STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petitions for Redetermination Under the Hazardous Substances Tax Law of:	)	DECISION AND RECOMMENDATION
	)	Nos.
petitioner	)	

The Appeals conference in the above-referenced matters was held by H. L. Cohen, Senior Staff Counsel, on Oc in Sacramento, California.

Appearing for Petitioner:

Appearing for the Department of Toxic Substances Control (DTSC): Ms. S. Small, Staff Counsel

Appearing for the Environmental Fees Division of the Board (EFD): Ms. D. Kalfsbeek, Senior Tax Auditor

Observer: Mr. D. Fillman, Staff Counsel, Sales and Use Tax Section

Protested Items

The liability is:

Small Treatment Facility Fee 7/1/87 - 6/30/88

Small Treatment Facility Fee 7/1/88 - 6/30/89

TOTAL

[1/]A determination for $: based on operation of a small storage facility was issued January 26, 1989. An increase letter was issued December 16, 1992, based on the operation of a small treatment facility.

Contentions

1. Petitioner contends that the amount of hazardous waste which petitioner treated was significantly less than the amount listed by the audit.

2. The waste which petitioner treated was exempt from fees during the period in question, thus, no fees are due.

3. Petitioner was operating a mini-treatment rather than a small treatment facility; and if fees are due, they should be based on the mini-treatment classification.

Summary

Petitioner is a corporation which is in the business of manufacturing and selling building materials. It ceased operations as a hazardous waste facility on December 5, 1988 and its interim status document, which allowed it to operate, was rescinded on January 9, 1989. No fees have been assessed for any period after fiscal year 1988/1989.

At issue is the handling of waste products from petitioner's plastic coated wood product plant located in California.

An investigation by the Board auditor revealed that petitioner was incinerating waste hydraulic oil and oil filters. In addition, the County Air Pollution Control District reported that petitioner was incinerating hydrochloric acid and sulfuric acid.

Petitioner states that the report of incinerating hydrochloric and sulfuric acids is in error. Neither substance is used in petitioner's manufacturing process, although small amounts may be used as reagents in its laboratory. Neither substance can be incinerated. Petitioner believes that the inspector erroneously concluded that drums marked "caustic" contained acids. Actually, they contained mild alkali which were not toxic.

Petitioner states that it does burn approximately 660 gallons per year of used oil. This corresponds to 4,831 pounds of oil. This oil is burned in a boiler in lieu of natural gas to reduce the amount of natural gas consumed. Petitioner states that the used oil is not regarded as a hazardous waste at the present, as is shown by the fact that the petitioner is not required at this time to hold a Hazardous Waste Facility Permit.

Although the used oil was considered hazardous waste during the period in question, petitioner believes there was an exemption for burning used oil in a boiler at that time. Petitioner states that other waste products which are burned in the incinerator were not hazardous and were not mixed with the used oil to create a single stream of waste which would have contained hazardous substances. Petitioner contends, therefore, that even if it is regarded as treating hazardous waste, the only hazardous waste would be the used oil, the quantity of which is in the mini-treatment classification.

EFD points out that the mini-treatment classification was established beginning with the 1988-1989 fiscal year. EFD also states that even if the burning of the used oil was exempt during the period in question, petitioner would be liable for fees because it was authorized to operate a hazardous waste facility during the period. The fact that no nonexempt activities were actually carried out is immaterial.

Analysis and Conclusion

Section 25205.2 of the Health and Safety Code provides that, with exceptions not here applicable, each operator of a hazardous waste facility shall pay a fee for each state fiscal year or portion thereof based on the size and type of facility. Subdivision (b) of Section 25205.1 defines facility to include any structure and all contiguous land used for the treatment, transfer, storage, resource recovery, disposal, or recycling of hazardous waste which has been issued a permit or grant of interim status or which is operated in a manner that would require the holding of a permit or a grant of interim status. Petitioner had been granted interim status and was the operator of a hazardous waste facility during both periods in question. Inasmuch as petitioner operated a permitted facility, petitioner is liable for a facility fee. The only question is what classification is properly applied to petitioner.

Section 25123.5 defines "treatment" to include 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 removes or reduces the harmful properties or characteristics. Petitioner apparently concedes that the used oil constituted hazardous waste. The burning of the used oil changed the physical, chemical, and biological characteristics of the used oil in a manner which reduced its hazard. Accordingly, the process must be regarded as treatment.

Subdivision (i) of Section 25205.1 in the form in effect prior to July 1, 1988 defined a small treatment facility as a facility which treated less than 1,000 tons of hazardous waste per month. Effective July 1, 1988, Section 25205.1 was amended. A mini-treatment facility classification was added in subdivision (g) and was defined as a facility which treats 1,000 pounds or less of hazardous waste per month. Inasmuch as there was no mini-treatment classification for fiscal year 1987-1988, petitioner is liable for fees as a small treatment facility for that period. This is true even if the material treated was exempt because petitioner was authorized to operate a treatment facility, and the small treatment facility was the smallest category in the statute at the time.

Petitioner's description of its process indicates the used oil and oil filters were the only hazardous waste which it treated. Petitioner states that the amount treated was 4,831 pounds per year. This calculates to about 400 pounds per month which is well within the mini-treatment facility classification. Again, even if the burning of the oil was exempt, petitioner would be liable for the fee because it was authorized to operate a hazardous treatment facility.

Recommendation

Deny the petition. Grant the petition in part by reducing the fee from that for a small treatment facility to that for a mini-treatment facility.

H. L. Cohen, Senior Staff Counsel Date