

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition )  
for Redetermination Under the ) DECISION AND RECOMMENDATION  
Hazardous Substances Tax Law of: )  
)  
) No. )  
)  
)  
)  
Petitioner )

The Appeals conference in the above-referenced matter was held by H. L. Cohen, Senior Staff Counsel on [redacted], in Hollywood, California.

Appearing for Petitioner: Mr. [redacted]

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

Mr. G. L. Thorpe  
Staff Counsel

Appearing for the Special  
Taxes Division, State  
Board of Equalization (STD):

Mr. R. O'Neill  
Senior Tax Auditor

Protested Item

The liability is:

Hazardous Waste Generator Fees for calendar years  
1988, 1989 and 1990

\$ [redacted]

### Contentions

Petitioner contends:

1. The material is not actually hazardous.
2. If the material is hazardous, the fee should be based only on the amount of hazardous material in the waste.

### Summary

Petitioner is a corporation which relines and rebuilds automobile drum brake shoes and disk brake pads. It accomplishes this by removing the old brake lining from used shoes and pads and installing new lining on the used metal shoes or pads. Removal consists of punching out rivets on riveted brakes or of baking the lining and shoe or pad assembly until the bonding material decomposes on bonded brakes. The linings as removed are solid. They are placed in polyethylene bags and shipped for disposal under hazardous waste manifests.

Petitioner reported and paid fees based on the net weight of asbestos in the waste submitted for disposal. STD concluded that the fees should be based on the total weight of waste submitted for disposal. The total weight was obtained from the hazardous waste manifests filed by petitioner. A deficiency determination was issued for the difference between the reported weight and the weight on the hazardous waste manifests.

Petitioner submitted evidence to show that the material submitted for disposal contained less than 16% asbestos. Petitioner contends that if fees are due they should be based only on the amount of hazardous material present in the waste. DTSC contends that if property is shipped under a hazardous waste manifest, the entire weight should be used as the basis for fees. DTSC also points out that under Section 66699(b) of Title 22 of the California Code of Regulation (now Section 66261.24(a)(2)(A)) a waste is regarded as hazardous if it contains 1% or more in weight of asbestos.

Petitioner contends additionally that the waste is not actually hazardous. Petitioner states that the material is nonfriable asbestos as defined in the Federal Register, Vol. 55, No. 224, dated November 20, 1990, and is therefore not subject to regulation. The material cannot be crumbled, pulverized or reduced to powder using hand pressure. Petitioner submitted evidence to show that its process does not release asbestos into its work place in amounts regarded as dangerous to the health of employees.

Petitioner also stated that it is no longer shipping the material under hazardous waste manifests.

Analysis and Conclusions

Section 25205.2 in the form in effect during the period in question provided in pertinent part:

"(a) in addition to the fee imposed pursuant to Section 25174, every generator of hazardous waste, in the amounts specified in subdivision (b), shall pay the board a fee for each generator site for each fiscal year, or portion of thereof."

The pertinent part of 22 CCR 66305(b) provides:

"It shall be the waste producer's responsibility to determine if the waste is classified as a hazardous waste pursuant to Section 66305(a). If the producer determines that the waste is hazardous, the waste shall be managed pursuant to the provisions of this Chapter. If the producer determines that the waste is nonhazardous, the producer, except as provided for in Section 66305(e), may either proceed to manage the waste as nonhazardous or apply to the Department for concurrence with the nonhazardous determination through the notification procedure set forth in Section 66305(c) before managing the waste as nonhazardous."

Under this regulation, the responsibility for classification of waste is that of the generator of the waste. There is nothing in the regulation or in any authority brought to my attention that makes a generator's initial determination irrevocable. Indeed, looking at the reverse of the situation here, if an initial determination of a generator that waste is not hazardous was irrevocable as to the generator, much hazardous waste could be disposed of improperly with a large potential risk to the environment. I conclude that a generator's decision is not necessarily irrevocable.

Having concluded that a determination that waste is hazardous is not necessarily irrevocable, it is necessary to decide at what point and under what conditions the determination becomes irrevocable.

Regulation 66482 provides in subdivision (b) that a hazardous waste manifest must be certified by the producer that the waste shipped is properly classified. It is my conclusion that where waste material is shipped under a hazardous waste manifest and is certified thereon as being hazardous waste by the producer, it has entered the stream of material subject to being managed pursuant to the requirements for hazardous waste. In the instant case, there is no question that the material is waste. Petitioner has certified on the hazardous waste manifest that it is hazardous. If the material is not actually hazardous, petitioner's remedy is to ship any like material in the future without a certification that it is hazardous. In other words, when waste is shipped, a determination that it is hazardous becomes irrevocable at the time that the waste is certified as hazardous on a hazardous waste manifest. If the generator does not certify on the hazardous waste manifest that the waste is hazardous, the use of a hazardous waste manifest does not cause imposition of the fees. I note that if the material shipped is not actually waste, the fee will also not apply.

If a waste material is hazardous, anything which contains the material is regarded as hazardous unless it contains an amount below the level regarded as hazardous. There is no evidence to show that the level of asbestos content of 16% is not hazardous. The regulation places the threshold level at 1%. The fact that petitioner has no problem with workplace contamination is immaterial as to classification of waste.

Petitioner states that it is no longer shipping the material under hazardous waste manifests. The regulation permits petitioner to do this, but petitioner remains at risk if petitioner does not obtain concurrence from DTSC that the material is not hazardous. The Board has no authority to review decisions of DTSC as to whether or not materials are hazardous. See Section 43301 of the Revenue and Taxation Code.

Recommendation

Deny petition.



\_\_\_\_\_  
H. L. Cohen, Senior Staff Counsel

\_\_\_\_\_  
Date

JA