

Protested Items

The liability is:

Hazardous Waste Facility Fee,		
Small Treatment Facility, 7/1/88-6/30/89	\$	
7/1/89-6/30/90		35
7/1/90-6/30/91		<hr/>
Total	\$	

Contentions

Claimant contends that:

1. No fee is due because claimant has not engaged in activities which require the holding of a hazardous waste facility fee since 1986.
2. Claimant's process qualifies for a variance and therefore no fee is due.
3. Claimant's process qualifies for exemption under the "Permit By Rule (PBR)" program.
4. If claimant is regarded as operating a treatment facility, it should be classified as a mini-treatment facility, not a small treatment facility.
5. The application of fees is barred by the statute of limitations.

Summary

Claimant operated the facility in question from February 1979 to March 1991 at which time the facility was sold to 1

During the period in question, petitioner manufactured electronic components. The manufacturing process involved the use of strong acids. The acids were washed off of manufactured components with water. The acidic waste water was neutralized and the neutralized water was discharged into a publicly owned treatment works under a permit from the local governmental agency.

The Department of Health Services, the predecessor agency to DTSC, issued an Interim Status Document (ISD) to

claimant in 1981. An ISD authorizes a person who operated a hazardous waste facility prior to enactment of the regulatory laws to continue operating pending review by DTSC of the person's application for a hazardous waste permit.

Claimant concluded that it was not required to hold a hazardous waste permit and applied for a variance in 1983. In 1984, DTSC denied claimant's request for a variance. DTSC specified that certain changes would have to be made in claimant's process in order for a variance to be granted. In 1986, claimant submitted additional information, stated that it had made the changes in its process and reapplied for a variance. DTSC has not acted on this second variance application.

On March 3, 1992, EFD issued a determination to claimant for each fiscal year from 1988-89 through 1990-91 (three years). The amounts of the determinations were based on the fees for a small treatment facility. Claimant paid the fees on April 2, 1992 and filed a timely claim for refund.

Claimant states that it previously was issued a determination for fiscal year 1987-88 by EFD and that it filed a petition for redetermination with respect to this determination. At that time, DTSC informed petitioner that if petitioner submitted an affidavit certifying to certain facts, no facility fees would be due. Petitioner submitted an affidavit which was modified from the form requested by DTSC. Nevertheless, DTSC notified claimant on July 11, 1988 that claimant was not subject to the facility fee for fiscal year 1986-87 and for fiscal year 1987-88. The affidavit is shown in Exhibit 1 and the letter from DTSC is shown in Exhibit 2.

Claimant states that it made all of the changes in its process which DTSC required when the first application for a variance was denied. Accordingly, the second application for a variance should have been granted promptly. It is unfair and not in accordance with the intent of the Legislature for DTSC to subject applicants to years of fee liability because of its own failure to act timely. DTSC should not be allowed to profit from its own wrongdoing. Further, since claimant has performed in accordance with all of the requirements of DTSC for obtaining a variance, under equity principles, DTSC should be regarded as having performed its duties of issuing a variance. In addition, claimant relied on the statement by DTSC that if it modified its process, the variance would be granted. Claimant also contends that the 1988 letter from DTSC should be treated as a de facto variance.

DTSC contends that the Board has no equitable powers citing Standard Oil Company v. State Board of Equalization, 6 Cal.2d 557. Thus, the Board cannot grant equitable relief.

Claimant points out that under the PBR program, businesses which had failed to obtain a permit or an ISD were not held liable for fees for prior periods. Claimant contends that it is unfair to apply fees to businesses which attempted to comply with the law while granting relief to those businesses which violated the permit-holding requirements. Claimant contends that this constitutes a violation of its constitutional right to equal protection under the law. Claimant notes that Litton, the purchaser of the facility, has been authorized to operate under the PBR system.

Claimant contends that the fees are barred by the statute of limitations since Section 25205.3 of the Health and Safety Code requires the Board to establish facility fees in 30 days after enactment of the annual Budget Act and to notify persons subject to the fees within 30 days after establishment of the fees. Further, Revenue and Taxation Code Section 43402 requires that notices of determination be issued within three years after the date when the amount should have been paid. Under this provision, at least the first installment of the fiscal year 1989-90 would be barred.

Claimant states that it used about 650 pounds of liquid acid per month during the period in question. Claimant should at worst be liable for mini-facility fees rather than small facility fees. I note that claimant admits that the amount of acidic waste water it produces is about 4,400 gallons per day. By letter dated November 1, 1993, DTSC agreed that the facility is properly classified as a mini-treatment facility.

Analysis and Conclusions

Subdivision (a) of Section 25205.2 of the Health and Safety Code imposes a fee on each operator of a facility for each state fiscal year or any portion thereof based on the size and type of the facility. Subdivision (b) of Section 25205.1 defines "facility" to mean any units or other structures and all contiguous land used for the treatment, transfer, storage, resource recovery, disposal, or recycling of hazardous waste which has been issued or deemed to hold a permit or an ISD. Section 25123.5 defines "treatment" to mean any method, technique, or process which changes or is designed to change the physical, chemical, or biological character or composition of any hazardous waste or removes or reduces its harmful properties.

Clearly, petitioner's neutralization process changes the physical and chemical character of the acidic wash water. The acidity is reduced to a point where claimant is allowed to dispose of the liquid into a publicly owned treatment works. This fits the statutory definition of "treatment". Further, claimant was issued an ISD. Claimant is thus properly regarded as having operated a treatment facility.

Subdivision (c) of Section 25205.2 provides that a person who is issued a variance by DTSC is not subject to facility fees. Claimant applied for a variance and made modifications to its process in response to the stated requirements of DTSC, but claimant was never issued a variance. The issuing of a variance is based on technical and scientific evaluation. Section 43301 of the Revenue and Taxation Code provides that protests based on grounds of incorrect classification of materials as hazardous must be referred to DTSC and that such protests shall not be considered by the Board. This shows that the Legislature intended that technical and scientific decisions be left to DTSC. The Board does not have the expertise to evaluate technical contentions. The Board cannot issue variances. Claimant did not actually hold a variance. No relief from fees can be granted on the basis of claimant's application for a variance.

Section 25205.12 of the Health and Safety Code provides:

"(a) The owner of a hazardous waste facility authorized by the department to operate pursuant to a permit by regulation is exempt from the facility fee specified in Section 25205.2 for any activities authorized by the permit by regulation at that facility for the fiscal year during which the authorization is effective.

"(b) If a facility qualifying for a facility fee exemption pursuant to subdivision (a) conducts an activity which is eligible for authorization under a permit by regulation, and conducted this activity in a fiscal year prior to receiving authorization to operate from the department, the facility is also exempt from the fee for that fiscal year when the activities were conducted, including, but not before, the 1988-89 fiscal year. However, a facility may receive this retroactive exemption only if the facility

owner or operator notifies the department of the person's intent to operate the facility pursuant to a permit by regulation within six months following the effective date of regulations establishing the facility's initial eligibility to operate pursuant to a permit by regulation.

"(c) Subdivision (b) does not apply to any facility which was authorized by the department to operate on or before June 1, 1991."

Subdivision (b) provides that the exemption is retroactive to, but not before, the 1988-89 fiscal year. The fees at issue in this claim are for periods covered by the statute. However, claimant was authorized to operate before June 1, 1991. Accordingly, claimant is not eligible for relief under these provisions.

Section 25205.4 establishes the rates of the fees for various types of hazardous waste facilities. The fee for a small treatment facility is twice the defined base rate. The fee for a mini-treatment facility is one-half the base rate. Thus, the fee for a small treatment facility is four times the fee for a mini-treatment facility. Section 25205.1 defines a "mini-treatment facility" as a treatment facility which treats 1,000 pounds or less of hazardous waste per month. A small treatment facility is a treatment facility which treats more than 1,000 pounds and less than 1,000 tons of hazardous waste per month. DTSC has concurred with claimant's contention that the facility is a mini-treatment facility.

Section 25205.3 provides that the Board shall establish the facility fees specified in Section 25205.2 within 30 days after the effective date of the enactment of the annual budget act. This section also requires that the Board send a notice of fees to all persons subject to the fees within 30 days of the establishment of the fees. Claimant argues that this establishes a limitation period for sending deficiency determinations. I disagree. There is nothing in this section purporting to limit the issuance of deficiency determinations. Section 43202 of the Revenue and Taxation Code provides that, except in the case of fraud or failure to make a return, every deficiency determination shall be issued within three years after the date when the amount should have been paid. This is clearly the limitation period intended by the Legislature. The notices here were issued March 3, 1992. They are effective as to any fees which were due on March 3, 1989 or later. Section 43152.6 of the Revenue and

Taxation Code in the form in effect during the periods in question required payment of facility fees in two equal installments on or before November 1 and April 1 of each fiscal year. The notices were obviously effective as to the second installment for fiscal year 1988-89, and for fiscal years 1989-90 and 1990-91. I conclude that the notices were also effective as to the first installment for fiscal year 1988-89 because the fee is an annual fee. The requirement for installment payments does not render the fee a semi-annual fee.

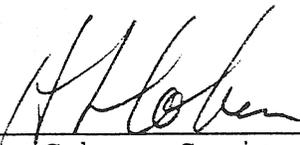
Claimant has contended that the DTSC letter dated July 11, 1988 (Exhibit 2) constitutes a variance. There is nothing in this letter to indicate anything other than the fees for 1986-87 and 1987-88 are not due because no hazardous waste treatment was carried out. This conclusion was based on claimant's affidavit signed May 20, 1988 (Exhibit 1) which stated that no treatment other than neutralization was conducted. Whatever the reasoning of DTSC at the time, neutralization is treatment and is subject to fees as discussed earlier.

Claimant has made several arguments based on equity. I make no conclusion as to the validity of these arguments. It is my position that equity, like beauty, is in the eye of the beholder. Equity is a judicial remedy. In the Standard Oil case cited by DTSC, the California Supreme Court ruled that the Board does not have judicial powers.

Claimant has also raised constitutional issues. The California Constitution in Article 3, Section 3.5, provides that no administrative agency can refuse to enforce a statute on the basis of it being unconstitutional unless an appellate court made a determination that the statute is unconstitutional.

Recommendation

Grant the claim to the extent of the difference between the fee for a mini-treatment facility and a small treatment facility. Deny the claim in all other respects.



 H. L. Cohen, Senior Staff Counsel

Smw

 Date

w/Exhibits 1 and 2

Return to:
Department of Health Services
Toxic Substances Control Division
714/744 P Street
P.O. Box 942732
Sacramento, Ca. 94234-7320
Attn: Dink Mather

EXHIBIT 1

Page _____ Of _____

AFFIDAVIT

I, _____, declare that:

1. I am _____ (owner or, if a corporation, title of corporate officer) of _____ (name of business) located at _____
EPA # CAT 000625392

2. To the best of my knowledge I declare that none of the facilities of said business, including all the business' structures, appurtenances, improvements, and contiguous land were:

- a. ever used to dispose of hazardous waste.
- b. used to store (over 90 days) any hazardous waste since January of 1986.
- c. ever used for treatment of any hazardous waste other than the neutralization of a corrosive waste water in a tank prior to discharge under permit to a publicly owned treatment works (POTW). This neutralization treatment process is exempt under the Resource Conservation and Recovery Act (RCRA) and is regulated and monitored by the Santa Clara County Water Pollution Control Board.

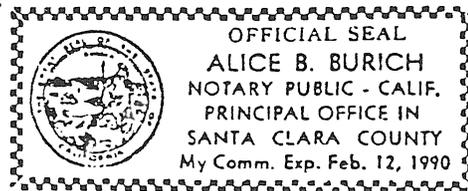
3. I understand that the term "dispose of", as used in this affidavit, includes both depositing hazardous waste on the site and continuing presence of hazardous waste on the site from prior years, unless the department has certified a disposal facility as closed.

I declare under penalty of perjury that the foregoing is true and correct. Signed this 20 day of May, 1988, at _____, California.

[Signature]
(Signature)

Suscribed and sworn to before me this 20th day of May, 1988.

Alice B. Burich
Notary Public



611 HANSEN WAY, PALO ALTO, CA 94303

DEPARTMENT OF HEALTH SERVICES

714/744 P STREET
SACRAMENTO, CA 95814EXHIBIT 2

Page _____ Of _____

July 11, 1988

RECEIVED
JUL 13 1988
HEALTH SERVICES
SACRAMENTO, CALIF. 95814

Facility Fee Notice
FY 1987-88
EPA # _____
FACILITY # _____

Gentlemen:

Based on the information on your petition for redetermination and review by the Toxic Substances Control Division, Department of Health Services, the following determination has been made.

You are not subject to a hazardous waste facility fee as a small treatment facility for FY 1986-87 and FY 1987-88 because a signed affidavit stating your facility has never been used for hazardous waste treatment, storage, (over 90 days) or disposal was received. We will recommend to the Board of Equalization that your petition be granted.

If you have any questions, please contact Dink Mather at (916) 323-6555.

Sincerely,

A handwritten signature in cursive script that reads "Alex R. Cunningham".

Alex R. Cunningham
Chief Deputy Director

cc: Charlene Williams - No Coast Calif. Section
Steve Hanna - HWIS
Caroline Cabias - Haz. Waste Mgmt. Section
Board of Equalization - Excise Tax Unit
Generator category for FY 1986-1987 is 5-49 tons and
FY 1987-88 is 0 tons.