

Memorandum

To : Bob Frank
Fuel Taxes Division MIC:30

Date: April 24, 1995

From : Stella Levy
Staff Counsel

Stella Levy

Subject:

I am responding to your request for a legal opinion as to whether and to what extent the bankruptcy of P affects its liability for the Childhood Lead Fee (Fee). has paid the Fee and is seeking a refund on numerous grounds (not here relevant), including the ground that "the current entity is a new organization under the law which did not exist in 1991".

Background and Facts

The facts, as I understand them, are as follows:

, a Delaware corporation, filed a petition for reorganization under 11 U.S. Code Chapter 11 in January of 1990. The plan for reorganization was confirmed in November of 1992 with an effective date the following month. According to the documents that are part of the bankruptcy file, all pre-petition tax claims by the BOE and the Controller have been settled.

Beginning in April of 1993, the Fee has been payable in April of each year based on the activities of the year before the previous year. Thus, if sold no fuel in 1991 or did not exist in 1991, it would not be liable for the payment of the Fee in April of 1993. sold fuel in 1991, but claims that it does not owe the Fee because it has been reorganized. reasons that the reorganized is a new and different entity which has no liability for the Fee stemming out of the activities of the old.

Analysis

It is clear that is not liable for the pre-petition tax claims which were settled. It is also clear that reorganized is liable for payment of the Fee on its post-petition,

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post-confirmation activities. Since the reorganization plan was effective in December of 1992, is liable for payment of the Fee in April of 1994 and thereafter.

The time which is questionable is the post-petition, pre-confirmation period between January 22, 1990 and December 31, 1992. Generally, taxes which are incurred by the bankrupt estate fall within the definition of "administrative expenses" and, as such, are to be paid by the trustee or debtor-in-possession of the estate. 11 U.S.C.A., § 503(b)(1)(B). The determination of whether a state tax was incurred by the estate, and therefore eligible for the administrative expense priority, is made based on whether the state's right to the payment of the tax arose in the pre-petition or post-petition period. *Matter of Columbia Gas System, Inc.*, Bkrtcy.D.Del. 1992 146 BR 114. In a case whose facts are reminiscent of those here, a bankruptcy court found that hazardous waste cleanup costs which were assessed post petition, but which related to releases that occurred both pre-petition and post petition, were entitled to the administrative expense priority. *In re Chateaugay Corp.*, 112 BR 513.

Conclusion

is liable for the payment of the Childhood Lead Fee for the post-petition, pre-confirmation period. Therefore, it is not due a refund on the amounts already self assessed and paid.

SCL:wk

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