

COURTS: HAZARDOUS SUBSTANCES 'FEE' IS ACTUALLY A TAX, COURT RULES

A hazardous substances charge on virtually all businesses in the state, labeled a "fee" by the State Board of Equalization, is a tax according to a May 5 decision of the Third District Court of Appeal. The court held the tax to be legal.

The court, distinguishing a "tax" from a "fee," said charges are "regulatory fees" if they bear a reasonable relationship to the payer's burdens and or benefits from a regulatory activity.

Conversely, a charge is a tax if revenue is the primary purpose and regulation is incidental.

In finding the charge in question a tax, the court said the purpose of the hazardous substance charge "is to raise revenue to pay for a wide range of governmental services and programs primarily relating to hazardous waste remediation, cleanup and disposal."

The court continued: "The charge to the company is not regulatory because it does not seek to specifically regulate the company's use, generation or storage of hazardous material but to raise money for the disposal and remediation of hazardous material generally. The charge is therefore a tax."

The tax was challenged on the basis of equal protection and due process – for example, the tax hits some businesses harder than others based on number of employees, and some organizations that work with hazardous substances are exempt – but the court found the tax legal in that respect. "The Legislature is given broad power to determine the best methods to carry out its programs," the court wrote.

The decision was written by Associate Justice M. Kathleen Butz, and concurred in by Acting Presiding Justice Coleman Blease and Justice Harry Hull.

The case is the *Morning Star Company v. State Board of Equalization* (May 5, 2011) Case No. C063437.

(CalTax: To eliminate confusion, the BOE should start calling the assessment a tax.)