

**MF 05-1**

**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**

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<b>THE DEPARTMENT OF REVENUE</b>	)	
<b>OF THE STATE OF ILLINOIS</b>	)	
	)	<b>Docket No. 04-ST-0000</b>
v.	)	<b>Acct # 00-00000</b>
	)	<b>NTL # 00-000000 0</b>
<b>ABC DRILLING COMPANY</b>	)	<b>NTL # 00-000000 0</b>
	)	
<b>Taxpayer</b>	)	

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Kent Steinkamp, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Elliott M. Hedin of Brown, Hay & Stephens, LLP for ABC Drilling Company.

Synopsis:

The Department of Revenue (“Department”) issued two Notices of Penalty for Dyed Diesel Fuel Violation (“Notices”) to ABC Drilling Company (“taxpayer”). The Notices alleged that the taxpayer was the operator of a licensed motor vehicle that had dyed diesel fuel within its ordinary attached fuel tank or tanks and that the taxpayer failed 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 taxpayer timely protested the Notices and an evidentiary

hearing was held during which the taxpayer argued that the Notice concerning the licensed motor vehicle was insufficient on its face because it refers to the wrong standard that is required under the statute. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. On April 16, 2004, the Department issued a Notice of Penalty for Dyed Diesel Fuel Violation to the taxpayer that stated on March 31, 2004 the taxpayer was the operator of a licensed motor vehicle that had dyed diesel fuel within its ordinary attached fuel tank or tanks. The Notice shows a penalty due of \$2,500. The Notice was admitted into evidence under the certification of the Director of the Department. (Dept. Ex. #1).

2. On April 16, 2004, the Department issued a Notice of Penalty for Dyed Diesel Fuel Violation to the taxpayer that stated on March 31, 2004 the taxpayer failed to display the required notice, "Dyed Diesel Fuel, Non-taxable Use Only" on a container, storage tank, or facility that the taxpayer owns, operates, or controls in which the taxpayer stores or from which the taxpayer distributes dyed diesel fuel. The Notice shows a penalty due of \$500. The Notice was admitted into evidence under the certification of the Director of the Department. (Dept. Ex. #1).

CONCLUSIONS OF LAW:

Section 4f of the Motor Fuel Tax Law (35 ILCS 505/1 *et seq.*) provides as follows:

A legible and conspicuous notice stating "Dyed Diesel Fuel, Non-taxable Use Only" must appear on all containers, storage tanks, or facilities used to store or distribute dyed diesel fuel. (35 ILCS 505/4f)

Paragraphs 14 and 15 of section 15 of the Motor Fuel Tax Law provide in part as follows:

14. Any person who owns, operates, or controls any container, storage tank, or facility used to store or distribute dyed diesel fuel without the notice required by Section 4f shall pay the following penalty:

First occurrence.....\$ 500  
Second and each occurrence thereafter.....\$1,000

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 21 of the Motor Fuel Tax Law 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 of tax owed is *prima facie* correct and *prima facie* evidence of the correctness of the amount of tax 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 Department's *prima facie* case was established when the Department's certified copies of the Notices were admitted into evidence. In response, the taxpayer first argues that the Notice concerning the operation of a motor vehicle is insufficient on its face because it does not contain the same language that is in the statute. The Notice that the Department issued states that the taxpayer operated "a licensed motor vehicle," which is the language that was in the statute prior to the amendment under Public Act 92-

0030, effective July 1, 2001. The amendment changed the statute to state that the penalty applies only to the operator of “a motor vehicle required to be registered for highway purposes.”

The taxpayer states that under section 205.20(b) of the Administrative Code (86 Ill.Admin.Code §205.20(b)) and section 4(b) of the Taxpayers’ Bill of Rights Act (20 ILCS 2520/4(b)), the Department has a duty to include on all tax notices an explanation of tax liabilities and penalties. Also, under section 205.20(c) of the Administrative Code (86 Ill.Admin.Code §205.20(c)) and section 4(c) of the Taxpayers’ Bill of Rights Act (20 ILCS 2520/4(c)), the Department is required to abate taxes and penalties assessed based upon erroneous written information or advice given by the Department. The taxpayer contends that the Department breached its duty to include an explanation of tax liabilities and penalties in its Notice because the Notice did not accurately cite the proper standard. In addition, the taxpayer argues that the Department issued the Notice based on erroneous findings because the Department found that the taxpayer was an operator of a licensed motor vehicle, which is not the same as an operator of a motor vehicle required to be registered for highway purposes.

The taxpayer’s arguments are not a basis for dismissing the Notice. The language in the Notice is sufficiently close to the language in the statute in order to give the taxpayer fair warning and a reasonable opportunity to know what rule it allegedly violated. The taxpayer’s business is highly regulated, and the taxpayer should be aware of the relevant statutes with which it must comply. The Notice provided enough notification to the taxpayer for it to be aware of the charge that the Department was raising against it.

In addition, having the wrong standard on the Notice does not necessarily mean that the Department used the wrong standard in determining whether to issue the Notice. The taxpayer had the opportunity at the hearing to present evidence to show that it was not operating a motor vehicle required to be registered for highway purposes. At the hearing, no witnesses for the taxpayer were present, and the taxpayer's counsel made an offer of proof because his client was not available to testify. No reason was given for the unavailability of the witnesses, and a continuance was not requested. Without any testimony or documents indicating that the taxpayer was not operating a motor vehicle required to be registered for highway purposes, the penalty must be upheld. Because no evidence was presented concerning the penalty relating to the notice requirement, that penalty must be upheld as well.

Recommendation:

For the foregoing reasons, it is recommended that the two Notices of Penalty for Dyed Diesel Fuel Violation be affirmed.

Linda Olivero  
Administrative Law Judge

Enter: February 28, 2005