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#### Closure Settlement Negotiations

The fact that a feepayer is negotiating a settlement with the Department of Toxic Substances Control concerning the operation of its facility does not stay the collection of fees for later periods. 9/15/93. (Am 2003-1).

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition )  
for Redetermination Under the ) DECISION AND RECOMMENDATION  
Hazardous Substances Tax Law )  
of: )  
)  
)  
)  
)  
)  
)  
Petitioner )

The above-referenced matter came on regularly before Anthony I. Picciano on (redacted), in Torrance, California.

Appearing for Petitioner: (Redacted)

Appearing for the Department of Toxic Substances Control (DTSC): No appearance made.

Appearing for the Special Taxes Division, State Board of Equalization (STD): No appearance made.

Protested item

The protested tax liability for the period July 1, 1990, through June 30, 1991, is:

<u>Item</u>	<u>Amount</u>
Hazardous Waste Facility Fee for the period 7/1/90 to 6/30/91 based on the rate established for a small treatment facility.	\$ (redacted)

### Petitioner's Contentions

- Petitioner contends that it has complied with the cease and desist order it received and has not treated nor stored, any hazardous waste since July 1990.
- In that the Department of Toxic Substances (DTSC) has entered into settlement negotiations, no facilities fees are due until the review is completed.

### Summary

Petitioner treated hazardous waste at its site located at (redacted). Petitioner is a solvent recycling facility that had been receiving solvents from mostly small generators, such as, the plastics, paint and coating, fiberglass, and laboratory industries. After distillation, the recycled solvents were sold back to the same industries from which they came. (Redacted) corresponded with the DTSC and explained that it is interested in acquiring petitioner. It is (redacted)'s intention to purchase petitioner once petitioner reaches settlement with DTSC and receives tentative authority to operate as a hazardous waste facility.

The DTSC issued a cease and desist order to stop all hazardous waste treatment and storage operations. Petitioner initially received an oral order to cease and desist in July 1990 at which time it stopped treating hazardous waste. A written order was issued by DTSC in October 1990.

The DTSC entered into settlement negotiations with petitioner which were conducted during several meetings between the parties. It appears it was petitioner's hope, and DTSC's intention, that petitioner reopen its facility as a result of the negotiated settlement. The parties have not entered into a written settlement agreement. Thus, DTSC has not authorized the site to resume operations as a facility, nor has the site been certified closed by the DTSC.

The Board indicates that the fee was assessed at the small treatment facility rate in accordance with Health and Safety Code Section 25205.2. The Board is aware that DTSC and petitioner were in settlement negotiations. The Board asserts that petitioner owes the small treatment facility fees for fiscal year 1990-91 through the present, unless and until, it completes the necessary closure procedures and is certified as closed by the DTSC. The Board indicates that DTSC does not have the authority to settle the facility fee determination. See attached Exhibit "A".

Petitioner presented a letter (Exhibit "B") which indicates that the DTSC does not intend to pursue facility fees for the years since the issuance of the cease and desist order, however, the Board might pursue collection of the fees. The letter states that the collection of fees is based on the fact that the facility had been operating in such a manner that it is required to obtain a permit. See Health and Safety Code Section 25205.1(b) and 25205.2(c).

### Analysis and Conclusions

Section 25205.2 of the Health and Safety Code provides in subdivision (a) that every operator of a

hazardous waste facility must pay a facility fee for each fiscal year, or portion thereof, based on the size and type of facility. The amounts and types of fees are specified in Section 25205.4. There are fees for storage, treatment, and disposal. If a facility falls into more than one category, only the rate for the highest fee category applies.

Section 25205.2, in the form in effect during the 1988-89 fiscal year, provided in subdivision (c) that a person who is in a closure period, approved by DTSC, or who is issued a variance from the requirement of obtaining a hazardous waste facilities permit, or who is issued a grant of interim status, is not subject to the facility fee for any fiscal year following the fiscal year in which the variance or closure was granted, or approved by DTSC. For fiscal year 1989-90 and the following periods, the fee also did not apply in the fiscal year following any fiscal year in which the facility had completed all activities necessary for DTSC to approve the closure including, but not limited to, the submittal to DTSC of certification that the closure activities have been completed.

The action by petitioner of ceasing to handle hazardous waste, does not initiate a closure period. The closure process presumes that the facility is still being operated, if only for the purposes of completing the closure process. A facility is subject to regulation until closure is complete; thus, the fees, which are intended to reimburse DTSC for regulatory costs, apply until closure is completed. Closure for the periods in question must have been granted or approved by DTSC. We conclude that fees continue to be due until the approvals by DTSC, as specified in the statutes and regulations, are obtained. This conclusion is in accordance with Appeals Review staff recommendations in similar cases.

The fact that petitioner entered into settlement negotiations with the DTSC has no bearing on whether or not it owes the fees until the settlement becomes effective. Petitioner has not provided us, or are we aware of, any provision under the law that allows DTSC to unilaterally cancel the collection of fees. Given that circumstance, and the above cited authority, we have no choice but to uphold the Board's position that the fees are still due.

Section 25205.1 was modified, effective in the 1988-90 fiscal year, to add a mini treatment facility category. Section 25205.4 provides that the fee for a mini treatment facility is one-quarter the fee of a small treatment facility. Since petitioner ceased activities involving hazardous waste in July 1990, the mini treatment facility fee should apply to the period in question.

#### Recommendation

Reduce the fees for 1990-91 to \$10,530. Redetermine without further change.

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Anthony I. Picciano, Staff Counsel  
W/Exhibits A & B

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Date



STATE BOARD OF EQUALIZATION  
1020 N STREET, SACRAMENTO, CALIFORNIA  
P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001  
(916) 323-9499

October 8, 1992

(Redacted)

WILLIAM M. BENNETT  
First District, (illegible)  
BRAD SHERMAN  
Second District, Los Angeles  
ERNEST J. DRONENBURG JR.  
Third District, San Diego  
MATTHEW K. FONG  
Fourth District, Los Angeles  
GRAY DAVIS  
*Controller, Sacramento*

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BURTON W. OLIVER  
*Executive Director*

#### PETITION FOR REDETERMINATION

Dear Mr. (Redacted)

This is in response to your letter dated September 21, 1992, regarding the Petition for Redetermination of the Notice of Facility Fee noted above. You stated that on September 17, 1992, you had a meeting with Nancy Long, the Department's staff attorney and Florence Pearson of DTSC, where the past facility fees were discussed. You state that it was suggested by DTSC that the facility fees for 1990/91 would be included as part of the settlement.

We have discussed this with Nancy Long who has indicated that the facility fees are not part of the settlement. DTSC does not have the authority to settle the facility fee determination.

Based on this information it is still our position that your facility is subject to hazardous waste facility fees until the site receives certified closure from DOHS or a variance is granted.

Based on the above information it is our position that your petition for redetermination for fiscal year 1990/1991 be denied and the amount redetermined with no adjustment.

If you are still in disagreement with the above, please request a hearing within 30 days from the date of this letter. If a response is not received within the specified time, we will presume that you are no longer interested in pursuing this matter and will recommend redetermination with no adjustment for the fiscal year 1990/1991.

If you have any questions, please do not hesitate to contact this office.

Sincerely,

Theresa Portillo  
Senior Tax Auditor  
Environmental Fees Section  
Special Taxes Division

TMP: klh

B:\

Enclosure

Cc: Jo Nelson, Fees Unit  
Dept. of Toxic Substances Control

DEPARTMENT OF TOXIC SUBSTANCES CONTROL

400 (Illegible) Street, 4<sup>th</sup> Floor

P.O. Box (Illegible)

Sacramento, CA (Illegible)

(916)327-0979

December 8, 1992

(Redacted)

(Redacted)

(Redacted)

Dear Mr. (Redacted):

I am in receipt of your letter, dated October 19, 1992. After careful consideration of your proposal, the Department would like to respond to some of the points raised in your letter.

First, regarding the types of waste the facility would be allowed to accept under a stipulated agreement, the Department is willing to allow only wastes which would be processed in the distillation unit. This authorization is consistent with both (redacted) and (redacted)'s previous correspondence indicating the need to service the acetone manufacturing industry. Any additional wastes would need to be addressed in the permit process.

As we discussed briefly on the telephone, the Department does not intend to pursue facility fees for the years since the issuance of the Cease and Desist Order. However, as we indicated at our September 17 meeting, the Board of Equalization may pursue collection of the fees based on the fact the facility has been previously "operating in such a manner that the facility is required to obtain a permit" and the facility is not "in a closure period approved by the department." (Health & Saf. Code, §§ 25205.1, subd. (b) and 25205.2, subd. (c).)

I have had an opportunity to review the Haz\Control settlement. Without being privy to the negotiations concerning this case, it is not clear to me that the improvements to the facility were necessarily credited "dollar for dollar." Further, it should be noted that the improvements to the facility were for a roof over the storage area and an air scrubber which were probably not required for statutory or regulatory compliance. The improvements described in your letter, concrete work and fencing, are usually required for compliance purposes.

EXHIBIT "B"