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Hazardous Substances – Responsible Party No Proration of Facility Fee

A person purchased a facility covered by a hazardous waste facility permit and continued to operate the facility for the remainder of the reporting period. The statute provides that each operator is liable for the fee for each reporting period or any portion thereof (Health and Safety Code section 25205.2). The statute does not provide for any proration of the fee, and thus the total amount of the fee may be collected from either or both the buyer and/or the seller. 7/2/93.

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Hazardous Substance Tax Facility)
Fee of:)
)
(Redacted)) No. (Redacted)
)
)
)
Petitioner)

The Appeals conference in the above-referenced matter was held by Staff Counsel Lucian Khan on (redacted) in Sacramento, California.

Appearing for Petitioner: (Redacted)
(Redacted)

Appearing for the Department
of Toxic Substances Control
(DTSC): Richard W. Sherwood
Senior Staff Counsel

Appearing for the
Environmental Fees Division: Louie E. Feletto
Supervising Tax Auditor

Protested Item

<u>Item</u>	<u>Amount</u>
The protested liability involves a hazardous waste facility fee for the period July 1, 1989 through June 30, 1990 based on the rate established for a small storage facility.	\$ (Redacted)

Petitioner's Contentions

Petitioner contends that the prior owners are responsible for the facility fee since they operated approximately 9 months of the period while petitioner operated only 3 months. If the prior owner is not responsible for the entire amount, then in the alternative, petitioner is responsible only for the 3 month periods in which it had acquired ownership.

Summary

Petitioner is a corporation which operated a polychlorinated biphenyls (PCB) commercial storage facility located at (redacted), California. Effective March 28, 1990, petitioner acquired this facility from (redacted) Company in an asset purchase agreement.

On March 30, 1992, the Environmental Fees Division (EFD) issued a billing in which petitioner was assessed a hazardous waste small storage facility fee of \$ (redacted).

On April 27, 1992, petitioner filed a petition for redetermination in which petitioner argues the prior operator, (redacted), should be held responsible for the fee, or in the alternative, petitioner is only liable for the portion of the fiscal yearly period of July 1, 1989 to June 30, 1990.

At the Appeals conference on June 7, 1993, Mr. (redacted), on behalf of petitioner, referenced its petition dated April 27, 1992 and also a letter of June 1, 1992 from petitioner to Carol Reisinger of EFD, in which petitioner argues the law is silent on how the facility fee should be assessed when a facility has more than one operator during the reporting period. Petitioner points out Section 25205.2 of the Health and Safety Code states that each operator of a facility shall pay a facility fee for each reporting period, or any portion thereof. Petitioner interprets this language in the statute to require that when there is more than one operator during a reporting period, each operator must pay a fee only for its portion of the reporting period. If the section is read to require that one operator must pay the full facility fee for the reporting period, it does not suggest which one of the two operators who owned the facility during the reporting period must pay the full fee. The law provided no notice to petitioner that if it acquired the facility during that reporting period that it would be responsible for the fee for the full period. In a March 26, 1992 phone conversation between Mr. (redacted) (now retired), petitioner's former employee, and Senior Tax Auditor Barbara Fosha of EFD, petitioner was advised that the state could only accept payment from one operator for the period in question. To substantiate this claim, petitioner provided a copy of a June 3, 1993 affidavit which is signed by Mr. (redacted), and attached as Exhibit 1.

In summary, petitioner contends the prior owner has total responsibility for the fee, or in the alternative, petitioner should only be liable for that portion of the fiscal yearly period when the purchase was made (March 28, 1990) until the end of the fiscal year (June 30, 1990).

EFD and Department of Toxic Substance Control (DTSC) both argue that under Health and Safety Code Section 25205.2, there is no provision whereby the fee may be prorated between the nine month period the prior owner operated the facility and the remaining three month period petitioner operated. DTSC further argues that if it was the intent of the Legislature to allow that a fee may be prorated, it would be specifically addressed in the statute. (See, e.g., Health and Safety Code Section 25347.7 attached as Exhibit 2.)

It is further argued by EFD and DTSC that their interpretation of Section 25205.2 is that the total amount of the fee may be collected from either or both operators for the period in question; thus, petitioner is liable.

Analysis and Conclusions

Section 25205.1 of the Health and Safety Code defines a facility as any structure, and all contiguous land, used for the treatment, transfer, storage, resource recovery, disposal, or recycling of hazardous waste.

Section 25205.2 of the Health and Safety Code provides that each operator of a facility shall pay a facility fee for each state fiscal year, or any portion thereof, to the Board based on the size and type of the facility, as specified in Section 25205.4.

The express words of the statute indicate that each operator must pay this fee, and the fee must be paid for each state fiscal year or any portion of the year.

A review of the affidavit submitted by petitioner (Exhibit 1) indicates that, according to Mr. (redacted) he was advised by Barbara Fosha from EFD that the state was going to bill both petitioner and the predecessor (redacted) for the fiscal yearly period of 1989 – 1990. There is no indication in the affidavit that Ms. Fosha ever represented the fee could be prorated, the prior operator would be responsible, or the fee could be collected from only one operator. Even if such representations were made to Mr. (redacted), petitioner could not rely on a verbal opinion from an employee which was given over the telephone. Revenue and Taxation Code Section 43159 allows relief from taxes (fees) imposed under Section 25205.2 based on erroneous written advice, but not oral advice.

I conclude that petitioner is liable for the full amount of the fee under Section 25205.2.

Recommendation

Deny the petition.

Lucian Khan, Staff Counsel

(Redacted)

Date

STATE OF WEST VIRGINIA)
) AFFIDAVIT OF: (REDACTED)
COUNTY OF KANAWAH)

I, (redacted), make the following affidavit based upon personal knowledge:

From approximately October 1986 until April 1992, I was employed by (redacted), Inc., headquartered in (redacted), in the position of Health, Safety and Environmental Affairs Manager or Permitting/Compliance Manager. As such, my responsibilities included assisting (redacted)'s several operating locations and storage warehouses with environmental permitting and associated fees. One of the locations I worked with was a warehouse located in (redacted), California.

On March 26, 1992, I returned a call from Ms. Barbara Fosha of the California State Board of Equalization. Ms. Fosha informed me during this call that (redacted) would be receiving a billing order and notice of determination for facility fees for the (redacted) warehouse for the fiscal years 1989-90 and 1990-91. Until this phone call, (redacted) had received no prior notice or billings for these fees. Ms. Fosha further noted that, since the permit for this facility was transferred to (redacted) from (redacted) (the previous operator) on April 30, 1990, the State was billing both (redacted) and (redacted) for the fee for fiscal year 1989-90.

FURTHER AFFIANT SAYETH NAUGHT

Dated this 3RD day of June 1993

(Redacted)

Sworn to before me this 3RD day
of June 1993

Notary

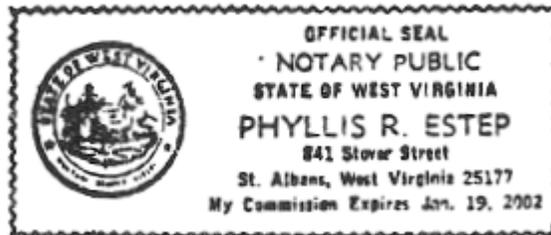


EXHIBIT 1

operation and maintenance activity, and thirty-four thousand dollars (\$34,000) for an extra-large operation and maintenance activity.

(k) (1) Fees for any oversight activity being performed on July 1, 1989, or any subsequent date, shall be assessed pursuant to this section and Section 25347.7, even if the activity began prior to July 1, 1989. If the activity began prior to July 1, 1989, the fees shall be payable within 60 days after the effective date of the act adding this section. This section shall not apply to activities for which work has been completed prior to July 1, 1989.

(2) If there is a conflict between this subdivision and Section 25347.7 and the provisions of any agreement entered into pursuant to subparagraph (C) of paragraph (1) of subdivision (a) of Section 25355.5 prior to the effective date of the act adding this section, the agreement shall prevail, unless the agreement is modified as allowed by its terms or by mutual consent of all parties.

(3) Any order or agreement entered into for removal or remedial action may be modified by consent of all parties to assess the fees listed in this section in place of any provisions for charges or cost recovery contained in the order of agreement.

(1) Notwithstanding this section, a potentially responsible party shall pay the State Board of Equalization a fee equal to the actual costs of the department's costs of oversight, in advance of the oversight for removal or remedial activities which is done, pursuant to an agreement, if the site is not listed pursuant to Section 25356, except the potentially responsible party is not required to pay for the costs of any activities necessary and incidental to entering the agreement, which shall be reimbursed pursuant to the agreement.

(m) (1) The department may reclassify a site as to size, as warranted by new information supplied by the department, but this reclassification shall not result in a charge in the amount of fees for oversight of any activity which has been completed or is underway.

(2) If a site may be classified as two sizes pursuant to Sections 25313.5, 25317.5, 25318, and 25326.6, it shall be classified as the larger of those sizes.

(n) Notwithstanding this section, the department may waive the fees imposed by this section for any hazardous substance release site owned and operated by an agency of the federal government, if the department has entered into an agreement with that agency for the payment of fees in an amount different from the amounts specified in this section.

(Amended by Stats. 1989, Ch. 1032.)

25347.7. (a) A potentially responsible party is liable for reimbursing the state (illegible) the Hazardous Substance Cleanup Fund for all expenditures associated (illegible) and remediation of hazardous substances (illegible) interest and administrative costs, pursuant to Section 25350, for any of these activities which occur before July 1, 1989. (Illegible) completed prior to July 1, 1989, pursuant to this section.

(b) The department shall divide the fee for an activity or phase of activity specified in Section 25347.6 by the number of months estimated by the department to be required to conduct the activity or phase of activity to establish a monthly fee quotient. The department may apply the monthly fee quotient in either of the following ways to establish the prorated fee:

(1) The department may subtract that portion of an activity or phase of activity completed prior to July 1, 1989, from the total number of months estimated by the department to be required to conduct the activity or phase of activity and then multiply the remainder by the monthly fee quotient to establish the prorated fee.

(2) The department may estimate the number of months required to complete an activity or phase of activity and multiply that figure by the monthly fee quotient to establish the prorated fee.

(c) For purposes of making the estimates as are necessary to prorate fees, the department may use the following time periods as guidelines to establish the time periods necessary to complete the various activities and phases of activity specified in Section 25347.6 for which fees are assessed:

(1) The time period required to estimate site size for fee assessment purposes is three months.

(2) The time period required to conduct preliminary endangerment assessments is three months.

(3) The time period required to conduct removal actions is four months for small actions, six months for medium actions, 12 months for large actions, and 24 months for extra-large actions.

(4) The time period required to conduct remedial investigations and feasibility studies is nine months for small sites, 17 months for medium sites, 33 months for large sites, and 60 months for extra-large sites.

(5) The time period required to prepare remedial action plans is three months for small sites, three months for medium sites, six months for large sites, and nine months for extra-large sites.

(6) The time period required to prepare remedial design is two months for small sites, three months for medium sites, six months for large sites, and 12 months for extra-large sites.

(7) The time period required to conduct final remedial actions is deemed to be four months for small sites, eight months for medium sites, 20 months for large sites, and 40 months for extra-large sites.

(8) Ongoing operation and maintenance activities are deemed to be conducted 12 months per year.

(Amended by Stats. 1989, Ch. 1032.)

25348. The board shall enforce the provisions of this article and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this article.

(Added by Stats. 1981, Ch. 756.)

Article 5. Uses of the State Account

25350. For response actions taken pursuant to the federal act, only those costs for actions which are consistent with the priorities, guidelines, criteria, and regulations contained in the national contingency plan, as revised and republished pursuant to Section 105 of the federal act (42 U.S.C. 9605), shall qualify for appropriation by the

EXHIBIT 2