STATE BOARD OF EQUALIZATION
HAZARDOUS SUBSTANCES TAX APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Administrative Protest and Claims for Refund under the Hazardous Substances Tax Law of: ESGMANAGEMENT, INC., dba Employer Services Group Feepayer/Claimant	Account Number EF STF 42-120512 Case ID's 481182, 510896, 574007 Ventura, Ventura County

Type of Business: Employee leasing

Claim periods: 01/01/05 – 12/31/07 (Case ID 481182)
01/01/05 – 12/31/08 (Case ID 574007)
Liability period: 01/01/05 – 12/31/08 (Case ID 510896)

Item	Claimed Refunds
Environmental fee	$ 2,189 (Case ID 481182)
Environmental fee, interest, and penalties	$15,844 (Case ID 574007)
	Disputed Determined Amounts (Case ID 510896)[1]
Environmental fee	$11,233
Negligence penalty	$ 1,123

Fee as determined and protested	$11,233.00
Interest	2,364.03
Negligence penalty	1,123.30
Finality penalty	1,123.30
Total tax, interest, and penalty	$15,843.63
Payments	- 15,843.63
Balance Due	$ 00.00

This matter was scheduled for Board hearing in October 2013, but was postponed at feepayer's request to allow additional time to prepare.

UNRESOLVED ISSUES

Issue: Whether feepayer is liable for the environmental fee for the years 2005 through 2008. We conclude feepayer is liable.

[1] The D&R shows the disputed amount related to the determination as $14,570.55, which is greater than the total of the fee and penalty because it includes the interest that was included in the determination, $2,214.25.

Feepayer is a professional employer organization (PEO) that contracts with client companies to provide various administrative and human resource services to those businesses and to provide certain benefits to the employees. The employees are referred to as "co-employees" since both feepayer and the client company retain some type of control over the employee. Specifically, feepayer, as a PEO, handles the payroll, benefit, and human resource functions for each co-employee. Although the client company supplies the funds for payroll and payroll taxes, feepayer is responsible for the payment of wages, taxes, and benefits even if the client company does not supply the necessary funds. Feepayer also provides the co-employees with health insurance, workers compensation insurance, and retirement programs. Feepayer reports the co-employees to the Employment Development Department (EDD) when it files quarterly payroll reports.

Feepayer reported and paid environmental fees of $2,189.00 for the years 2005 through 2007 and has filed a claim for refund for the entire amount, contending that it was not responsible for reporting and paying the fee.[2] Based on an examination of feepayer's business, the Environmental Fees Division of the Property and Special Taxes Department (Department)[3] concluded that feepayer had underreported its environmental fee for the years 2005 through 2008. Accordingly, the Department issued a Notice of Determination for fees of $11,233.00 and a negligence penalty of $1,123.30. A finality penalty of $1,123.30 was subsequently added. Feepayer filed an untimely petition for redetermination, which the Department accepted as an administrative protest. The Department determined that feepayer was responsible for reporting and paying the environmental fee for the years 2005 through 2008 and it recommends no adjustment to the determination. The Department also has recommended that the claims for refund be denied.

Feepayer contends that it should not be responsible for the environmental fee because the employees in question should be attributed to the client businesses that actually receive the benefit of the employees' services. Feepayer does not dispute that it is a PEO, that it is an employer, or that it

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[2] Feepayer also reported and paid fees of $1,016 for 2008, but it has not filed a claim for refund of those fees.

[3] Since the Property and Special Taxes Department was reorganized in December 2012, the Appeals and Determinations Group has been responsible for issuing Notices of Determination and processing claims for refund. However, at the time this determination was issued, the Environmental Fees Division was responsible.

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reports the employees to EDD. Feepayer argues that it is a co-employer of the employees, and, relying on California Code of Regulations, title, 22, section (Regulation) 66269.1, subdivision (a)(1), asserts that the client business should be the enterprise that reports and pays the environmental fee because it receives the employees' services.

In addition, feepayer contends that public policy suggests the client company should bear the burden of the environmental fee, asserting that there is no connection between its hazardous waste footprint and that of the co-employees because the co-employees use and consume hazardous materials and generate hazardous waste in fulfilling their duties for the client company. Feepayer argues that the legislature intended that the environmental fee be imposed only on large companies, which feepayer is not. Feepayer also describes various issues that it finds inequitable, related to the fee structure and related to the possibility that the PEO would pass along the cost to its client companies.

There is no dispute as to the basic facts (i.e., that feepayer is a PEO, that feepayer reports the employees to EDD, that feepayer is a co-employer of the employees, and the basic structure of the PEO-client company working relationship). Because feepayer is the employer that reports the employees to EDD (see Cal. Unemp. Ins. Code § 13020), feepayer is responsible for the environmental fee, pursuant to Regulation 66269.1, unless feepayer can show that it meets the exception of common ownership or management.

Feepayer's contention that it meets the exception of common management because the client company and feepayer have co-employees misconstrues the concept of common management. Regulation 66269.1 is clear that the exception applies to two or more businesses that are united by common ownership or management, that is, when the *businesses* are owned or managed by the same people. Feepayer has not argued that this is the case here, and it clearly is not. There is no provision that allows for a shifting of the responsibility for the environmental fee when two businesses are co-employers. Consequently, we find feepayer does not qualify for the exception and is responsible for the environmental fee as the employer that reports the employees to EDD. Accordingly, we recommend no adjustment to the determined amounts and recommend that the claims for refund be denied.

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Feepayer's public policy contentions are immaterial to the foregoing analysis. We can only apply the law that has been enacted to the specific facts presented in this appeal. Feepayer's public policy concerns are more properly addressed to the legislature.

OTHER MATTERS

None.

Summary prepared by Deborah A. Cumins, Business Taxes Specialist III