

**This document has been retyped from an original copy.
Original copies can be provided electronically by request.**

Determinations Facility 1

The statute of limitations for issuing a notice of determination concerning a facility fee prepayment begins on the date that the annual fee was due at the end of the year. If a deficiency determination for a facility fee prepayment issues within three years from the due date of the prepayment, interest on the prepayment begins to accrue as of the due date of the prepayment. However, if the Board is relying on the statutory period which begins to run on the due date of the annual fee at the end of the year, interest begins to accrue as of that date. 5/17/95.

Memorandum

To: Lou Feletto – MIC: 57
Environmental Fees Division

Date: May 17, 1995

From: Janet Vining
Legal Division

Subject: **Statute of Limitations for Facility Fee Prepayments**

I am writing in response to your e-mail message of March 6, requesting an opinion concerning the statute of limitations for the facility fee prepayment. For the reasons set forth below, we conclude that the statute of limitations on the facility fee prepayment commences to run as of the date the annual fee is due at the end of the year. However, as discussed below, we recommend that, where possible, the Board issue a deficiency determination for the prepayment within three years from the date the prepayment is due.

The facility fee is imposed in Health and Safety Code section 25205.2, but the manner in which it is reported and paid is set forth in the Revenue and Taxation Code. Until the end of fiscal year 1990-91, Revenue and Taxation Code section 43152.6 provided that the hazardous waste facility fee was due and payable to the Board in two installments, in the fall and spring of the fiscal year for which the fee was collected.

In late 1991, section 43152.6 was amended to provide that the facility fee is due and payable annually on or before the last day of January, and each facility operator subject to the fee must file an annual return and pay the appropriate fee. Section 43152.12, which was also added in 1991, requires every facility operator subject to the facility fee to make a prepayment of at least 50% of the fee on or before April 25 of each calendar year. Section 43152.12(d) specifies that any person who fails to make a required prepayment is subject to the same penalties and interest that apply to all late-paid fees. Pursuant to section 43152.6, the Board will credit the prepayment made pursuant to section 43152.12 against the amount due with the annual return.

Several tax programs administered by the Board require prepayments, but none is identical to the facility fee prepayment. For example, both the Sales and Use Tax Law (Rev. & Tax. Code, §§ 6470, et.

seq.) and the Motor Vehicle Fuel License Tax Law (Rev. & Tax. Code, §§ 7659, et. seq.) require certain taxpayers to make prepayments. Both of these statutes impose a penalty, but not interest, for the failure to make a prepayment. The fact that such delinquent prepayments are not subject to interest suggest that they are not in the nature of separate taxes with separate due dates, but are instead installments required to be paid on tax liabilities that are due at the end of the reporting period.

The Insurance Tax Law requires a prepayment of insurance tax by certain taxpayers (Rev. & Tax. Code, §§ 12251, et. seq.), and imposes both penalty and interest on any insurer who fails to make a prepayment within the time required (§ 12258). The interest accrues from the due date of the prepayment until the date of payment, but not for any period after the due date of the annual tax. This suggests that the insurance tax prepayment is actually a separate liability with a separate due date. However, the statute of limitations for issuing an insurance tax deficiency determination runs from April 1 of the year following the year for which the amount of tax is assessed, which is the date the annual tax is due (Rev. & Tax. Code, § 12432). Thus, the statute of limitations runs from the date the annual tax is due, whether the deficiency determination includes the prepayment or not.

The current hazardous waste facility fee provisions are similar to the Insurance Tax provisions, in that late prepayments are subject to interest and penalties. However, the statute of limitations for issuing a deficiency determination in the Hazardous Substances Tax Law (Rev. & Tax. Code § 43202) only states that the statutory period runs from “the date when the amount should have been paid or the return was due”. Unlike the Insurance Tax Law, the Hazardous Substances Tax Law does not specify the date when the limitation period begins. Thus, the Hazardous Substances Tax Law does not provide explicit guidance concerning the application of the statute of limitations to the facility fee prepayment.

A reasonable argument can be made for either of two outcomes: the statute of limitations for the facility fee prepayment runs from the due date for the annual facility fee, or from the due date for the prepayment.

The annual fee is due by January 31, and is due for each reporting period “or portion thereof” (see Health & Saf. Code, § 25205.2(a)). The Board has interpreted this language to mean that a facility must pay the entire annual facility fee even if it only operated during a portion of the reporting period. Thus, a facility that started operating in the middle of the fiscal year would nonetheless be liable for the entire facility fee. If the prepayment due date had passed, the entire fee would be due January 31. In fact, Revenue and Taxation Code section 43152.6 requires that “the fee imposed pursuant to Section 25205.2 of the Health and Safety Code” (that is, the entire annual facility fee) is due January 31. Revenue and Taxation Code section 43152.12 then further provides that a prepayment is due April 25, and the facility

Lou Feletto
May 17, 1995
Page 3

operator can take a credit for the prepayment on its annual facility fee return. Based on the fact that one annual facility fee is imposed in Health and Safety Code section 25205.2, and the entire annual fee is due if the facility operates during any portion of the reporting period, we conclude that the statute of limitations for any unpaid portion of the annual facility fee (whether a prepayment was made or not) begins to run on January 31, when the annual facility fee is due.

We believe that the above analysis is compelling. However, a reasonable argument could also be made that, since 1991, when section 43152.12 was added to the Revenue and Taxation Code, the statute of limitations for issuing a deficiency determination has run from April 25. This interpretation favors the literal language of section 43202, which states that April 25 is the date "when the amount should have been paid or the return was due". For this reason, we recommend that, where possible, the Board issue a deficiency determination for a facility fee prepayment within three years from the April 25 due date of that prepayment.

If a deficiency determination for a facility fee prepayment issues within three years from April 25, interest on the prepayment begins to accrue as of April 25. However, if the Board is relying on a statutory period which begins to run January 31, interest should begin to accrue as of that date.

Revenue and Taxation Code Section 43452 states that a claim for refund must be filed within three years from the date the fee was due and payable. In applying this statute of limitations to a claim for refund of a facility fee prepayment, we should utilize the same due date that was used in the issuance of the notice of determination for the prepayment.

Please contact me if you would like to discuss this opinion or have any questions.

Janet Vining

JV:wk
ffprepay.lf

Cc: Stephen R. Rudd – MIC: 57
David McKillip – MIC: 57
Carol Reisinger – MIC: 57
Larry Augusta – MIC: 82