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Determinations – Relief

The assessment of interest on the underpayment of hazardous waste fees is mandatory. A feepayer's bankruptcy is not the type of disaster contemplated by the Legislature when it adopted Revenue and Taxation Code section 43158, which allows the Board to grant relief from interest when the failure to timely file a return is due to a disaster. 7/7/95.

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

APPEALS SECTION

In the Matter of the Petitions for)
Redetermination Under the Hazardous)
Substances Tax Law of:) DECISION AND RECOMMENDATION
)
)
) Nos.
)
)
Petitioner _____)

The Appeals conference in the above-referenced matters was held by Paul O Smith, Staff Counsel on (redacted), in Culver City, California.

Appearing for Petitioner (Redacted)
(Redacted)
(Redacted)
(Redacted)
(Redacted)
(Redacted)

Appearing for the Department of
Toxic Substances Control
(by telephone conference): Denise Hoffman
Staff Counsel
Joan A. Markoff
Senior Staff Counsel

Appearing for the Environmental
Fees Division of the Board
(by telephone conference): Jeffery R. George
Supervising Tax Auditor

<u>Protested Items</u>	<u>Amount</u>
Superfund tax for the period March 3, 1989 through December 31, 1990, based on the audit of hazardous waste disposed on uniform hazardous waste manifests.	\$ (Redacted)
Disposal fees for the period March 3, 1989 through December 31, 1991 based on the audit of hazardous waste disposed on uniform hazardous waste manifests.	<u>\$ (Redacted)</u>
Total	<u>\$ (Redacted)</u>

Petitioner's Contentions

1. The Board must determine fees based upon its assessment of all available information.
2. Board staff and the Department of Toxic Substances Control have ignored petitioner's classification of the solid waste stream as Non-Resource Conservation and Recovery Act hazardous waste.
3. Petitioner's solid waste stream is non-Resource Conservation and Recovery Act hazardous waste and was Non-Resource Conservation and Recovery Act hazardous waste between March 1989 and September 1990.
4. Health and Safety Code section 43301 does not prevent Petitioner from disputing the appropriate category of hazardous waste fees and taxes.
5. Petitioner is entitled to relief from the penalties and interest assessed.

Summary

During the periods in issue petitioner (redacted), a California corporation, operated a used oil recycling facility that accepted used oil, oily water and similar materials from off-site generators and transporters for different recycling processes at petitioner's facility. This facility was operated under a grant of interim status issued by the California Department of Health Services (now the Department of Toxic Substances Control [hereinafter "DTSC"]). Petitioner's waste solid stream consists of two components, both similar in physical characteristics; namely, solids generated in a centrifuge process that removes

excess liquid; and soil from the facility that contains petroleum hydrocarbons.¹ Petitioner's treatment process was a multiple step process of heat treatment, settling, centrifugal action and chemical treatment that produced a product that petitioner sold in the open market. This treatment process also produced a semi-solid petroleum sludge, contaminated soil from soil removal projects involving soil from ground spill clean-up and tank cleaning and mixtures of the soil with the semi-solid sludge produced. Petitioner disposed of its waste at an off-site landfill.

Prior to 1988, and based on its own general knowledge about hazardous waste received from generators, petitioner classified its waste as Non-Resource Conservation and Recovery Act ((hereinafter "RCRA") hazardous waste.² Petitioner also submits as support that its waste was Non-RCRA hazardous waste, results from the testing of waste from another oil recycling firm located in (redacted). (See Petit. Br., Mar. 31, 1995, Ex. 5.) Beginning in 1988, petitioner disposed of its waste at a facility operated by (redacted) (hereinafter (redacted)).

(Redacted) required each generator disposing waste at its facility to complete a profile sheet, wherein the generator, among other things, describe the waste being disposed, the process that generated the waste, described the physical characteristics of the waste and identified the metals present in the waste. In 1989, (redacted) instructed petitioner commence identifying its waste on each manifest as RCRA hazardous waste rather than Non-RCRA hazardous waste. Thereafter, petitioner identified its waste in the manifest with a RCRA D code.³

In early 1990, petitioner commenced use of the United States Environmental Protection Agency's (hereinafter "EPA") Toxicity Characteristic Leaching Procedure (hereinafter "TCLP") extraction method to test its waste. Between February 1990, and January 1991, petitioner used the TCLP test, at least 19 times, to test samples from its waste. At no time did any of the samples exhibit soluble lead or soluble chromium at a concentration equal to or greater than 5.0 milligrams of lead or chromium per liter or extract. Later in 1990, petitioner, using the new TCLP waste codes determined that (redacted)'s analysis was incorrect, and had incorrectly caused petitioner to classify its waste as RCRA hazardous waste rather than Non-RCRA hazardous waste.

On September 26, 1990, (redacted) advised petitioner that the RCRA D code should not have been used to characterize petitioner's waste, rather, the waste should have been identified as Non-RCRA hazardous waste. From September 25, 1990 through the end of the periods in issue, petitioner

¹ For simplicity, hereinafter petitioner's waste stream, regardless of composition, will be referred to as waste.

² Petitioner states its knowledge was based on eight specific factors, none of which related to any form of testing of the waste. (See Petit. Br., Mar. 31, 1995, p.4.)

³ The RCRA codes used were D007 for Chromium and D008 for lead. Petitioner also used the California code 611 representing "Contaminated Soil From Site Cleanups". Petitioner used the RCRA codes from March 6, 1989 through September 24, 1990.

identified its manifested waste as Non-RCRA hazardous waste, but did not file any waste disposal fee or superfund tax reports with the Board. Petitioner states that its failure to file returns was due to an uncertainty whether disposal facilities were already collecting and paying the fees and taxes.

Petitioner does not dispute that its waste was hazardous waste; it is petitioner's contentions that such waste should be characterized as Non-RCRA hazardous waste because: (1) the Board must determine fees based upon its assessment of all available information; (2) that Board staff and DTSC have ignored petitioner's classification of the waste as Non-RCRA hazardous waste; (3) that petitioner's waste is Non-RCRA hazardous waste and was Non-RCRA hazardous waste between March 1989 and September 1990; and (4) that Health and Safety Code section 43301 does not prevent petitioner from disputing the appropriate category of hazardous waste fees and taxes. Petitioner further contends that it is entitled to relief from the penalties and interest assessed.⁴

On February 2, 1993, two field audit reports were prepared by the Board's Special Taxes and Operations Department (hereinafter "Department") for the periods March 3, 1989 through December 31, 1990 (superfund tax), and March 3, 1989 through December 31, 1991 (waste disposal fee). The Department, among other things, determined that prior to September 1990, the test required by Federal Regulation section 262.11 was a EP Tox test, and petitioner did not at any time, prior to September 1990, perform any test on its manifested waste. The Department also determined that waste generated before September 24, 1990 was subject to the fees at the RCRA rate. Petitioner was assessed at the RCRA rate for the disposal fee and the superfund tax, for the period that petitioner manifested its waste as RCRA hazardous waste (March 6, 1989 through September 24, 1990). On June 9, 1993, the Department issued Notices of Determination to petitioner, inclusive of interest and failure to file penalties, and on July 9, 1993, petitioner files its Petitions for Redetermination.

On March 31, 1995, DTSC responded by declaration that the total metals data of the petitioners 1988 (redacted) profile sheet for contaminated soil did not provide sufficient information to determine whether the sample was RCRA or Non-RCRA waste. DTSC concluded from its own analysis that the waste could have failed the EP-Toxicity test. DTSC could not find any records that showed either petitioner or CMW performed an EP-Toxicity or a TCLP test on any of petitioner's waste prior to February 12, 1990. DTSC also found that petitioner's TCLP results from Weck Laboratories collected in February, May and September 1990, were unreliable to be representative of Non-RCRA hazardous for the period prior to February 1990, as well as between February and September 1990. DTSC further states that petitioner failed to comply with Regulation 66471, subdivision (b) (1), in that in none of the information provided by petitioner indicates that sufficient test samples were used for the February, May and September 1990 TCLP results. (See DTSC Dec., March 31, 1995.)

⁴ In 1988 and 1989, petitioner experienced serious financial difficulty that led to its filing for bankruptcy protection in the U.S. Bankruptcy Court.

Analysis and Conclusions

California regulates the treatment, storage, and disposal of hazardous waste through the Hazardous Waste Control Act. (Health & Safety Code §25100 et seq.; Cal. Code Regs., tit 22, § 66001 et seq.) Health and Safety Code section 25174.1⁵, subdivision (a) provides in relevant part that each person who disposes of hazardous waste in the state, shall pay a “disposal” fee directly to the State Board of Equalization for disposal of hazardous waste to land. The fee is determined as a percentage of the base rate set forth in section 25174.2. (Health & Safety Code, § 25174.6, subd. (a).) Section 25342 provides in relevant part that every person who disposed of more than 500 pounds of hazardous waste in the state during the preceding calendar year shall pay a “superfund tax” on the total amount of hazardous waste disposed of, as set forth in section 25345.⁶ Petitioner concedes that its waste is hazardous waste subject to the disposal fee and the superfund tax. Petitioner, however, argues that the waste is subject to the Non-RCRA rate rather than the RCRA rate. Thus, petitioner’s contentions regarding the disposal fee and superfund tax can be summarized into a single argument: whether the waste petitioner generated before September 24, 1990 should be characterized as Non-RCRA hazardous waste and subject to the Non-RCRA rate.

Revenue and Taxation Code section 43201 authorizes the Board to issue determinations “based on any information available to it”, including reasonable estimates and assumptions. The taxpayer bears the burden of proving that a determination issued by the Board is incorrect. (See H. J. Heinz Company v. State Board of Equalization (1962) 209 Cal. App. 2d 1.) The Board is entitled to documentation in support of claimed exemptions or exclusions, and testimony alone will not normally suffice. (See Paine v. State Bd. of Equalization (1982) 137 Cal. App.3d 438.) While these rules were developed in the context of sales and use tax determinations, I see no reason why these rules cannot apply under the Hazardous Substances Tax Law.

Prior to its amendment by Statutes 1989, Chapter 1436, section 4, effective October 2, 1989,⁷ section 25117.9 provided in relevant part that “Non-RCRA hazardous waste” meant all hazardous waste regulated in the state, other than hazardous waste subject to regulation by the EPA pursuant to RCRA. A hazardous waste was presumed to be regulated by RCRA [after amendment the waste was presumed to be RCRA hazardous waste], unless a DTSC regulation provided that the waste was a Non-RCRA

⁵ All statutory references are to the Health and Safety Code, as in effect during the periods in issue, unless stated otherwise.

⁶ This tax was repealed by Stats. 1990, operative January 1, 1991.

⁷ The amendment to section 25117.9 also provided that “RCRA hazardous waste” was defined in section 25120.2. Section 25120.2 as added by Statutes 1989, Chapter 1436, Section 5, effective October 2, 1989, provides that “RCRA hazardous waste” means all waste identified as hazardous waste in Part 261 (commencing with section 261.1) of Subchapter I of Chapter 1 of Title 40 of the Code of Federal Regulations. . . .”

hazardous waste. It was not until July 1, 1991, that regulations defining RCRA and Non-RCRA hazardous waste were adopted by DTSC. (Cal. Code Regs., tit. 22, reg. 66261.101.)

Until DTSC adopted regulations to implement section 25117.9, a hazardous waste was presumed to be regulated by RCRA, unless the generator of the waste determined it was not a hazardous waste pursuant to the standards set forth in Part 261 (commencing with section 261.1) of Subchapter I of Chapter 1 of Title 40 of the Code of Federal Regulations. (Health & Safety Code, § 25117.9) As stated above, petitioner's argument is that the waste was Non-RCRA hazardous waste and was mistakenly classified on the manifests as RCRA hazardous waste. Petitioner now wants to change the classification of its waste to Non-RCRA waste.

Regulation 66482, before its repeal effective July 1, 1991, provided in subdivision (b) that a hazardous waste manifest must be certified by the producer that the waste shipped is properly classified. It is my conclusion that where waste material is shipped under a hazardous waste manifest and is certified thereon as being RCRA hazardous waste by the generator, it has entered the stream of material subject to being managed pursuant to the requirements for RCRA hazardous waste.

Here, there is no question that the material is hazardous waste. Further, petitioner certified that the material in questions was RCRA hazardous waste. When the waste was shipped and entered into the stream of other RCRA hazardous waste, the certification on the hazardous waste manifest that the waste was RCRA hazardous waste became irrevocable. The Board has previously ruled that the use of a hazardous waste manifest is sufficient to justify the application of the disposal fee. Under this reasoning I find no basis to treat petitioner's waste as anything other than RCRA hazardous waste.

Petitioner argues that it manifested its waste as RCRA hazardous waste only because of the instructions given to it by CWM. The only test support that petitioner's waste generated throughout the period was Non-RCRA hazardous waste are TCLP Soluble Lead and Chromium tests conducted on and after February 12, 1990. The waste, here, may have been erroneously classified as RCRA hazardous waste, but its treatment as RCRA hazardous waste in transporting and disposing of it is sufficient to cause the disposal fee and superfund tax to be applied to the amount disposed. Also, petitioner states that prior to 1988, it used its own knowledge, and the advice of a consultant engineer to classify its waste as Non-RCRA hazardous waste. Yet, there is no evidence that petitioner disputed in any way (redacted)'s subsequent reclassification of petitioner's waste from Non-RCRA waste to RCRA waste.

Further, petitioner has not demonstrated that the waste samples submitted for testing by the Indiana oil recycling firm were substantially similar to the waste generated by petitioner during the same period. Thus, I cannot agree that the samples are representative of the nature of petitioner's waste characteristics during the periods in issue. DTSC's expert found petitioner's test to be incomplete because an insufficient number of samples were tested, and no complete characterization was performed on any single sample. DTSC's expert also found numerous other problems with these samples (see DTSC Dec., Mar. 31, 1995, p. 8-9), and concluded that the tests were not representative of

Non-RCRA hazardous waste for the period prior to February 1990, as well as between February and September 1990. I find these statements by DTSC's expert to be persuasive. In view of the above, I find that the Department properly classified petitioner's waste as RCRA hazardous waste. Because I find that petitioner has failed to establish that its waste was Non-RCRA waste rather than RCRA waste, I need not determine whether the provisions of section 43301 are applicable, and prohibit the Board from accepting or considering petitioner's Petition for Redetermination.

I now address petitioner's argument that it is entitled to relief from the penalties and interest assessed.

Revenue and Taxation Code section 43156 provides in relevant part that all tax not paid on the due date shall bear interest. (Emphasis added). Thus, the assessment of interest on the underpayment of tax by petitioner is mandatory. (See Deputy v. Dupont (1939) 308 U.S. 488, 498, where the United States Supreme Court stated that interest means "compensation for the use or forbearance of money".) The interest here is not a penalty but compensation for the use of money which would have been paid earlier to the Board had the fee and tax been properly determined by petitioner. Further, petitioner, with the concurrence of DTSC, requests the Board grant relief from the interest assessed during the two month extension granted DTSC for filing its opening brief. As I have stated above, the imposition of interest is mandatory. Thus, any waiver of interest for this period must be by an appropriate statute. Because I find no statutory basis for this request, nor am I directed to any, I cannot recommend the waiver requested.

Revenue and Taxation Code section 43158 provides in relevant part that relief from interest assessed under Revenue and Taxation Code section 43156 can be granted when the failure to timely file a return is due to disaster. However, I cannot recommend that petitioner be granted relief from the interest assessed under section 43156, because petitioner's bankruptcy is not the type of disaster contemplated by the Legislature when it enacted this section. Accordingly, the Department properly assessed the interest in question.

With respect to the penalty assessed, during the periods in issue Revenue and Taxation Code section 43157 provided in relevant part that if a person's failure to file a return is due to circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person can be granted relief from the penalty assessed pursuant to section 43155 of the Revenue and Taxation Code. This section further provided that any person seeking to be relieved of a penalty for failure to file a return "shall file with the Board a statement, under penalty of perjury, setting forth the facts upon which he or she bases his or her claim for relief." This petitioner has not done so. Therefore, I recommend that the petitioner be given thirty (30) days from the date this report is mailed so that petitioner may submit the required statement, if he desires to do so.

Recommendation

Allow thirty (30) days so that petitioner may submit a statement, signed under penalty of perjury, requesting relief from the penalty for failure to file a return, and in all other respects deny the petition.

Paul O. Smith, Staff Counsel

Date