

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Claim for)
Refund Under the Hazardous) DECISION AND RECOMMENDATION
Substances Tax Law of:)
)
) No.
)
)
)
)
Claimant)

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel James E. Mahler or , in Ventura, California.

Appearing for Claimant: None.

Appearing for the Department
of Toxic Substances Control: Bryce Caughey
Staff Counsel

Appearing for the Special
Taxes Division, State
Board of Equalization: E. V. Anderson
Administrator

Subject of Claim

The amount at issue is a \$500 environmental fee paid for the calendar year 1989.

Claimant's Contentions

1. The environmental fee is not due from nonprofit organizations.

2. Claimant is not included as one of those industries that use, generate, store or conduct activities in this state related to hazardous materials.

Summary

Claimant is a nonprofit corporation organized to provide job training to individuals. It is funded by a variety of grants from the State of California and is apparently exempt from state and local tax. Claimant's Standard Industrial

Classification (SIC) code is not revealed in the record before us.

Section 25205.6 of the Health and Safety Code provides in subdivisions (a) and (b):

"(a) On or before November 1 of each year, the department shall provide the board with a schedule of two digit SIC codes, as defined in subdivision (o) of Section 25501, as established by the United States Department of Commerce, that consists of corporations which use, generate, store, or conduct activities in this state related to hazardous materials, as defined in subdivision (j) of Section 25501 including, but not limited to, hazardous waste.

"(b) Each corporation identified in the schedule adopted pursuant to subdivision (a) shall pay an annual fee, which shall be set at one hundred dollars (\$100) for those corporations with 50 or more employees but less than 100 employees, five hundred dollars (\$500) for corporations with 100 or more, but less than 500 employees, and one thousand dollars (\$1,000) for corporations with 500 employees or more."

On or about November 1, 1989, in accordance with this statute, the Department of Health Services (now the Department of Toxic Substances Control, hereinafter "DTSC") sent this Board a list for use in identifying corporations liable for the environmental fee. The list included every SIC code except code 88 (private households).

The Board's staff then requested the Employment Development Department (EDD) to furnish a list of all corporations in California, except private households, which employed more than a certain number of employees. Claimant's name appeared on that list. Early in 1990, therefore, the Board's staff sent an environmental fee return to claimant.

Claimant filled out the return indicating that it employed from 100 to 499 employees and calculating that the environmental fee would be \$500. Claimant filed the return and paid that amount on May 17, 1990. (This was more than two months past the due date of the return, but no late fee was assessed or

paid.) On the same day it filed the return, claimant also filed the instant claim for refund.

Analysis and Conclusions

1. Health and Safety Code Section 25205.6, which imposes the environmental fee, does not authorize any exemptions or exclusions for nonprofit entities. The fee is imposed on all corporations which employ the requisite number of employees and which have an SIC code identified by DTSC.

It should be noted that liability for the fee depends on the corporation's SIC code, not on the corporation's particular activities. Thus, a corporation with the requisite number of employees is liable for the fee if it has an SIC code identified by the Department as an industry related to hazardous materials, even if the corporation itself never deals in hazardous materials.

Claimant is admittedly a corporation which employs the requisite number of employees. Furthermore, DTSC has determined that all SIC codes reflect industries subject to the fee, except private households, and it does not appear that claimant is a private household. Accordingly, we must conclude that claimant was liable for the fee.

2. Claimant may also be objecting to DTSC's decision that all SIC codes (except private households) reflect industries which "use, generate, store, or conduct activities in this state related to hazardous materials...."

DTSC responds by arguing that all businesses in this state use, generate, store, or conduct activities related to hazardous materials. The definition of hazardous materials is broad enough to include many materials commonly found in the workplace. These include ink, toner fluid, heavy metals on circuit boards inside computers, cleaning substances, and mercury and polychlorinated biphenyls in fluorescent lights. In addition, most businesses use motor vehicles to receive or deliver goods and services. Vehicles use hazardous materials such as lead batteries, oil and fuel.

Arguably, DTSC's decision should have been made by regulation, after allowing public input. (Cf. Greir v. Kizer, 219 Cal.App.3d 422.) Unfortunately, however, the Board of Equalization has no authority to review DTSC's decision on this point. Health and Safety Code Section 25205.6 expressly provides that the list of SIC codes is to be prepared by DTSC, not by this Board.

The statutory history of Section 25205.6 supports the view that DTSC has exclusive jurisdiction to determine whether a given SIC code should be included in the schedule. As originally enacted by SB 475 (Chapter 269, Stats. 1989), effective August 3, 1989, this section began:

"(a) On or before November 1 of each year, the board [Board of Equalization] shall adopt a schedule of SIC codes, as defined...."
(Emphasis added.)

However, AB 41 (Chapter 1032, Stats. 1989), effective September 29, 1989, amended this section to read:

"(a) On or before November 1 of each year the department shall provide the board with a schedule of two digit SIC codes as defined...." (Emphasis added.)

Further, technical expertise resides solely within DTSC. The Board has no capability to determine the degree or nature of hazardous materials. Section 43301 of the Revenue and Taxation Code provides, in pertinent part:

"No petition for redetermination of taxes determined under this part shall be accepted or considered by the board if the petition is founded upon the grounds that the director has improperly or erroneously determined that any substance is a hazardous or extremely hazardous waste. Any appeal of a determination that a substance is a hazardous or extremely hazardous waste shall be made to the director."

While this statute relates to hazardous waste rather than hazardous materials, there is a clear analogy to hazardous materials. Thus, any challenge to the list of SIC codes prepared by DTSC must be through the internal review procedures of DTSC or by court action.

Recommendation

Deny the claim for refund.

James E. Mahler
James E. Mahler, Senior Staff Counsel

Date

JA



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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MATTHEW K. FONG
Fourth District, Los Angeles
GRAY DAVIS
Controller, Sacramento
CINDY RAMBO
Executive Director

February 19, 1993

[REDACTED]

Dear Sir or Madam:

[REDACTED]

Enclosed is a copy of the Decision and Recommendation pertaining to the above-referenced claim for refund. I have recommended that the claim be denied.

Please read the Decision and Recommendation carefully. If you accept the decision, no further action is necessary. If you disagree with the decision, you have the following two options:

REQUEST FOR RECONSIDERATION. If you have new evidence and/or contentions not previously considered, you should file a Request for Reconsideration. Any such request must be sent to me within 30 days from the date of this letter, at the post office box listed above, with a copy to the Special Taxes Division Administrator at the same box number. No special form is required, but the request must clearly set forth any new contentions; and any new evidence must be attached.

BOARD HEARING. If you have no new evidence and/or contentions, but wish to have an oral hearing before the Board, a written request must be filed within 30 days from the date of this letter with Ms. Janice Masterton, Assistant to the Executive Director, at the above post office box.

If neither a request for Board hearing nor a Request for Reconsideration is received within 30 days from the date

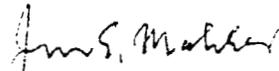
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February 19, 1993

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of this letter, the Decision and Recommendation will be presented to the Board for final consideration and action. Official notice of the Board's action will then be mailed to you.

Sincerely,



James E. Mahler
Senior Staff Counsel

JEM:ct
Enclosure

cc: Ms. Jo Nelson
Dept. of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806 (w/enclosure)

Mr. James R. Cutright
Acting Chief Counsel
Dept. of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806 (w/enclosure)

Ms. Janice Masterton
Assistant to the Executive Director (w/enclosure)

Mr. Glenn Bystrom
Principal Tax Auditor (file attached)

Mr. E. V. Anderson
Special Taxes Division Administrator (w/enclosure)

Mr. Bob Frank, Supervisor
Environmental Fees Section (w/enclosure)

Assistant Chief Counsel, Special Taxes Section