

1 CALIFORNIA STATE BOARD OF EQUALIZATION

2 APPEALS DIVISION FINAL ACTION SUMMARY

3 In the Matter of the Petitions for Redetermination)
 4 and Administrative Protests Under the Childhood)
 5 Lead Poisoning Prevention Fee Program of:)
 6)
 7 CONCO PAINT COMPANY) Account Number: CA MT 51-069905
 8) Case IDs. 165485; 77681; 214933;
 9) 89000961230; 89000961240; 89000961250;
) 89000961260; 151419; 57628
)
 8 Petitioner/Taxpayer) Los Angeles, Los Angeles County
 9)

10 Type of Business: Manufacturer of architectural coatings

11 Period of liability and protested amounts:

12 <u>Year</u>	<u>Amount</u>	<u>Finality Penalty</u>
13 1993	\$ 42,155	
14 1994	\$ 80,452	\$ 8,045
15 1995	\$147,844	\$14,784
16 1996	\$128,294	
17 1997	\$126,616	
18 1998	\$113,457	
19 1999	\$ 99,966	\$ 9,997
20 2001	\$ 10,413	
21 2002	\$ 12,616	

	<u>Total Fees¹</u>	<u>Penalties</u>
19 As Determined	\$876,279.20	\$32,826.25
20 Adjustments: Appeals Division	<u>-114,464.19</u>	
21 Proposed assessment	\$761,815.01	<u>\$32,826.25</u>
22 Interest through 9/1/09	818,943.71	
23 Finality Penalty	<u>32,826.25</u>	
24 Total fee, interest, and penalty	<u>\$1,613,584.97</u>	
25 Monthly interest beginning 9/2/09	<u>\$5,078.77</u>	

24 Since petitioner did not respond to the Notice of Hearing, the Board Proceedings Division
 25 informed petitioner that this matter will be presented to the Board for decision without oral hearing.
 26 The matter was scheduled for decision on the Board's June 30, 2009 consent calendar, but was pulled
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28 ¹ Details by year reflected on Fee Table, attached.

STATE BOARD OF EQUALIZATION
CHILDHOOD LEAD POISONING PREVENTION FEE APPEAL

1 from that calendar by Honorable Michelle Steel. The matter has thus been rescheduled as an
2 adjudicatory item.

3 BACKGROUND

4 The Legislature enacted the Childhood Lead Poisoning Prevention Act (CLPPA) in 1991 to
5 address the health problems associated with lead toxicity in children. The California Department of
6 Public Health (CDPH)² was required to establish a program for evaluating all children for risk of lead
7 poisoning (Health & Saf. Code, § 105285), and to support this program solely with fees imposed on
8 manufacturers and certain other persons (Health & Saf. Code, §§ 105305, 105310). CDPH was given
9 broad regulatory authority to fully implement and effectuate the purposes of the CLPPA, and its
10 regulations for fee assessment and collection are exempt from review by the Office of Administrative
11 Law. (Health & Saf. Code, §§ 105300, 105310, subd. (h).) The Board administers and collects
12 CLPPA fees established by CDPH in accordance with the Hazardous Substances Tax Law, Revenue
13 and Taxation Code section 43001 et seq. (Health & Saf. Code, § 105310, subd. (e).)

14 UNRESOLVED ISSUES

15 **Issue 1:** Whether petitioner is subject to the CLPPA fees under Health and Safety Code section
16 105310. We conclude that petitioner is subject to the CLPPA fees.

17 Petitioner, a corporation formed in 1992, manufactured and distributed paint products under the
18 trade names of “Conco” and “Conco Pro” (Conco) during the fee years in issue. At the time petitioner
19 was formed, its corporate stock was owned by Smiland Paint Company (Smiland) and Valspar
20 Corporation.³

21 The Conco trade name was initially established in 1919 by the former Consolidated Paint
22 Company (Consolidated). In 1966, Smiland acquired the assets of Consolidated and started producing
23 and distributing paint products under the Conco brand name. In 1993 Smiland sold the following
24 Conco assets to petitioner: (1) all rights, title, and interest in the Conco trade names and trademarks;
25 (2) an executory contract and business relationship with Home Depot; (3) goodwill; and (4) all
26

27 ² Formerly known as the Department of Health Services.

28 ³ Initially, Smiland was incorporated as Consolidated Paint Company. In 1985, it changed its name to Smiland Paint Corporation, and in 1988 the name was changed to the current Smiland name.

1 merchandising aids and labels.⁴ Thus, starting in 1993 petitioner received the right to manufacture and
2 distribute paint products under the Conco trade name. The fees at issue were assessed against
3 petitioner because of its acquisition of the Conco assets that were previously owned by Smiland and
4 Consolidated, which manufactured and distributed lead-based paint products prior to 1978, when the
5 federal government banned the distribution of lead-based paint products. (16 C.F.R. § 1303.)

6 Petitioner has made various arguments as to why it does not owe the fee. It also questions
7 CDPH's interpretation and application of section 105310 as to legislative intent and constitutionality,
8 and the validity and/or retroactivity of certain CDPH's regulations. Petitioner's first argument is that
9 the fee can only be imposed on manufacturers who actually sold lead-based coatings, or manufacturers
10 who assumed contingent liabilities from such manufacturers.

11 CDPH determined that petitioner was liable for the fees under subdivision (a), of Health and
12 Safety Code section (section) 105310, because it was *historically associated* with Smiland and
13 Consolidated, as that term is defined in California Code of Regulations, title 17, section (Regulation)
14 33010 which was effective July 1, 2001, and subdivision (b)(5), of former Regulation 33040. CDPH
15 adopted the regulations to interpret the provisions of subdivisions (a) and (b), of section 105310. The
16 regulations define "historically associated" to include certain businesses that have a significant
17 relationship with other entities that were responsible for lead contamination, and in this case CDPH
18 determined that petitioner was liable for the fees since it obtained the Conco assets from Smiland,
19 which earlier obtained the assets from Consolidated.

20 Petitioner argues that, since it never obtained or sold lead-based coatings, section 105310 does
21 not apply. Petitioner argues that CDPH's interpretation of the statute (through the regulation) is
22 invalid because it contradicts legislative intent and the language of the enabling act. Petitioner argues
23 that where the statute refers to persons formerly or presently engaged in the stream of commerce of
24 lead or products containing lead, or who are otherwise responsible for identifiable sources of lead, any

26 ⁴ This information was obtained from declarations provided by Bronco Smiland and petitioner's president, John Teets.
27 Although we asked petitioner to provide a copy of the sales agreement with Smiland to determine the full extent of the
28 assets that petitioner received, a copy of the sales agreement was not provided. Thus, petitioner may have acquired
additional assets from Smiland, which are not mentioned in the declarations. In any event, this will not change of the
outcome of this appeal since the assets that petitioner admits receiving is sufficient to impose liability for the fees at issue.

1 interpretation that would make a person liable who did not manufacture, distribute, or sell lead-based
2 paints would be unconstitutional, and contrary to the case of *Sinclair Paint v. State Board of*
3 *Equalization* (1997) 15 Cal.4th 866, which requires a “clear nexus” or “causal connection” between the
4 manufacturers’ products and lead poisoning. In short, petitioner argues that the fees can only be
5 imposed on persons who are responsible for creating the harm to be remedied, unless the person who
6 did not create the harm expressly agrees to assume the liabilities of one who did. Petitioner asserts that
7 it never assumed any liabilities nor did it ever manufacture, distribute, sell or receive inventory of lead-
8 based paints from someone who did.

9 We note from a review of subdivision (a) of section 105310 that it specifically refers to persons
10 who formerly or presently engage in the stream of commerce of lead products or products containing
11 lead. We interpret this part of the statute to mean (as petitioner does) that the fee is imposed on
12 persons who now, or in the past, manufactured, distributed, and sold, lead-based paints and other
13 products containing lead. *However*, the statute also refers to persons who are “otherwise responsible”
14 for identifiable sources of lead which have “significantly contributed historically, currently contribute,
15 or both have significantly contributed historically and contribute currently to environmental lead
16 contamination.” We interpret this part of the statute to mean (as CDPH does) that the fee can also be
17 imposed on a person who did not actually manufacture, distribute or sell lead-based paints or products
18 containing lead, if that person is “historically associated” (had a significant relationship) with a person
19 who did.

20 Clearly, if the Legislature only intended to limit the fee to those persons who actually
21 manufactured, distributed, or sold lead or products containing lead, it could have easily said so. There
22 would be no need to refer to persons “otherwise responsible” nor would terms such as “historically
23 associated” be necessary. Any other interpretation of the statute would lead to absurd results (never
24 intended by the Legislature) whereby *all* manufacturers who previously sold lead-based products could
25 easily escape liability by something as simple as transferring their assets to newly formed business
26 entities. No fees would be collected from anyone and CDPH would have no funds to enforce the
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1 provisions of the act. We doubt that any reasonably minded person or the California Legislature would
2 interpret the statute as petitioner is asking us to do.

3 In the alternative, petitioner argued that since CDPH failed to rebut the claims made in its
4 declarations in support of the exemption (i.e., that it never sold or distributed lead-based paint products
5 under the Conco brand name), it was entitled to an exemption from the fee. We conclude that
6 petitioner is liable for the fees even if it did not actually cause environmental lead contamination since
7 it acquired the Conco assets from Smiland, and therefore had a *significant relationship* with Smiland
8 and Consolidated, sufficient to impose liability under subdivisions (a) and (b) of section 105310, and
9 Regulations 33010 and 33040. The California Legislature granted CDPH *broad* regulatory authority to
10 consult with medical experts and establish regulations identifying manufacturers and other persons
11 responsible for identifiable sources of lead. (Health & Saf. Code, §§ 105285, subd. (a); 105300, subd.
12 (a) & 105310, subd. (b).)

13 From our reading of subdivision (d)(1) and (2) of Health and Safety Code section 105310, it is
14 clear that CDPH (not the Board) is the primary agency which determines if an exemption from the fee
15 applies. The statute specifically requires a person seeking the exemption to demonstrate “as
16 determined by [CDPH]” that his or her industry did not contribute to environmental lead
17 contamination, or that the party has no current *or historical* association that resulted in “quantifiably
18 persistent environmental lead contamination.”

19 We do not agree with petitioner that it is entitled to a claimed exemption unless CDPH
20 somehow rebuts petitioner’s arguments. Petitioner has confused its burden of proving that it is entitled
21 to exemption from the fee with CDPH’s burden of establishing that the fee is valid. The California
22 Supreme Court has already held that the fee imposed pursuant to Health and Safety Code section
23 105310 is a valid regulatory fee imposed under the state’s police power (*Sinclair Paint Co. v. State Bd.*
24 *of Equalization* (1997) 15 Cal.4th 866, 879), and thus the validity of the fee is not at issue here. What
25 is at issue is petitioner’s burden of proving that it is entitled to the exemption provided by section
26 105310, subdivision (d)(2), which clearly places that burden on petitioner: Petitioner has not met that
27 burden, and we therefore find that petitioner is not entitled to the exemption.

1 Attachment: Fee Table
2 Summary prepared by Rey Obligacion, Business Taxes Specialist III

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FEE TABLE**Childhood Lead Poisoning Prevention Act Fee**

<u>Year</u>	<u>1993</u>	<u>1994</u>		<u>1995</u>		<u>1996</u>	<u>1997</u>	<u>1998</u>
	Fee	Fee	Penalty	Fee	Penalty	Fee	Fee	Fee
As determined	\$42,155.01	\$80,451.98	\$8,045.20	\$147,843.96	\$14,784.40	\$128,294.48	\$126,616.44	\$113,456.91
Adjustments								
Proposed assessment	\$42,155.01	\$80,451.98	<u>\$8,045.20</u>	\$147,843.96	<u>\$14,784.40</u>	\$128,294.48	\$126,616.44	\$113,456.91
Interest to 9/1/09	\$62,213.62	\$109,280.72		\$183,080.24		\$143,476.50	\$126,722.43	\$101,638.66
Penalty		<u>\$8,045.20</u>		<u>\$14,784.40</u>				
Total Fee & Penalty	<u>\$104,368.63</u>	<u>\$197,777.90</u>		<u>\$345,708.60</u>		<u>\$271,770.98</u>	<u>\$253,338.87</u>	<u>\$215,095.57</u>
Monthly Interest beginning 9/2/09	<u>\$281.03</u>	<u>\$536.35</u>		<u>\$985.63</u>		<u>\$855.30</u>	<u>\$844.11</u>	<u>\$756.38</u>

<u>Year</u>	<u>1999</u>		<u>2001</u>	<u>2002</u>		
	Fee	Penalty	Fee	Fee	Total Fee	Total Penalty
As determined	\$99,966.49	\$9,996.65	\$62,221.55	\$75,272.38	\$876,279.20	\$32,826.25
Adjustments			-\$51,808.18	-\$62,656.01	-\$114,464.19	
Proposed assessment	\$99,966.49	<u>\$9,996.65</u>	\$10,413.37	\$12,616.37	\$761,815.01	<u>\$32,826.25</u>
Interest to 9/1/09	\$78,306.94		\$6,959.58	\$7,265.02	\$818,943.71	
Penalty	<u>\$9,996.65</u>				<u>\$32,826.25</u>	
Total Fee and Penalty	<u>\$188,270.08</u>		<u>\$17,372.95</u>	<u>\$19,881.39</u>	<u>\$1,613,584.97</u>	
Monthly interest beginning 9/2/09	<u>\$666.44</u>		<u>\$69.42</u>	<u>\$84.11</u>	<u>\$5,078.77</u>	