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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of **AUTO INVESTMENT COMPANY ASSOCIATES** For Review of a Determination of the Division of Clean Water Programs, State Water Resources Control Board, Regarding Participation in the Underground Storage Tank Cleanup Fund. OCC File UST-91.	**ORDER WQ 97-02-UST**

BY THE BOARD:

Auto Investment Company Associates (petitioner) seeks review of a Final Division Decision (Decision) by the Division of Clean Water Programs (Division) regarding a claim filed by the petitioner seeking reimbursement from the Underground Storage Tank Cleanup Fund (Fund).

The issue involved in this petition is whether the petitioner's claim ought to be assigned to Priority Class B, commonly referred to as the Small Business Priority Classification. The Division assigned the petitioner's claim to a lower priority class, Priority Class C. For the reasons hereafter stated, this Order determines that the relevant gross receipts, including those of affiliates, exceed the limits established by applicable regulation for qualification for Priority Class B. The Division's Decision denying Priority Class B eligibility for petitioner's claim therefore is affirmed.

I. STATUTORY, REGULATORY, AND FACTUAL BACKGROUND

Chapter 6.75 of the California Health and Safety Code, commencing with section 25299.10, authorizes the State Water Resources Control Board (SWRCB) to conduct a program to reimburse certain owners and operators of petroleum underground storage tanks (UST) for corrective action costs incurred by such owners and operators.[1] Section 25299.77 of this chapter authorizes the SWRCB to adopt regulations to implement the program. On September 26, 1991, the SWRCB did adopt such regulations. The regulations, hereafter referred to as Cleanup Fund Regulations or Regulations, are contained in chapter 18, division 3, title 23 of the California Code of Regulations, and became effective on December 2, 1991. Among other things, the Regulations provide for submittal of reimbursement claims to the SWRCB by owners and operators of petroleum UST, for acceptance or rejection of these claims by staff of the SWRCB, and for appeal of any discretionary staff decisions to the SWRCB.

The Cleanup Fund Regulations in effect at the time this petition was filed provided that a petition would be denied if the SWRCB failed to take action within 270 days of receipt of the petition.[2] (Regulations § 2814.3(d).) This time limit may be extended for a period not to exceed 60 calendar days by written agreement of the SWRCB and the petitioner. (*Ibid.*) The SWRCB

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[1] Unless otherwise indicated, all statutory references in this Order are to the California Health and Safety Code.

[2] The Cleanup Fund Regulations were amended on August 8, 1996. Under the current version of the Cleanup Fund Regulations, a petition will be deemed denied if the SWRCB fails to take action within 90 days of receipt of a petition. (Regulations § 2814.3(d).)

did not take action on this petition within the prescribed time period. The SWRCB has the discretion to waive any nonstatutory requirements pertaining to processing payment or approval of claims. (Regulations § 2813(e).) The SWRCB hereby exercises its authority to hear the petition, notwithstanding expiration of the time limits set by the Regulations. (See also Regulations section 2814.2(b) authorizing the SWRCB to hear petitions on its own motion.)

Both the statutes which authorize the reimbursement program and the Cleanup Fund Regulations address the issue of prioritization of reimbursement claims. Section 25299.52(b) of the Health and Safety Code provides in relevant part:

> "Except as provided in subdivision (c), in awarding claims pursuant to Section 25299.57 or 25299.58, the board shall pay claims in accordance with the following order of priority:
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> (1) Owners of tanks who are eligible to file a claim pursuant to subdivision (e) of Section 25299.54.
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> (2) Owners and operators of tanks which are either of the following:
>
> (A) An owner or operator which is a small business, as defined in subdivision (c) of Section 14837 of the Government Code . . . ."[3]

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[3] Senate Bill 562 contained provisions which amended Health and Safety Code section 25299.52. (Sen. Bill No. 562 (1995-1996 Reg. Sess.) § 12.) These amendments became effective January 1, 1997, and eliminate certain requirements relating to small business classification. Specifically, claimants need not show that the principal office is located in California or that all officers are domiciled in California to qualify for Priority Class B. All other requirements for small business classification, including the limitation on gross receipts, remain. The Cleanup Fund Regulations have not yet been amended to reflect the changes brought about by SB 562.

Subdivision (c) of section 14837 of the Government Code defines a small business. That definition in relevant part reads as follows:

> "Small business" means a business, in which the principal office is located in California, and the officers of such business are domiciled in California, which is independently owned and operated, and which is not dominant in its field of operation.
>
> "In addition to the foregoing criteria the director [of the California Department of General Services], in making a detailed definition, shall use dollar volume of business as a criterion. The maximum dollar volume which a small business may have under the definition shall vary from industry to industry to the extent necessary to reflect differing characteristics of such industries. In addition, when the character of any given industry so requires, the director may consider financial . . . arrangements of any applicant seeking classification under the definition . . . . [T]he director may take account of other relevant factors as determined by regulation."

The general thrust of the statutes just referenced is that, with the exceptions noted above, claimants which meet all the requirements of a small business as provided in regulations promulgated by the California Department of General Services, Office of Small and Minority Business (OSMB) shall be given second priority in reimbursement of claims from the Fund, which corresponds with Priority Class B under the Cleanup Fund Regulations.

OSMB has promulgated regulations which define those entities which qualify as a small business. (Cal. Code Regs., tit. 2, div. 2, chapter 3.) In relevant part, section 1896(n)(3) of the OSMB regulations provides:

> "'Small Business', when used in reference to a service firm means:

"A business concern in which the principal place of business is located in California and the owners (or officers in the case of a corporation) of such business are domiciled in California, which is independently owned and operated and which is not dominant in its field of operation; and which has been classified by Office of Small and Minority Business in one of the following industry groups, and does not have, together with any affiliates, annual receipts for the preceding three years, exceeding the maximum receipts specified below for the applicable industry groups . . . ." (Emphasis added.)

OSMB regulations list a number of industry groups and assign a maximum three-year gross receipts limit to each industry group. Applicants to OSMB for small business certification are assigned to an industry group. An applicant who satisfies the gross annual receipts limit of the industry group to which it is assigned qualifies as a small business; an applicant who exceeds the assigned receipts limit does not so qualify.

Cleanup Fund Regulations were modeled after the OSMB regulations. The regulations provide in pertinent part:

"'Small Business' means a business which complies with all of the following conditions . . . .

(a) The principal office is located in California;

(b) The officers of the business are domiciled in California;

(c) The business is independently owned and operated;

(d) The business is not dominant in its field of operation; and

(e) Gross revenues from the business do not exceed the limits established by Section 1896 of Title

2 of the California Code of Regulations." (Regulations § 2804.)[4]

Under applicable statutes and OSMB regulations, qualification as a small business depends in part on the receipts of the business concern involved, including affiliates of the applicant. OSMB regulations provide that:

> "'Affiliate' means a business concern which is a subsidiary of or owned in part by another business concern such that the applicant business concern is subject to the control of a non-applicant business concern(s).[5] As an alternative to actual ownership, an affiliation may be based upon the existence of other appropriate factors including common management, shared or common employees and existing contractual relationships . . . ." (Cal. Code Regs., tit. 2, § 1896, subd. (b).)

As indicated by the definition, a determination of affiliation depends on the element of control. OSMB regulations define "control" as follows:

> "'Control' means the authority or ability to regulate, direct, dominate or directly influence the day-to-day operations of any business concern. Every business concern is considered as having one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative, and it is immaterial whether it is exercised so long as the power to control exists. If the concern under consideration is a corporation, it should be noted that a party is considered to control or have the power to control a business concern if such party controls or has the power to control fifty percent or more of its voting stock . . . ." (Cal. Code Regs., tit. 2, § 1896, subd.(c).)

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[4] As indicated earlier, the requirements expressed in subsections (a) and (b) were eliminated by SB 562.

[5] As OSMB interprets its regulations, allocable gross receipts include not just the gross receipts of those businesses which are deemed to control an applicant but also the gross receipts of those businesses that are deemed to be controlled by the applicant or any member of the applicant.

Generally, OSMB regulations provide that in determining whether an applicant meets the gross receipts limit that applies to that applicant, OSMB will look to the gross receipts of both the applicant and any affiliates of the applicant; that is, to the gross receipts of any other party or parties who have control over the activities of the applicant or who are controlled by the applicant or any member thereof.

The petitioner is a limited partnership. There are two general partners, William K. Chase and Robert A. Chase. They are brothers. The petitioner is in the business of leasing real estate.

Chase Chevrolet, Inc. (Chase Chevrolet) is a corporation. William Chase owned a majority of the common stock of Chase Chevrolet in the years 1991 (83 percent), 1992 (53 percent) and 1993 (53 percent). In 1994, William Chase's ownership decreased to 49.4867 percent. The balance of the stock is owned by William's son, John Chase. The subject site is located at 424 N. Van Buren Street in Stockton, California. The petitioner leased the site to Chase Chevrolet from 1956-1994. The petitioner leased two other properties to Chase Chevrolet during the years 1991, 1992, and 1993.

Petitioner discovered an unauthorized release of petroleum at the subject site in November of 1992, and is currently performing corrective action. Chase Chevrolet has also been identified as a responsible party at the site and is assisting with the cleanup efforts. Petitioner applied to the Cleanup Fund on January 21, 1994, and sought placement of its

claim in Priority Class B, the Small Business Priority Classification. The petitioner's claim was assigned to the Motor Vehicle Dealer industry group, which has a three-year gross receipts limit of $20 million.[6] The Division determined that the petitioner and Chase Chevrolet were affiliates of one another during the applicable accounting period. After reviewing the petitioner's gross receipts, including those of Chase Chevrolet, for the years 1991, 1992 and 1993, the Division determined that the applicable cap had been exceeded by far.

II. CONTENTION AND FINDING

Contention: Petitioner contends that the Division incorrectly concluded that the petitioner and Chase Chevrolet are affiliates. Petitioner makes several arguments in support of this contention. First, petitioner argues that it and Chase Chevrolet can be considered affiliates only if petitioner was subject to the control of Chase Chevrolet. Second, petitioner argues that William Chase did not and could not control petitioner because a receiver had been appointed in 1986, and exercised control over the petitioner. Third, petitioner argues that William Chase did not control Chase Chevrolet. Finally, petitioner argues that an affiliation does not exist because

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[6] The petitioner itself is not a motor vehicle dealer. Since the Division concluded that Chase Chevrolet, which is properly classified as a motor vehicle dealer, was an affiliate of the petitioner during the relevant three-year period, the Division applied the $20 million gross-receipt limitation assigned to motor vehicle dealers, which is substantially higher than the cap assigned to the petitioner's category.

Robert Chase, the other general partner of the petitioner, does not have any interest in Chase Chevrolet.

Finding: Petitioner's first argument, that petitioner and Chase Chevrolet can be considered affiliates only if petitioner was subject to the control of Chase Chevrolet, is without merit. Again, the OSMB regulations define affiliate, in relevant part, as follows:

> ". . . a business concern which is a subsidiary of or owned in part by another business concern such that the applicant business concern is subject to the control of a non-applicant business concern(s) . . . ." (Cal. Code Regs., tit. 2, § 1896, subd. (b).)

For purposes of applying this regulation to the Cleanup Fund program, petitioner is the applicant business concern and Chase Chevrolet is the nonapplicant business concern. Petitioner argues that Chase Chevrolet can neither be considered an affiliate nor can its gross receipts be attributed to petitioner because petitioner is not controlled by Chase Chevrolet. As discussed in the Mariposa Quik Stop Order (In the Matter of the Petition of Mariposa Quik-Stop, SWRCB Order WQ 93-13-UST), OSMB interprets its regulation to include in allocable gross receipts not just the gross receipts of those businesses which are deemed to control an applicant but also the gross receipts of those businesses that are deemed to be controlled by the applicant or any member of the applicant (Mariposa Quik-Stop Order, p. 6, fn. 2). Since the SWRCB uses both the OSMB regulations and its interpretation and application of those regulations, the gross-receipts limitation is determined by the amount of gross receipts available to the claimant and all other entities that are deemed

to be under substantial control of the claimant. Accordingly, it is appropriate to consider the gross receipts of all entities that control or are controlled by petitioner.

Placement in Priority Class B will impact the timing of reimbursement from the Fund, not eligibility. The legislative intent behind establishment of the Fund's current priority system is that those persons who are least able to defray the costs of site cleanup ought to receive highest priority for reimbursement from the Fund. A claimant's ability to defray cleanup costs is determined by all financial resources available to the claimant, including the resources of affiliates.

Petitioner's second argument, that the receiver, rather than William Chase, actually controlled petitioner, and that therefore there is no common control over petitioner and Chase Chevrolet, is unpersuasive. The OSMB regulations define control, in pertinent part, as follows:

> "'Control' means the authority or ability to regulate, direct, dominate or directly influence the day-to-day operations of any business concern. Every business concern is considered as having one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative, and it is immaterial whether it is exercised so long as the power to control exists . . . ." (Cal. Code Regs., tit. 2, § 1896, subd.(c).) (Emphasis added.)

In the Mariposa Order, the claimant was a partnership owned 51 percent by a corporation and 49 percent by an individual. We found that each general partner controlled the claimant. According to our holding in the Mariposa Order, William Chase controls petitioner since he is a general partner

of petitioner. This case is complicated, however, by the fact that a receiver has been in place since 1986. Although the OSMB regulations do not seem to contemplate such a situation, in our opinion, William Chase exercised substantial control over the gross receipts of the petitioner despite the presence of the receiver.

A receiver is a representative of the court, appointed to manage property forming the subject of litigation, in order to preserve and dispose of it pursuant to the final judgment of the court (55 Cal.Jur.3d, Receivers, § 1, p. 7.) The receiver is not the agent of either party to the action, but represents all persons interested in the property. (*Ibid.*) The appointment of a receiver is an equitable remedy, ancillary to a pending action involving another subject (55 Cal.Jur.3d, Receivers, § 2, p. 8.) The California Code of Civil Procedure provides that in an action between partners, a receiver may be appointed upon a showing of probable right to or interest in the property, funds, or proceeds thereof, and that the property or fund is in danger of being lost, removed, or materially injured (Code Civ.Proc., § 564, subd. (b)(1)).

The functions and powers of a receiver are controlled by statute, by the order appointing the receiver, and by orders subsequently made by the court. (55 Cal.Jur.3d § 52, p. 56.) A receiver's conduct is always subject to the control of the court that appointed the receiver. (*Ibid.*) Upon receiving approval of the court, a receiver may sell receivership property (Code Civ. Proc., § 568.5). The intent of this provision is that the

receiver shall take the property and keep it in the receiver's possession and do no act with respect to the property that involves a surrender of the property without a court order (55 Cal.Jur.3d § 54, p. 58).

In 1985, Robert A. Chase, petitioner's other general partner, filed a complaint against William Chase for Dissolution and Winding Up of Limited Partnership. In 1986, the court appointed a receiver, Herbert H. Bowman. In June of 1995, the parties entered into a settlement agreement. Robert Chase, the plaintiff and Cross-Defendant, dismissed the lawsuit as to most matters. The receiver is still in place for the purposes of disposing of partnership assets and settling of the accounting.

There are several indications that William Chase exercised control over the petitioner. First, both William Chase and Robert Chase entered into a Stipulation for an Order Appointing Receiver (Stipulation). The Stipulation was, of course, subject to approval by the court, but both parties apparently negotiated and ultimately agreed upon the terms contained in the Stipulation. The receiver was and is required to comply with the terms of the Stipulation. The Stipulation provides that pending trial of the legal action, the sole function of the receiver is to act as the principal in listing the real property of the petitioner for sale and to list and sell such real property under several terms and conditions. The terms and conditions for selling the real property include the following: (1) that the real property listing shall first be offered to a certain agent or broker, and that if that individual

declines, that the receiver may select an agent or broker; (2) that the real property shall be listed for a sale price as established by a particular appraiser, unless the receiver believes the established prices are commercially unreasonable; and (3) in listing a piece of property that was leased to Chase Chevrolet, the receiver was authorized to represent that the lease in that matter shall have the exact same terms, with certain exceptions, to a prior lease entered into between the petitioner and Chase Chevrolet (the exceptions relate to Chase Chevrolet's right to sublet, the amount of minimum rent and the lease term).

In addition to the conditions concerning the sale of the real property pending trial in the lawsuit, the Stipulation also speaks to the receiver's powers and duties after a judgment has been entered in the matter. According to the Stipulation, the receiver is authorized to operate and conduct the business of the petitioner in accordance with the petitioner's Agreement of Limited Partnership (Agreement). Furthermore, for any property that has not been sold before the entry of judgment in the matter, the receiver is required to sell the property in accordance with the Agreement, upon notice and in a manner prescribed by the court. The Stipulation describes the distribution of the proceeds from the sale of the property.

The underlying legal action between Robert Chase and William Chase was not settled until 1995. Although the Stipulation states that the receiver was limited to listing petitioner's property pending trial in the underlying action,

petitioner has indicated that the receiver actually conducted petitioner's business during this time period. Petitioner claims that soon after the receiver was appointed in 1986, the receiver began collecting rents, negotiating new rental agreements, authorizing repairs to the property, and paying bills for repairs, maintenance, taxes and insurance. Both general partners were and continue to be involved in the decisions relating to the potential disposition of the property including the sale, lease, rental and/or donation of the property. In November of 1990, the receiver obtained an order from the court relieving the receiver of any duties associated with detecting and remedying any physical conditions respecting petitioner's real property. Beginning in 1990, the general partners have had complete control over remediation at the subject site. Even though the ultimate decisions, with the exception of those relating to site remediation, are made by the receiver, the receiver is obligated to dispose of the property and conduct the petitioner's business in accordance with the Stipulation and the Agreement. The receiver acts, therefore, under the indirect control of both William Chase and Robert Chase. William Chase and Robert Chase make all of the decisions relating to site cleanup. Thus, we find that William Chase had substantial control over the gross receipts of the petitioner.

The petitioner's third argument, that William Chase did not control Chase Chevrolet, is also without merit. The OSMB regulations clearly express that if the business concern under consideration is a corporation, that a party is considered to

control or have the power to control that concern if such party controls or has the power to control fifty percent or more of its voting stock. (Cal. Code Regs., tit. 2, § 1896, subd. (c).) During the relevant three-year period, William Chase owned at least 50 percent of Chase Chevrolet's stock. Therefore, William Chase had substantial control over the gross receipts of Chase Chevrolet during the years 1991, 1992, and 1993, and the gross receipts for these years are properly attributable to the petitioner.

Finally, petitioner argues that it and Chase Chevrolet are not affiliates because Robert Chase, the other general partner of the petitioner, does not have any interest whatsoever in Chase Chevrolet. The petitioner is subject to the control of Chase Chevrolet, and vice versa, by virtue of William Chase's involvement with both entities. The fact that Robert Chase does not own any portion of Chase Chevrolet does not sever the affiliation that exists between the petitioner and Chase Chevrolet. In fact, the relationship between Robert Chase and William Chase supports our conclusion that the petitioner and Chase Chevrolet are affiliates of one another. The OSMB regulations provide the following:

> "In the following circumstances there will be a presumption that business concerns are affiliates, however such presumption may be rebutted by clear and convincing evidence that an affiliation does not, in fact, exist: . . . .
>
> "(2) If the controlling or majority owners of concerns which are engaged in similar or commonly related business activity are familiarly related, as defined herein, and have established a business or

financial relationship between them." (Cal. Code Regs., tit. 2, § 1896, subd. (b).)

A familial relationship means:

". . . relationships between the following family members: Husband, wife, child, step-child, mother, father, grandparent, brother, sister, grandchild, stepbrother, stepsister, stepmother, stepfather, mother-in-law, father-in-law, brother-in-law, sister-in-law, daughter-in-law, son-in-law, and if related by blood, uncle, aunt, niece, nephew." (Cal. Code Regs., tit. 2, § 1896, subd. (k).)

During the years 1991, 1992, and 1993, Robert Chase and William Chase were controlling owners of the petitioner. William Chase was also the controlling owner of Chase Chevrolet. As brothers, the two are familiarly related and have established a business relationship through the several leases entered into between the petitioner and Chase Chevrolet. It is arguable that the petitioner and Chase Chevrolet are engaged in a commonly-related business. The petitioner purchased, improved, sold, and leased real property to auto dealerships, and Chase Chevrolet, as an auto dealership, had and continues to have a need to purchase or lease properties for its dealerships and related concerns.

In light of our earlier findings, it is not necessary to show that the presumption expressed above applies. While Robert Chase's lack of ownership in Chase Chevrolet does not destroy the affiliation established between the two concerns involved, the regulation discussed immediately above supports our earlier conclusion that an affiliation existed between the petitioner and Chase Chevrolet during the years 1991, 1992, and 1993.

III. SUMMARY AND CONCLUSIONS

1. Claimants who meet the requirements for small business classification under the OSMB regulations qualify for Priority Class B. Under the OSMB regulations, qualification as a small business depends in part on the gross receipts of the business concern or concerns under consideration.

2. In determining those gross receipts attributable to an applicant, OSMB would look not just to the gross receipts of the applicant but also to the gross receipts of the person or persons who are deemed to control the applicant or who are deemed to be controlled by the applicant.

3. Under the facts of this case, William Chase directly or indirectly controlled the gross receipts of both the petitioner, and Chase Chevrolet during 1991, 1992, and 1993.

4. The fact that Robert Chase, the other general partner of the petitioner, did not control Chase Chevrolet is of no consequence and does not sever the affiliation between the two business concerns created by William Chase.

5. The gross receipts of the petitioner and its affiliate, Chase Chevrolet, far exceed the $20 million gross-receipts cap which applies to the petitioner, and the petitioner is, therefore, ineligible for placement in Priority Class B.

IV. ORDER

IT IS THEREFORE ORDERED that the Decision of the Division determining that the claim of petitioner is ineligible

for Priority Class B and placing this claim in Priority Class C is affirmed.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 20, 1997.

AYE: John P. Caffrey
James M. Stubchaer
John W. Brown
Mary Jane Forster

NO: None.

ABSENT: Marc Del Piero

ABSTAIN: None.

Maureen Marché
Administrative Assistant to the Board