's assessment of the penalty against the Taxpayer as a "person" who "operated" the vehicle is reasonable. It is undisputed that the vehicle contained dyed diesel fuel, and was being used on the highway, therefore, the Division properly imposed the \$\$\$\$ penalty as a first offense under Utah Code Ann. §59-13-320.5.

The Commission is granted discretion to "waive, reduce, or compromise" the penalty upon a showing of reasonable cause. Taxpayer proffered that each of the company's vehicles is provided with a gas card, that the employee driving the vehicle had also been given a pre-paid CREDIT CARD for other expenses, the employee was not directed to use dyed fuel in the vehicle, and was later fired. However, the Taxpayer did not provide any supporting documentation that would show, for example, the fuel card assigned to each vehicle, the purchase records for the fuel cards, or company policy that instructed employees on the use of dyed diesel fuel. The Division proffered that in the STATE 1 report, the employee stated he was instructed to use the dyed diesel fuel and was not given funds with which to purchase fuel. However, the Division did not provide a copy of the report received from the state of STATE 1. Unlike other tax types, the use of dyed diesel on the highways is not something the Division is able to track and audit. As noted by the Division's representative, states are losing millions of dollars in tax revenue each year as a result. The burden of proof is upon the Taxpayer in this matter. Given the conflicting proffers, and absent supporting documentation showing the employee had the ability to purchase non-dyed fuel, the Taxpayer has not provided reasonable cause for a waiver of the penalty.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission denies the Taxpayer's request for a waiver of the penalty. 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 request

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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

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

DATED this _____ day of _____, 2011.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner