

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeals of:	)	OTA Case No. 18063386, 18063387, 18063388,
	)	18063389, 18063390, 18063391,
	)	& 18063392
COAST WASTE MANAGEMENT, INC.	)	CDTFA Case ID Nos. 973662, 973569, 973663,
G.I. INDUSTRIES, INC.	)	973634, 976144, 976145
	)	973090
USA WASTE OF CALIFORNIA, INC.	)	CDTFA ACCT Nos. 58-300831, 58-300712,
VALLEY GARBAGE AND RUBBISH COMPANY, INC.	)	58-300704, 58-300830,
	)	58-300711, 58-300739,
	)	58-300675
WASTE MANAGEMENT COLLECTION & RECYCLING, INC.	)	Date Issued: April 15, 2019
WASTE MANAGEMENT OF ALAMEDA COUNTY, INC.)	
WASTE MANAGEMENT OF CALIFORNIA, INC.)	
)	
)	

OPINION

Representing the Parties:

For Appellants:	Jeffery Marks, Attorney Karri Rozario, Representative
-----------------	--

For Respondent:	Kevin B. Smith, Tax Counsel III Damian Armitage, Business Taxes Specialist III Stephen Smith, Tax Counsel IV
-----------------	--

For Office of Tax Appeals:	Lisa Burke, Business Taxes Specialist III
----------------------------	---

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 9152, Coast Waste Management, Inc., G.I. Industries, Inc., USA Waste of California, Inc., Valley Garbage and Rubbish Company, Inc., Waste Management Collection & Recycling, Inc., Waste Management of Alameda County, Inc., and Waste Management of California, Inc. (collectively, appellants) appeal a decision issued by respondent California Department of Tax and Fee Administration (CDTFA), denying timely claims for refund of a

portion of the annual flat rate fuel tax that appellants paid in connection with their use of liquified natural gas (LNG) and compressed natural gas (CNG).

Office of Tax Appeals (OTA) Administrative Law Judges Jeffrey G. Angeja, Michael F. Geary, and Daniel K. Cho, held an oral hearing for this matter in Los Angeles, California, on February 20, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUE

Whether appellants have established that they are entitled to a refund of a portion of the annual flat rate fuel tax.

FACTUAL FINDINGS

1. Appellants conduct waste and sanitation business operations in California. To provide these services, appellants each maintain a fleet of vehicles that are powered by LNG or CNG. Some of appellants' vehicles are equipped with power take-off (PTO) technology, which allows engine power to be transferred to auxiliary devices, such as compactors on garbage trucks. Accordingly, some of the LNG and CNG is used to power these auxiliary devices.
2. For the vehicles powered by LNG or CNG, appellants elected to pay the annual flat rate fuel tax of \$168 per vehicle pursuant to R&TC section 8651.7(a), for vehicles with an unladen weight of 12,001 pounds or more. While appellants also filed annual returns reporting the volume of the LNG and CNG used during the year, they did not pay the excise tax pursuant to R&TC section 8651.6 for the volume of LNG and CNG consumed in their vehicles, because they elected to pay the annual flat rate fuel tax.
3. On July 14, 2016, appellants each filed a claim for refund of alleged overpayments of the annual flat rate fuel tax. CDTFA found that some of the claims were not timely for the

entire period claimed and adjusted the claim periods and refund amounts accordingly.¹

Appellants do not dispute the adjustments.

4. It is undisputed that if appellants had elected to pay the use fuel tax on the total number of units of LNG and CNG they used during the claim periods, and that amount of use fuel tax was reduced by the safe harbor of 35 percent provided in California Code of Regulations, title 18, section (Regulation) 1432, subdivision (a)(2), for diesel fuel used for exempt purposes in garbage trucks, the resulting tax would exceed the annual flat rate fuel tax they reported.

DISCUSSION

R&TC section 8651 imposes an excise tax upon the use of fuel as defined by R&TC section 8604. There are two alternate methods by which users of CNG or LNG may report and remit excise tax. The first alternative is for users to report tax monthly based on the amount of fuel used. (R&TC, §§ 8651.5, 8651.6; Regulation § 1331.)

The second alternative is for users to report tax annually at a flat rate based on the type or weight of the vehicle propelled by the CNG or LNG. (R&TC, § 8651.7.)² The annual flat tax is in lieu of paying the tax on the basis of the number of gallons used. (Regulation § 1325(a).) R&TC section 8651.7(b) provides that the annual period for the annual flat rate fuel tax is the period from the end of the month in which the tax was paid to the end of the month prior in the following calendar year, and it allows for the proration of the annual period under certain

¹ The total amount claimed by appellants is \$211,936.20. After adjustments by CDTFA, the claimed amounts total \$209,701.80. As adjusted, Coast Waste Management, Inc. filed a claim for refund of \$5,586 tax for the period November 1, 2013, through October 31, 2016; G.I. Industries, Inc. filed a claim for refund of \$13,857.20 tax for the period August 1, 2013, through July 31, 2016; USA Waste of California, Inc. filed a claim for refund of \$61,334.70 tax for the period April 1, 2013, through March 31, 2017; Valley Garbage and Rubbish Company, Inc. filed a claim for refund of \$2,646 tax for the period November 1, 2013, through October 31, 2016; Waste Management Collection & Recycling, Inc. filed a claim for refund of \$67,326 tax for the period August 1, 2013, through July 31, 2016; Waste Management of Alameda County, Inc. filed a claim for refund of \$32,398.80 tax for the period April 1, 2014, through March 31, 2017; and Waste Management of California, Inc. filed a claim for refund of \$26,553.10 tax for the period November 1, 2013, through October 31, 2016.

² R&TC section 8651.7(a) provides that an owner or operator, except an interstate user, of a vehicle propelled by a system using liquefied petroleum gas, LNG, or CNG may pay the fuel tax for the use of those fuels by paying an annual flat rate fuel tax according to a schedule that shows increasing amounts of tax for increasing unladen weights of the vehicles. For example, while the annual flat rate fuel tax is only \$36 for all passenger cars and other vehicles with an unladen weight of 4,000 pounds or less, the annual flat rate fuel tax is \$168 for the garbage trucks at issue, which have unladen weights of 12,001 pounds or more. There have been no changes to the amounts of the annual flat rate fuel tax provided by R&TC section 8651.7 since the statute became operative on January 1, 1976.

circumstances not present here.³ Notably, there are no other provisions for prorating the annual flat rate fuel tax, and no refund provisions.

On appeal, appellants rely on R&TC section 8652(c), which provides that tax shall not be imposed with respect to fuel used for a purpose other than the generation of power to propel a motor vehicle in this state. Appellants assert that since a portion of the LNG and CNG for which they paid the annual flat rate fuel tax was consumed in PTO auxiliary devices rather than being used to propel motor vehicles, a corresponding portion of the annual flat rate fuel tax should be refunded to them. Appellants concede that the law does not provide any safe harbor for CNG or LNG consumed in a PTO unit, but appellants argue that the 35 percent safe harbor provided by the Diesel Fuel Tax Law (Regulation § 1432(a)(2)) should apply to LNG or CNG consumed in appellants' trucks.⁴ Therefore, appellants request a refund of 35 percent of the annual flat rate fuel tax they paid to use LNG or CNG in garbage trucks.

Here, appellants elected to pay tax using the flat tax alternative, which is based on the unladen weight of the vehicle and has no relation to the amount of fuel used during the year.⁵ The annual flat rate alternative contains no provision for users to establish the exempt use of any gallons, and there is no authority allowing a taxpayer to obtain a refund from the flat-rate tax it elected to pay.

For the foregoing reasons, we conclude that the annual flat rate fuel tax was properly paid, and appellants have not established that they are entitled to a refund.

HOLDING

Appellants have failed to establish that they are entitled to a refund of tax.

³ R&TC section 8651.7(b), further provides that when an owner or operator elects to pay the annual flat rate fuel tax on more than one vehicle, the owner or operator may request that the tax due on a vehicle added during the annual period be prorated so that all vehicles have the same annual period. If the tax due is prorated under those circumstances, the prorated amount is calculated by dividing the annual tax amount by 12 and multiplying the resulting amount by the number of months remaining before the beginning of the next annual period.

⁴ The 35 percent "safe harbor" provided by Regulation 1432(a)(2) specifically applies to diesel fuel, and there is no "safe harbor" provision in the law regarding the use of CNG/LNG. Accordingly, we decline to further address the safe harbor provision.

⁵ The annual flat tax alternative essentially entitles the owner of a vehicle to an exemption from the per-gallon tax, because CNG/LNG vendors are not required to collect the tax when delivering fuel to a vehicle that bears the current year's flat tax identification decal. (Regulation §§ 1318(c), 1325(b).)

DISPOSITION

CDTFA's action in denying appellants' claims for refund is sustained in full.

DocuSigned by:
Jeff Angeja
0D390BC3CCB14A9...
Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:
Michael F. Geary
1A9B52EF88AC4C7...
Michael F. Geary
Administrative Law Judge

DocuSigned by:
Daniel K. Cho
9CAF790C88DF4A5...
Daniel K. Cho
Administrative Law Judge