

Licensee VS. Compliance Reviews

The Department of Revenue & Regulation has implemented two programs that are designed to both help taxpayers with the maintenance of proper fuel tax records and to ensure that the appropriate amount of taxes are being reported and paid. These programs are the licensee review and the compliance review. Usually only a minimal amount of time is required to schedule a business for one of these.

The **Licensee Review** is an education tool that was developed by the Department to help educate taxpayers on the proper procedures to follow in keeping and maintaining fuel tax records. This review can take anywhere between a half an hour and three working days to complete. This will generally depend on the size of the company being reviewed and the amount of records that are being maintained. No assessments result from this type of review and the taxpayer is given an opportunity to correct errors, usually by amending tax returns. Penalties and interest are assessed if tax returns have to be amended. Recommendations are also given on how to correct any minor errors that are found and business, company or corporate officer and license information is updated. If major problems are found during a licensee review, the agent has the option of recommending the business for an audit.

The **Compliance Review** is a tool that is used in place of an audit to correct known problems that have been discovered with a business. This type of review can take between 1 working day and a working week to complete. During the review, records are inspected in order to determine if the problem is a valid one. Again, problems can be corrected by amending tax returns but the general solution to these types of problems is to schedule the company for an audit.

Audits

The Department of Revenue & Regulation routinely audits taxpayers required to pay fuel taxes. The purpose of an audit is to verify the accuracy of reported fuel purchases, usage, deductions, credits and refunds.

Notice of Intent to Audit

The audit process begins when the Department mails a “Notice of Intent to Audit” to the taxpayer. Taxpayers are normally notified at least 30 days prior to the audit date (unless the Department Secretary determines that a delay would jeopardize the collection of tax).

At the opening conference the taxpayer must supply all records of fuel purchases and sales, including tax-unpaid sales of special fuel and sales on which sales tax was charged; all distribution records; and all fuel inventory records.

Within 60 days after the beginning of the audit, the taxpayer must provide the auditor with all records supporting deductions and exemptions. If the taxpayer fails to present documentation to the auditor within the 60-day period, the auditor may disallow the claimed exemption or deduction, resulting in an assessment of additional taxes and interest.

If the taxpayer's records are not complete enough to show the true liability, the auditor may estimate the taxable receipts.

Certificate of Assessment

If the auditor determines, after reviewing the taxpayer's records, that additional taxes are due, a "Certificate of Assessment" will be issued. The certificate shows the type and amount of tax due and the reasons for the assessment. The taxpayer has 60 days from the date of the certificate to take the following action:

1. Pay the assessment, including accrued interest, or
2. Request a hearing (in writing) before the Secretary of Revenue & Regulation.

Appealing an Audit Assessment

A request for hearing is the taxpayer's only way of contesting an audit assessment. If a taxpayer decides to appeal the assessment, he or she must submit a "Request for Hearing" within the 60-day time limitation. The request, submitted in letter form, must specifically identify the issues being contested. If it does not, the administrative hearing could be denied.

The request for hearing must state:

1. The portion of the assessment being contested, and
2. The mistake of fact or error of law the taxpayer believes resulted in an invalid assessment.

Once a proper request for hearing has been filed, the matter becomes a contested case and falls within the scope of the Administrative Procedures Act (SDCL 1-26). The South Dakota Office of Hearing Examiners schedules the matter for hearing and serves the taxpayer with a "Notice of Hearing."

Notice of Hearing

The notice of hearing informs the taxpayer of the time and place of hearing, the name and address of the hearing examiner, and sets forth the issues to be considered. The notice of hearing must be served on the taxpayer at least 10 days prior to the hearing to allow time for "discovery proceedings," which may include a pre-hearing conference involving the Department's attorney, the taxpayer and his or her representative, and the hearing examiner.

The Administrative Hearing

The administrative hearing is conducted according to the provisions of the Administrative Procedures Act (SDCL 1-26) and the rules set forth by the Office of Hearing Examiners. The taxpayer may be represented by an attorney. Essentially, the taxpayer is a plaintiff in a civil matter. Consequently, he or she must prove that the assessment is invalid because it is based on a mistake of fact or error of law. In most cases, the administrative hearing is the taxpayer's only opportunity to present testimony and evidence.

At the conclusion of the hearing, the hearing examiner may request briefs on the legal issues. Following the submission of briefs, the hearing examiner prepares proposed

findings of fact and conclusions of law for the Secretary of Revenue & Regulation to consider.

Findings of Fact, Conclusions of Law, and Order

The Secretary may adopt the proposals of the hearing examiner or, after reviewing the record, may submit their own findings, conclusions and decision. Copies of the findings of fact, the conclusions of law and the order are sent to the taxpayer.

If the taxpayer is ordered to pay additional fees and/or tax and desires to appeal the decision to the circuit court, they must:

1. Pay the amounts ordered to be paid, or
2. File a bond with the Department to insure payment.

The South Dakota Supreme Court has ruled that if payment is not made, or a bond posted, the circuit court cannot hear an appeal.

Notice of Appeal

After the taxpayer has paid the fees and/or tax or filed a bond, the appeal to the circuit court is governed by the Administrative Procedures Act. The taxpayer must serve their notice of appeal upon the Department of Revenue and file it, along with proof of service, with the clerk of courts of the appropriate county. This notice of appeal must be filed within 30 days of the date the Secretary of Revenue & Regulation serves the taxpayer notice of their decision.

When the court hears the appeal, it will base its review of the Department Secretary's decision upon the administrative record. With regard to the questions of fact, the Secretary's findings will be upheld unless "clearly erroneous." Questions of law are fully reviewable by the court.

The decision of the circuit court may be appealed to The South Dakota Supreme Court. The Supreme Court will review the Secretary's decision on the record, under the same standards of review employed by the circuit court.

Collections

If a taxpayer fails to pay taxes, penalties and interest, the Department of Revenue & Regulation may begin a civil suit against the taxpayer for recovery of the debt. If successful, the Department becomes a judgment creditor and can use the normal collection procedures open to such a creditor.

Notice of Jeopardy Assessment

In some cases, the Department may bypass the formal audit procedure in determining if taxes are due. If the Secretary of Revenue & Regulation finds that the assessment or collection of any tax is jeopardized by delay, they may immediately make an assessment of the estimated tax, penalty or interest and demand payment from the taxpayer. Thus, when confronted with an uncooperative taxpayer who fails to file required returns or report