

**BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO**

In the Matter of the Protest of	)	
	)	DOCKET NO. 16422
[REDACTED],	)	
	)	DECISION
Petitioner.	)	
_____	)	

On January 29, 2002, the Revenue Operations Division of the Idaho State Tax Commission issued a Notice of Deficiency Determination to [Redacted] (the taxpayer), denying a refund of transfer fees claimed by the taxpayer for reporting periods 04/99 through 09/99 in the total amount of \$42,221.00

On March 14, 2002, a timely protest and petition for redetermination was filed by the taxpayer. Some other taxpayers had filed refund claims on the same issue that was raised in this protest, and have agreed with the Tax Commission to stay their proceedings and be bound by the result of this protest, if and when this protest is decided in the courts. An informal conference was requested by the taxpayer and held on December 4, 2002.

The Tax Commission has reviewed the file, is advised of its contents, and hereby issues its decision affirming the Notice of Deficiency Determination.

**Facts**

Idaho Petroleum Clean Water Trust Fund

In 1990, the Legislature enacted the Idaho Petroleum Clean Water Trust Fund Act (the Act), codified at Idaho Code § 41-4901 *et seq.* The Act creates the Idaho Petroleum Clean Water Trust Fund (the trust fund). § 41-4904. The trust fund is a self-supporting insurance fund, designed to fund the investigation and remediation of releases of petroleum products from storage tanks in Idaho, and to make insurance affordable to owners and operators of petroleum storage tanks.

The manager of the State Insurance Fund is the trustee of the trust fund, and he or she is vested with “absolute control” of the trust fund. § 41-4933(1). The State Insurance Fund is responsible for the administration of the trust fund, including underwriting and actuarial functions. § 41-4904(6). The Department of Insurance regulates the trust fund in specified ways. § 41-4922 *et seq.* The Department of Insurance is specifically authorized to examine the books of the trust fund to determine, among other things, “the financial condition and actuarial adequacy of the trust fund.” § 41-4935.

#### Transfer fee

Section 41-4908(7) imposes a “transfer fee” of one cent per gallon on the delivery or storage of all petroleum products within Idaho. The transfer fee is imposed on the first licensed fuel distributor who receives a petroleum product within Idaho. The transfer fee is collected by the Tax Commission along with the excise tax on motor fuel that is imposed in chapter 24 of Title 63, Idaho Code. The transfer fee on gasoline is not distributed in its entirety to the trust fund. A portion is retained by the Tax Commission to reimburse itself for actual costs of collection and enforcement. § 41-4909(2). A portion goes into the state refund account. § 41-4909(3). Twenty percent of the remainder goes to the trust fund, along with 100% of transfer fees on off-road diesel and aircraft fuels, the latter two being computed after the Tax Commission reimbursements for administrative costs and refunds. Most of the remainder of the transfer fees on gasoline, after the above distribution, goes to state highways and parks.

#### Ceiling on trust fund’s unencumbered balance

The trust fund is required to be “actuarially sound,” so that its “financial resources [are] adequate under reasonable estimates for payment of all claims ... and other obligations.” § 41-4923. The trust fund must establish a reserve for claims, both made and not yet reported, “but only to the

extent that a reasonable estimate can be made based on prior statistical evidence and the condition of storage tanks insured by the trust fund.” Reserves are “liabilities in any determination of the financial condition of the trust fund.” § 41-4920.

The Act contains provisions triggering the start of collection of the transfer fee; suspending collection; and lifting the suspension. As in effect in 1998 and 1999, § 41-4908(10) provides:

(10) The director [of the department of insurance] shall certify to the [tax] commission when the unencumbered balance in the trust fund equals thirty million dollars (\$30,000,000). Effective the first day of the second month following the date of such certification, the imposition of the transfer fee shall be suspended. Thereafter, the director shall certify to the commission when the unencumbered balance in the trust fund equals twenty million dollars (\$20,000,000). Effective the first day of the second month following the date of such certification, the imposition of the transfer fee shall be reinitiated.

In 2000, the Legislature lowered both the floor and the ceiling to \$15,000,000 and \$25,000,000, respectively. 2000 Sess. Laws, ch. 419, § 1, p. 1363. Thus, the unencumbered balance of the trust fund drives the collection of the transfer fee, even though only a portion of the transfer fee goes into the trust fund.

#### Estimates of trust fund's unencumbered balance in 1998 and 1999

The taxpayer has gathered and presented to the Tax Commission certain documents, which have some plausibility to a lay observer. But the Tax Commission has no expertise in environmental science, storage tank regulation, statistical analysis apart from audit sampling, or actuarial science. No input has been requested or received from the Departments of Environmental Quality (DEQ) or Insurance, the State Insurance Fund, or any actuary. The Tax Commission expresses no opinion on any ultimate conclusions to be drawn from the following documents. With these caveats, the taxpayer's version of events and the submitted documents is as follows.

DEQ estimated that as of the end of 1997, there were 4,654 active underground storage tanks in Idaho that were eligible but not insured (EBNI). New federal Environmental Protection Agency (EPA) requirements went into effect in 1998. Tanks that were not in compliance with the new EPA mandates were closed around the country, including Idaho. As a result, active EBNI tanks in Idaho were 3,819 at the end of 1998.

An actuarial consulting firm, [Redacted]), under contract with the State Insurance Fund, prepared a report on February 1, 1999 on the actuarial condition of the trust fund as of the end of 1998. The [Redacted] report used DEQ tank data as of January 26, 1998, which reported the 4,654 EBNI tanks as of the end of 1997. Actual active, uninsured tanks in Idaho were 1,536 at the end of 1998. Had [Redacted] used the latter figure instead of the year-old figure, then its projections of future needs for environmental site assessments and the number of tanks to be insured would have been much lower than they were in [Redacted]report.

The manager of the State Insurance Fund on February 24, 1999 issued its semiannual report to the Department of Insurance. Based on the [Redacted] report, the manager reported the unencumbered balance of the trust fund to be \$28,955,777 as of the end of 1998. In the first half of 1999, approximately 140 more tanks were closed in Idaho. At the end of June, 1999, the trust fund's books showed an unencumbered balance below \$30 million. But when the updated DEQ tank census as of June 30, 1999 was employed in [Redacted] semiannual analysis, it showed a reduced need for reserves. On July 28, 1999, the manager of the State Insurance Fund retroactively reduced the reserves in the trust fund for site assessments and losses by \$2,821,306.

On August 12, 1999, the manager of the State Insurance Fund made its semiannual report to the Department of Insurance, showing that the trust fund's unencumbered balance as of the end of June, 1999 was \$31,166,090. On August 27<sup>th</sup>, the Department of Insurance certified to the Tax

Commission that the trust fund “has reached thirty million dollars.” As of October 1, 1999, the Tax Commission suspended collection of the transfer fee.

Previous administrative and judicial activity

On September 6, 2000, the taxpayer requested a declaratory ruling from the Tax Commission to the effect that the members of an association of petroleum marketers, including the taxpayer, were collectively owed a refund of the transfer fee in the amount of approximately \$5.8 million, which included all collections of the transfer fee after an unspecified date in 1998. The theory was that had the State Insurance Fund used updated information on tanks in Idaho, the unencumbered balance of the trust fund would have been found to have reached the \$30 million cutoff sometime in 1998. The association argued that the Tax Commission has an independent duty to ascertain the unencumbered balance of the trust fund, to the end that excessive transfer fees would not be collected.

After an informal conference, the Tax Commission declined to issue the requested ruling. The taxpayer and the trade association filed a judicial review action in the district court for Ada County. The Court upheld the Tax Commission’s denial of the ruling. *Idaho Petroleum Marketers Ass’n v. State Tax Commission*, No. CV OC 0006463D, June 4, 2001 (memorandum decision and order per Wilper, J.). The Court found that the Tax Commission’s duties under the Act are limited to merely collecting the transfer fees and remitting the amounts collected. Higher order duties such as actuarial analysis and examination of the trust fund’s books are specifically assigned to the State Insurance Fund and the Department of Insurance, respectively. Any audit duties of the Tax Commission are limited to examining the fuels tax returns of particular fuel distributors and do not extend to auditing the trust fund.

## **Analysis**

This protest raises again the issues that were decided in the declaratory ruling and the decision of the district court. The Tax Commission holds that its duties under the Act do not extend to auditing the unencumbered balance of the trust fund. The Tax Commission acted in accordance with the law when it suspended collection of the transfer fee as of October 1, 1999. Had the Tax Commission suspended such collection before receiving the certification from the Department of Insurance, it would have acted without authority.

It is true that when the trust fund “equals” \$30 million, the Department of Insurance is to make the certification to suspend collection of the transfer fee. § 41-4908(10). The Tax Commission has authority to audit fuels tax returns, § 63-3042, and is required to refund fuels taxes that are “erroneously” collected, § 63-2410(4). Those provisions apply to the transfer fee. § 41-4908(8)(transfer fee remitted with distributor’s monthly fuels tax report). Part of the transfer fee goes into an account to pay refunds. §§ 41-4909(3), 63-3067. But these mechanical provisions do not grant the Tax Commission authority that has been expressly delegated to other agencies of state government.

In the absence of instructions, from the Department of Insurance or a court of competent jurisdiction, to the effect that an error was made and transfer fees should be refunded, the Tax Commission has no authority to grant any refund based on the actuarial condition of the trust fund.

## **Conclusion**

WHEREFORE, the Notice of Deficiency Determination dated January 29, 2002, is hereby APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer receive zero refund of transfer fees.

An explanation of the taxpayer's right to appeal this decision is enclosed with this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

IDAHO STATE TAX COMMISSION

\_\_\_\_\_  
COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of \_\_\_\_\_, 2003, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[REDACTED]

[Redacted]

\_\_\_\_\_