

7) Letter with DTSC

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 above-referenced matter came on regularly for hearing before Hearing Officer Cynthia Spencer-Ayres on 1 in San Francisco, California.

Appearing for Claimant:

Appearing for the Department of Toxics Substance Control:

Dennis Mahoney  
Staff Counsel

Appearing for the Special Taxes & Operations Department, State Board of Equalization:

Larry Bergkamp  
Senior Tax Auditor

Protested Items

The protested liability for the period January 1, 1984 through December 31, 1986 is for the annual Hazardous Substance Account tax in the amount of \$ ,-- .

Summary

(hereinafter referred to as claimant) operates chemical mining and processing facilities in , California. It provides soda ash and other industrial chemicals extracted from brine. In the course of its operation, it also generates fly ash, bottom ash, and lime, which, to the extent they cannot be sold, are disposed of to land.

Taxes were assessed based on an operation where claimant pumps brine, which contains various salts from beneath the lake bed at \_\_\_\_\_ in the Mojave Desert. The brines are pumped to large evaporation ponds where the salts are crystallized. The salts are then sent through a process. From this process fly and bottom ash and unusable lime are generated as waste. Claimant sells some of the fly ash for use as an ingredient in the manufacture of concrete and cement and disposes of the rest of these substances at the site where they are produced on lands owned or leased by claimant. In connection with the disposal, the Board of Equalization (Board) has assessed claimant under the Hazardous Substance Account tax (HSA tax)<sup>1</sup> for the amounts in dispute for calendar years: 1984 - \$\_\_\_\_\_; 1985 - \$1\_\_\_\_\_; and 1986 - \$\_\_\_\_\_. Claimant paid the taxes under protest on June 27, 1985, May 20, 1986 and June 22, 1987, and requested a refund.

On July 15, 1983, petitioner submitted an application to the Department for a variance to classify these wastes as non-hazardous. Petitioner based its application on the grounds that (1) the wastes were not hazardous under the informal guidelines contained in an internal Department manual, and (2) in any event, a variance should be granted from the hazardous waste provisions because the wastes did not present any danger to the public owing to the naturally brackish environment in which they were disposed.

The Department did not respond to the application until February 25, 1985 at which time it rejected the application. The Department concluded that the fly ash was hazardous because its vanadium content exceeded the legal limit under the regulation; that the lime was hazardous because its pH content was equal to the lowest pH level treated as hazardous under the regulation; and that the bottom ash should be treated as hazardous under the regulation because insufficient information was available to determine that it was non-hazardous. The Department is currently considering claimant's alternate request for a variance from the provisions of the hazardous waste regulations.

The claimant makes several arguments in support of the position that it is entitled to a refund of the hazardous waste tax paid in the amount of \$\_\_\_\_\_ and such additional amounts,

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<sup>1</sup> The tax at issue is the annual Hazardous Substance Account tax (HSA tax) which most disposers of hazardous waste must pay pursuant to Health and Safety Code sections 25342 and 25345. Revenues from this tax are deposited into the Hazardous Substance Account and used exclusively to fund the Department of Toxic Substances Control (Department) site remediation program pursuant to Health and Safety Code section 25351.

including interest, as are legally due. First, claimant argues that the state hazardous waste tax provisions are pre-empted by federal law in section 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The funds from the Hazardous Substance Account (HSA) under Health and Safety Code section 25330(d) may be expended for certain purposes related to the cleanup of hazardous waste sites. These enumerated purposes include the financing of governmental cleanup of a release or threatened release of a hazardous substance and the financing of cleanup costs of third parties. (Health and Safety Code section 25351(a).) Claimant states these purposes are pre-empted from state taxation because they are within the scope of CERCLA under Exxon Corp. v. Hunt, 89 L. Ed. 2d 364, 382 (1986).<sup>2</sup> Section 114(c) of CERCLA, as in effect during the periods at issue, provided in pertinent part that no person may be required to contribute to any fund, the purpose of which is to compensate claims that may be compensated under CERCLA. (42 U.S.C. section 9614.) Under California law, the HSA in part compensates cleanup claims that may be compensated under CERCLA. Therefore, California's tax is pre-empted by section 114(c) of CERCLA and the tax is invalid.

Second, claimant argues the standards contained in the Department's October 1984 regulations were mistakenly applied to its case, rather than the controlling federal regulations. Section 25345 of the Health and Safety Code imposes a tax on the waste and material specified in section 25342. Section 25342 imposes an obligation to report the total amount of hazardous wastes disposed of in the state. Section 25342 does not identify what wastes are "hazardous" within the meaning of that section, nor does it provide any specific guidelines for determining whether a waste is hazardous. It simply refers to section 25117, which section defines hazardous waste as a waste that may cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitation reversible illness or "pose a substantial or potential hazard to human health or environment." Claimant states that sections 25140 and 25141 of the Health and Safety Code, directed the Department to prepare a list of hazardous wastes and develop and adopt by regulation criteria and guidelines for the identification of hazardous wastes. The legislature further directed that until these final regulations were adopted by the Department, the regulations promulgated by the United States Environmental Protection Agency (EPA) would be in effect in

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<sup>2</sup> CERCLA imposes an excise tax on petroleum and other specified chemicals and establishes a trust fund commonly known as "Superfund." Superfund monies may be used to clean up releases of hazardous substances and to accomplish certain other purposes. 42 U.S.C. section 9611(a).

California. (Health & Saf. Code sections 25159.5 and 25159.6.) Those federal regulations are found in Title 40 of the Code of Federal Regulations.

Claimant states the Department's regulations containing the testing standards necessary to identify which substances were considered hazardous became effective October 1984 (Title 22, California Code of Regulations (CCR) sections 66693-66723 and 66680.) Until that time, no standards had been promulgated at the state level. In 1979, the Department prepared a very general list of chemical and common names to be used as a starting point. This general listing of names was too vague to be useful as a guideline and did not provide a reliable legal basis for determining whether a particular substance was hazardous for purposes of section 25345. Claimant therefore concludes that until the regulations setting forth the testing standards became effective in October 1984, the Department had not yet adopted procedures for determining whether substances were hazardous. As a consequence, until that time the question of whether a substance was hazardous was to be determined under the then existing federal EPA regulations. Thus, the wrong tests for determining whether a waste was hazardous were applied for the period prior to October 1984, and the tax should not be imposed for that period.

Third, claimant argues the assessment is illegal and unconstitutional because it attempts to impose liability for activities conducted before clear legal standards were adopted. It is well settled that the due process clause of the Fourteenth Amendment in the United States Constitution precludes a state from applying a law which is insufficiently clear and specific to give reasonable notice of the conduct to which the law applies. (See Lanzetta v. New Jersey 306 U.S. 451, 458, (1939); state statute may not be so vague, indefinite and uncertain that its meaning cannot be reasonably discerned.) Claimant contends that the California statute itself failed to provide any clear definition of the term "hazardous." Until October 1984, the only published regulations consisted of a general list of chemical and common names which was insufficient to provide adequate notice of which substances were to be considered hazardous. This defect is not cured by the later adoption of the regulations clarifying the meaning of hazardous waste. Retroactive application of the law also violates the constitutional guarantee of due process. (See Coolidge v. Long, 282 U.S. 582 (1931).)

In summary, claimant states that prior to the adoption of the regulations, the Department relied upon guidelines contained in an internal manual. The guidelines were informal, ad hoc criteria developed without the legal procedures required to have the force of law. The internal guidelines were modified on a number of occasions and therefore did not provide manufacturers with any

fixed, reliable standards for determining whether their wastes were hazardous under the California law. The guidelines provided that a waste that otherwise would be deemed hazardous could avoid such classification if the manufacturer showed that under the circumstances the waste posed no risk to the public's health and safety. The guidelines did not provide the clear, fixed, legal standard required by the law and the due process clauses of the United States and California Constitutions.

Fourth, claimant argues imposing a tax before final determination by the Department on claimant's variance request violates its constitutional rights. Claimant applied for a variance based on Title 22, CCR section 66310(a) which provides that the hazardous waste is an insignificant hazard or is regulated by another governmental agency in a consistent manner with the hazardous waste provisions. Claimant argues its wastes are insignificant as a hazard to human health and safety, livestock or wildlife because its physical and chemical characteristics are consistent with the naturally brackish environment of the Searles Lake area. The Department must respond within 60 days to the variance request under Title 22, CCR section 66310(d) and (g). It took approximately two years for the Department to resolve the variance issue and the tax continued to be assessed up to that time. Thus, not granting this refund request and forcing claimant to pay the tax before the variance request has been ruled upon deprives claimant of its rights of due process under the Fourteenth Amendment to the United States Constitution and section 7 of Article 1 of the California Constitution.

The Department contends that claimant's assertions lack merit and should be rejected. First, the Board does not have jurisdiction, over a federal pre-emption issue. The claimant demands nothing less than the Board to nullify the state's primary mechanism for funding the HSA, insofar as it was applied prior to the federal law revision in 1986. Neither the Department nor the Board has authority to refuse to enforce a state law for the reasons stated in claimant's petition for refund. No appellate court has declared that sections 25342 and 25345 of the Health and Safety Code are pre-empted or unenforceable. Therefore, pursuant to Article III, Section 3.5, subdivision (c), neither Department nor the Board may do so either.

Second, without waiving its contention that the Board does not have jurisdiction, the Department addressed the pre-emption issue on its merits. The Department argues that the federal law does not pre-empt the HSA tax. The essential element for pre-emption under CERCLA section 114(c) is that the costs associated with the state law could have been compensated under CERCLA. The Department is

not authorized to spend the HSA funds for costs that can be compensated under CERCLA. This is made clear by section 25358 which provides:

"The state shall actively seek to obtain all federal funds to which it is entitled under the federal act and shall take all actions necessary to enter into contractual or cooperative agreements under sections 104(c)(3) and 104(d)(1) of the federal act (42 U.S.C. section 9604(c)(3) and 42 U.S.C. section 9604(d)(1))."

Furthermore, section 25351 provides:

"(a) Consistent with the requirements of Section 114(c) of the federal act (42 U.S.C. Sec. 9614(c))<sup>1</sup>, moneys in the state account may be expended by the director, upon appropriation by the Legislature, for all of the following purposes:

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"(4) For payment of all costs of removal and remedial action incurred by the state, ... in response to a release or threatened release of a hazardous substance to the extent the costs are not reimbursed by the federal act.

"(5) For payment of all costs of actions taken pursuant to subdivision (b) of Section 25358.3, to the extent that these costs are not paid by the federal act."

The Department concludes that by instructing it to seek all possible federal funding, and by prohibiting HSA expenditures for removal and remedial activities which are reimbursed by CERCLA, the Legislature eliminated the possibility that HSA funds could legally be spent for purposes for which CERCLA funding is available. The Legislature went as far as possible to avoid any federal pre-emption problem, by expressly stating in section 25351(a) that HSA expenditures must be "consistent with the requirements of Section 114(c) of the federal act." Thus, by State law, there can be no expenditure of HSA funds for any purpose pre-empted by Section 114(c). Section 25351(a) is enough, even standing alone, to preclude the pre-emption problem to which claimant alludes.

The Department contends that the Department's standards, rather than federal standards, were controlling in 1984 as to the definition of a hazardous waste. The Department argues claimant's assertions have no merit and must be rejected. The Board does not have jurisdiction to declare a statute unenforceable because of an

alleged due process violation. A plain reading of section 25242 demonstrates that the Department complied with state statutes in utilizing state criteria to define materials as hazardous for all wastes disposed of during 1984. During 1984, section 25242 provided in part:

"On or about March 1, 1982, and March 1 of each year thereafter, every person who submitted for disposal off-site, or who disposed of on-site, more than 500 pounds of hazardous waste or extremely hazardous waste in the state during the preceding calendar year shall report to the board the following information: ...."

Section 25245 then provided that the information submitted under section 25242 would form the basis for the HSA tax amount which means the report which formed the basis for the 1984 tax was not due until March 1, 1985. The Department argues that the state's regulations promulgated in 1984, did not create new categories of hazardous materials. In other words, they did not take materials which had previously been non-hazardous and deem them to be henceforth hazardous. They simply classified what existing law already meant by hazardous. Section 25117, which was incorporated by reference into section 25316(g), defined hazardous waste. The definition required regulatory clarification which was provided in the 1984 regulations. A waste which was hazardous under the Departmental regulations would have been hazardous pursuant to section 25117 criteria throughout the entire year of 1984. The Department concluded that the regulations resolved any uncertainty and thus clarified existing law.

The Department states that claimant's argument is not that the Department applied sections 25242 and 25245 incorrectly, but rather that it was a violation of constitutional due process to apply a vague statutory definition to a period before that definition had been clarified or made specific. This argument has no relevance before the current forum, pursuant to Article III, Section 3.5(a) of the California Constitution, which prohibits an administrative agency from refusing to enforce a statute on grounds that it is unconstitutional, except upon a ruling by an appellate court.

The Department argues that the tax law in effect at the end of 1984 was applicable for all of 1984. Assuming arguendo that claimant is correct, and that the standard for setting the HSA tax changed on October 27, 1984, the new standard should nevertheless apply to the entire 1984 calendar year. The California courts have affirmed the retroactivity of changes in the state tax law so long as the retroactivity does not extend to a prior tax year. In Gutknecht v. City of Sausalito (1974) 43 Cal.App.3d 269, the court observed:

"Our courts have upheld the retroactive application of tax laws only where such retroactivity was limited to the current tax year [citations]. In Allen v. Franchise Tax Board, 39 Cal.2d 107, 114, the California Supreme Court stated that while '[w]e are not here concerned with the question whether the Legislature may change the rate of tax after the close of the taxable year ... [i]t may be assumed that under the state organic law changes in the rates may be enacted only in the taxable year to which they apply.'"

The Department concludes under the courts' holdings in Gutknecht, Allen, and related cases, there is no constitutional objection to applying to the entire year of 1984 a standard for taxation which did not come into effect until October of that year.

The Department concludes that claimant's arguments have no merit and must be rejected. First, the Board does not have jurisdiction to declare a statute unenforceable because of an alleged due process violation. The Board acted in accordance with sections 25342 and 25345 in collecting the tax for the 1984, 1985 and 1986 calendar years. There is no provision in any statute which suspends the assessment or collection of the HSA tax because a taxpayer's variance request is pending. Claimant argues that sections 25342 and 25345 should not have been enforced because doing so violated a constitutional right. The Department concludes that neither the Board nor the Department may decline to enforce sections 25342 and 25345 for the reasons suggested by claimant.

Second, the Department contends the variance request was irrelevant to the HSA tax. The Department has no authority to waive the HSA tax by variance because pursuant to section 25143 it has only the authority to waive the provisions of the chapter in which the authorizing statute appears. The variance statute, section 25143 appears in Chapter 6.5 of Division 20 of the Health and Safety Code. The tax statutes, sections 25342 and 25345, appear in Chapter 6.8 of the same division and code.

Third, the variance, if granted, would not have been retroactive. The Department states that claimant's constitutional argument is difficult to understand unless one assumes that a variance, once granted, is retroactive. Claimant asserts that due process is denied if the HSA tax is charged for the time period before a variance determination is made. This could only be true if the variance determination, once made, in some way impacts that time period.

Health and Safety Code section 25143 describes the variance as a waiver of statutory provisions and Title 22, CCR section 66228 defines a variance as a deviation. Both indicate that a variance is an exemption from an otherwise applicable law, and is not a determination that the law has never applied; nor is it a declaration of existing law. As an exemption, it begins at a particular point in time; that is, when the variance is granted, or at such time as expressly stated in the variance. There is nothing in statute or regulation which suggests that the variance issued pursuant to Title 22, CCR section 66310 is retroactive.

The Department concludes that the tax is owed for the three calendar years that are at issue in this appeal. The claimant's request to the Board to declare that Health and Safety Code sections 25342 and 25345 should not be enforced, either because they are pre-empted by federal law or because they are unconstitutional should be rejected. In support of this contention, the Department states it has demonstrated (1) that state law has been crafted to preclude any possible pre-emption by CERCLA section 114(c); (2) that the Department's 1984 regulatory amendments merely clarified the existing definition of hazardous waste; (3) even if the 1984 regulations had created new categories of hazardous waste, it would have been constitutionally acceptable to apply them retroactively to the beginning of 1984; and (4) had the Department granted the variance requested by claimant, it would not have affected its tax assessment.

#### Analysis and Conclusions

We begin the analysis of this case with the constitutional issues raised by the claimant. Whether certain provisions of the Hazardous Waste Control Law and corresponding sections of the Revenue and Taxation Code are pre-empted by CERCLA and whether the claimant was deprived of its due process rights are issues beyond the jurisdiction of the Board. This conclusion is based upon Article III, Section 3.5 of the California Constitution which provides that an administrative agency has no power to declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. Consequently, the Board may not refuse to enforce any statute in the absence of an appellate court determination of invalidity or a superior court order.

The issue which remains left for resolution is whether the Department failed to apply the proper regulatory standards and, therefore, improperly determined that certain wastes are hazardous in claimant's case.

The Department concluded that the fly ash was hazardous because its vanadium content exceeded the legal limit under the regulations; that the lime was hazardous because its pH content was equal to the lowest pH level treated as hazardous under the regulations; and that the bottom ash should be treated as hazardous under the regulation because insufficient information was available to determine that it was nonhazardous.

Claimant argues it is not liable for any tax imposed with respect to any activities conducted prior to the effective date of the Departmental regulations adopted in October 1984. As a consequence, until that time, the question of whether a substance was hazardous was to be determined under the then existing federal EPA regulations. Thus, claimant concludes that the wrong tests for determining whether a waste was hazardous were applied for the period prior to October 1984 because the wrong set of regulations were applied.

Pursuant to section 43301 of the Revenue and Taxation Code, the Board may not accept or consider a petition for redetermination of taxes determined under the Hazardous Substances Tax Law 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.

The claim for refund in this case is founded upon the grounds that the Department improperly or erroneously determined that certain wastes were hazardous. The Legislature provided that the Department, not the Board, is the appropriate agency to determine whether a particular substance is a hazardous waste. The Department is the agency empowered to determine what substances and wastes are hazardous based on certain federal and state criteria. There was no evidence presented that claimant appealed the classification of the waste as hazardous to the Director as required under Revenue and Taxation Code section 43301. We believe the primary issue is whether the wastes in question were hazardous. Thus, the Board is not the proper forum for the resolution of this issue because of the limitations imposed by section 43301 of the Revenue and Taxation Code. The resolution of the issue will involve extensive and protracted expert witness testimony on technical and scientific issues that are entirely inappropriate for the consideration of the Board.

The claimant argued that the internal guidelines did not provide claimant with the guidance required by the United States and California Constitutions. First, the guidelines were informal

ad hoc criteria developed without the legal procedures required to have the force of law. Second, the internal guidelines were modified on a number of occasions and therefore did not provide any fixed, reliable standards for determining whether their wastes were hazardous under the California law. Third, the guidelines provided that a waste that otherwise would be deemed hazardous could avoid such classification, if the manufacturer showed that under the circumstances the waste posed no risk to the public health and safety. Thus, claimant argues only when the Departmental regulations were adopted setting forth clear tests for identifying hazardous wastes could it reasonably ascertain whether its wastes were in fact hazardous under Health and Safety Code section 25345. Whether the Department inappropriately implemented rules or standards that were not promulgated under the Administrative Procedure Act must be resolved through the legal processes at the Office of Administrative Law and/or the courts.

We conclude the Board does not have jurisdiction to resolve the constitutional issues nor the issue that the waste was not hazardous founded upon the grounds that the Department improperly or erroneously determined that the various substances were hazardous.

Recommendation

It is recommended that the claim be denied.

Cynthia Spencer-Ayres  
Cynthia Spencer-Ayres, Staff Counsel

JA

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Date