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US Contractor Operating on Federal Property

A person contracted with the United States Government to demilitarize napalm and constructed a facility on federal land for this purpose. The person applied for and was issued a hazardous waste treatment facility permit. The person, not the United States Government, was the operator of the facility and was liable for the facility fee. 1/11/94.

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

LEGAL DIVISION, APPEALS REVIEW SECTION

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

The Appeals conference in the above-referenced matters was held by Senior Staff Counsel James E. Mahler on (redacted), in Ventura, California.

Appearing for Petitioner: (Redacted)
(Redacted)
(Redacted)
(Redacted)

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

Appearing for the Special
Taxes Department: E. V. Anderson
Administrator

Protested items

Petitioner protests facility fees assessed against it as a small treatment or minitreatment facility as follows:

<u>Account</u>	<u>Classification</u>	<u>Period</u>	<u>Fee</u>
(Redacted)	Small	7/1/88 – 6/30/89	\$(Redacted)
(Redacted)	Small	7/1/89 – 6/30/90	\$(Redacted)
(Redacted)	Mini	7/1/90 – 6/30/91	\$(Redacted)

Petitioner's Contention

1. The fees are liabilities of the United States Government, not petitioner.
2. Petitioner did not treat any hazardous wastes or recycled materials at its facility.
3. If any fees are due, the assessed amounts are inaccurate and excessive.

Summary

Petitioner is a partnership or joint venture which contracted with the Department of Defense (DOD) to "demilitarize" napalm-B for the United States Navy. The contract with DOD is not in the record before us, but DOD's request for bids stated (on the top of page 1): "IT HAS BEEN DETERMINED THAT THIS PROPERTY IS NO LONGER NEEDED BY THE FEDERAL GOVERNMENT".

The "demilitarization" process involved boiling the napalm to separate it into its constituent chemicals, namely gasoline, benzene and polystyrene. It appears that petitioner was also required to decontaminate and remove the containers in which the napalm had been stored. Petitioner was allowed to keep the constituents and the containers as part of its compensation.

In 1987, petitioner began to construct a facility to process the napalm at the Naval Weapons Station in (redacted) County. In June of that year, it applied for a permit for the site from the Environmental Protection Agency. Petitioner identified itself as the operator of the facility on the permit application, while the U.S. Government was shown as legal owner. Petitioner as "operator" and the Naval Weapons Station as "owner" also received a permit from the California Department of Health Services (now the Department of Toxic Substances Control, hereinafter "the Department"). The Department issued the permit for use of the site as a "hazardous waste treatment facility" to "demilitarize and recycle" napalm.

On October 24, 1988, Mr. (redacted), petitioner's (redacted), sent a memo to Mr. (redacted), DOD's Contract Representative for this job. Mr. (redacted) indicated that petitioner, as the employer at the site, was required to comply with State labor regulations; and that the project would be delayed if the Navy would not allow petitioner to provide appropriate rest and meal facilities for petitioner's workers.

Representatives of petitioner and DOD met with representatives of the local sanitation district on December 7, 1988. The sanitation district required an analysis of the first batch of waste water generated at the facility. To control the costs of a laboratory analysis, DOD agreed to research its files to determine what contaminants had been introduced into the napalm liquid. The sanitation district was to bill petitioner for the inspection fees.

On December 13, 1988, DOD advised petitioner of the results of a recent project review. The review noted numerous equipment defects and other "concerns" relating primarily to station safety and OSHA

regulations. DOD recognized that the facility had not yet been completed, and indicated that petitioner would not receive a Notice to Proceed until the problems were rectified.

On November 1, 1989, apparently in response to a Report of Violation issued by the Department, the Navy wrote to the Department that petitioner would be responsible for correcting the violations. The letter went on to state: "The vast majority of these [containers of napalm] are not leaking and are considered to be hazardous material, not hazardous waste. It is possible that these canisters could still be used for their intended purpose if the need arises."

Petitioner recovered several tons of polystyrene and gasoline from the napalm, as well as 123 canisters. It sold the polystyrene but apparently still has the gasoline and canisters. We do not know what happened to the benzene in the napalm.

The parties appear to agree that petitioner processed a total of 90,710 pounds of napalm at the facility, and that processing ceased in February 1990. However, they do not agree when petitioner started the processing. According to the Department, operations began on June 14, 1989; according to petitioner, construction problems delayed the start-up until August 4, 1989.

Petitioner's records have been lost, and the parties rely on affidavits to support their respective positions. The Department relies on an affidavit from Mr. (redacted) stating that petitioner "process the napalm between June 14, 1989 and February 8, 1990 (approximately 8 months)." Petitioner counters with an affidavit from Mr. (redacted). To prove that petitioner could not have started operations in June, Mr. (redacted) alleges that a report to the California Regional Water Quality Control Board shows that no water samples were collected or analyzed during the second quarter of 1989. A copy of the report is purportedly attached to Mr. (redacted)'s affidavit, but in fact no copy is attached.

Analysis and Conclusions

1. At all relevant times, Section 25205.2 of the Health and Safety Code has required each "operator" of a hazardous waste facility to pay an annual fee. Petitioner contends that the United States was the "operator" of this facility and is thus responsible for any fees.

Petitioner points out that the United States was shown as the "owner" of facility on the permit applications. Petitioner also alleges that the Navy "controlled individual tasks, identity of personnel involved in each task, the equipment used, the sequence of operations, shutdown procedures, as well as how, when and where each task of the operation was to be performed." Petitioner relies on the December 13, 1988 notice from DOD to support these allegations.

We find no merit in this contention. The December 13, 1988 notice from DOD simply requires petitioner to comply with state and federal safety regulations as a condition for authorization to proceed with construction of the facility, and specifies the steps needed to comply with those regulations. If that were enough to make the United States the operator of the facility, the United States would be the operator of almost every business in the country.

It is true that the United States was described as the “owner” of the facility on the permit applications. On those same applications, however, petitioner admitted that it was the “operator” of the facility. It also considered itself the employer of the workers at the site, and the United States regarded petitioner as the party responsible for correcting hazardous waste violations at the site.

In short, petitioner contracted to process napalm for the government. Under United States v. New Mexico, 455 U.S. 720 (71 L.Ed.2d 580, 102 S.Ct. 1373 [1982]), we must presume that petitioner performed this function as a private contractor and not as an agent or instrumentality of the United States. Petitioner has not presented a copy of its contract or any other evidence to rebut the presumption. Accordingly, we conclude that petitioner was the operator of the facility.

2. Health and Safety Code Section 25117 defines “hazardous waste” as “a waste, or combination of wastes” with certain characteristics. Section 25124 of the Code defined “waste” to include any “recyclable material” or (as amended in 1988) to include certain types of “discarded material” and material which is “recycled”. The Department’s regulations state that material is a “waste” if it is managed by being “reclaimed”; and “reclaimed” means that “a material is processed to recover a usable product. . . .” (Cal Code of Regs., Title 22, §§ 66261.2(d) (3) and 66260.10.)

Petitioner concedes that the napalm and its constituent materials were hazardous, but contends they were not “waste”. (Citing Liquid Chemical Corp. v. Department of Health Services [1991] 227 Cal. App. 3d 1682 and American Mining Congress v. U.S. Environmental Protection Agency [1987] 824 F.2d 1177.) Petitioner further argues that processing the napalm was not “treatment” of a hazardous waste, so no treatment fees are due. The Department responds that the napalm must have been “waste” because, inter alia, the Navy hired petitioner to get rid of it.

The Department also argues that this issue is not properly before us because it was not raised in the written petition for redetermination, and because the Board has no jurisdiction to address the question. Petitioner has now filed a written amendment to the petition which is sufficient to counter the Department’s first objection. However, we agree with the Department’s second point, that the Board lacks jurisdiction.

Revenue and Taxation Code Section 43301, second paragraph, provides:

“No petition for redetermination of taxes determined under [Hazardous Substances Tax Law] 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.”

Article II, section D, of the Interagency Agreement between this Board and the Department (executed by the Board’s Executive Director on August 23, 1993, and by the Department’s Director on September 10, 1993) is entitled “Decisions Concerning Whether a Waste is Hazardous” and provides:

“The Department has the sole discretion to determine whether a substance is a waste and/or a hazardous waste, and the Board staff will not make such a determination. Any disputes concerning whether a substance is a hazardous waste will be resolved by the Department.

“It is agreed that the Department will implement a procedure for resolving disputes concerning the classification of waste that provides the feepayer an opportunity to present evidence and argument concerning the classification to a representative of the Department who is authorized to resolve the dispute.”

Petitioner notes that the Navy, in its November 1, 1989 letter to the Department, stated that napalm containers are hazardous material but not hazardous waste. Petitioner alleges that the Department failed to challenge or object to the Navy’s position, and appears to view this failure as an implied finding that the napalm itself, in addition to the containers, was not a waste. In fact, however, the Department did challenge and object to the Navy’s position. It requested this Board to issue notices of determination, implying a preliminary finding that the napalm was a hazardous waste. Administrative review of that preliminary finding must be done by the Department, not by this Board.

We urge petitioner to contact the Department, in writing, within thirty days of the date this report is mailed, to arrange a meeting with a representative of the Department who is authorized to resolve the dispute regarding the classification of napalm and its constituent chemicals. As soon thereafter as possible, the Department should notify us of the results.

Petitioner should send us a copy of its letter to the Department. If petitioner does not file a request for a meeting with the Department within thirty days, we will assume that petitioner concedes the classification issue and recommend that the petitions for redetermination be processed accordingly. Otherwise, we recommend that the petitions be held in abeyance pending receipt of notice from the Department as to the results of the meeting with petitioner.

3. Assuming the Department rules that napalm-B or its constituents are “hazardous wastes”, the remaining question is whether the fees were properly calculated. Under Health and Safety Code Section 25205.2, the amount of the fee depends on the size and type of the facility: a “minitreatment facility” is charged a lower fee than a “small treatment facility”. A minitreatment facility is one which “treats or recycles” 1,000 pounds or less of hazardous waste during any one month; a small treatment facility is one which treats or recycles more than 1,000 pounds but less than 1,000 tons per month. (H&S Code, § 25205.1, subds. (g) and (j).)

The parties agree that petitioner processed 90,710 pounds of napalm. Relying on Mr. (redacted)’s affidavit, the Department concluded that the processing occurred during the eight months from June 14, 1989, through February 8, 1990, an average of about 11,300 pounds per month. The Department assumed that petitioner processed more than 1,000 pounds during the two weeks from June 14, 1989, through the end of that fiscal year (1988-89), and processed the remainder during the next fiscal year (1989-90). Petitioner was thus classified as a small treatment facility for both those fiscal years. For fiscal year 1990-91, when no napalm was processed, petitioner was classified as a minitreatment facility.

Petitioner disagrees with the Department on two points. It contends, first, that it did not process any napalm during fiscal year 1988-89 because construction problems delayed the start of the operations; and second, that it was not a “treatment facility” at all in the years when no napalm was processed, so no fees should be assessed for those years.

On the first point, Revenue and Taxation Code Section 43201 authorizes the Board to issue determinations “based on any information available to it”, including reasonable estimates and assumptions. The taxpayer bears the burden of proving that a determination issued by the Board is not correct. (See H. J. Heinz Company v. State Board of Equalization [1962] 209 Cal.App.2d 1.) The Board is entitled to documentation in support of claimed exemptions or exclusions, and testimony alone will not normally suffice. (See Paine v. State Bd. of Equalization [1982] 137 Cal.App.3d 438.) While these rules were developed in the context of sales and use tax determinations, we see no reason to create different rules for determinations under the Hazardous Substances Tax Law.

We agree with petitioner that Mr. (redacted)’s affidavit is ambiguous as to whether petitioner processed napalm during fiscal year 1988-89. Nevertheless, the affidavit is susceptible to the interpretation urged by the Department, and it is therefore a reasonable basis for the determination. Petitioner has failed to establish that it did no processing in that year. The report to the Water Quality Control Board, upon which petitioner relies, has not been presented in evidence.

Petitioner has no records to show when it began processing operations, or to show how much napalm it processed in any particular month. Mr. (redacted)’s affidavit is not an adequate substitute for

contemporaneous business records and is insufficient, standing alone, to show that the determinations are incorrect.

On the second point, petitioner relies on the wording of Health and Safety Code Section 25205.1, subdivision (g), which defines “minitreatment facility” as one which “treats or recycles” 1,000 pounds “or less” of hazardous waste. Petitioner reads this to mean that some quantity greater than zero must be processed, and if nothing is processed, no fee is due.

We do not accept this reading of the statute. In our view, a person who treats no hazardous waste has treated less than 1,000 pounds. If the person holds a permit as operator of a treatment facility, he or she is properly considered a minitreatment facility and the appropriate fee is due.

We find support for our interpretation in subdivision (c) of Health and Safety Code Section 25205.2. That subdivision allows relief from the facility fee for persons who have received a closure or variance from the requirement of holding a facility permit, beginning with the fiscal year following the fiscal year in which the closure or variance was granted. Relief from the fee is conditioned on the issuance of a closure or variance, not on meeting the requirements for closure or variance. Thus, a person who has ceased operations but not as yet received a closure or variance is still required to pay the fee, even if no hazardous waste is being processed. In other words, the fact that no waste is being processed does not in itself warrant a fee exemption.

For these reasons, the evidence currently available does not provide a basis for reduction of the assessed fees. If petitioner wishes to present additional evidence (such as the report to the Water Quality Control Board) it may do so in a Request for Reconsideration. The procedures for filing such a request are outlined in the cover letter accompanying this Decision and Recommendation.

Recommendation

If petitioner files a request for a meeting with the Department on the classification issue within thirty days, hold the petitions for redetermination in abeyance until the Department decides whether the materials should be reclassified. If petitioner does not request a meeting, or if the Department declines to reclassify the materials, redetermine the fees without adjustment.

James E. Mahler, Senior Staff Counsel

Date

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