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Classification Bankruptcy

The generator fee does not apply to persons who generate less than five tons of hazardous waste in a year. If, in a given year, a person generates four tons prior to filing for bankruptcy and two tons after filing, the generator fee will be due. There is no change of ownership of the assets, and thus the generation of the waste before and after filing for bankruptcy is by the same person. 9/20/88.

Ms. Oveta Riffle
Excise Tax Unit

September 20, 1988

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Tax Counsel

Establish Bankruptcy Claims Under
the Hazardous Substance Tax Program

Your June 24, 1988 memorandum to Mr. Larry Augusta regarding your office's procedures in filing claims in bankruptcy on hazardous substance tax cases has been referred to me for reply. Specifically, you noted the following situations:

"Situation No. 1

The taxpayer has filed bankruptcy. The petition date is January 9, 1987. Taxpayer was billed a Hazardous Waste Generator Fee pursuant to Section 25205.5 of the Health and Safety Code. The fee period for the generator fee is July 1, 1986 to June 30, 1987. The fee is due on January 1, 1987. Since the petition date falls within the generator fee period, how do we determine the pre-petition and post-petition liabilities?

"The fee is designed as an annual fee. The amount of the fee is based upon the quantity of hazardous waste generated at each generating site. The fee is established on or before November 1 of each year. Categories are as follows:

<u>Category</u>	<u>1986 Fee Rate</u>	<u>1987 Fee Rate</u>
4 – More than 5 tons but less than 50 tons	\$ 483.00	\$ 1,078.00
3 – 50 tons but less than 250 tons	\$ 966.00	\$ (illegible)
2 – 250 tons but less than 2,500 tons	\$ 4,830.00	\$10,780.00
1 – 2,500 tons or more	\$ 9,660.00	\$21,560.00"

Given this information, you asked whether it matters whether waste is generated during the pre-petition period or the post-petition period. Yes, it does matter, because under the Bankruptcy Code, the Board would have a pre-petition claim against the debtor's estate under Title 11, United States Code, Section 507. As to the post-petition period, the Board is entitled to a priority payment of the tax as a cost of administration of the estate under Title 11, United States Code, Section 503.

You asked whether a generator who generates four tons prior to the petition date and two tons after the petition date would be responsible for the generator fee. As you noted, normally, in this instance, the generator would qualify for the fee because his hazardous waste generation of six tons would place him within Category 4, the five to 50 tons category. If the fee were determined by waste generated separately during the pre- and post-petition periods, the generator would owe no fee as four tons and two tons treated independently are less than the amount which would qualify the generator for the fee. Conversely, if the generator generated 10 tons during the pre-petition period and 10 tons during the post period, the taxpayer may owe two annual fees.

Although the filing of a petition under the Bankruptcy Code creates an estate comprised of all assets of the debtor, we believe that there is no change of ownership to a new person under the Hazardous Waste Substance Tax Law. Therefore, for purposes of this annual fee, we believe that only one fee is applicable, and the generator who generates four tons prior to the petition date and two tons after the petition date is subject to the fee.

When a taxpayer petitions for bankruptcy during the period within which the annual fee is applicable, it is our opinion that the staff should generally prorate the annual fee according to the respective portions of the annual period which are pre-petition and post-petition. However, in the event that all operations which resulted in the tax occurred either pre-petition or post-petition, the Board should file its claim entirely within such period and not prorate the fee.

"Situation No. 2

The Facility Fee pursuant to Section 25205 poses a similar problem.
Can we prorate the annual fee?"

We were unable to find a section 25205 in the Health and Safety Code. We assume that, in this case, you are referring to section 25205.2, the facility fee imposed on the operators of facilities. We believe that the application should be the same as in Situation No. 1.

"Situation No. 3

The Hazardous Substances (Superfund) Tax program poses a different problem. The tax rate for the Superfund for the current year is not set

until April of the next year. This means that Superfund taxable disposals made in 1988 will not have a Superfund tax rate set until April 1989. The tax is not due until July 1.

We have had situations where the taxpayer has filed for bankruptcy during the current year. We know the taxpayer owes the Superfund tax, and we would like to make a claim against the debtor in the bankruptcy court. The question is can we use last year's rates to assess a liability, so that we can make a timely claim. Our intention is, after the actual rate has been set, to go back and revise our claim figures to reflect the actual amount due.

Given the formula in Section 25342 of the Health and Safety Code, for setting the tax rate, it is conceivable that last year's rate might be lower than the current year's rate. However, since the inception of the Superfund Tax Program, this has never happened. Historically, the rate has always gone up."

We suggest that you file a claim based on an estimate. Since the rate has historically risen, you should file the claim based on the anticipated increase. You may then file an amended claim. Amendment to a bankruptcy claim is freely allowed where the purpose is to cure a defect in the claim as originally filed. (Szatkowski v. Meade Tool and Die Company, 164 F.2d 228.)

We hope this answers your questions; however, if you need further information, feel free to write again.

RLD:sr