

**Letter of Findings Number: 09-0701
Underground Storage Tank Fees
For the Tax Years 2003-2007**

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ISSUES

I. Underground Storage Tank Fee – Amount of Penalty Imposed.

Authority: IC § 6-8.1-1-1; IC § 6-8.1-5-1; IC § 13-23-12-1; IC § 13-12-12-4; Indiana Dept. of State Revenue v. Bulkmatic Transport Co., 648 N.E.2d 1156 (Ind. 1995); [328 IAC 1-3-3](#).

Taxpayer protests the imposition of penalties for unpaid underground storage tank fees.

STATEMENT OF FACTS

Taxpayer manufactures recreational powerboats in Indiana. At this facility are two underground storage tanks (USTs), one of which holds gasoline and the other diesel fuel. These USTs have been used at Taxpayer's facility since 1989. However, it was not until a 2007 private Phase I environmental audit that Taxpayer discovered that it was required to have paid an annual UST registration fee for each year going back to 1989. Taxpayer paid the required fees, plus the Department's statutorily mandated 10 percent penalty and interest. However, the Department also assessed a total of \$60,000 in "environmental penalties" - \$4,000 for 2003; \$8,000 for 2004; \$12,000 for 2005; \$16,000 for 2006; and \$20,000 for 2007. Taxpayer protests the assessment of environmental penalties. An administrative hearing was held, and this Letter of Finding results.

I. Underground Storage Tank Fee – Amount of Penalty Imposed.

DISCUSSION

IC §13-23-12-1 imposes a fee on underground storage tanks. Although the Indiana Department of Environmental Management (IDEM) regulates underground storage tanks for the State, IC §13-12-12-4 mandates that the Department of Revenue collect and deposit the underground storage tank fees. IC § 6-8.1-1-1 defines "listed tax" to include "the underground storage tank fee ([IC 13-23](#))." The laws and regulations concerning the Department's collection of listed taxes apply to the Department's collection of the underground storage tank fees. All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1 (c).

The fee on USTs is imposed at IC §13-23-12-1 as follows:

(a) Each year the owner of an underground storage tank that has not been closed before July 1 of any year under:

(1) rules adopted under [IC 13-23-1-2](#); or

(2) a requirement imposed by the commissioner before the adoption of rules under [IC 13-23-1-2](#);
shall pay to the department of state revenue an annual registration fee.

If an owner of an UST does not pay their annual registration fees described in IC § 13-23-12-1, the owner "shall be assessed a penalty of not more than two thousand dollars (\$2,000) per underground storage tank for each year that passes after the fee becomes due and before the fee is paid." IC § 13-23-12-7(a). This penalty is referred to as the "environmental penalty." [328 IAC 1-3-3](#)(e)(3). The Indiana Administrative Code clarifies this penalty, stating that:

For sites containing only tanks that were never registered, or sites containing only tanks for which no tank fees were paid when due, the penalty will be calculated at two thousand dollars (\$2,000) under [IC 13-23-12-7](#)(a) per petroleum underground storage tank per year that passes after each year's fee is due.

[328 IAC 1-3-3](#)(f)(2)(A). Although the annual registration fee had not been paid since 1989, environmental penalties were only assessed dating back to 2003. Because taxpayer owned two USTs, the Department assessed \$4,000 for 2003; \$8,000 for 2004; \$12,000 for 2005; \$16,000 for 2006; and \$20,000 for 2007.

Taxpayer argues that the environmental penalties should at most be \$20,000. Taxpayer characterizes the penalty provided for in IC § 13-23-12-7(a) to be "not more than \$2,000 per UST per year," which would mean that since there were two USTs, and five years have been determined to be subject to environmental penalties, then the total amount should be \$20,000 (two (2) USTs × five (5) years × \$2,000 = \$20,000). Taxpayer further argues that [328 IAC 1-3-3](#) is beyond the scope of IC § 13-23-12-7, as the cumulateness of the penalty prescribed by the regulation "adds to the authority granted to IDEM by the statute." Taxpayer concludes that the regulation is therefore invalid, citing to several cases for support. See Indiana Dept. of State Revenue v. Bulkmatic Transport Co., 648 N.E.2d 1156, 1160 (Ind. 1995) ((citations omitted) "An administrative agency may not promulgate regulations which add to the law as enacted or extend its powers.").

However, Taxpayer's argument that [328 IAC 1-3-3](#)(f)(2)(A) exceeds the scope of IC § 13-23-12-7(a) because "the cumulative penalty... is not authorized by IC § 13-23-12-7" is incorrect. In fact, IC § 13-23-12-7(a) does

provide for a cumulative penalty, and not a "simple penalty" as Taxpayer has argued. The penalty that IC § 13-23-12-7(a) provides for is not "\$2,000 per UST per year," as Taxpayer characterized it. Rather, IC § 13-23-12-7(a) states that the penalty is "two thousand dollars (\$2,000) per underground storage tank **for each year that passes after the fee becomes due** and before the fee is paid" (**emphasis added**). For example, if a fee on one of the tanks that was due in 2003 was not paid until 2008, then \$2,000 is assessed **for each year that passed** before that 2003 year fee was paid (\$2,000 for 2003; \$2,000 for 2004; \$2,000 for 2005; \$2,000 for 2006; and \$2,000 for 2007). The same is true for the 2004 fee if it was not paid until 2008, the 2005 fee if it was not paid until 2008, and so on. With that being the case, the environmental penalties are cumulative per IC § 13-23-12-7(a) and the penalties assessed against Taxpayer for their two USTs were assessed correctly, as illustrated below:

	2003	2004	2005	2006	2007
2003 Fees	\$4,000	\$4,000	\$4,000	\$4,000	\$4,000
2004 Fees		\$4,000	\$4,000	\$4,000	\$4,000
2005 Fees			\$4,000	\$4,000	\$4,000
2006 Fees				\$4,000	\$4,000
2007 Fees					\$4,000
Subtotal	\$4,000	\$8,000	\$12,000	\$16,000	\$20,000

Since IC § 13-23-12-7(a) provides that the environmental penalty is cumulative, it renders moot the issue of whether [328 IAC 1-3-3\(f\)\(2\)](#) exceeds the scope of the statute. When comparing IC § 13-23-12-7(a) and [328 IAC 1-3-3\(f\)\(2\)\(A\)](#), there is very little difference in the language of the statute versus the language of the regulation. The regulation merely rephrases what is stated in the statute. The only major difference between the two is that the regulation contains a calculation and a table. Therefore, [328 IAC 1-3-3\(f\)\(2\)\(A\)](#) merely clarifies, rather than expands upon, the statute, which is permissible.

[328 IAC 1-3-3\(f\)\(2\)\(B\)](#) does provide for a one thousand dollar (\$1,000) penalty if the annual fee is paid in part, but not in full, by the date it was due. However, whether that expands upon what is provided for in IC § 13-23-12-7 is irrelevant, as the annual fees were not paid at all by the date they were due. Therefore, the Department declines to address this issue at this time.

Taxpayer also presented arguments regarding whether the penalty was punitive in nature or inequitable given the amount of the annual UST fee. However, the penalty has been assessed in accordance with what is provided for in the statute as passed by the legislature.

FINDING

Taxpayer's protest is respectfully denied.

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