

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUE

Whether appellant is liable for the environmental fee.

FACTUAL FINDINGS

1. Appellant is a California corporation that operates an employment staffing agency in California for home/nursing care facilities. Appellant did not file an environmental fee return for the liability period.
2. CDTFA received from the Department of Toxic Substances (DTSC) its schedule of Standard Industrial Classification (SIC) codes, which categorizes the various types of organizations that use, generate, store, or conduct activities in California related to hazardous materials. The types of organizations identified on DTSC's schedule are subject to the environmental fee on a sliding scale, based on the number of employees employed by the organization. CDTFA determined appellant's type of organization was identified on DTSC's schedule.
3. CDTFA obtained information from the California Employment Development Department (EDD) revealing that appellant employed between 131 and 506 employees during any given month of 2020.⁴ CDTFA also determined each of appellant's employees were employed for more than 500 hours during 2020.
4. CDTFA reviewed the DTSC and EDD information and concluded that appellant was required to pay an environmental fee of \$2,663.
5. On October 6, 2021, CDTFA issued the aforementioned NOD to appellant. Appellant filed a timely petition for redetermination, which CDTFA denied.
6. This timely appeal followed.

⁴ CDTFA's Appeals Bureau decision erroneously states that CDTFA received employment information for the year 2019. OTA notes that appellant's petition for redetermination also identifies the year 2019 as the year in question. However, CDTFA's audit workpapers identify that CDTFA received employment information for the year 2020. This is corroborated by the NOD, which identifies a liability period of January 1, 2020, through December 31, 2020. In its opening brief, CDTFA confirmed that its references to the year 2019 were in error.

DISCUSSION

The Health and Safety Code imposes an environmental fee on organizations, including corporations, that use, generate, store or conduct activities in California related to hazardous materials as defined in Health and Safety Code section 25501 unless the organization is exempt. (Health & Saf. Code, § 25205.6(a), (b), (c)(1), (g).) The environmental fee is administered and collected by CDTFA. (R&TC, § 43054.) Under the Hazardous Substances Tax Law (R&TC, § 43001, et seq.), the environmental fee is a tax. (R&TC, § 43008; *Morning Star Co. v. State Bd. of Equalization* (2011) 201 Cal.App.4th 737, 755.)

Each year, DTSC is required to provide CDTFA with a schedule of SIC codes that consists of the types of organizations that use, generate, store, or conduct activities in this state related to hazardous materials. (Health & Saf. Code, § 25205.6(b).) This schedule must use identification codes consistent with those established by either the SIC manual (established by the United States Department of Commerce) or the North American Industry Classification System (adopted by the United States Census Bureau). (*Ibid.*) For periods prior to January 1, 2022, DTSC has determined that every business in California with 50 or more qualifying employees uses, generates, stores, or conducts activities in this state related to hazardous materials, and thus, DTSC’s yearly schedule includes an SIC code for all businesses, except those that are specifically exempt. (Cal. Code Regs., tit. 22, § 66269.1; *Morning Star Co. v. State Bd. of Equalization, supra*, at p. 744.)

Effective January 1, 2022, DTSC’s regulations are amended to include only businesses with 100 or more employees. (Cal. Code Regs., tit. 22, § 66269.1.) Therefore, each organization with 100 or more employees are, unless exempt, of a type identified in DTSC’s schedule, and must pay the environmental fee.⁵ (Health & Saf. Code, § 25205.6(c)(1), (g); Cal. Code Regs., tit. 22, § 66269.1; *Morning Star Co. v. State Bd. of Equalization, supra* at p. 744.) The amount of the environmental fee is based on the number of persons the organization employed in this state for more than 500 hours during the calendar year preceding the calendar year in which the fee is due. (Health & Saf. Code, § 25205.6(e).) The environmental fee is not currently imposed on businesses with less than 100 employees. (Health & Saf. Code, § 25205.6(c)(1), (2).)

⁵ In *Morning Star Co. v. State Bd. of Equalization*, (2011) 201 Cal. App.4th 737, 749-750, the court held that California Code of Regulations, title 22, section 66269.1 is “consistent with and not in conflict with,” and “reasonably necessary to effectuate the purpose of” the underlying statute.

When used in Health and Safety Code section 25205.6 or California Code of Regulations, title 22, section 66269.1, “employee” means any person who is an employee within the meaning of the Unemployment Insurance Code (Chapter 3, commencing with section 601, of Part 1 of Division 1).⁶ (Cal. Code Regs., tit. 22, § 66269.1(a)(1).) Also, “a person is the employee of the employing unit that lawfully reports him or her as an employee to the [EDD].” (*Ibid.*) It is the feepayer’s⁷ responsibility to maintain and make available for examination on request by CDTFA, for a minimum of four years, complete records, including but not limited to payroll records and all other documents listing employees, wages, hours worked, and employment agreements or contracts. (Cal. Code Regs., tit. 18., §§ 3020(a), (b)(2), 4901(i).)

Here, appellant concedes that it employed 400 persons in California during 2020, well over the minimum threshold number of employees (i.e., 50 employees) to be held liable for the environmental fee. In addition, there is no dispute that appellant’s business is of a type identified in DTSC’s schedule, and is not specifically identified as an exempt organization, or that its employees worked 500 hours or more in 2020.

Despite these facts, appellant contends that it is not liable for the environmental fee. Instead, appellant asserts that for the purpose of the environmental fee, it only had 12 employees during the liability period. As an explanation, appellant argues that its employees fall into two categories: 12 are administrative employees who work at appellant’s corporate office; the remaining 388 are field employees who work in clients’ homes and consume household items purchased by the clients. Appellant argues that because the field employees use items for which hazardous materials or waste-related fees or taxes were previously paid by the client, the field employees should not be included in CDTFA’s calculation of the environmental fee.

⁶ Unemployment Insurance Code section 621(b), defines an “employee” as, among other things, “[a]ny individual providing labor or services for remuneration... unless the hiring entity demonstrates all of the following conditions: (1) [t]he individual is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact[;] (2) [t]he individual performs work that is outside the usual course of the hiring entity’s business[;] (3) [t]he individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”

⁷ For the purpose of the Hazardous Substances Tax Law the term “feepayer” has the same meaning as taxpayer, as defined in R&TC section 43012. (R&TC, § 43013.) R&TC section 43012 defines “taxpayer” as a person liable for the payment of a fee or a tax specified in paragraph (1) of subdivision (a) of section 25173.6 of the Health and Safety Code, paragraph (1) of subdivision (a) of section 25174 of the Health and Safety Code, paragraph (1) of subdivision (a) of section 25174.01 of the Health and Safety Code, or imposed by Section 105310 of the Health and Safety Code. (R&TC § 43012).

However, the relevant law makes no distinction between employees who work in an office and those who work in the field and use items for which hazardous materials or waste-related fees or taxes were previously paid. Thus, OTA finds appellant’s argument unpersuasive. The evidence shows that during the liability period, appellant was a corporation of a type identified in DTSC’s schedule and employed 400 employees. As such, appellant is subject to an environmental fee of \$2,633.

HOLDING

Appellant is liable for the environmental fee.

DISPOSITION

CDTFA’s action is sustained.

DocuSigned by:
Keith T. Long
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Keith T. Long
Administrative Law Judge

We concur:

DocuSigned by:
Lauren Katagihara
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Lauren Katagihara
Administrative Law Judge

DocuSigned by:
Natasha Ralston
25F8FE08FF56478...

Natasha Ralston
Administrative Law Judge

Date Issued: 12/12/2023