

**This document has been retyped from an original copy.
Original copies can be provided electronically by request.**

Variances No Partial Exemption

There is no provision for exemption for partial fiscal years based on the issuance of a variance. 12/2/93

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

LEGAL DIVISION, APPEALS REVIEW SECTION

In the Matter of the Petition)	
for Redetermination Under the)	DECISION AND RECOMMENDATION
Hazardous Substances Tax Law of:)	
)	
(Redacted), Inc.)	No. (Redacted)
)	
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was scheduled by Senior Staff Counsel James E. Mahler for (redacted) in Downey, California. All parties waived appearance.

Protested Item

Petitioner protests the assessment of a \$(redacted) facility fee (small treatment facility) for the period July 1, 1987, through June 30, 1988. The fee was assessed upon the recommendation of the Department of Health Services (now the Department of Toxic Substances Control, hereinafter "the Department").

Petitioner's Contentions

1. The Board should defer action until the Department acts upon petitioner's request for waiver of the fee.
2. The fee should be reduced to a pro-rate portion for the period of time petitioner remained in interim status to the date it was granted a variance.

Summary

The petitioner corporation manufactures truck beds. Prior to 1986, it applied for and received a Hazardous Waste Facility Permit to treat waste water at a site in (redacted), California, and to discharge the water into a sewer system. The waste water was apparently generated in the process of cleaning equipment used to paint the truck beds.

Petitioner later requested a variance from the permit requirements, and the variance was granted on August 13, 1987. (The variance was granted conditionally, but the Department does not contend herein that petitioner failed to meet the conditions.)

(Redacted)

(Redacted)

The issue is whether petitioner is liable for the facility fee for the fiscal year 1987-1988. That fiscal year began on July 1, 1987, that is, about six weeks before petitioner's variance was granted. The Department advised this Board that the fee was due for the entire year, so an assessment was issued on September 1, 1987.

On the same day it filed its petition with this Board, petitioner also requested the Department to waive the fee. This request was made pursuant to the Code of California Regulations, Title 22, Article 8, which included the following sections:

Section 66670 (a) "The operator of an off-site hazardous waste facility shall pay fees to the Department for hazardous waste which he disposes of on or into land or applies to land. . . ."

Section 66672 (a) "The operator of an on-site hazardous waste facility shall pay a fee . . . to the department for the first 2,500 tons of hazardous waste which he disposes of on or into land or applies to land. . . ."

Section 66676 (a) "The operator of a hazardous waste facility shall pay the appropriate fee as required by this article unless the Department has given the operator a written waiver of fees for disposal of that waste. The fee may be waived if it is shown to the satisfaction of the Department that the waste has been rendered nonhazardous."

On June 21, 1988, the Department's Chief Deputy Director wrote to petitioner:

"You are not subject to a hazardous waste facility fee as a small treatment facility for . . . FY 1987-88 because a variance was granted on August 13, 1987. We will recommend to the Board of Equalization that your petition be granted."

The Department has now changed its position and is recommending that the petition be denied. The Department argues that the fee is required by Health and Safety Code Section 25205.2, and that the statute does not allow proration.

According to the Department, the June 21, 1988 letter did not grant the requested waiver, but merely stated a conclusion (which the Department now believes was erroneous) that the fee was not due in the first instance. The Department points out that the letter was not phrased in terms of a waiver and did not mention the waiver provision of the regulation. Also, according to the Department, Regulation Section 66676 did not authorize a waiver in this type of case. The Department appears to construe the Regulation as applying only to fees for waste disposed on land, and not to waste water flushed down a sewer. Finally, the Department notes that Regulation Section 66676 was repealed as of January 1, 1991.

(Redacted)

(Redacted)

Analysis and Conclusions

1. We agree with the Department that its June 21, 1988 letter to petitioner was not a grant of the requested waiver. Further, since Regulation Section 66676 has now been repealed, it seems apparent that the Department will not grant the request. We find that the requested waiver has in effect been denied.

Regulation Section 66676 authorized only the Department to grant a waiver, not this Board. Absent evidence that the Department abused its discretion (and no such evidence has been presented herein), the Department's denial of the waiver is beyond our jurisdiction.

2. Health and Safety Code Section 25202.2, as it read during the period in question, required the operator of a hazardous waste facility to pay a facility fee based upon the type and size of the facility. Subparagraph (c) of the statute provided:

“(c) Notwithstanding subdivision (a), a person who is issued a variance by the department from the requirement of obtaining a hazardous waste facilities permit or grant of interim status . . . is not subject to the fee, for any fiscal year following the fiscal year in which the variance or closure was granted. . . .”
(Emphasis added.)

This section provides for an exemption from taxation. (See Rev. & Tax Code § 43008.) It must therefore be strictly construed. (See Hospital Service of California v. City of Oakland, 25 Cal.App.3d 402.) Since the statute expressly allowed the closure exemption only as of the fiscal year “following” the fiscal year in which closure was granted, no exemption or partial exemption is available for the year in issue.

Recommendation

Deny the petition.

James E. Mahler, Senior Staff Counsel

(Redacted)

Date