

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Claim for Refund under the)
Underground Storage Tank Maintenance Fee Law of:)
VASKIN KOSHKERIAN) Account Number TK STF 44-035258
Claimant) Case ID 624762
Orange, Orange County

Type of Business: Owner of underground storage tanks
Claim period: 10/01/00 – 06/30/01

<u>Item</u>	<u>Claimed Refund</u>
Claimed overpayment	\$65,463
	<u>Requests for Relief</u>
Failure-to-file penalty	\$ 6,299
Finality penalty	\$ 6,299

Claimant filed a claim for refund for refund of payments totaling \$65,462.81 that were made against a notice of determination. Also, claimant has requested relief of the failure-to-file penalty and the finality penalty, each of which is \$6,299.25, which have not been paid.

UNRESOLVED ISSUES

Issue 1: Whether claimant is entitled to a refund of the fee. We conclude that he is not.

In June 1993, claimant registered for an Underground Storage Tank Maintenance (USTM) fee account for three UST's, and additional UST's were added to the account later. In February 1997, claimant and Liana Koshkerian (his wife at that time) transferred ownership to the properties from themselves to Koshkerian Family LP (the partnership), in which claimant was a general partner. There is no evidence that claimant, the partnership, or anyone else notified the board of the transfer of ownership of the properties.

The partnership held seller's permit SR Y EA 97-009681, and it operated gas stations with mini-marts at the four locations where the UST's are located. As herein relevant, on July 21, 2000, the partnership filed for Chapter 11 bankruptcy protection and was appointed by the court to act as debtor-in-possession to continue operating the gas stations. However, the partnership's secured creditor,

1 Bankers Trust Company, discovered that claimant and the partnership were embezzling cash from the
2 cash registers. Therefore, In December 2000, the partnership entered into an agreement (the
3 stipulation) with Bankers Trust Company whereby the partnership remained the debtor-in- possession,
4 but an independent third-party operator, Trigild Corporation, was engaged to oversee the partnership's
5 operation of the gas stations. The stipulation further required the partnership to deposit all of the
6 income generated by the gas stations into a series of blocked accounts from which the partnership was
7 not authorized to make withdrawals. On March 7, 2001, the partnership's Chapter 11 bankruptcy was
8 converted to a Chapter 7 bankruptcy, and the partnership ceased doing business. At that time, Energy
9 One 99 LLC (Energy One) took over operating the gas stations. On October 1, 2001, claimant filed for
10 Chapter 7 personal bankruptcy.

11 From the fourth quarter 1993 (4Q93) through 3Q00, claimant filed UST returns and paid the
12 USTM fees. After claimant discontinued filing UST returns, the Property and Special Taxes
13 Department (Department) issued a notice of determination (NOD) to claimant for USTM fees. The
14 Department calculated the fees based on the Board's reconciliation reports showing the number of
15 gallons of fuel sold, as reported by the operators of the gas station (either the partnership or Energy
16 One), and the gallons reported by the fuel suppliers.

17 On July 2, 2010, the Board received a payment of \$62,992.48 from the trustee handling
18 claimant's personal bankruptcy case, which paid the determined amount of fees in full. On March 9
19 and March 15, 2012, the Board received payments, through enforcements of a lien on claimant's
20 personal residence, of \$2,470.33 and \$250.00, respectively. Claimant filed a claim for refund on
21 March 13, 2012, which was not timely filed for the payment of \$62,992.48 and was premature for the
22 payment of \$250.00, but was timely for the payment of \$2,470.33.

23 Claimant contends that he did not own the properties where the UST's are located, but that the
24 partnership owned them. Also, claimant asserts that the partnership had millions of dollars available to
25 pay creditors even after it filed for Chapter 11 bankruptcy, and claims that the Board's only remedy for
26 seeking payment of the fee was to file a claim in the partnership's Chapter 11 bankruptcy case.
27 Claimant argues that, since the Board did not file such a claim, it should be barred from recovering any
28 amounts due from claimant individually. In addition, claimant contends that neither he nor the

1 partnership is liable for any USTM fees incurred after December 20, 2000, because the partnership's
2 secured creditor, Bankers Trust Company, took over and essentially became the "new owner" of the
3 properties where the UST's are located as the result of the stipulation.¹

4 There is no dispute that, although claimant registered for a USTM fee account as sole owner
5 and filed UST returns prior to the claim period as sole owner, the partnership actually owned the
6 properties where the UST's are located during the claim period. There is also no dispute that, as a
7 general partner in the partnership, claimant is jointly and severally liable for the USTM fee incurred by
8 the partnership. (Corp. Code, § 16306, subd. (a).) Further, there is no dispute that 6,817,431 gallons
9 of petroleum were placed in the UST's during the claim period, or that the Department miscalculated
10 the number of gallons, such that the fee was only billed to claimant with respect to 5,249,373 gallons.

11 Since the July 1, 2003 NOD was issued to claimant individually, and an NOD for the USTM
12 was not issued to the partnership, the Board cannot now collect from the partnership. Nevertheless,
13 because claimant reported the business entity that owned the UST's as a sole proprietorship under his
14 name, and failed to file a written partnership agreement with the Board at the time he registered for a
15 USTM fee account, the Department was entitled to collect the USTM fee from claimant individually.
16 (Rev. & Tax. Code, § 50138.5.) As for claimant's assertion that the Department should have
17 exclusively pursued the partnership for payment of the USTM fee because the partnership could afford
18 to pay the fee, there is no provision in the Underground Tank Maintenance Fee Law that affords relief
19 from the obligation to remit USTM fees on the ground that the registered owner of the UST's cannot
20 afford to pay the fees. Further, as explained previously, the Department was equally entitled to pursue
21 claimant as a general partner for payment of the unpaid USTM fee incurred by the partnership. (Corp.
22 Code, § 16306, subd. (a); Rev. & Tax. Code, § 50138.5.) Consequently, we reject claimant's assertion

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24 ¹ Claimant also alleges that he never knew about the USTM fee and only learned it was past due after receiving the July 1,
25 2003 NOD, but we find that argument unpersuasive since claimant filed UST returns through 3Q00, the quarter
26 immediately preceding the claim period. However, even if we were convinced that claimant knew nothing of the fee, such
27 lack of knowledge would not relieve him from liability. In addition, claimant alleges that the Board obtained a payment
28 from enforcement of a lien against his personal residence in violation of section 704.950 of the Code of Civil Procedure,
which discusses the effect of certain judgment liens on a declared homestead. However, that section explicitly states that it
only protects against enforcement of a judgment lien created pursuant to Article 2 of the California Code of Civil
Procedure. Thus, the provisions of the section do not impact the validity of a state tax lien created pursuant to Revenue and
Taxation Code, section 50123.

1 that the Board's only remedy for seeking payment of the USTM fee was to collect it from the
2 partnership.

3 In response to claimant's assertion that neither he nor the partnership is liable for USTM fees
4 incurred after December 20, 2000, we find there is no evidence of transfer of title to the properties
5 from the partnership to Bankers Trust Company. There is also no evidence that ownership of the
6 properties was transferred from the partnership to anyone else prior to the date Energy One acquired
7 them on June 28, 2001. Therefore, we reject claimant's argument that Bankers Trust Company
8 became the new owner of the UST's on December 20, 2000.

9 Finally, we note that, to grant claimant a refund of monies collected from him to satisfy debts
10 owed by the partnership, the USTM fees must have been paid more than once, or must have been
11 erroneously or illegally collected or computed. (Rev. & Tax. Code, § 50139.) In this case, the fees
12 have only been paid once, and the only apparent error in computing the fees understated the amount
13 that was due. Further, the Department did not erroneously or illegally collect the fees because it was
14 entitled to collect them from claimant individually. (Corp. Code, §§ 15904.04, subd. (a), 16306, subd.
15 (a).) Consequently, there is no basis to grant the refund.

16 **Issue 2:** Whether relief of the failure-to-file penalty is warranted. We find relief is not
17 warranted.

18 Claimant filed a request for relief of penalty on the grounds that he was under protection of the
19 bankruptcy court when the liabilities at issue occurred. Specifically, claimant stated that he did not file
20 UST returns because the bankruptcy courts (in both the partnership's bankruptcy and claimant's
21 personal bankruptcy) ordered him not to do so.

22 There is no dispute that the USTM fees at issue became due while the partnership was in
23 bankruptcy. However, claimant has provided no documentation to support his assertion that the
24 bankruptcy court ordered him (or the partnership) not to file UST returns. We further note that the
25 explicit terms of the stipulation between the partnership and Bankers Trust Company required the
26 partnership to continue to pay its taxes while it was in Chapter 11 bankruptcy. Thus, we reject
27 claimant's assertion that the court handling the partnership's Chapter 11 bankruptcy ordered claimant
28 or the partnership not to file UST returns.

