

Letter of Findings Number: 09-0642
Underground Storage Tank Fees
For the Tax Years 1991-2008

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ISSUE

I. Underground Storage Tank Fee – Imposition.

Authority: IC § 6-8.1-1-1; IC § 6-8.1-5-1; IC § 13-7-20-32; IC § 13-7-20-41; IC § 13-11-2-150; IC § 13-23-8-4; IC § 13-23-12-1; IC § 13-23-12-4; IC § 13-23-12-7; [28 IAC 1-1-9](#); [328 IAC 1-3-3](#).

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

STATEMENT OF FACTS

Taxpayer owns and operates a gas station and mini-mart. At this facility are two underground storage tanks (USTs). The facility was built in 1990, and Taxpayer purchased the facility in January 2006. However, it was not until the spring of 2009 that Taxpayer discovered that it was required to have paid an annual UST registration fee. The Department assessed registration fees for each year from 1991 to 2008. The Department also assessed a 10 percent penalty and interest. Finally, the Department also assessed a total of \$60,000 in "environmental penalties." These environmental penalties consisted of: \$4,000 for 2003; \$8,000 for 2004; \$12,000 for 2005; \$16,000 for 2006; and \$20,000 for 2007. Taxpayer only paid the required registration fees, penalty, and interest for the years 2006 through 2008. Taxpayer protests the assessment of the remaining fees and all environmental penalties. An administrative hearing was held, and this Letter of Finding results.

I. Underground Storage Tank Fee – Imposition.

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 §13-23-12-4 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.

The amount of the registration fee is found in subsection of IC § 13-23-12-1 as follows:

(b) The annual registration fee required by this section is as follows:

(1) Ninety dollars (\$90) for each underground petroleum storage tank.

(2) Two hundred forty-five dollars (\$245) for each underground storage tank containing regulated substances other than petroleum.

Prior to 1998, the annual registration fee was two hundred ninety dollars (\$290) (See IC §§ 13-7-20-32 and 13-7-20-41, as in effect through 1996, when it was repealed by P.L.1-1996, SEC.13; and IC § 13-23-12-1, as in effect through 1998, thereafter amended by P.L.212-1999, SEC.4).

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\(f\)\(2\)\(A\)](#).

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. This is because the penalty is cumulative. Per IC § 13-23-12-7(a), 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 2004 was not paid until 2008, then \$2,000 is assessed **for each year that passed** before that 2004 year fee was paid (\$2,000 for 2004; \$2,000 for 2005; \$2,000 for 2006; and \$2,000 for 2007). The same is true for the 2005 fee if it was not paid until 2008, the 2006 fee if it was not paid until 2008, and so on. With that being the case, the environmental penalties were assessed as illustrated below:

	2003	2004	2005	2006	2007
2003 Fees	\$4,000.00	\$4,000.00	\$4,000.00	\$4,000.00	\$4,000.00
2004 Fees		\$4,000.00	\$4,000.00	\$4,000.00	\$4,000.00
2005 Fees			\$4,000.00	\$4,000.00	\$4,000.00
2006 Fees				\$4,000.00	\$4,000.00
2007 Fees					\$4,000.00
Subtotal	\$4,000.00	\$8,000.00	\$12,000.00	\$16,000.00	\$20,000.00

Taxpayer argues that it was not the owner of the USTs prior to 2006, and therefore it does not owe the registration fees or environmental penalties for the years 1991 through 2005. Taxpayer also asserts that the environmental penalties assessed for the years in which they did own the tanks are not properly assessed pursuant to statute, and besides which are excessive and should be reduced.

A. UST Registration Fees and Environmental Penalties prior to 2006

Taxpayer maintains that it purchased the facility in January 2006, which means that it did not own the USTs prior to that time. Therefore, Taxpayer argues that is not liable for the fees and penalties associated with the USTs owed during the period prior to its ownership.

IC § 13-11-2-150(a)(1)(A) describes an "owner" of a UST to mean "a person who owns the underground storage tank." In support of Taxpayer's contention that it was not the owner of the USTs prior to 2006, Taxpayer submitted a copy of the sales contract and the warranty deed. Taxpayer further asserts that the previous owner informed Taxpayer that everything was in compliance, and that there was no agreement to assume the liabilities of the previous owners.

Taxpayer has clearly demonstrated that it was not the owner of the USTs prior to 2006. Therefore the taxpayer is not responsible for the payment of the UST fees due for the years 1991-2005, or the environmental penalties assessed for the years 2003-2005. However, Taxpayer is admonished that if the UST fees are not paid in full, Taxpayer or any future owner will not be eligible for full payments from the Excess Liability Trust Fund (ELTF) in the event that there is a gasoline spill or other environmental problem resulting from Taxpayer's underground storage tanks.

IC § 13-23-8 details the process for claiming monies from the ELTF. Further guidance is found in [328 IAC 1-3](#). With regards to the amount that an UST owner (or operator) may claim for reimbursement, an owner or operator may be reimbursed for eligible costs arising out of releases of petroleum according to the following formula provided in [328 IAC 1-3-3\(b\)](#) as follows:

(b) Persons listed in section 1 of this rule shall be eligible to apply to the fund for reimbursement from the fund according to the following formula:

- (1) Determine the number of payments that were owed under [IC 13-23-12-1](#) on all regulated tanks at the facility from which a release occurred, **beginning with the date that the fees for each tank first became due under IC 13-23-12 and continuing until the date on which the release occurred.**
- (2) Determine the number of payments actually made under [IC 13-23-12-1](#) on all regulated tanks at the facility from which a release occurred, **beginning with the date each tank became regulated under IC 13-23 and continuing until the date on which the release occurred.** Divide the number of payments actually made by the number of payments due as determined in subdivision (1).
- (3) Determine the amount of money the person would have received from the fund if all payments due on the date the release occurred had been paid when due and multiply the amount by:
 - (A) the percentage determined in subdivision (2), if the percentage is fifty percent (50%) or more; or
 - (B) zero (0), if the percentage determined in subdivision (2) is less than fifty percent (50%). (**Emphasis added**).

In order to be eligible for ELTF reimbursement, the applicant must demonstrate that the requirements in IC § 13-23-8-4(a)(1) through IC § 13-23-8-4(a)(4) have been met. [328 IAC 1-3-3\(a\)\(1\)](#). This includes the requirement that all necessary tank fees have been paid "at the time a release was first discovered or confirmed." [328 IAC 1-1-9\(a\)\(2\)](#).

This is meant to include registration fees from all years that the registration fee was owed, regardless of whether the current owner was the owner of the USTs at the time when the registration fees were first owed. Therefore, since the ELTF rules require all applicable years to be taken into account when calculating eligibility percentage under [328 IAC 1-3-3\(b\)](#), if Taxpayer chooses not to pay the registration fees owed in each year from 1991 to 2005, neither Taxpayer nor any future owner will be eligible for full payments from the ELTF.

B. Environmental Penalties Assessed after 2006

Taxpayer admits that it was the owner of the USTs starting in 2006, and has since paid the annual

registration fees due in 2006, 2007, and 2008. However, it argues that the amounts of the environmental penalties assessed for 2006 and 2007 are incorrect. Taxpayer believes that under IC § 13-23-12-7(a), the maximum amount of environmental penalties assessed for the failure to pay the 2006 registration fees should be \$8,000, and the maximum amount of environmental penalties assessed for the failure to pay the 2007 registration fees should be \$4,000.

Since Taxpayer has already established that it did not own the USTs prior to 2006, 2006 would be the first year that Taxpayer could be assessed a penalty for failing to pay the annual registration fee due in 2006 pursuant to IC § 13-23-12-1. Taxpayer is therefore correct that the environmental penalties should be assessed as follows.

	2006	2007
2006 Fees	\$4,000.00	\$4,000.00
2007 Fees		\$4,000.00
Subtotal	\$4,000.00	\$8,000.00

However, Taxpayer further argues that the environmental penalties should be reduced beyond the corrected amounts. Taxpayer asserts that the 2006 environmental penalty should be reduced to \$900.24, and that the 2007 environmental penalty should be reduced to \$432.26. Taxpayer is willing to pay these amounts in order to close the matter. Taxpayer's only legal basis for this reduction is that IC § 13-23-12-7(a) states that the environmental penalties "shall be assessed [at] **not more than** two thousand dollars (\$2,000)," which Taxpayer interprets to mean that the environmental penalties could be reduced (**Emphasis added**). However, Taxpayer presents only equitable reasons to reduce the environmental penalties to \$900.24 and \$432.26. Since the Department must make its determination on legal grounds, the Department cannot reduce the penalties beyond the modification above.

FINDING

Taxpayer is sustained as to Issue IA; Taxpayer is sustained in part and denied in part as to Issue IB.

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