STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for Redetermination and the Late Protest Under the Hazardous Substance Tax Law of:	)	DECISION AND RECOMMENDATION
	)	(Petition) and (Late Protest)
Petitioner	)	

The above-referenced matter came on regularly for hearing before Senior Staff Counsel H. L. Cohen on J , , in San Francisco, California.

Appearing for Petitioner:

Appearing for the Dept. of Toxic Substances Control (DTSC): Mr. R. Sherwood
Staff Counsel

Appearing for the Excise Tax Division (ETD): Mr. D. McKillip
Supervising Tax Auditor

Mr. R. O'Neill
Senior Tax Auditor

Protested Items

The protested liabilities are as follows:

Acct. No.	Period	Type of Fee	Amount
[illegible]	1/1/82-12/31/84	Generation & Disposal	[illegible]
[illegible]	1/1/81-12/31/83	Generation & Disposal	[illegible]
		Total	[illegible]

Contentions

Petitioner contends that:

1. Petitioner's handling of hazardous waste constitutes treatment, not disposal, and the fees should be applied accordingly.

2. The statutory provisions are vague and ambiguous and thus fail to provide adequate notice as to what activities are subject to the fees.

Summary

Petitioner is a corporation which is engaged, among other activities, in treating wood products to minimize fungus and bacterial attack and to retard flammability. The processes utilize fire retardant chemicals, copper chromate arsenate, creosote, phenols, pentachlorophenol (penta), and other substances. In a typical operation, wood products such as telephone poles, shingles or railroad ties are loaded on a tram which is rolled into a pressure vessel. The pressure vessel is about six feet in diameter and 100 feet long. The cylinder is filled with the desired chemical and then pressurized. The wood product is impregnated with the chemical as a result of the process.

The process chemicals and rainwater from the concrete-covered process areas are recovered. This waste water is processed through a three-phase system. The first step involves an oil-water gravity separator. Oil rises to the top and creosote sinks to the bottom. Both are removed for re-use. The remaining liquid is then pumped to a treatment pond. The pond is lined with compacted clay and asphalt. The pond has been demonstrated to have no leaks. In the pond, the contaminants, which are primarily organic, are biologically and photochemically degraded and a portion

of the water evaporates. In periods in which there are heavy rains or in which the evaporation rate is low, water is pumped out of the pond to prevent overflow. Petitioner states that the pond holds about one million gallons and that five million gallons per year of waste water are processed through it. The water which is pumped out is sprayed onto an engineered sprayfield which contains a large amount of vegetation and which has an asphalt concrete liner. The biological and photochemical degradation of the contaminants continues in the field. The level of penta (the principal contaminant) in the soil of the field has remained constant. The water ultimately runs off into an unlined ditch. Water from the ditch is taken by an adjacent lumber mill which sprays the water onto its stored logs.

The groundwater of petitioner's facility had been previously contaminated. As part of the clean-up process, petitioner has dug wells and is pumping water up to be sprayed on the sprayfields for treatment. That activity is not related to the fees assessed at this time.

Petitioner had reported fees based on the amount of sludge which accumulated in the pond. Petitioner estimated the amount as one-fourth ton per month. The auditor regarded petitioner's operation as the generation and disposal of hazardous waste on-site. Fees were assessed based on the amount of evaporation in the pond and the amount of liquid pumped from the pond to the sprayfield. The auditor estimated that 300,000 gallons of hazardous waste per month were pumped into the pond and that half of this was hazardous waste. Subsequent to the hearing, ETD assessed additional fees on the basis that the original auditor had applied fees to only one-half of the material which was subject to the fee.

DTSC contends that all waste water generated by petitioner, including rain runoff, was hazardous waste. The holding of the waste water in the pond constitutes disposal under 22 C.A.C. 66535(b) because the waste water was stored there indefinitely except for amounts that were sprayed onto the sprayfields. The spraying itself constituted direct disposal of hazardous waste on land. DTSC contends, therefore, that petitioner is liable for fees for the generation and disposal of hazardous waste.

Petitioner's principal argument is that the pond and sprayfield constitute a multi-step treatment facility. Petitioner also questions whether the waste water constitutes hazardous waste under the standards then in

effect. Petitioner further contends that if its activities are regarded as disposal, the fees should be based on the weight of chemical residues, not the weight of the water involved.

Petitioner points out that Section 25174 of the Health and Safety Code in the form in effect during the period in question required a payment for disposal of hazardous waste. Section 25174.6 of the Health and Safety Code, which became effective July 1, 1982, provided for a fee of $4 per ton of hazardous waste which the operator "disposes of on land or applies to the land". Petitioner contends that the two sections should be read together and should not be interpreted to include a fee for application to land for the purposes of treatment.

Petitioner points out that Health and Safety Code Section 25342 required every person who disposed of hazardous waste on-site to submit a report of the total amount of hazardous waste which was transferred to a surface impoundment. Again, petitioner contends that the fee applies only to disposal, not treatment.

Petitioner states that sampling of the waste water entering the pond shows an average level of penta of 135 parts per million (ppm). In the pond, the average level is 39 ppm. The average level in the sprayfield was 4 ppm. The average level in the drainage ditch was .5 ppm. These figures correspond to 1.3 gallons of penta per day entering the pond, .39 gallons of penta per day entering the sprayfield, and .005 gallons per day entering the drainage ditch. Petitioner contends that this data demonstrates the effectiveness of the system in treating the waste water. Petitioner points out that the pond and sprayfield have consistently been regulated as treatment activities under the Clean Water Act. Petitioner also points out that in an enforcement action which the Department of Health Services (DHS) brought against petitioner for alleged violations of the Hazardous Waste Regulations, DHS sought to regulate the pond and sprayfield as treatment facilities.

DTSC takes the position that disposal and treatment are not mutually exclusive terms. Both are broadly defined in order to bring a large universe of activities into the regulatory sphere. A liquid hazardous waste dumped onto ground will change its physical characteristics and is also likely to exhibit a reduction in harmful properties because of dilution. DTSC contends that under petitioner's reasoning, dumping of a liquid

hazardous waste would never constitute disposal. This approach would render much of the law regarding hazardous waste meaningless. A statute cannot be interpreted in a manner to yield an absurd result. See Younger v. Superior Court, 21 Cal.3d 102. While the statutory definitions of storage excludes disposal, the statutory definition of treatment does not.

DTSC disputes petitioner's contention regarding the use of the weight of the hazardous material itself as a basis for calculating the fees. DTSC cites Section 25174.6(b) of the Health and Safety Code which provides that the fees be calculated using the total wet weight of the hazardous waste in the form in which it exists at the time of disposal, submission for disposal, or application to land. DTSC contends that the pond constitutes a surface impoundment used for the purpose of reducing the water content of the waste by means of evaporation and thus falls within the language of Section 25342(a) regarding the application of tax to hazardous waste. Some treatment occurs in most surface impoundments, but that does not cause the surface impoundment to become classified as a treatment activity.

DTSC disputes petitioner's contention that the use of petitioner's waste water by a neighboring lumber mill demonstrates re-use. DTSC states that the neighbor's need was for water, not the hazardous constituents. DTSC contends that since the penta is a hazardous material, the runoff to the lumber mill's pond was in itself a hazardous waste. Under 22 C.A.C. Section 66300(a), any waste containing a chemical on DTSC's list of hazardous chemicals is required to be managed as a hazardous waste. Even though the concentration of penta in the runoff was low, the runoff was hazardous waste. Had petitioner desired to manage the runoff as nonhazardous, it could have applied for a nonhazardous classification from DTSC. Petitioner did not do so and therefore the runoff must be regarded as hazardous waste.

Analysis and Conclusions

The fees asserted in the determination which is the subject of HM HQ 36 000170-010 are based on Sections 25174 and 25174.6 of the Health and Safety Code. Section 25174 provides that each operator of any site at which hazardous wastes are disposed shall pay a fee to the director of DHS for disposal of such wastes. The director was authorized to establish a schedule of fees based on criteria set in the statute. Section 25174.6 of the Health

and Safety Code provided that, effective July 1, 1982, the fee would be $4.00 for each ton or fraction thereof of hazardous waste disposed of on land or applied to land. For purposes of this fee, "disposed" was defined in Section 25113 of the Health and Safety Code in the form in effect at the time in question as meaning to abandon, deposit, inter, or otherwise discard waste.

The tax which was asserted in the determination which is the subject of HA HQ 36 005177-010 is based on Sections 25342 and 25345 of the Health and Safety Code. Section 25342 required every person who disposed of hazardous waste on-site to report information regarding the quantity and quality of the waste. Section 25345 imposed a tax on certain categories of this hazardous waste. For purposes of this tax, "disposal" was defined as meaning to abandon, deposit, inter, or otherwise discard waste into or on land as a final action after its use has been achieved and no intended beneficial use or re-use can be demonstrated.

Section 43301 of the Revenue and Taxation Code provides that any appeal of a determination that a substance is hazardous waste shall be made to the director of DHS. DTSC, which is the successor to DHS for purposes of administering the laws regarding hazardous waste, has declared that petitioner's waste water is hazardous at every point in the process, i.e., going into the pond, going onto the sprayfield, and leaving the sprayfield. The conclusion that the waste water is hazardous is not subject to review in the instant process. This limits the discussion herein to whether or not the process constitutes disposal and if it did, the amount of material disposed of.

Initially, I note that I agree conceptually that disposal and treatment are not mutually exclusive. Any decision in this regard must be based on the facts of the individual case.

Looking first to the pond, I conclude that it constituted solely a treatment facility. There is no way that hazardous materials can escape from it into the atmosphere, water table, or uncontained portions of the land. The entire intent of pumping waste water into the pond is that the contamination level be reduced. The contentions of DTSC that waste is stored at the pond for the sole purpose of evaporation and for more than one year are not supported by the facts. It is true that evaporation occurs. However, if that were all that happened in the pond, the concentration of contaminants

would increase while in fact the evidence shows clearly that it is greatly reduced. Further, the evidence is clear that the pond cannot hold a one-year's input of waste water.

Looking next at the sprayfield, I again conclude that it constitutes solely a treatment facility. It is not unenclosed land. The earth is contained in an asphalt concrete shell. The concentration of contaminants remains both low and constant. This demonstrates that there is in fact treatment and that there is no accumulation of hazardous material. I interpret the statutes referring to application to land to mean unconfined earth where there can be or is a buildup of hazardous material or an uncontrolled leaching of hazardous substance into the surrounding land.

Finally, the status of the waste water flowing from the sprayfield to the lumber mill pond must be considered. As noted earlier, the waste water is hazardous waste. Clearly, no treatment takes place in the drainage ditch or at any later point. The release of the waste water into the unlined ditch cannot be described as other than the disposal of hazardous waste on land. The disposal fee and the tax should be based on the hazardous waste which is released into the ditch.

The tax and the fee should be based, as DTSC contends, upon the wet weight of the waste water, not the weight of the hazardous material alone. This is in accord with Section 25174.6(b) of the Health and Safety Code as cited by DTSC.

The use of the waste water by the lumber mill does not cause the waste water to be regarded as other than a hazardous waste product. The lumber mill used the waste water despite the fact that it is contaminated. Similarly, the standards of the RWQCB as to what is allowed to be dumped into the groundwater or streams does not affect the classification of the waste water by DTSC. That classification can be altered only by appeal to the director of DTSC as noted above.

Recommendation

Grant the petition and the late protest in part by regarding the amount of hazardous waste disposed of as the amount of waste water entering the drainage ditch.

H. L. Cohen, Senior Staff Counsel

Date

JA