

descriptive terminology and examples of types of business activities that have been included in class codes in the past.

EVIDENTIARY RULING

The record consists of petitioner's Exhibits P1 through P4 and ORAC's Exhibit O1, which were admitted into the record without objection. The record closed following the hearing.

FINDINGS OF FACT

(1) ORRCO is an Oregon corporation engaged in the business of recycling used oil products² and other materials. The company also collects antifreeze, waste-water and other wastes and used materials. Its employee drivers, who are called "generators," collect the substances from collection sites throughout the Northwest and from clients at their businesses. They are an integral part of, and the first step in, the oil recycling and reclaiming process. They start the process of recycling and reclaiming the substances by testing each substance, clarify the acceptability of the substance, sorting, profiling, pumping, and picking-up and delivering the substance to the receiving facility. About 70 to 75 percent of ORRCO's business comes from recycling used oil used for lubrication, 10 to 15 percent from recycling used asphalt, and 5 percent from recycling used diesel fuel.³ (Exs.P3, P4, O1; test. of Briggs.)

(2) All of ORRCO's generators receive 90 hours of Hazmat or hazardous waste training before they begin work. They learn how to test the substances and how to record the results on waste/material profiles. The generators are responsible for correctly identifying the substances by testing each substance collected to determine what the substance is before sorting and pumping the substances into tanks. Fifty percent of the generators' time is spent in testing the materials. It is extremely important to the reclamation process that the substances are correctly tested and sorted. (Test. of Briggs.)

(3) The generators complete Waste/Material Profiles on each substance collected wherein they record the results of their testing, including the type of waste/material, the percentage of water, and the amount of PCBs. After receiving and sorting the substances into tanks and completing the Waste/Material Profiles, the generators deliver the tanks containing the sorted material to the receiving facility, Fuel Processors, Inc.,⁴ which reclaims the wastes/materials by

² "Basic Used Oil" is defined by ORRCO's Facility Management Plan (FMP) as being "limited to the following materials: automotive drain oil, machine lubricating oil, machine tool cutting and cooling fluids (including as-used solutions) containing at least 1 percent oil, hydraulic oil, brake fluid, refrigeration oil, oil used as non-contact heat transfer media and any material specifically agreed for inclusion in this plan by DEQ. (Ex. P3.)

³ ORRCO also collects naphtha which is a liquid obtained from crude gasoline that the company burns on site. Briggs testified that it is illegal for ORRCO to pick up gasoline unless it is used gasoline for recycling. As a waste recycler, ORRCO is not authorized to collect virgin or unused gasoline.

⁴ Fuel Processors, Inc. is a related but currently separate from ORRCO for purposes of liability. Mr. Briggs is the majority stockholder in both businesses. He is also the majority stockholder in two other related companies: Industrial Oils, Inc., and Energy Recovery, Inc. (Ex. O1.)

removing the pollutants and contaminants and burns the hazardous materials into ash which can then be disposed of. ORRSCO thereafter sells the reclaimed substances and delivers the substances to the buyers. (Ex. P3; test. of Briggs.)

(4) On October 25, 2002, NCCI performed an inspection of ORRSCO's business. The inspection described ORRSCO's business activities as "Recycling of Used Oil and Other Material." The inspection concluded that ORRSCO was properly classified in Code 4740. (Ex. P4.) SAIF, ORRSCO's workers' compensation carrier, subsequently audited the company and reclassified ORRSCO's principal business classification from Code 4740 to Code 8350. On May 1, 2003, NCCI conducted another inspection of ORRSCO's business. This inspection described ORRSCO's business activities as "Hauling of Used Oil and Other Material and the sale of Recycled Oil and Other Material." This inspection concluded that ORRSCO was properly classified in Code 8350. (Ex. O1.)

CONCLUSIONS OF LAW

ORAC incorrectly declined to amend ORRSCO's principal classification to Code 4740 (Oil Refining – Petroleum & Drivers).

OPINION

Petitioner's business activities have been reclassified by SAIF from Code 4740 to Code 8350. The issue is whether ORAC's decision declining to amend petitioner's principal business activities to Code 4740 was incorrect. Inasmuch as petitioner is the party seeking redress before the department concerning ORAC's decision, petitioner has the burden of proving its position on the issue by a preponderance of the evidence. *See* ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of legislation adopting a different standard, the standard in an administrative hearing is by a preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General contractors v. Tandy Corp.*, 303 Or 390 (1989). I find that petitioner has met its burden.

ORAC applied *Basic Manual* Rule 1-D-1⁵ and determined that ORRSCO should be classified separately from Fuel Processors, Inc. and no longer share the same classification because they were now separate legal entities. ORAC had previously classified the activities performed by ORRSCO and Fuel Processors in Code 4740 when they were part of the same legal entity, apparently deciding that because ORRSCO was longer part of the business that performed the reclamation of the used oil products, it should no longer be classified in that class code. Class Code 8350, which ORAC concluded was the appropriate classification by analogy to ORRSCO's business activities, provides in pertinent part:

⁵ Basic Manual Rule 1-D-1 states:

1) Separate Legal Entities

Classification rules apply separately to each legal entity operating in a state even if multiple entities are insured under a single policy.

PHRASEOLOGY GASOLINE DEALER & DRIVERS.

* * * * *

SCOPE Code 8350 is applied to dealers engaged in gasoline and oil distribution. These dealers receive various grades of refined gasoline and oil which are pumped into storage tanks. There may be incidental mixing and blending operations utilizing a small system of pipelines which lead from the storage tanks to mixers, and from there to conveniently located outlets from which the products are filled into tank trucks prior to delivery. The classification contemplates dealers such as refinery distributors who sell and distribute gasoline and lubricating oil directly to retail filling stations and, in addition, make bulk deliveries of fuel oil to factories, apartment houses, office buildings and private residences. ***. This classification also is applied to oil and gasoline dealers who, as an incidental phase of their general operations, engage in spreading oil on roads.

(Emphasis in original.)

ORAC acknowledges that Code 8350 does not accurately describe ORRCO's business activities. Noting that Code 8350 applied to dealers with principal operations of oil distribution, pumping oil into storage tanks or tank trucks, and blending and mixing operations, ORAC determined that ORRCO's principal operations were the same. I disagree and find Code 4740 more applicable.

Class Code 4740 states in relevant part:

PHRASEOLOGY OIL REFINING – PETROLEUM - & DRIVERS. * *
***. * * .**

CROSS –REF. Gasoline Recovery and Drivers

SCOPE * * * * * Code 4740 additionally contemplates risks engaged in the reclaiming, recycling or rerefining of used motor oil.

ORRCO is not a gasoline dealer and does not distribute virgin gasoline or deliver fuel oil from refineries to office buildings, apartments and residences. The generators collect used oil products and other materials, testing the substances for hazardous wastes before accepting them. After completing the tests, generators record the results on material/waste profiles and, if acceptable, transport the substances to the receiving facility. Because the activities of the generators in determining the reclamation value of the substances is integral to the recycling and reclamation process and because 50 percent of the generators' time is spent on these recycling and reclamation activities, I conclude that ORRCO's principal operations are more similar to businesses classified in Code 4740. Accordingly, ORAC decision is reversed.

ORDER

ORAC's decision denying Oil Re-Refining Company's request to classify its business activities in Code 4740 is reversed. Petitioner's business shall be reclassified in Code 4740.

IT IS SO ORDERED.

Dated this 6th day of July 2004 in Salem, Oregon.

/s/ Ella D. Johnson
Ella D. Johnson, Administrative Law Judge
Office of Administrative Hearings

NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this proposed order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this proposed order. Mail exceptions to:

Department of Consumer and Business Services
Mitchel D. Curzon, Chief Enforcement Officer
Oregon Insurance Division
350 Winter Street NE, Room 440
Salem, OR 97301-3883