

Executive Hearing Office
Arizona Department of Transportation
3838 North Central Ave, Suite 300
Phoenix, Arizona 85012
Telephone: (602) 712-7737
Email: www.azdot.gov/mvd/ExecutiveHearing



**IN THE MATTER OF TAX ASSESSMENT:
UNLAWFUL USE OR HOLDING OF
DYED DIESEL FUEL**

[REDACTED]

And

[REDACTED]

Petitioner.

TAX-2511

**FINDINGS OF FACT
CONCLUSIONS OF LAW
DECISION AND ORDER**

[REDACTED]
Administrative Law Judge

TAX ASSESSMENT AFFIRMED

Appearances: [REDACTED]
[REDACTED], Assistant Attorney General
[REDACTED], Office of Inspector General

- Exhibits: 1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]
6. [REDACTED]

Pursuant to the authority of A.R.S. § 28-5924, a hearing was convened before an Administrative Law Judge in the Executive Hearing Office of the Arizona Department of Transportation on [REDACTED], 2018. The purpose of the hearing was to afford the Petitioner an opportunity to present any and all evidence necessary to establish cause why the Department's Notice of Tax Assessment of [REDACTED] dated [REDACTED] 2018 was in error.

The Administrative Law Judge has jurisdiction of the parties and the subject matter of this proceeding pursuant to the authority of A.R.S. §§ 28-5924, 28-5645, 28-5647 and A.A.C. R17-1-501.

FINDING OF FACTS

In the morning of [REDACTED], 2018, [REDACTED] was conducting fuel tax evasion investigations when he noticed a [REDACTED] water truck without a license plate operating on [REDACTED] Road (a county maintained taxable highway) in [REDACTED], Arizona. The Detective observed the vehicle travel 0.9 miles on [REDACTED] Road from [REDACTED] Road (a private non-taxable roadway). The Detective conducted a traffic stop on the vehicle and made contact with the operator, [REDACTED], a ranch hand working for [REDACTED] (Petitioner).

Mr. [REDACTED], told the Detective that he was told to take water up to the cattle in a different portion of the ranch and drove the 0.9 mile up [REDACTED] Road to get to the other part of the ranch. Mr. [REDACTED] told the Detective that he was aware that the fuel in the truck was “ranch diesel” because he had filled the tank about a month ago. Mr. [REDACTED] told the Detective that he took [REDACTED] Road rather than the ranch road because the ranch road was washed out and had not been repaired. The ranch road is a private road and is a non-taxable roadway.

The Detective requested that he be allowed to determine what diesel was being used for propulsion in the [REDACTED] with VIN # [REDACTED]. (Exhibit [REDACTED]). Mr. [REDACTED] agreed. Detective [REDACTED] indicated that a red dye diesel fuel test was conducted on the vehicle’s propulsion tank. Detective [REDACTED] testified that a pipette was dipped into the propulsion tank placed into a jar. (Exhibit [REDACTED]). The Detective completed a PetroSpec analysis, a process by which the amount of dye is measured in the fuel sample. In this case, Detective [REDACTED] testified that the fuel removed from the tank was red in color. Detective [REDACTED] testified that the driver’s side

propulsion tank had a reading of 11.9 ppm per the PetroSpec test. (Exhibit 3) Detective [REDACTED] testified that the PetroSpec analysis established that the fuel in the propulsion tank was red dyed diesel fuel.

The Detective asked to be allowed to check the holding tank that Mr. [REDACTED] had filled the truck from and was taken to it. Once there the Detective noted that it had the required markings on it indicating that the dye diesel was for "Off Highway Use Only." (Exhibit [REDACTED]) The Detective testified that the [REDACTED] had a vehicle identification number (VIN) that indicated it was a vehicle designed to be modified by the buyer to be used however it is modified. In other words, it is offered as a cab, engine and frame that can be added to thereby altering the vehicle by the addition of whatever the buyer's plan of use is for the [REDACTED]. In the case of [REDACTED] [REDACTED], this was the addition of a water tank to the [REDACTED]. The VIN also indicates that the vehicle should be registered and plated. The Detective through his Sergeant sent a Notice of Assessment on [REDACTED] 2018 to [REDACTED] for violations of A.R.S. §§ 28-5645 and 28-5647. (Exhibit [REDACTED]).

Mr. [REDACTED] (Petitioner) testified that he is the General Manager of [REDACTED] [REDACTED]. Petitioner testified that the vehicle in question has not had a license plate for the entire fifteen years he has worked for the company, but now has a farming plate. Petitioner testified that the ranch road is not a good alternative route to [REDACTED] Road as it is often washed out but is also an impractical route even if it were not. Petitioner notes the ranch road's incline and terrain is not practical for the [REDACTED] to travers. Petitioner admits that the ranch does have equipment for maintenance of ranch roads. Petitioner admits that [REDACTED] Road is a county road. Petitioner testifies that the [REDACTED] is used only in the dry season, in that the water truck has to take water to the cattle in far parts of the ranch. Petitioner noted that in this case, the well out in that

part of the ranch was down and that is why the water truck was dispatched to that area. Petitioner submitted a Parcel Map of the ranch and surrounding areas to show that only that 0.9 of a mile of [REDACTED] Road are used by [REDACTED]. Petitioner also notes that the [REDACTED] is only used for ranch purposes and only travels the 0.9 miles down [REDACTED] Road incidentally as part of its use as an implement of husbandry.

CONCLUSIONS OF LAW

Petitioner argues that the Tax Assessment should not be upheld. Petitioner argues that the [REDACTED] fits into the exception as noted by A.R.S. §28-5610(A)(8)(a). Specifically, that the [REDACTED] is an implement of husbandry used in agriculture and only incidentally operated on a highway.

In this matter, the issue in dispute is what action(s) violates red dye fuel statutes. One theory is that the violation occurs when the listed vehicle with red dye is not a school bus (A.R.S. § 28-5649(B)(1)), a qualified bus (A.R.S. § 28-5649(B)(2)), a farm tractor (A.R.S. § 28-5610(A)(8)(a)), an implement of husbandry¹ “designed primarily for or used in agricultural operations and only incidentally operated or moved on a highway” (A.R.S. § 28-5610(A)(8)(a)), a road roller (A.R.S. § 28-5610(A)(8)(b)), or “a vehicle that is all of the following: (i) [d]esigned

¹ "Implement of husbandry" means a vehicle designed primarily for agricultural purposes and used exclusively in the conduct of agricultural operations, including an implement or vehicle whether self-propelled or otherwise that meets both of the following conditions:

(a) Is used solely for agricultural purposes including the preparation or harvesting of cotton, alfalfa, grains and other farm crops.

(b) Is only incidentally operated or moved on a highway whether as a trailer or self-propelled unit. For the purposes of this subdivision, "incidentally operated or moved on a highway" means travel between a farm and another part of the same farm, from one farm to another farm or between a farm and a place of repair, supply or storage.

A.R.S. § 28-101(26).

and used primarily for grading, paving, earthmoving or other construction work on a highway[;] (ii) [n]ot designed or used primarily for transportation of persons or property[;] [and] (iii) [i]ncidentally operated or moved over the highway” (A.R.S. § 28-5610(A)(8)(b)(i-iii)). Under this theory, it does not matter if the violating vehicle was driven on a roadway or highway because the Petitioner is automatically in violation due to the fact the vehicle is not one of the vehicles listed above. This theory primarily focuses on the prohibited acts statute, which states that a “person shall not use or hold for use any dyed diesel fuel for a use other than a nontaxable use if the person knew or had reason to know that the fuel was so dyed”. A.R.S. § 28-5647(B).

A.R.S. § 28-5610(C) also specifically identifies vehicles that are not exempt from use fuel taxes imposed under A.R.S. § 28-5606, which include:

1. A vehicle that was originally designed for the transportation of persons or property and to which machinery is attached or on which machinery or other property may be transported,
2. A dump truck,
3. A truck mounted transit mixer,
4. A truck or trailer mounted crane,
5. A truck or trailer mounted shovel.

A.R.S. § 28-5610(C)(1-5). The issue at the hearing under this theory is what type of vehicle was being used, not how the vehicle was being used.

Another theory is that a person violates the red dye fuel statutes when the motor vehicle, containing red dye, is *driven* on the highway or road. Otherwise, a person can have red dye in a motor vehicle so long as it is not driven on a public road.

In order to determine what constitutes a violation, the legislative intent should be examined. The legislative history demonstrates that the Arizona legislature intended to follow the federal example, which involved red dye for off-highway use only. Specifically:

The dyed diesel program was started by the federal government to allow the purchase of diesel fuel without the payment of tax, but for *off-highway use only*. According to the Arizona Department of Transportation (ADOT), Arizona began a program similar to the federal one in 1998. While the federal government allows city transit and school buses an exemption, the Arizona program does not. Arizona does not allow the use of dyed diesel *on the roadway* and also taxes the dyed diesel fuel these vehicles use.

See Arizona House Bill Summary, 2000 Reg. Sess. S.B. 1530; Arizona Senate Fact Sheet, 2000

Reg. Sess. S.B. 153 (emphasis added).

The legislative history shows that Arizona conformed with the federal government by passing A.R.S. § 28-5649, which allows dyed fuel to be used on Arizona highways in the following federally exempt motor vehicles: a school bus and a qualified bus. A.R.S. § 28-5649. If the vehicle is not a school bus or a qualified bus, a person cannot operate or maintain the motor vehicle on *any highway* in this state with dyed use fuel in its fuel supply. A.R.S. § 28-5645 (*emphasis added*).

The legislature also codified this theory (that a violation of the red dye fuel statutes involves the motor vehicle using a highway) under A.R.S. § 28-5606. Specifically, to partially compensate Arizona for the use of the highways, certain fuel taxes are imposed. *Id.* Red dye is taxed at a lower rate because it is not primarily used for highway use. “‘Highway’ means any way or place in this state of whatever nature that is maintained by public monies and that is open to the use of the public for purposes of vehicular travel, including a highway under construction.” A.R.S. § 28-5601(11). “‘Public monies’ means those monies that are received by this state and that are derived all or in part from tax revenues or other funding sources.” A.R.S. § 28-5601(23).

In tax cases before the Executive Hearing Office, the state charges a petitioner with violating A.R.S. § 28-5645 and then assesses a penalty under A.R.S. § 28-5647 (either through

statements, registration or other evidence presented during the inspection). Specifically, under A.R.S. § 28-5647, if a person uses or holds for use dyed diesel fuel for a use other than a nontaxable use, the penalty is assessed. *Id.* “‘Use’ includes the placing of fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion of the vehicle. . . .” A.R.S. § 28-5601(36). A “‘motor vehicle’² means a self-propelled vehicle required to be licensed or subject to licensing for operation on a highway.” A.R.S. § 28-5601(19).

The issue becomes what is a “nontaxable use”. Arizona statutes do not define “nontaxable use”³, but Arizona law does state that the use of Arizona highways (which means any public roads) is taxable. *See* A.R.S. § 28-5606. It should be noted that it is just a presumption that all use fuel received into any receptacle on a motor vehicle from which fuel is supplied to propel the vehicle is consumed in propelling the vehicle on the highways. A.R.S. § 28-5615. Petitioner, therefore, has the burden in hearings before the Executive Hearing Office to show that the vehicle was not propelled on a highway by “competent proof”. *Id.*

In this case, it is found that the [REDACTED] with VIN #1 [REDACTED] in not designed primarily for agricultural purposes and thereby does not meet the exception pursuant to A.R.S. §28-5610(A)(8)(a). Additionally, it is found that [REDACTED] used the vehicle in a taxable manner by using [REDACTED] Road, a highway. Lastly, it is found that [REDACTED] [REDACTED] violated A.R.S. §28-5645 by using Red Dye Fuel to propel the [REDACTED] on a taxable highway.

² A.R.S. § 28-101(33) defines a “motor vehicle” based on the following:

(a) Means either:

(i) A self-propelled vehicle.

(ii) For the purposes of the laws relating to the imposition of a tax on motor vehicle fuel, a vehicle that is operated on the highways of this state and that is propelled by the use of motor vehicle fuel.

³ The Chief Counsel Advisory for the Internal Revenue Service has referred to “nontaxable use” as “nontaxable use (i.e., a taxable use)”. *See* IRS CCA 201132023 (Aug. 12, 2011).

DECISION and ORDER

Based on the evidence presented at hearing, it is ordered **AFFIRMING** the tax assessment of the Department in the amount of \$ [REDACTED] against [REDACTED] and [REDACTED].

It is so **ORDERED** this [REDACTED], 2018.

[REDACTED]
[REDACTED], Administrative Law Judge
Executive Hearing Office

NOTE: The assessment or civil penalty ordered herein must be paid not later than thirty (30) days from the date of this Order. The check or money order is to be made payable to the Arizona Department of Transportation, Motor Vehicle Division and mailed to:

Arizona Department of Transportation
ATTN: Revenue Accounting
1801 W. Jefferson Street, Mail Drop 519M
Phoenix, AZ 85007
Mvd1801collections@azdot.gov

IMPORTANT:

This decision is subject to review by the Superior Court of Arizona. You may also request a rehearing in the Executive Hearing Office, provided that your rehearing request is filed with this Office not more than twenty (20) days from the mailing date of this Order and, further, that your rehearing request meets the requirements of A.A.C. R17-1-511.

CERTIFICATE OF SERVICE

Notice of Hearing sent via Certified Mail on this [REDACTED], 2018 to:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

/s/ [REDACTED]
[REDACTED], Case Management Specialist