

To : File

Date: July 11, 1994

From : Don Hennessy

Subject: The following action was taken on Business Taxes items under the jurisdiction of the Appeals Review Section on _____ and _____, 1994 in Sacramento.

THURSDAY, _____ 1994

Item 3, _____ BY _____

Fee of \$_____,_____ determined for the period July 1, 1988 to June 30, 1991.

Taken under consideration. The Board staff is to reaudit on the basis that the cleaning and recycling of underground tanks is an exempt activity. In addition, any storage of residue from the tanks incidental to such cleaning and recycling is to be exempt. The reaudit is to examine no more than a five month period unless the result of that examination justifies a further examination. Refer the file to Mr. Steven Rudd, Administrator of the Environmental Fees Division to conduct the reaudit.

Item 4, _____ BY _____

Tax of \$ _____ determined for the period October 1, 1989 to September 30, 1992.

Taken under consideration. Subsequently considered on _____, 1994. Tax redetermined to \$_____ to reflect a reduction in taxable rental receipts to \$5,000. Refer the file to Mr. William Faiola to prepare the suggested Notice of Board Action.

Annotate
Uninc. 7-11-91
no. 10000000

100

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Late Protest)
 Under the Hazardous Substances) DECISION AND RECOMMENDATION
 Tax Law of:)
)
) No. 10000000)
)
)
)
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)
)
Protestant)

The Appeals conference in the above-referenced matter was held by Staff Counsel Lucian Khan on 10/11/91 in Sacramento, California.

Appearing for Protestant:

Appearing for the Department of Toxic Substances Control (DTSC):

Orchid Kwei
Senior Staff Counsel

Appearing for the Special Taxes & Operations Department (STD):

Jeffrey R. George
Supervising Tax Auditor

Theresa Portillo
Senior Tax Auditor

Protested Item

Protestant protests the hazardous waste facility fee for the period of July 1, 1988 through June 30, 1991 based on the rate established for a large treatment facility.

Protestant's Contentions

1. There is no statutory authority for a retroactive fee increase; thus, STD did not have authority to reclassify protestant from a small to a large storage facility.

2. Storage tanks would not be considered hazardous waste.

Summary

Protestant is a corporation involved in the operation of receiving, storing, treating, and recycling used and unused petroleum products, bilge water, and underground storage tanks. For the fiscal years of 1988/89 and 1990/91, protestant paid the appropriate fee for a small treatment facility. For the fiscal year 1989/90, protestant was not billed for the facility fee, which remained unpaid.

On March 25, 1992, STD issued a determination in the amount of \$. The determination was the result of reclassifying protestant from a small to large treatment facility for the fiscal years of 1988/89, 1989/90 and 1990/91. It also included the amount due for the fiscal year 1989/90 facility fee, since no payment for this period was previously made.

On July 23, 1992, protestant's representative, , sent a letter regarding the previously issued determination. The letter was accepted as a late protest. In the letter, argues DTSC is responsible for determining whether protestant should be classified as a small or large treatment facility. STD lacks authority to in effect "veto" the earlier determination by DTSC classifying protestant as a small treatment facility. The calculations by STD of tonnage treated at protestant's facility erroneously included the weight of tanks which were rinsed, cut up, and sold to scrap metal dealers. DTSC previously gave an opinion that the tanks would not be considered hazardous waste. Mr. letter did not specify whether the DTSC opinion was oral or written.

At the conference, Mr. pointed out that Health and Safety Code Section 25205.2(a) states DTSC shall notify the Board of all known facility operators, by facility type and size, at the time it establishes the facility fees. He maintains the reasonable interpretation of this section prevented STD from reclassifying protestant from a small to a large treatment facility, without first being notified by DTSC.

He also pointed out, Revenue and Taxation Code Section 43152.8 states DTSC must notify STD when there are any changes in a facility size category. He maintains this section is also a prerequisite to any action taken by STD to reclassify protestant.

STD maintains Revenue and Taxation Code Section 43201 provides authority for it to redetermine the amount to be paid, based on information available. Therefore, this section grants authority to, in effect, "reclassify" protestant. Mr argues this section was not meant to have retroactive

application; thus, it may only be applied to protestant prospectively.

DTSC argues Revenue and Taxation Code Section 43152.8 (cited by protestant) is not applicable, because the effective date is July 1, 1991, which is after the period covered in the determination. It further argues, DTSC has promulgated regulations requiring protestant to report any changes in the size of its facility. Protestant did not provide notification. At the conference, DTSC was given additional time to provide proper authority on this issue.

Protestant admits supplying all information on the application form which was submitted to DTSC, and led to its classification as a small treatment facility. DTSC argues the initial classification was based on reliance on protestant's information.

DTSC contends the tanks are considered hazardous waste, and denies ever advising protestant to the contrary. It was stipulated that for the fiscal years of 1989/90 and 1990/91 protestant treated over 1,000 tons of hazardous waste, excluding the weight of the tanks.

Information regarding tonnage for the fiscal year of 1988/89 was not available at the conference. All parties agreed to submit documentation verifying tonnage treated for this period. In a June 15, 1993 letter from Jeff George of STD, he states that a review of the hazardous waste information system for June 1989 disclosed protestant treated 1,850 tons, or 1,523 tons after excluding the weight of the tanks. In a June 30, 1993 letter from , he provides totals for the months of July 1988 (1,240 tons), August 1988 (1,396 tons), and June 1989 (849 tons).

In a June 29, 1993 letter from Orchid Kwei of DTSC, she cites Section 66270.72(a) of Title 22 of the California Code of Regulations as requiring facility operators to notify DTSC of any changes in the volume of waste treated at their facility, or any changes on the permit application.

In a July 6, 1993 letter from , he argues Health and Safety Code Sections 25205.2(a), 25205.4, and Revenue and Taxation Code Section 43152.8 obligate DTSC to receive and review manifests. Revenue and Taxation Code Section 43152.8 had an initial effective date of September 25, 1988; not July 1, 1991 as previously stated by DTSC. For each of the tax years in question, protestant received a facility fee return stating, "The Department of Health Services has notified us that you are

responsible for facility fees as indicated above...as a small treatment facility." Protestant relied on this statement. Finally, protestant argues Section 66270.72(a) only applies to changes in design capacity and not increases in volume treated as DTSC opined. Protestant disagrees with DTSC that it was obligated to advise DTSC of any increase in volume treated.

Analysis and Conclusions

1. Statutory authority for fee increase and reclassification from small to large facility

For the operative period of September 26, 1988 to June 30, 1991, Health and Safety Code Section 25205.1(d) defines a large treatment facility, as a facility which treats or recycles 1,000 or more tons of hazardous waste during any one month of the current fiscal year.

Health and Safety Code Section 25205.2(a) for the same operative period provides in pertinent part that DTSC shall notify the Board of all known facility operators by facility type and size, at the time it establishes the facility fees.

Revenue and Taxation Code Section 43152.8(a)(2) provides in pertinent part that DTSC shall notify the Board when any facility changes a size category. This section became effective September 26, 1988.

Revenue and Taxation Code Section 43201(a) provides in pertinent part that if the Board is dissatisfied with a return or report filed by any taxpayer, it may compute or determine the amount to be paid based on any information available to it.

Section 66270.72(a) of Title 22 of the California Code of Regulations provides in pertinent part that an owner or operator of an interim status facility may make changes at the facility regarding transfer, treatment, storage, or disposal of new hazardous waste not previously identified in the application if it submits and receives DTSC approval prior to such transfer, treatment, storage or disposal.

The facts are undisputed that protestant submitted the initial application form which led to its classification as a small treatment facility. Some time later, protestant discovered that it was treating more waste than initially anticipated.

For each fiscal year covered in the determination, protestant treated over 1,000 tons of hazardous waste during any one month. Thus, protestant should be classified as a large treatment facility.

I do not agree with protestant's position that DTSC must contact STD as a prerequisite to any action taken by STD. Health and Safety Code Section 25205.2 requires DTSC to notify the Board of all known facility operators based on their type and size. Clearly, DTSC was unaware protestant needed reclassification until after STD acted. This section places no affirmative duty on DTSC to make itself aware of any changes in the size of protestant's activity, only to advise STD of known changes.

Revenue and Taxation Code Section 43152.8(a)(2) parallels that of Health and Safety Code Section 25205.2. I note, however, this section does not make reference to known facility operators. Clearly, the intent of this section was meant to apply to known operators, because without knowledge of protestant's change of status, DTSC would have no logical reason to contact STD for the reclassification.

Under Section 66270.72(a) of Title 22 of the California Code of Regulations, protestant had a duty to contact DTSC once it started treating hazardous waste in an amount which classified it as a large treatment facility. Protestant admits this was not done. I disagree with protestant's interpretation of this section. The section deals with significantly more changes than just an increase in design capacity. In fact, only subdivision (a)(2) of the section applies to increases in design capacity. Subdivision (a)(1) applies to the transfer, treatment, storage or disposal of new hazardous waste not previously identified in part (a) of the permit application, and the addition of units being used to transfer, treat, store or dispose of hazardous waste. In its entirety, this section covers most types of changes which could occur after the initial application form has been submitted. For any change involved, the owner or operator is required to contact DTSC.

I do not agree with protestant's conclusion that Revenue and Taxation Code Section 43201 provides for only prospective application. This section must be read and interpreted in conjunction with Revenue and Taxation Code Section 43202.

Revenue and Taxation Code Section 43202 provides that in the absence of fraud or intent to evade, a notice of determination of an additional amount shall be given within three years after the date the amount should have been paid. This section expressly allows three years to assess any additional amount after it

should have been paid. The term "additional amount" can only refer to a situation where an underpayment has been made. It is therefore clear the intent of Section 43201 is to allow for assessment of the additional fee which should have been paid. Protestant's interpretation would render Sections 43201 and 43202 meaningless.

Based on the foregoing, once protestant treated hazardous waste in an amount sufficient to classify it as a large treatment facility, it had a duty to contact DTSC. STD had authority to make the reassessment and, in effect, "reclassify protestant" from a small to a large treatment facility.

2. Tanks not hazardous waste.

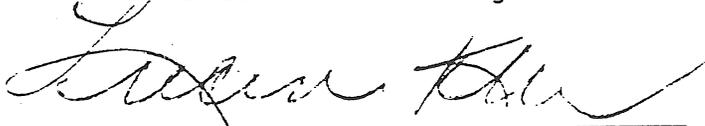
Section 43301 of the Revenue and Taxation Code provides in pertinent part no petition for redetermination shall be considered by the Board if the petition is based on the grounds DTSC has improperly or erroneously classified any substance as hazardous waste. Any appeal of this determination must be made to the director of DTSC. Any dissatisfaction with the results of any such appeal is a matter for judicial review, not appeal to the Board.

DTSC has already given its opinion the tank is hazardous waste. It denies ever giving an opinion to the contrary. Since Revenue and Taxation Code Section 43301 precludes me from making this determination, my decision as to whether the proper fee has been collected must be based on including the weight of the tank.

According to the undisputed facts, the tonnage treated by protestant for each of the three fiscal years exceeds 1,000 tons for any one month. Therefore, it was properly classified as a large treatment facility and the correct fee was assessed for each of the three fiscal years. It should be noted, however, that even if the weight of the tanks were subtracted from the total tonnage for each of the three fiscal yearly periods, protestant would still be classified as a large treatment facility. This fact is agreed upon, by all parties, based on figures submitted.

Recommendation

Redetermine without adjustment.



Lucian Khan, Staff Counsel

JA

Date

10/27/75