

10/11/88
10/25/88

Gravity Separation
10/25/88
11/15/88

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petitions)
 for Redetermination and Late)
 Protest Under the Hazardous) DECISION AND RECOMMENDATION
 Substances Tax Law of:)
)
) Nos.)
)
)
)
Petitioner)

The Appeals conference in the above-referenced matters was held by Staff Counsel Lucian Khan on _____ in Sacramento, California.

Appearing for Petitioner/Protestant (hereinafter petitioner):

Attorney at Law

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

Joan A. Markoff
Staff Attorney

Appearing for the Environmental Fees Division of the Board:

Carol Reisinger
Senior Tax Auditor

Protested Items

<u>Items</u>	<u>Amount</u>
1 - Late protest regarding facility fee for the period 7/1/87-6/30/88 based on rate for small treatment facility.	\$
2 - Petition regarding facility fee for the period 7/1/88-6/30/89 based on rate for small treatment facility.	\$

_____ - Petition regarding facility fee for the period 7/1/91-12/31/91 based on rate for small treatment facility.

Contentions

1. Petitioner is not liable for the fees because the oil/water mixture is not a hazardous waste.
2. Petitioner's gravity separation does not constitute treatment.
3. The United States Environmental Protection Agency (EPA) had exclusive jurisdiction to determine petitioner's status as a generator during the time periods in question; therefore, DTSC may not exert retroactive jurisdiction.
4. The doctrine of equitable estoppel applies to bar DTSC from asserting a claim against petitioner.
5. Recent amendments to Health and Safety Code Section 25205.2 make it clear that the legislative intent is to assess fees based on one's activity and not status.

Summary

Petitioner operates a terminal facility for the storage and distribution of petroleum fuel such as residual fuel oil, marine diesel and gas oil, cutter stock, and occasionally heavy crude oil. The facility is located in _____, California. At the facility, petitioner discharges waste water consisting of storm water runoff, ship ballast (via pipeline), commodity drainage, and steam condensate into the west basin of _____ Harbor, via a storm drain. Prior to discharge, all wastes are treated in an API oil separator, a concrete-lined holding pond, an air flotation unit, and a catch tank. All the oil reclaimed in the separation process is returned to storage tanks.

On January 4, 1992, DTSC issued petitioner a grant of Interim Status Document (ISD), which is a category in which facilities which were in existence on or after November 19, 1980 may continue to operate without a permit or a variance.

On February 4, 1986, investigators from the EPA and DTSC conducted an inspection of petitioner's facility. During the inspection, it was determined petitioner was operating an oil and water separation process which constituted treatment.

On December 9, 1987, DTSC again inspected petitioner's facility and in a report dated December 22, 1987, concludes that the facility does not generate, transport, treat, store or dispose of any RCRA hazardous waste, but does store California-regulated waste (mainly oil and water mixture) in a holding pond, and treats it by an oil separation process at the waste water treatment area of the facility.

In a February 10, 1988 letter from EPA Chief William Wilson addressed to DTSC, he notes that DTSC's December 9, 1987 inspection verified petitioner as not operating a TSD facility and the facility is a California-regulated generator only, with cited violations under state jurisdiction. The letter also states EPA will change its records to reflect the fact that petitioner does not store, treat or dispose of hazardous waste, and is a generator only subject to the California generator requirements.

In a March 10, 1988 letter addressed to petitioner, DTSC references an enclosed affidavit which it requested petitioner to complete in response to petitioner's recent claim that it did not treat, store, or dispose of hazardous waste. The attached affidavit contained preprinted statements that the facility was never used to treat, store, or dispose of hazardous waste.

In a follow-up letter to petitioner dated August 26, 1988, DTSC notes it has not received the signed affidavit included in the earlier March 10, 1988 letter. The letter informs petitioner that since the affidavit was not submitted, DTSC assumed petitioner withdrew its petition.

In a responding letter dated September 15, 1988, petitioner states that it takes exception to the requirement an affidavit be signed in order to exempt petitioner from the hazardous waste facility fees. Petitioner argues that the determining issue should be whether the facility ever operated as a treatment, storage, or disposal facility. Petitioner interprets the affidavit to include the representation that there has never been a spill of hazardous material which was not properly treated, stored, or disposed of. Because petitioner cannot monitor each and every transfer to ensure no materials were ever released onto the ground, petitioner felt it could not sign the affidavit.

In a January 13, 1989 letter to petitioner, DTSC again encloses the same affidavit form to be signed. In a responding letter of February 6, 1989, petitioner again advises DTSC that it

feels the affidavit is overreaching and wrong. It has never operated a hazardous waste treatment, storage, or disposal facility; however, prior to petitioner's occupation of the site, it was a fuel terminalling facility since the 1920s or 1930s, as well as an oil refinery. Petitioner interprets the affidavit to mean it would be liable for fees if some hazardous waste was deposited prior to its occupation of the property.

In a letter dated August 13, 1992, DTSC advises petitioner that based on a review of its files and inspection of the facility, it concludes petitioner was a hazardous waste transporter only, and not a storage, treatment, or disposal facility. Petitioner is therefore not subject to the hazardous waste facility permitting regulations.

In a follow-up letter dated December 28, 1992, DTSC informs petitioner that the earlier letter of August 13, 1992 was incorrect. DTSC made an error, in that the information in the earlier letter does not apply to petitioner's facility. The letter of August 13, 1992 is rescinded. In January 1993, petitioner submitted a signed and completed affidavit.

Oil/Water Mixture Not Hazardous Waste

Petitioner argues that since the oil and water mixture is recycled material, it cannot be considered hazardous waste. Health and Safety Code^{1/} Section 25121 defines "recycled material" as a material which is used, reused, or reclaimed. The oil in the separator is overflow from the storage tanks and is merely recycled back into the storage tanks.

Section 25143.2 lists materials which are excluded from regulation as waste. The recycled oil fits into three of these exceptions. Subdivision (b)(3) requires that the material be returned to the original process from which it was generated without being reclaimed if the material is returned as a substitute for raw material feedstock, and the process uses raw materials as principal feedstocks. The oil in the separator is returned to the storage tanks at the facility, is considered a virgin product, and is the same physically and chemically after being recycled back into the tank as it was when it arrived at the facility.

^{1/} Hereinafter, all references are to the Health and Safety Code unless otherwise stated.

Subdivision (c)(2) allows petitioner to recycle the oil, and requires the material be recycled at the same facility at which it was generated; that it be recycled within 90 days of generation; and that it be managed in accordance with all requirements applicable to hazardous waste generators. Western recycles the oil from the separator at the facility to the storage tanks at the facility. It is recycled within 90 days of entering the separator, and all laws and regulations applicable to generators are followed.

Subdivision (d)(5)(F) is a list of processes specifically excluded from the definition of waste. This section provides that if a waste is non-RCRA hazardous waste, and is managed in accordance with applicable statutes, it is excluded as waste if it is recycled at the same site it is generated, and is used or reused as an ingredient in an industrial process to make a product, if the material is not being treated before introduction to the process except by one or more of certain enumerated procedures. One of the procedures includes physical or gravity separation, without the addition of external heat or chemicals. (Section 25143.2(d).) Petitioner fits this exclusion because the oil is considered non-RCRA waste and is managed according to applicable statutes. It is recyclable, and in fact recycled on petitioner's premises. The recycled oil is then re-introduced into storage tanks after having been separated from the water in a gravity separator.

DTSC argues it is well settled in the scientific community that crude oil contains varying amounts of benzene and toluene. Refined fuel products include chemicals and additives which include xylene, ethylbenzene 1, 2, dichloroethane (DCA), tetraethyl lead, and n-hexane. Title 22 of the California Code of Regulations (CCR), Section 66261.126, Appendix X, sets forth a list of chemicals which are presumed to be hazardous waste unless it is determined the waste is not hazardous pursuant to the procedures set forth in Section 66262.11. These chemicals are all listed in Appendix X. Section 66262.11(b) provides that if a waste is listed in Appendix X, the generator may determine the waste is not hazardous by the application of knowledge or by testing. Accordingly, the oil and water mixture is presumed hazardous unless petitioner demonstrates otherwise. Petitioner states in the affidavit submitted with its brief that it is a generator of hazardous waste.

DTSC further argues that petitioner does not qualify for any of the recycling exclusions or exemptions provided for under Section 25143.2. Subdivision (b)(3) requires that to be excluded, the material must be returned to the original process

from which it was generated, without first being reclaimed if the material is returned as a substitute for raw material feedstock, and the process uses raw materials as principal feedstocks. This exclusion cannot be claimed for two reasons: (1) Petitioner does in fact perform reclamation; and (2) the material is not returned as a substitute for raw material feedstock in a process that uses raw material as principal feedstocks. To claim this exclusion, petitioner would have to produce one or more products from crude oil, or use reclaimed petroleum products such as lubricants or fuels as substitutes for raw material in the process that uses raw material as principal feedstocks. Petitioner does not produce products from raw material feedstocks. Returning reclaimed petroleum products to bulk storage does not constitute refining or production. Petitioner returns products to bulk storage. At no time in the course of petitioner's reclamation do these recovered products revert to raw materials.

Petitioner also does not meet the requirements of subdivision (c)(2), which requires that the material must be recycled and used at the same facility in which the material was generated. Section 25121 defines "recycled material" as material that is used, re-used or reclaimed. In subdivision (c)(2)(A) of Section 25143.2, "recycled" refers to reclamation from which a material or commodity capable of being used or re-used is obtained. In contrast, "used" within the context of the recycling law generally implies an application in which the material is consumed or spent. Thus, to qualify for this exclusion, the facility would have to utilize and expand the reclaimed oil in a process at the facility. Therefore, reclamation by itself does not constitute use. Petitioner does not in any sense use the reclaimed oil at the same facility in which reclaimed oil is generated. Instead, it is sold.

To claim the exclusion provided under subdivision (d)(5)(F), petitioner would have to produce one or more new products from reclaimed oil products in an industrial process. Petitioner is not entitled to this exclusion because returning reclaimed petroleum products to bulk storage does not constitute industrial process which culminates in a product. Petitioner is merely an intermediary which stores, repackages, and redistributes products produced by others.

Gravity Separation Does Not Constitute Treatment

Petitioner argues Section 25123.5 defines "treatment" as any method, technique or process which changes or is designed to change the physical, chemical, or biological character or composition of hazardous waste or material contained therein, or

removes or reduces harmful properties or characteristics for any purpose. There is no scientific evidence presented, that the API separator works to alter the chemical or physical composition of the oil and water. When the oil and water are mixed together, it does not create a third chemical entity. Over time, the oil and water mixture merely separate with the oil floating to the top, and the water sinking to the bottom. Gravity separation of two materials without a change in the physical or chemical makeup is not treatment.

DTSC argues it has always regarded the oil and water separation process conducted in API separators as "treatment". Section 25200.3(a)(8)(A) and Section 67450.11(a)(10)(A) of Title 22 specifically refer to gravity separation of oil and water. Furthermore, gravity separation is explicitly regarded as treatment throughout Code Sections 25143.2, 25200.3, and 22 CCR Section 67450.11. There is absolutely nothing in the statute which states the process must create a separate chemical entity for the process to constitute treatment. The statute merely states any process designed to change the physical, chemical or biological composition constitutes treatment. API separators are expressly designed to facilitate the separation of oil from water.

EPA - Exclusive Jurisdiction

Petitioner argues California was granted interim authorization phase I to administer its hazardous waste program under RCRA in 1981. (46 Fed. Reg. 29935 [June 4, 1981].) In 1983, California applied for interim authorization phase II component A under RCRA, allowing the state to operate a permit program for hazardous waste facilities. (48 Fed. Reg. 1197 [January 11, 1983].) EPA granted California this authorization; however, in 1986 the authorization expired and EPA again assumed the task of administering the federal RCRA program in California. (51 Fed. Reg. 4128 [January 31, 1986].) California was not given authorization to administer its own hazardous waste program until 1992. (57 Fed. Reg. 32726 [July 23, 1992].) Therefore, between 1986 and 1992, EPA had primary jurisdiction over hazardous waste programs in the State of California.

In 1988, EPA wrote to DTSC stating it would change its data base to reflect that petitioner did not store, treat or dispose of hazardous waste, and was only a generator. During this period, EPA was qualified, and the only agency empowered to enforce hazardous waste laws in this state. The EPA letter of February 10, 1988 would indicate that it was DTSC which asked EPA to rescind petitioner's Part A application due to petitioner's

status as a generator only. DTSC now seeks to exert retroactive jurisdiction over the determination of petitioner's status and should not be allowed to do so.

DTSC argues this lapse of federal authorization did not destroy its authority to operate and enforce its own state-mandated program. (Liquid Chemical Corp. v. Department of Health Services (1991) 227 Cal.App.3d 1682, 1691.) The notification of expiration of the interim authorization in the Federal Register specifically provided, "the state programs will continue in effect under state legal authorities." (51 Fed. Reg. 4128 [January 31, 1986].) Therefore, contrary to petitioner's assertion, EPA was not the only agency empowered to enforce the hazardous waste laws in this state.

Equitable Estoppel

Petitioner points out that the elements of equitable estoppel are that the party to be estopped must know the true facts; the party to be estopped must intend that his conduct shall be relied upon, or his acts must be such that the other party believes that he intended his conduct to be acted upon; the party asserting the estoppel must be ignorant of the true facts; and the party asserting the estoppel must rely on the other party's actions to his detriment. (City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 91 Cal.Rptr. 23.)

Here, DTSC evidently believed petitioner was treating hazardous waste at its facility; however, the first time it apprised petitioner of this belief was at the conference. Until then, petitioner believed DTSC was basing the levy of the fee on a mischaracterization of petitioner's operations. Petitioner was ignorant of DTSC's true position until recently. Petitioner relied on DTSC's written communication to its detriment, believing the mischaracterization of petitioner as a treater and transporter of hazardous waste was a clerical matter on DTSC's part.

DTSC argues that while the doctrine of equitable estoppel may be applied against the government where injustice and right require it, the courts will not do so if it would effectively nullify a strong rule of public policy. (United States Fid. & Guar. Co. v. State Board of Equalization (1956) 47 Cal.2d 384; City of Long Beach v. Mansell, supra.) It is also well settled that a state is not estopped from collecting a tax which was due and owing even though a state's representative may have incorrectly informed the taxpayer that no tax was due. (Fischbach & Moore, Inc. v. State Board of Equalization (1981)

117 Cal.App.3d 627; United States Fid. & Guar. Co. v. State Board of Equalization, supra; Market Street Railway Co. v. State Board of Equalization (1955) 137 Cal.App.2d 87.) The State Board of Equalization and its officers do not have judicial powers and accordingly are not actually authorized to apply equitable estoppel. (Standard Oil Co. of California v. State Board of Equalization (1936) 6 Cal.2d 557.)

The only arguable basis for relief would be DTSC's August 13, 1992 letter which was in error. However, DTSC's letter of December 28, 1992 rescinded the earlier letter. Therefore, petitioner's argument must ultimately fail in light of the fact that it relied to its detriment for a period of less than four months. Petitioner contends there was a DTSC letter to EPA which it has never seen. Petitioner is not entitled to rely on a letter it has never read or received. Any determination by EPA that petitioner is not a treatment facility under federal law has no bearing under state law. DTSC never intended that its erroneous revision of petitioner's status was an act upon which petitioner could rely. Petitioner has failed to allege how it relied on this four-month error to its detriment.

Although petitioner argues it was unaware the Department believed it was treating hazardous waste at its facility, petitioner was continually notified that the fees were being imposed because the Department had notified the Board that petitioner was responsible for facility fees for a small treatment facility. The Legislature in adopting the hazardous waste regulatory program stated quite clearly in Section 25205.2(a) that a facility must pay the hazardous waste facility fee.

Legislative Intent of Section 25205.2

Petitioner argues Section 25205.2, as recently amended (1994), clarifies the legislative intent behind facility fee assessments. Subdivision (d)(1) provides that operators pay the facility fee for each reporting period in which a facility actually engaged in the treatment, storage, or disposal of hazardous waste. During the time periods in question, petitioner did not engage in treatment, storage, or disposal of hazardous waste. The first time petitioner was apprised of DTSC's argument that gravity separation constituted treatment was at the conference.

DTSC argues that petitioner's argument is nothing more than semantics. Obviously, if DTSC imposed a fee based on petitioner's "status" as a treatment facility, there must have

been some identified form of treatment which was the basis of that status. As such, petitioner is liable for all fees.

* * *

In a brief dated March 23, 1994, petitioner responds to certain arguments contained in a DTSC brief of March 3, 1994, and relates to DTSC's above arguments. Petitioner states that its argument of alternative theories does not amount to a stipulation that any of the theories are wrong. It does not agree with DTSC that the terms "recycle" and "used" have different meanings. Petitioner uses the product it recycles because it is put back into storage tanks and sold as a virgin product. Petitioner maintains the recycled oil is product, is treated as product, and is sold as product. It does not dispose of recycled oil. DTSC misconstrues the meaning of waste, which is defined as worthless or useless by-product according to Webster's dictionary (1984 edition). By definition, recycled oil is not a "by-product" because it is the product. Because the oil is considered product and sold as a product, it cannot be considered waste.

Analysis and Conclusions

Section 25205.2(a) provides that each operator of a hazardous waste facility shall pay a facility fee to the Board for each state fiscal year or portion thereof. Section 25205.1(b) defines a "facility" as any structure, and all contiguous land, used for the treatment, transfer, storage, resource recovery, disposal, or recycling of a hazardous waste, which has been issued a permit or a grant of interim status by the Department (DTSC), or which operated in such a manner that the facility is required to obtain a permit or grant of interim status.

It is clear from the above authority, that petitioner would owe the facility fee for the periods in question unless relief can be granted based on any of the arguments or issues raised, which are discussed as follows.

Oil/Water Mixture Not Hazardous Waste

Revenue and Taxation Code Section 43301 provides that no petition for redetermination shall be accepted or considered by the Board if the petition is founded upon the grounds that the director (DTSC) has improperly or erroneously determined that any substance is a hazardous or extremely hazardous waste. Any appeal of a determination shall be made directly to the director (DTSC).

Under Section 25121, "recycled material" is defined as material which is used, re-used or reclaimed. Section 25143.2 provides that recyclable materials are subject to the same requirements which apply to hazardous waste except as provided in subdivisions (b), (c) or (d). Subdivision (b)(3) provides that recyclable material is excluded from classification as a waste if it is returned to the original process from which the material was generated without first being reclaimed, if the material is a substitute for raw material feedstock, and the process used raw materials as principal feedstocks. Subdivision (c)(2) exempts a facility from permitting requirements for the particular recycling activity where the material is recycled and used at the same facility at which the material was generated, recycled within 90 days of generation, and the material is managed in accordance with all requirements for generators of hazardous waste. Subdivision (d)(5)(F) relates to material used or re-used as an ingredient in an industrial process to make a product, if the material is not treated before introduction to that process except by one or more of the following procedures: physical or gravity separation without the addition of external heat or any chemicals.

Although Revenue and Taxation Code Section 43301 expressly presents the Board from considering a petition based on the grounds that DTSC has improperly classified a substance as hazardous waste, here, the issue is not whether the combination of oil and water is hazardous but whether petitioner's activity falls within the requirements to be exempted under Section 25143.2. Based on a review of this section, and the facts and evidence submitted, we conclude petitioner does not. As DTSC argues, subdivision (b)(3) does not apply to petitioner because it does not produce one or more products from crude oil or use reclaimed petroleum products such as lubricants or fuels as substitutes for raw material in a process that uses raw material as principal feedstocks. Petitioner merely returns reclaimed petroleum products to bulk storage which does not constitute refining or production. At no time do these recovered products revert to raw materials.

Subdivision (c)(2) would not apply, because as DTSC argues, it is specifically required that the material be recycled and used at the same facility. Subdivision (d)(5)(F) would also not apply because the material must be used or re-used as an ingredient in an industrial process to make a product. As DTSC argues, returning reclaimed petroleum products to bulk storage does not constitute an industrial process which culminates in a product. Therefore, we must conclude petitioner is not entitled to relief under this section.

Gravity Separation Does Not Constitute Treatment

Section 25123.5 defines the term "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 any material contained therein, or removes or reduces its harmful properties or characteristics for any purpose. It does not include the removal of residues from manufacturing process equipment for the purpose of cleaning that equipment. Section 25200.3(a)(8)(A) and Section 67450.11(a)(10)(A) of Title 22 specifically regard gravity separation or settling of oil mixed with water and oil/water separation as treatment.

Based on the facts presented, we must agree with DTSC that the gravity separation taking place at petitioner's facility would constitute treatment as defined under the statute and regulation.

EPA - Exclusive Jurisdiction

The issue of whether DTSC lacked jurisdiction between 1986 when authorization by the EPA expired, and 1992 when petitioner argues California was given authorization to administer its own hazardous waste program, was specifically decided in the case of Liquid Chemical Corporation, as cited by DTSC.

In that case, the court held that the Department of Health Services (DTSC) did not lack jurisdiction to pursue corrective action or impose civil penalties against defendants for violations of the California Hazardous Waste Control Act (Health and Safety Code Section 25100, et seq.), even though the Department's interim authorization under the Federal Resource Conservation and Recovery Act (RCRA) (42 U.S.C. Section 6921, et seq.) was no longer valid. The lapse of the federal authorization to operate the state program in lieu of the federal program did not destroy the authority of the Department to continue operating its own state-mandated program. It was the independent state program that defendants were charged as having violated, not the federal program. Therefore, compliance with federal requirements was not a shield from the more stringent provisions of the California Health and Safety Code.

Here, it is clear that in the instant case, DTSC seeks to enforce the collection of a fee imposed under a state, and not a federal program. Accordingly, neither DTSC nor the Board lacked jurisdiction to collect this fee if it is otherwise due.

Further, it is noted (as DTSC argues) that 51 Federal Register 4128 (cited by petitioner) provided, "the state programs will continue in effect under state legal authorities." This is further evidence of EPA's intent that where a state had an environmental protection program already in place that it would be given effect even after 1986 when the operation of the RCRA program was to revert to EPA.

Equitable Estoppel

Although the authority cited by DTSC generally provides that the Board and its officers do not have judicial powers and accordingly are not authorized to grant equitable relief, there is a noted exception under Revenue and Taxation Code Section 43159, which has this effect. This section provides that if a person's failure to make a timely return or payment is due to reasonable reliance on written advice from the Board, the person may be relieved of taxes or fees imposed, and any penalty or interest attached thereto.

The problem here is that this section provides relief for reasonable reliance on written advice from the Board. It does not expressly provide relief for advice received from DTSC. Therefore, petitioner is not entitled to relief.

Even if it could reasonably be argued that this section should be extended to include erroneous advice from DTSC, petitioner would still not be entitled to relief. Section 25205.2 expressly states that a facility operator must pay the facility fee for each fiscal year, or any portion thereof. If petitioner relied on erroneous advice from DTSC, it could only have done so from the time period covered by DTSC's August 13, 1992 letter, until DTSC's December 28, 1992 letter in which it advised petitioner that the earlier letter of August 13, 1992 was in error. The time period covered by the two petitions and the late protest was for the fiscal years of 1987/88, 1988/89, and the six-month period covering July 1, 1991 through December 31, 1991. All the periods in question preceded DTSC's erroneous letter of August 13, 1992. Accordingly, petitioner could not have relied on a letter it did not receive until after all the above periods had expired. Even if the fiscal year 1992-93 were in dispute, petitioner would still not be entitled to relief because it would have operated a partial period of eight months, consisting of before and after the four-month period in which erroneous advice was given. The fee imposed under Section 25205.2 would have then applied to the eight-month partial period. Therefore, under any scenario imaginable, petitioner would not be entitled to relief.

