

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 16467
[Redacted],)	
)	DECISION
Petitioner.)	
_____)	

On March 21, 2002, the Revenue Operations Division of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted] (the taxpayer) denying a refund of transfer fees claimed by the Petitioner for reporting periods April, 1999 through September, 1999 in the total amount of \$37,826.35.

On April 1, 2002, the Petitioner filed a timely protest and petition for redetermination. Numerous other taxpayers, all represented by the same attorney, filed refund claims on the same issue and agreed that one of them should proceed as a test case. The [Redacted] matter was not selected as the test case and was, by mutual consent, held in abeyance pending the outcome of the test case.

In the test case, the Commission issued a decision denying the taxpayer's request for a refund of transfer fees. That taxpayer appealed to district court and the case was dismissed on *res judicata* grounds without reaching the merits. This is discussed in more detail in the *Res Judicata* section of this decision.

On August 1, 2005, [Redacted] requested the Commission issue its decision on its protest and petition for redetermination. This is that decision.

BACKGROUND

The Idaho Petroleum Clean Water Trust Fund (“Trust Fund” or “Fund”) was established pursuant to the Idaho Petroleum Clean Water Trust Fund Act (“Act”), Idaho Code § 41-4901 *et. seq.*¹. The purpose of the Trust Fund is to provide insurance to owners and operators of petroleum storage tanks for the costs of corrective action and to provide funds for swift cleanup of releases of petroleum or petroleum products from leaking storage tanks. See Idaho Code § 41-4902(2). The Trust Fund is funded in part by the collection of transfer fees imposed on the first licensed distributor who receives a petroleum product for the purpose of storing or delivering petroleum within the state of Idaho. Idaho Code §§ 41-4905(3), 41-4909(7) (former Idaho Code §§ 41-4904(3), 41-4908(7).) The transfer fee is imposed at the rate of one cent per gallon. Idaho Code § 41-4909(7) and (8) (former Idaho Code § 41-4908(7) and (8).)

The Commission is responsible for collecting the transfer fees and depositing them into the Trust Fund. Idaho Code §S 41-4909(8), 41-4910(1) (former Idaho Code §§ 41-4908(8), 41-4909(1).) The State Insurance Fund is the administrator of the Fund and is authorized to use the Fund for the dual purposes of insurance and cleanup.² The Commission continues to collect the transfer fees as long as the unencumbered balance of the trust fund is below \$30,000,000. Once the unencumbered balance reaches \$30,000,000, the transfer fee imposed by the Act is suspended.³ Collection of the transfer fee is suspended on the first day of the second month after the director of the Department of Insurance certifies to the Commission that the unencumbered balance of the fund reached the \$30,000,000 ceiling. *Id.* Collection remains suspended until the

1 The Act was amended and section numbers redesignated in July 2003.

2 The fees collected under the Act are used for purposes other than to fund the trust fund. See, Idaho Code § 41-4910 (former Idaho Code § 41-4909.)

3 This section was amended to reduce the transfer fee suspension amount to \$25,000,000.

unencumbered balance of the Fund falls below \$20,000,000.⁴ Collection then continues until the \$30,000,000 ceiling is again reached. *Id.*

The Act does not specifically provide how to determine the encumbered and unencumbered balances of the Trust Fund. It does provide that the Trust Fund must maintain a minimum amount as a reserve for future liabilities. Idaho Code § 41-4921 (former Idaho Code § 41-4920.) The Act provides:

The Idaho petroleum clean water trust fund shall establish and maintain the following reserves for financial resources, which shall constitute liabilities in any determination of the financial condition of the trust fund:

(1) An amount sufficient for the payment of all claims made against the trust fund, which shall include reasonable estimates for claim adjustment expense, legal fees and other claim settlement costs, and including claims reported and not yet paid and claims incurred but not reported to the trust fund 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.

(2) An amount adequate under reasonable estimates for the payment of any unpaid contractual obligations, taxes and any other services and expenses incurred but not paid.

Idaho Code § 41-4921 (former Idaho Code § 41-4920).

The amount reserved for future liabilities, along with the amount required to administer the trust fund, is the encumbered amount, while any excess is the unencumbered amount.

While there is no specific provision regarding how the unencumbered balance is to be determined, the statute is clear that this determination requires an accounting and actuarial analysis to determine future liabilities. The Act provides that such accounting and actuarial services are to be provided by the manager of the State Insurance Fund. Idaho Code § 41-4905(5) (former Idaho Code § 41-4904(6) – directing the manager to enter into a “management

⁴ This section was amended to set the amount to reinstate collection at \$15,000,000.

and administrative contract” with the fund to provide administrative, accounting, auditing, and actuarial services to the fund.)

[Redacted] COMPANY CLAIM

[Redacted] Company is one of a number of distributors that made payments into the trust fund as required by the Act. [Redacted] paid the transfer fee until collection was suspended on October 1, 1999, following certification by the director of the Department of Insurance to the Commission that the unencumbered balance of the fund had reached the \$30,000,000 ceiling.

[Redacted] contends the unencumbered balance of the fund exceeded \$30,000,000 either in late 1998 or in early 1999, well before the date of the suspension. [Redacted]’s refund claim is for the period between the time it asserts the \$30,000,000 ceiling was actually reached and October 1, 1999, the date collection of the transfer fee was suspended. [Redacted]’s claim for refund fails on both substantive and *res judicata* grounds.

SUBSTANTIVE GROUNDS FOR DENIAL

The triggering event for suspending the transfer fee is not the unencumbered balance in the Trust Fund reaching \$30,000,000. The statute is clear that the triggering mechanism for suspending collection of the transfer fee is the certification by the director of the Department of Insurance to the Tax Commission that the \$30,000,000 figure has been reached. This certification is the single, identifiable precise date that provides certainty about the date the fee is to be suspended. The statute does not require suspension of the fee on the date the unencumbered balance reaches thirty million dollars for the very good reason that such a date cannot be determined with any precision. Too many variables are involved. These include the timing of Division of Environmental Quality (DEQ) reports, decisions about when to conduct

actuarial analysis, judgments about such an analysis, and the fact that statements to the director of the Department of Insurance are presented on a quarterly basis. [Redacted]

The Commission notes that should the transfer fee be reimposed as the statutes require be done if the unencumbered balance of the Trust Fund drops below \$15,000,000, then these same variables will affect the date of reimposition. There is even-handedness in determining the dates of suspension and reimposition.

The Tax Commission has a limited role in the Trust Fund program. Its obligations relate to administration, collection, enforcement and distribution of the transfer fee. Relative to determining when the Trust Fund's unencumbered balance reaches \$30,000,000, the Commission's powers and duties do not extend to oversight or supervision of either the Department of Insurance or the State Insurance Fund. Nevertheless, an explanation of how the Trust Fund was found to exceed thirty million dollars is useful.

As noted above, the Trust Fund is supported by the fuel transfer fee and does not charge a premium for policies issued to insure petroleum storage tanks. The overall reserves required by the Trust Fund to cover the cost of petroleum spill clean-up necessarily includes a component of reserves set up to cover potential policies that might be issued to existing uninsured petroleum storage tanks that may later become insured. That component of the reserves is based upon the number of existing but uninsured tanks as reported by DEQ and is referred to as the "eligible but not insured" (EBNI) reserves.

The Trust Fund's unencumbered balance exceeded \$30,000,000 not because of an over-collection of transfer fees but because of the Actuarial Reserve Analysis as of June 30, 1999, prepared on July 28, 1999, by the actuarial firm of Milliman & Robertson, Inc. This actuarial analysis determined that the amount of required EBNI reserves should be reduced because DEQ

revised downward its estimate of the number of “eligible but not insured” underground petroleum storage tanks as of the end of the second quarter of 1999. The downward adjustment of the number of EBNI storage tanks resulted in a downward adjustment of the Trust Fund’s required reserves for EBNI tanks. The downward actuarial adjustment of the EBNI reserves resulted in an equal upward adjustment of the unencumbered balance of the Fund. This resulted in the unencumbered balance exceeding \$30,000,000 as of the end of the second quarter of 1999 and is reflected in the Trust Fund quarterly statement filed with the Department of Insurance.

Because the statute regarding suspension of the transfer fee was followed, no refund of any amount collected in excess of \$30,000,000 is permitted.

There is an additional reason, sounding in equity, for denying any refund of the transfer fee. Distributors such as the taxpayer in this case typically pass along the transfer fee and other taxes to their purchasers. The distributor, in other words, has been reimbursed for the transfer fee already. Absent a showing by the taxpayer that it did not pass on the cost of the transfer fee to its customers, allowing recovery of any part of the transfer fee now will result only in a windfall to the taxpayer. Those who bore the real economic burden of the transfer fee will not be reimbursed, even if such reimbursement was justified.

RES JUDICATA

The Idaho Petroleum Marketers Association (Marketers), of which [Redacted] is a member, sent a letter dated September 6, 2000, to the Commission requesting a declaratory ruling as to whether distributors who paid the transfer fee prior to its suspension on October 1, 1999, were entitled to a refund of the fee paid for periods before the suspension but after the date on which the Marketers claimed that the Fund’s unencumbered balance exceeded \$30,000,000.

On November 1, 2000, the Commission issued a declaratory ruling that no refund was allowed under the Act. The Marketers, joined by [Redacted], filed an action on November 29, 2000, in district court in Ada County for judicial review of the declaratory ruling. Judge Ronald Wilper affirmed the Commission's interpretation of the Act and granted summary judgment against the Marketers on June 4, 2001, in Ada County Case No. CVOC0006463D. Judge Wilper wrote a Memorandum Decision and Order engaging in a detailed analysis of the Act. Neither the Marketers nor [Redacted] appealed the district court decision.

In January, 2002, [Redacted] Company filed with the Commission a request for refund for transfer fees paid in the period after the unencumbered balance in the Fund allegedly reached \$30,000,000 and October 1, 1999, the date collection of the transfer fee was suspended. Other petroleum distributors, including [Redacted], filed similar requests for refund. By mutual consent, these other refund requests were held in abeyance pending determination of the [Redacted] claim. On January 29, 2002, the Commission issued a Notice of Deficiency Determination (NOD) denying [Redacted] refund request. On March 14, 2002, following procedures for administrative remedy, [Redacted] filed a protest and petition for redetermination with the Commission. After an informal conference, the Commission issued a decision on May 27, [Redacted] and a number of other distributors, including [Redacted], filed suit in district court [Redacted] challenging the Commission's decision.

The Commission moved for dismissal of all plaintiffs other than [Redacted] on the grounds they had not exhausted their administrative remedies. This was granted. The Commission also moved that [Redacted] be dismissed on *res judicata* grounds. The Court allowed [Redacted] to conduct additional discovery but ultimately did dismiss [Redacted] on *res judicata* grounds. The Court found that the issue presented in the appeal of the Commission's

declaratory ruling and the issue presented in the refund case before it were the same. As a party to the appeal of the declaratory ruling, [Redacted] was precluded from again pursuing precisely the same refund issue. The [Redacted] case is currently on appeal to the Idaho Supreme Court. The appeal has been suspended while this matter proceeds.

[Redacted]'s refund request presents a slight, but not meaningful, factual distinction from that [Redacted] presented. Unlike [Redacted], [Redacted] was not a named party in the appeal of the declaratory ruling. [Redacted] is, however, and was at the time of the declaratory ruling, a member of the Idaho Petroleum Marketers' Association. The Marketers pursued the declaratory ruling on behalf of its members, including [Redacted]. This is clearly demonstrated in the letter of September 6, 2000, requesting a declaratory ruling on five issues, the last of which states:

The fuel distributors who remitted the overpayment of transfer fee/tax to the Commission are entitled to a refund of the transfer fee/tax erroneously remitted to the Commission with their fuel distributor reports, for any monthly reports the Commission determines included an overpayment of the transfer fee/tax.

(Letter dated September 6, 2000, to Commissioner DuWayne Hammond from [Redacted] Idaho Petroleum Marketers Association, requesting a declaratory ruling.)

The doctrine of *res judicata* precludes relitigation of a matter previously litigated. *Aldape v. Akins*, 105 Idaho 254 (Ct. App. 1983). The doctrine has two components, issue preclusion, also known as collateral estoppel, and claim preclusion. *Andre v. Morrow*, 106 Idaho 455 (1984); *Hindmarsh v. Mock*, 138 Idaho 92 (2002). Regardless of whether *res judicata* takes the form of issue preclusion or claim preclusion, it may apply against either a party in prior litigation or one in privity with a party to the prior litigation. *Foster v. City of St. Anthony*, 122 Idaho 883 (1992).

In this matter, [Redacted] an Idaho Petroleum Marketers Association member, is in privity with the Marketers. It is hard to imagine a more clear-cut example of privity than here

where the Marketers specifically requested a declaratory ruling that its member distributors were entitled to a refund. The doctrine of *res judicata* precludes [Redacted] from pursuing a refund in its own name when a refund for the same money, on the same theory, has already been filed on [Redacted] behalf by an organization to which [Redacted] belongs.

CONCLUSION

On both substantive and *res judicata* grounds, [Redacted] Company's refund request must be denied.

WHEREFORE, the Notice of Deficiency Determination dated March 21, 2002, is hereby APPROVED, AFFIRMED and MADE FINAL.

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

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

DATED this _____ day of _____, 2005

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that I have on this ____ day of _____, 2005, served a copy of the within and foregoing DECISION by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]
[Redacted]

Receipt No.
