

Letter of Findings Number: 10-0239
Underground Storage Tank Fees
For the Tax Years 2006-2008

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ISSUE

I. Underground Storage Tank Fee – Imposition.

Authority: 42 U.S.C. § 6991a; IC § 6-8.1-1-1; IC § 6-8.1-5-1; IC § 13-11-2-150; IC § 13-23-12-1; IC § 13-23-12-4; IC § 12-23-12-6; IC § 13-23-12-7; 40 CFR Part 280, Appendix II; [328 IAC 1-3-3](#).

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

STATEMENT OF FACTS

Taxpayer is a commercial property developer. Taxpayer financed the construction of a grocery store and gas station. Taxpayer has remained the owner of the property since it was built. However, Taxpayer explains that it built the property with the intent to lease it to a specific company as a "built-to-suit project," and that the lease was merely a financing mechanism. Taxpayer never intended to operate the facility itself, even though it is technically the owner. The property opened for business in October 2005, but the company leasing the property ("Company A") abandoned it in January 2006. The property remained vacant until July 2009, when a new company ("Company B") began to lease the property.

There are two underground storage tanks (USTs) at this facility. Taxpayer believes that the USTs were registered with the Indiana Department of Environmental Management (IDEM) in July 2005. In March 2010, the Department billed Taxpayer for registration fees for the two USTs for each year from 2006 to 2008. The Department also assessed a 10 percent penalty and interest on each fee. Finally, the Department also assessed a total of \$12,000 in "environmental penalties." These environmental penalties consisted of: \$4,000 for 2006, and \$8,000 for 2007.

Taxpayer protests the assessment of the environmental penalties, claiming that the assessments should be against Company A.

I. Underground Storage Tank Fee – Imposition.

DISCUSSION

IC §13-23-12-1 imposes a fee on underground storage tanks. Although the 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 (b) 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.

If an owner of a 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 owns two USTs, the Department assessed \$4,000 for 2006 and \$8,000 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:

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

Taxpayer has since paid the unpaid registration fees, and the associated 10 percent penalty and interest on the fees.

Taxpayer maintains that the contractor that installed the USTs submitted a completed State Form 45223 ("45223 form"), the "Notification for Underground Storage Tanks" form, to IDEM in order to register the USTs in July 2005. A copy of this form was provided prior to the hearing. Taxpayer believes that Company A was billed for the registration fees, and that since the registration fees were not paid, Company A should be assessed the environmental penalties. Taxpayer also states that it never received any bills or notices for the unpaid registration fees or environmental penalties either.

IC § 13-23-12-6 states that:

[a]t least thirty (30) days before payment of a fee is due in accordance with the schedule established under section 3 of this chapter, the department of state revenue shall **attempt to notify** each **owner** of an underground storage tank **who has submitted notification to the department as required under 42 U.S.C. 6991a(a)** of the requirements of this chapter. (**Emphasis added**).

42 U.S.C. § 6991a(a) states that:

(a) Underground storage tanks

(1) Within 18 months after November 8, 1984, each owner of an underground storage tank shall notify the State or local agency or department designated pursuant to subsection (b)(1) of this section of the existence of such tank, specifying the age, size, type, location, and uses of such tank.

...

(3) Any owner which brings into use an underground storage tank after the initial notification period specified under paragraph (1), shall notify the designated State or local agency or department within thirty days of the existence of such tank, specifying the age, size, type, location and uses of such tank.

...

(5) Beginning thirty days after the Administrator prescribes the form of notice pursuant to subsection (b)(2) of this section and for eighteen months thereafter, any person who deposits regulated substances in an underground storage tank shall reasonably notify the owner or operator of such tank of the owner's notification requirements pursuant to this subsection.

(6) Beginning thirty days after the Administrator issues new tank performance standards pursuant to section 6991b(e) of this title, any person who sells a tank intended to be used as an underground storage tank shall notify the purchaser of such tank of the owner's notification requirements pursuant to this subsection.

IDEM is designated as the local agency in 40 CFR Part 280, Appendix II. The form that Taxpayer presented is a copy apparently filled out in 2005 by the installer of the USTs. The form does not appear to have been filled out completely; for instance, the "Owner Certification" area is not filled out, which would show that the owner signed off on the information and would show when the form was filed. Additionally, IDEM unfortunately has no record of the 45223 form being filed in 2005, and without a mail receipt or other concrete evidence, there is no way to prove that Taxpayer filed the 45223 form at that time.

The Department can only attempt to notify taxpayers that they owe an annual registration fee if they file the 45223 form with IDEM. Since IDEM has no record that Taxpayer filed the 45223 form with IDEM in 2005, the Department was not aware that it should have attempted to notify anyone that it owed annual registration fees.

Further, IC §13-23-12-1(a), states that "[e]ach year the **owner** of an underground storage tank... shall pay to the department of state revenue an annual registration fee" (**Emphasis added**). IC § 13-11-2-150(a)(1)(A) describes an "owner" of a UST to mean "a person who owns the underground storage tank." If the owner of a 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" (**Emphasis added**). IC § 13-23-12-7(a). Furthermore, IC § 13-23-12-6 states that "the department of state revenue shall attempt to notify each **owner** of an underground storage tank **who has submitted notification to the department as required under 42 U.S.C. 6991a(a)** of the requirements of this chapter" (**Emphasis added**).

The law states that it is the owner's responsibility to pay the fees and environmental penalties by statute. The law also states that the UST bills be assessed against the owner. Despite Taxpayer's insistence that it was not intended to have anything to do with the property beyond constructing it as a "built-to-suit project" for a specific tenant, Taxpayer does in reality own the property and the USTs on the property. Therefore, since the fees were not paid, the environmental penalties have been properly assessed against Taxpayer as the owner of the USTs, and not Company A or Company B.

Taxpayer also presents equitable reasons to waive the environmental penalties. Since the Department must make its determination on legal grounds, the Department declines the invitation to waive the penalties based on equitable reasons.

FINDING

Taxpayer's protest is denied.

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