



1986

Taxation

John M. Collins

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

John M. Collins, *Taxation*, 40 Sw L.J. 697 (1986)
<https://scholar.smu.edu/smulr/vol40/iss1/23>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

TAXATION

by

John M. Collins*

I. LIMITED SALES, EXCISE, AND USE TAX

A. Application of Tax

IN *Geomap Co. v. Bullock*¹ the Austin court of appeals held that maps, which are a means of disseminating geological information, constitute an intangible product that is not subject to sales tax.² Geomap's subscription agreements required its customers to make an initial payment for a set of subsurface geological maps and for use of Geomap's library. The agreements stated that all maps remained the property of Geomap and the customer must then return to the company. A second agreement normally executed with customers provided additional maps and updates of information at approximately one-fourth the cost of the initial documents. The district court had agreed with the comptroller that Geomap's sales of the additional maps constituted sales of tangible property subject to sales tax under section 151.005 of the Tax Code.³ The appellate court, citing *Bullock v. Statistical Tabulating Corp.*,⁴ stated that the test for determining the taxability of the transaction is the "ultimate object or the essence of the transaction."⁵ The court then ruled that the additional maps supplied by Geomap are merely the means for distributing geographical information to customers.⁶ The customers are thus actually purchasing information, which is an intangible product.⁷

In a case involving similar principles, the comptroller determined that the essence of a taxpayer's transactions involving rental and servicing of water conditioning and softening devices constituted the provision of a service

* B.A., Duke University; J.D., University of Texas. Partner, Haynes and Boone, Dallas, Texas.

1. 691 S.W.2d 98 (Tex. App.—Austin 1985, writ ref'd n.r.e.).

2. *Id.* at 101.

3. TEX. TAX CODE ANN. § 151.005 (Vernon Supp. 1986). Although the comptroller conceded that the initial sale of the subscription agreement did not result in a taxable transaction because it included the provision of services, he argued that the second sale of maps constituted a taxable sale of tangible property.

4. 549 S.W.2d 166, 168 (Tex. 1977).

5. 691 S.W.2d at 100 (emphasis in original).

6. *Id.* at 101.

7. *Id.* In similar cases the comptroller has ruled that sale of multiple listing books and sale of negatives or prints by a commercial photographer constitute sales of tangible property. See Tex. Comptroller's Administrative Decision No. 12,110 (1982); Tex. Comptroller's Administrative Decision No. 11,925 (1982).

rather than the rental of equipment.⁸ In Decision 16,023 the comptroller examined the type of services rendered by the taxpayer and the degree of operational control exercised by the taxpayer's customers.⁹ The comptroller concluded that the customers did not exercise the degree of operational control normally found in a traditional rental, and that the taxpayer provided a significant amount of services.¹⁰

In two decisions the comptroller strictly applied the definition of a sale under section 151.005 of the Tax Code¹¹ to certain transactions even though the taxpayer did not make the sales in the regular course of business and had no profit motive in the transactions.¹² In Decision 16,693¹³ a corporation purchased items by mail-order on behalf of its employees. The corporation subsequently sold the items to the employees at cost. The comptroller ruled that the profit motive of the taxpayer is irrelevant.¹⁴ The only important factor to consider is whether the corporation transferred the goods for consideration.¹⁵ In Decision 15,951¹⁶ a parent corporation leased equipment to a subsidiary and charged a rental equal to depreciation plus a monthly service charge. In this case the subsidiary made no actual lease payments and the parties failed to execute a formal written lease. The comptroller ruled that on its face the transaction was subject to sales tax and the taxpayer had not established any specific exemption for the transaction.¹⁷

In two opinions issued during the Survey period, the attorney general ruled that the repeal of specific sales tax exemptions did not violate the United States Constitution.¹⁸ In 1984 the Texas legislature repealed the sales tax exemption for tangible personal property purchased by a contractor and used for the improvement of real property belonging to the United States or an agency or instrumentality of the United States.¹⁹ In Opinion No. JM-207²⁰ the attorney general ruled that section 151.311 of the Tax Code,²¹ as amended, does not result in either imposition of a direct tax on the United States²² or an indirect tax that unconstitutionally discriminates

8. Tex. Comptroller's Administrative Decision No. 16,023 (1985).

9. *Id.*

10. *Id.*

11. TEX. TAX CODE ANN. § 151.005 (Vernon Supp. 1986). Section 151.005(1) of the Tax Code provides that a sale includes a "transfer of title or possession of tangible personal property . . ." for consideration. *Id.*

12. Tex. Comptroller's Administrative Decision Nos. 16,693, 15,951 (1985).

13. Tex. Comptroller's Administrative Decision No. 16,693 (1985).

14. *Id.*

15. *Id.*

16. Tex. Comptroller's Administrative Decision No. 15,951 (1985).

17. *Id.*

18. Op. Tex. Att'y Gen. Nos. JM-263, JM-207 (1984).

19. Act of July 13, 1984, ch. 31, § 2, 1984 Tex. Sess. Law Serv. 462, 551 (Vernon).

20. Op. Tex. Att'y Gen. No. JM-207 (1984).

21. TEX. TAX CODE ANN. § 151.311 (Vernon Supp. 1986). Tangible personal property purchased by a contractor for use in the improvement of real property owned by Texas or a political subdivision of Texas remains exempt.

22. The attorney general acknowledged that Texas may not impose a direct tax upon the United States or any of its agencies citing *Mayo v. United States*, 319 U.S. 441, 446-47 (1943). Op. Tex. Att'y Gen. No. JM-207 (1984).

against the United States.²³ Since the statute imposes a tax upon property used by a contractor, it does not directly impose a tax upon the United States. Payment of sales tax by such contractors does, however, result in an indirect imposition of the tax upon the United States because the federal government bears the burden of the tax. Citing *United States v. County of Fresno*,²⁴ the attorney general noted that a state tax is not unconstitutional merely because it ultimately imposes a burden upon the federal government, provided that the state imposes such tax equally on other parties similarly situated.²⁵ After reviewing a number of United States Supreme Court cases dealing with the constitutionality of state taxes indirectly imposed upon the federal government,²⁶ the attorney general concluded that *State of Washington v. United States*²⁷ established the proper test for determining the constitutionality of such a tax.²⁸ In that case the Supreme Court held that no unconstitutional discrimination exists if the burdens imposed upon the federal government and its contractors equals the burdens imposed upon private enterprise.²⁹ Although a contractor dealing with the federal government sustains a different tax burden than one dealing with the State of Texas, the attorney general concluded that under the *Washington* test the Texas sales tax does not unconstitutionally discriminate against the federal government.³⁰

The 1984 sales tax legislation also repealed a specific sales tax exemption for newspapers under section 151.319 of the Tax Code.³¹ In Opinion No. JM-263³² the attorney general concluded that the repeal of this exemption does not single out newspapers for taxation, but merely imposes upon the press a tax burden similar to that imposed upon other businesses.³³ The attorney general noted that the United States Supreme Court has ruled that owners of newspapers are not shielded by the first amendment from any of the ordinary forms of taxation for the support of government.³⁴

23. *Id.* An indirect tax may be unconstitutional if it discriminates against the federal government. See *United States v. City of Detroit*, 355 U.S. 466, 473 (1958).

24. 429 U.S. 452, 462 (1977).

25. Op. Tex. Att'y Gen. No. JM-207 (1984).

26. The attorney general noted that courts have applied unclear and inconsistent tests when determining whether discrimination exists. Op. Tex. Att'y Gen. No. JM-207 (1984). One line of cases established an economic burden test. Under this test the Court invalidated the tax when it resulted in the imposition of a substantial economic burden upon the government. See *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386-87 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134, 136 (1937). In other cases the Court applied a legal incidence test, which turned on whether the interest taxed is that of the federal government or that of the contractor. See *United States v. County of Allegheny*, 322 U.S. 174, 189 (1944); *Trinityfarm Constr. Co. v. Grosjean*, 291 U.S. 466, 472 (1934).

27. 460 U.S. 536 (1983).

28. Op. Tex. Att'y Gen. No. JM-207 (1984).

29. 460 U.S. at 545-46.

30. Op. Tex. Att'y Gen. No. JM-207 (1984).

31. Act of July 13, 1984, ch. 31, § 3, 1984 Tex. Sess. Law Serv. 462 (Vernon); see TEX. TAX CODE ANN. § 151.319 (Vernon Supp. 1986).

32. Op. Tex. Att'y Gen. No. JM-263 (1984).

33. *Id.*

34. *Id.* (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)).

In Decision 13,699³⁵ the comptroller reiterated his position that the Texas use tax may be imposed upon an aircraft hangared in Texas, even though the aircraft is used exclusively in interstate transportation.³⁶ The taxpayer argued that the commerce clause of the United States Constitution³⁷ prohibited imposition of the Texas sales and use tax on property used exclusively in interstate commerce. The comptroller noted, however, that the taxpayer purchased and moved tangible personal property into Texas from outside the state for the purpose of retaining it and exercising dominion over it in Texas.³⁸ Accordingly, imposition of the Texas use tax does not result in discrimination against interstate commerce.³⁹ The tax merely requires that those engaged in interstate commerce bear their share of the state tax burden.⁴⁰ The comptroller concluded that if the tax does violate the commerce clause, the United States Supreme Court should inform Texas of such violation.⁴¹

B. Specific Exemptions

In a second significant sales and use tax case the Austin court of appeals determined that the legislature intended to impose a sales tax at some point on the sale of all returnable or non-returnable containers.⁴² The taxpayer argued that its purchase of returnable containers fell within the sale for resale exemption contained in article 20.04(O).⁴³ The taxpayer then argued that its subsequent leases or sales of these containers, filled with gas, qualified for exemption under article 20.04(E)(3)(a)(iii), which specifically deals with returnable and non-returnable containers.⁴⁴ Although the court acknowledged that the taxpayer's purchase of the returnable cylinders meets the literal requirements of a "sale of resale, leasing or renting," the court determined that the legislature intended article 20.04(E)(3)(a)(iii) to require payment of tax on receipts from the sale of returnable containers to those who fill such containers and sell the contents together with the container.⁴⁵ The court noted that if the taxpayer purchased a non-returnable container, filled it with gas, and sold it to a consumer, the taxpayer would not pay a tax on his purchase of the container, but the consumer would pay sales tax on

35. Tex. Comptroller's Administrative Decision No. 13,699 (1984).

36. *Id.*

37. U.S. CONST. art. I, § 8, cl. 3.

38. Tex. Comptroller's Administrative Decision No. 13,699 (1984).

39. *Id.*

40. *Id.* The comptroller reached the same conclusion in Decision 14,170. See Tex. Comptroller's Administrative Decision No. 14,170 (1984); see also Collins, *Taxation, 1985 Annual Survey of Texas Law*, 39 Sw. L.J. 545, 547 (discussing Decision 14,170).

41. Tex. Comptroller's Administrative Decision No. 13,699 (1984).

42. *East Texas Oxygen Co. v. State*, 681 S.W.2d 741 (Tex. App.—Austin 1984, no writ).

43. TEX. TAX—GEN. ANN. art. 20.04(O) (Vernon 1969) (now codified as TEX. TAX CODE ANN. § 151.302 (Vernon Supp. 1986)). Section 151.302 provides an exemption for taxable items sold for resale. *Id.*

44. TEX. TAX—GEN. ANN. art. 20.04(E)(3)(a)(iii) (Vernon 1969) (now codified as TEX. TAX CODE ANN. § 151.322 (Vernon 1982)). Section 151.322(a)(3) provides an exemption for a returnable container sold with its contents or resold for refilling. *Id.*

45. 681 S.W.2d at 744-45; see TEX. TAX—GEN. ANN. art. 20.04(E)(3)(a)(iii) (Vernon 1969) (now codified as TEX. TAX CODE ANN. § 151.322 (Vernon 1982)).

the container as part of his purchase.⁴⁶ In that event the sale for resale exemption specifically applies.⁴⁷ If the container is returnable, however, or if its sale to the consumer is exempt, the person purchasing the container and selling the container filled with its contents would pay tax on his purchase of the container, and the consumer of the contents would not pay tax on the value of the container.⁴⁸ The court concluded that this interpretation of the statute is required in order to effectuate the provisions of article 20.04(E)(3), which exempts sales of empty, non-returnable containers to one who sells goods in the containers.⁴⁹

In two cases decided during the Survey period, the comptroller reiterated his position that a financial institution may not claim the occasional sale exemption granted by section 151.304(b)(1) of the Tax Code for property it reposes.⁵⁰ In Decision 15,974⁵¹ the comptroller held that the sale of an airplane repossessed by a bank could not qualify as an occasional sale because financial institutions are considered to be engaged in the business of seeling such taxable items at retail.⁵² The bank then argued that the airplane constituted the entire operating assets of the former owner, and section 151.304(b)(2) of the Tax Code⁵³ exempts a sale of the entire operating assets of a business. The comptroller noted that this exemption refers to the person making the sale, not to the financial institution that has repossessed the goods in question.⁵⁴ Whether the comptroller would have reached the same conclusion if the bank had operated a business prior to sale of the airplane and the airplane constituted the entire operating assets of that business is not clear.⁵⁵ In Decision 15,795⁵⁶ the comptroller again ruled that sales of property acquired by financial institutions from defaulting debtors constitute sales in the regular course of its business.⁵⁷ Since the financial institution in this case had made sales of at least two other items within the preceding twelve months, the comptroller treated the bank as a retailer not entitled to the occasional sale exemption under section 151.304(b)(1).⁵⁸

In Decision 16,192⁵⁹ the comptroller required strict proof of a taxpayer's

46. *Id.* at 745.

47. *Id.*

48. *Id.*

49. *Id.*

50. See TEX. TAX CODE ANN. § 151.304(b)(1) (Vernon Supp. 1986) (occasional sales exempt if not in ordinary course of business).

51. Tex. Comptroller's Administrative Decision No. 15,974 (1984).

52. *Id.*; see Tex. Comptroller's Administrative Decision No. 12,338 (1982) (financial institution's sales of property received from defaulting debtors constitute sales in the ordinary course of business).

53. TEX. TAX CODE ANN. § 151.304(b)(2) (Vernon Supp. 1986).

54. Tex. Comptroller's Administrative Decision No. 15,974 (1984).

55. In Rule 3.316(d), the Comptroller has set forth the requirements for qualifying as a separate business. Tex. Comptroller of Public Accounts, Rule 3.316(d), [1 TEX.] ST. TAX REP. (CCH) ¶ 66-165, at 7320 (Jan. 31, 1978).

56. Tex. Comptroller's Administrative Decision No. 15,795 (1984).

57. *Id.*

58. *Id.*; see TEX. TAX CODE ANN. § 151.304(b)(1) (Vernon Supp. 1986). Section 151.304 of the Tax Code defines occasional sale to mean one or two retail sales of taxable items in a 12-month period by a person not habitually in the business of selling such items. *Id.*

59. Tex. Comptroller's Administrative Decision No. 16,192 (1984).

entitlement to the sale for resale exemption.⁶⁰ In this case the taxpayer made a number of sales for which it did not collect sales tax. As proof that the sales were exempt, the taxpayer merely provided an exemption number for its purchasers. The comptroller ruled that sales must be documented by exemption certificates.⁶¹ The comptroller recently amended rules 3.282(f)(1) and (3)⁶² to specify the proof required for the resale exemption. The rule now provides that, for transactions after October 2, 1984, resale and exemption certificates constitute the only acceptable proof that the taxpayer purchased a taxable item for resale or qualifies for exemption.⁶³

C. Procedure

In *Bullock v. Mel Powers Investment Builder*⁶⁴ the Austin court of appeals ruled that the district court did not acquire jurisdiction over a sales tax refund claim because the taxpayer failed to file suit within thirty days after the denial of his motion for rehearing of the comptroller's administrative decision on his claim.⁶⁵ The court noted that the statute allows a taxpayer to bring suit against the comptroller provided that he meets the requirements contained in article 1.11(A).⁶⁶ In this case the taxpayer did not file suit within thirty days after denial of its motion for rehearing, as specifically required by article 1.11(A)(6).⁶⁷ The court ruled that the thirty-day limitation is clearly jurisdictional, and the comptroller was thus entitled to summary judgment.⁶⁸ The court noted that the legislature drafted the refund statute with the intent that a taxpayer should proceed through administrative channels prior to filing suit in district court.⁶⁹

In Decision 15,550⁷⁰ the comptroller ruled that no statute requires Texas to await the conclusion of another state's audit prior to assessing and collecting the Texas sales and use tax.⁷¹ In this case the taxpayer argued that Louisiana auditors had not yet determined its liability for Louisiana sales taxes; therefore, it could not calculate its proper credit against Texas taxes. The comptroller noted that, after payment of Texas taxes, the taxpayer could seek a credit for the Louisiana taxes paid.⁷²

60. *Id.*

61. *Id.*

62. Tex. Comptroller of Public Accounts, Rule 3.282(f)(1), (3), [1 TEX.] ST. TAX. REP. (CCH) ¶ 66-005, at 7238 (Aug. 5, 1985).

63. *Id.*

64. 682 S.W.2d 400 (Tex. App.—Austin 1984, no writ).

65. *Id.* at 403. Article 1.11(A) required three actions prior to filing suit in district court: (1) the filing of a tax refund claim; (2) the overruling of the motion for rehearing; and (3) the actual payment of any additional tax. TEX. TAX.—GEN. ANN. art. 1.11(A) (Vernon Supp. 1982) (now codified as TEX. TAX CODE ANN. § 112.151-.154 (Vernon 1982)).

66. 682 S.W.2d at 402.

67. TEX. TAX.—GEN. ANN. art. 1.11(A)(6) (Vernon Supp. 1982) (now codified as TEX. TAX CODE ANN. § 112.151(c) (Vernon 1982)).

68. 682 S.W.2d at 403.

69. *Id.*

70. Tex. Comptroller's Administrative Decision No. 15,550 (1984).

71. *Id.*

72. *Id.*

D. Miscellaneous Comptroller Decisions

The comptroller rendered four additional decisions during the Survey period that merit discussion. In Decision 15,628⁷³ the comptroller distinguished between separately stated transportation charges, which are exempt from sales tax, and other handling costs associated with filling mail-orders that are subject to the tax.⁷⁴ Under section 151.007(c)(7) of the Tax Code⁷⁵ charges for transportation of tangible personal property after a sale are not included in the calculation of the sales price subject to sales and use tax if the taxpayer separately identifies these charges.⁷⁶ The taxpayer in this case included direct transportation charges with other handling charges and asserted that all of these charges should be included in costs associated with transportation. The comptroller rejected the taxpayer's contention.⁷⁷

In Decision 16,061⁷⁸ the comptroller determined that the taxpayer was not the original producer of certain farm products, and thus section 151.316(9) of the Tax Code⁷⁹ did not entitle him to an exemption for machinery and equipment the original producer used exclusively in the processing and packing or marketing of agricultural products.⁸⁰ Although the taxpayer owned the machinery and the chickens that laid the eggs that were processed and marketed, the taxpayer previously contracted with farmers to raise and care for the chickens on a day-to-day basis. The farmers also bore a risk of loss because the owner gave no assurance that they would receive adequate compensation for their effort. As a result, under the comptroller's test set forth in Decision 11,120,⁸¹ the taxpayer failed to qualify as the original producer.⁸²

The comptroller liberally interpreted useful life in determining that certain equipment used in a manufacturing process qualified for the exemption under section 151.318(f) of the Tax Code⁸³ in Decision 15,688.⁸⁴ The comptroller ruled that equipment that had an expected useful life in excess of six

73. Tex. Comptroller's Administrative Decision No. 15,628 (1985).

74. *Id.*

75. TEX. TAX CODE ANN. § 151.007(c)(7) (Vernon 1982).

76. Tex. Comptroller's Administrative Decision No. 15,628 (1985). Subsequent to the time the charges were made by the taxpayer in this case, the comptroller promulgated a new rule that requires charges for transportation to be stated separately from sales price. The rule also provides that transportation or delivery must take place after the completion of the sale. Tex. Comptroller of Public Accounts, Rule 3.303(d)(1), [1 TEX.] ST. TAX REP. (CCH) ¶ 66-107, at 7311-13 (Dec. 24, 1984).

77. Tex. Comptroller's Administrative Decision No. 15,628 (1985).

78. Tex. Comptroller's Administrative Decision No. 16,061 (1984).

79. TEX. TAX CODE ANN. § 151.316(9) (Vernon 1982).

80. Tex. Comptroller's Administrative Decision No. 16,061 (1984).

81. Tex. Comptroller's Administrative Decision No. 11,120 (1981). The comptroller stated two requirements that must be met for a person to qualify as the original producer: 1) the person must exercise operational control over the product; and 2) the person must bear the risk of loss of the product. *Id.*

82. Tex. Comptroller's Administrative Decision No. 16,061 (1984).

83. TEX. TAX CODE ANN. § 151.318(f) (Vernon Supp. 1986). The section provides that useful life of six months or less means that property will be completely consumed or without value within six months.

84. Tex. Comptroller's Administrative Decision No. 15,688 (1984).

months at the time of purchase could qualify for exemption if its actual useful life to the taxpayer was less than six months because of service life or obsolescence.⁸⁵ In this case the taxpayer determined that utilization of a furnace to produce particular items necessary in its manufacturing process was uneconomical; therefore, the taxpayer ceased using the furnace. Although the taxpayer had operated the furnace over a ten-month period, the controller ruled that the furnace qualified for the six-month exemption because the furnace remained idle for all but forty two days of the time the taxpayer possessed it.⁸⁶ The comptroller amended rule 3.300(a)(13) to incorporate this position.⁸⁷

In Decision 15,809⁸⁸ the comptroller ruled that radio and radar equipment installed on a tugboat became a component part of the vessel.⁸⁹ Section 151.329(4)(B) of the Tax Code exempts sales of component parts from sales tax.⁹⁰ The tax division asserted that the equipment leased by the taxpayer did not permanently attach to the vessel because the lease required the taxpayer to remove and return the equipment to the lessor at the end of the lease term. The comptroller ruled, however, that the correct inquiry was whether the property became a component part and not whether it became a fixture.⁹¹ Since the property was essential to the operation of the vessel and became a constituent part of the vessel, the taxpayer qualified for the exemption.⁹²

E. 1985 Tax Legislation

The Texas legislature completely restructured the taxation of telecommunication services effective October 1, 1985. Telecommunications services are now taxable services under section 151.0101 of the Tax Code,⁹³ and telegraph companies are no longer subject to the gross receipts tax.⁹⁴ Certain telephone company services, however, remain subject to the gross receipts tax.⁹⁵ Section 151.323 exempts from the sales and use tax interstate long-

85. *Id.*

86. *Id.*

87. Tex. Comptroller of Public Accounts, Rule 3.300(a)(13), [1 TEX.] ST. TAX REP. (CCH) ¶ 66-092, at 7306 (Dec. 3, 1984). The rule currently excludes storage, standby, and repair time from the computation of useful life. *Id.*

88. Tex. Comptroller's Administrative Decision No. 15,809 (1984).

89. *Id.*

90. TEX. TAX CODE ANN. § 151.329(4)(B) (Vernon 1982).

91. Tex. Comptroller's Administrative Decision No. 15,809 (1984). Under Rule 3.297(b)(2), the comptroller requires that a component part actually be attached to and become a part of the vessel. Tex. Comptroller of Public Accounts, Rule 3.297(b)(2), [1 TEX.] ST. TAX REP. (CCH) ¶ 66-077, at 7299 (Mar. 24, 1978).

92. Tex. Comptroller's Administrative Decision No. 15,809 (1984).

93. TEX. TAX CODE ANN. § 151.0101(a)(6) (Vernon Supp. 1986). Section 151.0101 defines telecommunication services to mean the "electronic or electrical transmission, conveyance, routing, or reception of sounds, signals, data, or information" using virtually any method (including long distance telephone service), but excluding the "storage of data or information for subsequent retrieval or the processing, or reception and processing, of data or information intended to change its form or content." *Id.*

94. *Id.* §§ 182.001-.004.

95. *Id.* § 182.061.

distance telecommunications services, commercial radio or television broadcasts (other than cable television service), and certain telephone service.⁹⁶ In addition the legislature amended the definitions of seller and retailer in section 151.008(b) by adding a new subparagraph (4) to include a hotel, motel, or owner or lessor of an office or a residential building or development that contracts and pays for telecommunication services for resale to a guest or tenant.⁹⁷ Further, under section 151.025(c) a seller of telecommunications services must distinguish on its invoices charges for taxable telecommunication services from charges for non-taxable items.⁹⁸

Telecommunications services are exempt from local sales and use taxes, MTA taxes, and regional transit taxes.⁹⁹ A city or authority may, however, begin to tax these services on or after October 1, 1987, by repealing the exemption by a majority vote of the city's governing body or the authority's board.¹⁰⁰ For purposes of local sales taxes, telecommunications services occur at the location of the machinery from which the transmission originates unless such location is not determinable.¹⁰¹

The legislature repealed section 151.507(b) of the Tax Code to remove a conflict with subchapter D of chapter 111 of the Tax Code.¹⁰² Subchapter D establishes a four-year limitation period for all state taxes, which runs from the date the tax becomes due and payable.¹⁰³ The legislature also repealed section 151.513¹⁰⁴ and replaced it with section 111.0081,¹⁰⁵ which covers all state taxes, not just sales and use taxes. Section 111.0081 provides that tax assessments are due and payable ten days after they become final.¹⁰⁶ The statute also provides for a ten percent penalty on delinquent payments.¹⁰⁷ In the event of a re-determination hearing, the amount becomes due and payable twenty days after the decision becomes final.¹⁰⁸

96. *Id.* § 151.323. The business of telephone companies currently subject to the gross receipts tax under § 182.061 of the Tax Code includes basic local exchange telephone service or telephone service paid for by the insertion of coins in a coin operated telephone. *Id.* § 182.061.

97. *Id.* § 151.008.

98. *Id.* § 151.025(c).

99. *See* TEX. REV. CIV. STAT. ANN. arts. 1066c, § 4B(a) (local sales and use taxes); 1118x, § 11B(B)(b-1)(1) (MTA taxes); 1118y, § 16(f)(1-A)(A) (Vernon Pam. Supp. 1986) (regional transportation authority taxes).

100. *Id.* arts. 1066c, § 4B(b), 1118x, § 11B(B)(b-1)(2), 1118y, § 16(f)(1-A)(B) (Vernon Pam. Supp. 1986).

101. *Id.* arts. 1066c, § 6(B)(f), 1118x, § (b-1)(7), 1118y, § 16(f)(1)(2)(G).

102. Limited Sales, Exise, and Use Tax Act, ch. 24, § 1, 1961 Tex. Gen. Laws, Local & Spec. 72, 89, repealed by Act of Jan. 8, 1985, ch. 37, § 4, 1985 Tex. Sess. Law Serv. 127, 128 (Vernon).

103. TEX. TAX CODE ANN. § 111.201 (Vernon 1982). Sales tax becomes due and payable on the 20th day of the month following the calendar month or quarter with respect to which the tax is payable. *See* TEX. TAX CODE ANN. §§ 111.204 (Vernon 1982), 151.401 (Vernon Supp. 1986).

104. Limited Sales, Exise, and Use Tax Act, ch. 24, § 1, 1961 Tex. Gen. Laws, Local & Spec. 72, 91 (repealed 1985).

105. TEX. TAX CODE ANN. § 111.0081 (Vernon Supp. 1986).

106. *Id.*

107. *Id.*

108. *Id.*

The legislature repealed the exemption from use tax for tangible personal property purchased outside Texas and brought into the state for use as a licensed and certified carrier of persons or property.¹⁰⁹ Amendments to section 151.307 specify the documentation required to claim a sales tax exemption for property exported outside the United States.¹¹⁰ In addition, the same requirements for documentation exist under a new section 151.330(g) to obtain an exemption for tangible personal property shipped to a point outside Texas.¹¹¹

Finally, the legislature amended section 6(B)(2) of article 1066(c) of Texas Civil Statutes.¹¹² The amended statute defines taxable use of tangible personal property purchased under a resale certificate for purposes of local sales and use taxes.¹¹³ Property is taxable if used in a manner that would subject it to the limited sales, excise, and use tax under section 151.154 the Tax Code.¹¹⁴ Previously, the statute did not define taxable use.

F. Sales Tax Procedure Changes

During the Survey period the comptroller adopted a number of amended rules. Rule 3.344 now lists detailed examples of taxable and non-taxable telecommunication services and provides guidance for application of local sales and use tax on telecommunication services.¹¹⁵ In accordance with the amendment of section 151.307 of the Tax Code,¹¹⁶ the comptroller adopted rule 3.323 to specify the information and forms required for the export exemption.¹¹⁷

The comptroller amended rule 3.298 to include physical fitness centers as places offering amusement services subject to sales tax, and to exclude cruises that last over 24 hours and extend beyond Texas territorial limits.¹¹⁸ The rule was also amended to provide specifically that no tax will be due upon the purchase of an admission to an amusement, entertainment, or rec-

109. Limited Sales, Exise, and Use Tax Act, ch. 24, § 1, 1961 Tex. Gen. Laws Local & Spec. 72, 81 (repealed 1985).

110. TEX. TAX CODE ANN. § 151.307(b) (Vernon Supp. 1986). The legislature provided that the following are proof of a right to the exemption: 1) a bill of lading; 2) United States customs broker documentation; or 3) import documents. *Id.*

111. *Id.* § 151.330(g).

112. TEX. REV. CIV. STAT. ANN. art. 1066c, § 6(B)(2) (Vernon Supp. 1986).

113. *Id.*

114. *Id.*

115. See Tex. Comptroller of Public Accounts, Rule 3.344, [1 TEX.] ST. TAX REP. (CCH) ¶ 66-285, at 7390 (Dec. 30, 1985). Taxable services include enhanced services, auxiliary services, intrastate long distance services, paging and mobile service, intrastate telegraph services, taxable services received at a pay telephone if service is not provided by a telephone company, sale or lease of telecommunication equipment, and installation of telecommunication services. *Id.* Nontaxable services include interstate long distance services, basic local service, commercial radio and television broadcasts, telecommunications services purchased for resale, interstate telegraph services, and separately stated installation charges. *Id.*

116. TEX. TAX CODE ANN. § 151.307(b) (Vernon Supp. 1986).

117. See Tex. Comptroller of Public Accounts, Rule 3.323, [1 TEX.] ST. TAX REP. (CCH) ¶ 66-195, at 7348 (Aug. 26, 1985).

118. See Tex. Comptroller of Public Accounts, Rule 3.298, [1 TEX.] ST. TAX REP. (CCH) ¶ 66-082, at 7299 (July 8, 1985).

reational activity if purchased under a written prescription of a licensed practitioner.¹¹⁹ Further, sales of amusement services by non-profit organizations are subject to sales tax if the party providing the service is a profit-making organization.¹²⁰ In addition, if two or more organizations provide the amusement service and one provider is a non-profit organization, the service is exempt only if the exempt organization incurs a risk of substantial loss.¹²¹

The comptroller amended rule 3.292 to revise the definition of lump sum contract.¹²² In order to be treated as a separated contract under which services rendered in repair or remodeling of tangible personal property are exempt from sales tax, rule 3.292 requires the issuance of invoices that separately set forth consumable supplies and equipment used in performing the repair contract.¹²³ Previously, the taxpayer could exclude those items without providing separate invoices. The comptroller increased from \$500 to \$1000 the maximum sales and use tax for filing on an annual, rather than a monthly or quarterly, basis.¹²⁴

Finally, the comptroller revised rule 3.302(g) to narrow the trade-in exclusion used in calculating sales tax base.¹²⁵ Previously, the taxpayer could exclude any trade-in of tangible personal property from his sales tax base. The amended rule provides that the taxpayer may exclude a trade-in only if it is of the same type property customarily sold in the taxpayer's regular course of business.¹²⁶

II. PROPERTY TAX

A. Application of Tax

In *Oake v. Collin County*¹²⁷ the Texas Supreme Court held that a taxing authority must prove its authority to collect taxes by showing that property it seeks to assess has a taxable situs within the limits of its boundaries.¹²⁸ The Dallas court of appeals had ruled that Collin County could rely upon two presumptions in its favor—that a taxing authority does not assess any land located outside its boundaries and that an assessment is properly made.¹²⁹ The court of appeals concluded that the taxpayer failed to rebut

119. *Id.* at 7305.

120. *Id.*

121. *Id.* at 7304. The rule defines substantial risk of loss to mean that direct expenses incurred by the exempt organization are equal to or greater than ten percent of the gross receipts of the event. *Id.*

122. Tex. Comptroller of Public Accounts, Rule 3.292, [1 TEX.] ST. TAX REP. (CCH) ¶ 66-052, at 7264 (Sept. 4, 1985).

123. *Id.*

124. Tex. Comptroller of Public Accounts, Rule 3.335, [1 TEX.] ST. TAX REP. (CCH) ¶ 66-247, at 7371 (Mar. 13, 1985).

125. Tex. Comptroller of Public Accounts, Rule 3.302(g), [1 TEX.] ST. TAX REP. (CCH) ¶ 66-102, at 7310 (Sept. 16, 1985).

126. *Id.*

127. 692 S.W.2d 454 (Tex. 1985).

128. *Id.* at 455.

129. *Plano Indep. School Dist. v. Oake*, 682 S.W.2d 359, 363 (Tex. App.—Dallas 1984), *rev'd on other grounds*, 692 S.W.2d 454 (Tex. 1985). The court of appeals cited *Crocker v.*

these presumptions because he had not established that his property did not lie within the boundaries of Collin County.¹³⁰ The Texas Supreme Court held that section 21.01 of Tax Code,¹³¹ which grants the taxing unit authority to tax real property located in the unit on January 1, requires Collin County to prove that all land it sought to tax was situated within its geographical boundaries.¹³² The court acknowledged that the taxpayer had rebutted the presumption that Collin County's assessment was proper when the taxpayer proved that the county could not locate its own boundary.¹³³

In *Lampson v. City of Beaumont*¹³⁴ the Beaumont court of appeals interpreted the Texas Tax Increment Financing Act of 1981.¹³⁵ Section 2(8) of the Act provides that tax increment base means the total appraised value of all taxable real property in a reinvestment zone for the year in which the zone was designated.¹³⁶ Section 3(a) of the Act further provides that an incorporated city or town must adopt an ordinance in order to designate an area as a reinvestment zone.¹³⁷ *Lampson* argued that section 2(8) of the Act requires that the year designated in the ordinance for the zone to begin must be the year of appraisal for property within the district. In this case the zone was designated to begin on January 1, 1983. The appellate court, however, agreed with the City of Beaumont that the legislature clearly intended the appraisal of the property to occur in the year the City adopts the ordinance, which in this case would be 1982.¹³⁸ The court noted that the statute requires that the adoption of the ordinance designating the reinvestment zone occur in a year prior to the year in which the zone takes effect.¹³⁹ *Lampson* raised this issue because the taxing entities were given insufficient time and notice of the designation of the reinvestment zone to properly plan for tax revenues in 1983. In 1983 the legislature made a number of amendments to the Act requiring a city to give notices, presentations, and financial information to other taxing entities prior to the designation and creation of the zone.¹⁴⁰

B. Specific Exemptions

In *Plainview Independent School District v. Edmonson Wheat Growers,*

Santo Consol. Indep. School Dist., 116 S.W.2d 750, 756 (Tex. Civ. App.—Eastland 1938, writ dismissed), and held that, without evidence to the contrary, the court presumes that the taxing authority correctly assessed the tax. See also *Nolan v. San Antonio Ranch Co.*, 81 Tex. 315, 317, 16 S.W. 1064, 1065 (1891) (burden of proving error of assessment on taxpayer).

130. 682 S.W.2d at 303.

131. TEX. TAX CODE ANN. § 21.01 (Vernon 1982).

132. 692 S.W.2d at 455.

133. *Id.*

134. 687 S.W.2d 788 (Tex. App.—Beaumont 1985, no writ).

135. *Id.* at 790; see TEX. REV. CIV. STAT. ANN. art. 1066e (Vernon Pam. Supp. 1986).

136. TEX. REV. CIV. STAT. ANN. art. 1066e, § 2(8) (Vernon Pam. Supp. 1986).

137. *Id.* § 3(a).

138. 687 S.W.2d at 790.

139. *Id.* The statute mandates that the zone take effect on January 1 of the year following the adoption of the ordinance. TEX. REV. CIV. STAT. ANN. art. 1066e, § 4(g)(3) (Vernon Pam. Supp. 1986).

140. See TEX. REV. CIV. STAT. ANN. art. 1066e, § 4(a-e) (Vernon Pam. Supp. 1986).

*Inc.*¹⁴¹ the Amarillo court of appeals held that grain delivered by producer-members to a cooperative marketing association did not lose its status as farm products in the hands of the producer and therefore remained exempt from taxation under section 11.16 of the Tax Code.¹⁴² In this case one of a farmer's options upon delivery of grain to an elevator owned by the association was to receive an advance based upon the current market price less anticipated selling expenses. The taxing authorities argued that the delivery of grain under this option constituted a sale to the Association, and the grain no longer remained in the hands of the producer-member. The taxing authorities cited a 1923 Texas Supreme Court case¹⁴³ that held that a marketing agreement between a cotton producer and a cotton growers association amounted to a contract for sale and not an agency contract.¹⁴⁴ The court of appeals ruled, however, that in *Texas Certified Cottonseed Breeders' Ass'n v. Aldridge*¹⁴⁵ the Texas Supreme Court had reversed its position and held that the delivery of the commodities to the association to enable it to effectuate its purposes did not result in a contract of sale, but rather an agency agreement.¹⁴⁶ The court also noted that the Texas attorney general has on numerous occasions followed this rationale in holding that farm products delivered to a cooperative association pursuant to a contract for sale and delivery remained farm products in the hands of the producer and as such were non-taxable.¹⁴⁷

In *Military Highway Water Supply Corp. v. Boone*¹⁴⁸ the Corpus Christi court of appeals strictly construed the exemption for charitable organizations granted by section 11.18(c)(1) of the Tax Code.¹⁴⁹ This section requires that an organization be "organized exclusively to perform religious, charitable, scientific, . . . purposes and, . . . engage exclusively in performing one or more of the following charitable functions: . . ."¹⁵⁰ In 1982 Military Highway Water Supply Corp. amended its articles of incorporation to permit the corporation to provide community services beneficial to the corporation's general members. The appellate court agreed with the chief appraiser of Hidalgo County that this amendment precluded exemption of the corporation because its charter no longer provided that the corporation was or-

141. 681 S.W.2d 299 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

142. *Id.* at 302. See TEX. TAX CODE ANN. § 11.16(b) (Vernon 1982) (farm products in hands of producer exempt).

143. *Texas Farm Bureau Cotton Ass'n v. Stovall*, 113 Tex. 273, 253 S.W. 1101, 1107 (1923).

144. *Id.* at 288-89.

145. 122 Tex. 464, 61 S.W.2d 79 (1933).

146. 681 S.W.2d at 301-02.

147. See Op. Tex. Att'y Gen. Nos. M-632 (1970), V-511 (1948), O-5484 (1943), O-5091 (1943). In Opinion No. O-5484, the attorney general stated that the purpose of article 8, § 19, of the Texas Constitution was to prevent imposition of a tax on farm products when the tax would bear directly upon the producer, and that this purpose would be defeated if taxes were levied on the goods held by the association because the producers would ultimately bear the burden of taxation. *Id.*

148. 688 S.W.2d 648 (Tex. App.—Corpus Christi 1985, no writ).

149. *Id.* at 651; see TEX. TAX CODE ANN. § 11.18(c)(1) (Vernon Supp. 1986).

150. TEX. TAX CODE ANN. § 11.18(c)(1) (Vernon Supp. 1986). The Tax Code lists thirteen charitable functions. *Id.* § 11.18(c)(1)(A)-(M).

ganized exclusively to perform permitted purposes.¹⁵¹

The Amarillo court of appeals upheld the exemption of a non-profit hospital corporation organized exclusively to provide medical care without regard to the beneficiaries' ability to pay.¹⁵² The appraisal district denied the hospital's exemption on the grounds that the non-charitable functions performed by the hospital were not merely incidental to its charitable functions. The court held that the hospital satisfied the three elements required for a public charity set forth by the Texas Supreme Court in the *City of Houston v. Scottish Rite Benevolent Association*:¹⁵³ (1) the organization does not make a profit; (2) it accomplishes entirely benevolent ends; and (3) it benefits persons, indefinite in numbers and personalities, by preventing them, through absolute gratuity, from burdening society and the state.¹⁵⁴ The court then noted that property may be used by non-charitable individuals or entities if such use is incidental to the qualified charitable organization's purpose, and the use is limited to activities that benefit the beneficiaries of the organization.¹⁵⁵ The court also noted that the Texas Supreme Court has ruled that receipt of income by a charitable hospital from paying patients does not destroy the hospital's charity status.¹⁵⁶ Although charity patients constituted only eight in fifteen percent of the total number of patients treated at the hospital, the court upheld the district court's finding that the organization had assumed, to a material extent, a task that otherwise might become the obligation of the community or state.¹⁵⁷ The court considered it important that the hospital had never denied a patient medical or hospital services because of inability to pay.¹⁵⁸

In *Dallas Symphony Association, Inc. v. Dallas County Appraisal District*¹⁵⁹ the Dallas court of appeals held that section 11.18(c)(1)(E) of the Tax Code¹⁶⁰ entitled the Association to an exemption from property tax as a purely public charity.¹⁶¹ The purpose clause of the Association's charter stated that it was organized and operated "for charitable or educational purposes as defined in section 501(c)(3) of the Internal Revenue Code . . . and the corporation shall have as its primary purpose the promotion of musical and educational activities through the organization, management, maintenance, operation, and control of a symphony orchestra and of allied and

151. 688 S.W.2d at 651.

152. *Lamb County Appraisal Dist. v. South Plains Hospital-Clinic, Inc.*, 688 S.W.2d 896, 908 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.). TEX. TAX CODE ANN. § 11.18(d) (Vernon 1982) provides that a charitable organization will not lose its exemption by performing non-charitable functions if those functions are incidental to the charitable functions of the organization. *Id.*

153. 111 Tex. 191, 198-99, 230 S.W. 978, 981 (1921).

154. 688 S.W.2d 896, 904-06 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.).

155. *Id.* at 905.

156. *Id.*; see *City of McAllen v. Evangelical Lutheran Good Samaritan Soc'y*, 530 S.W.2d 806, 810 (Tex. 1975).

157. 688 S.W.2d at 906.

158. *Id.* at 904.

159. 695 S.W.2d 595 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

160. TEX. TAX CODE ANN. § 11.18(c)(1)(E) (Vernon Supp. 1986). This section provides that a symphony orchestra qualifies as a charitable function.

161. 695 S.W.2d at 601.

kindred activities.”¹⁶² The court held that reference to section 501(c)(3) of the Internal Revenue Code did not so broaden the purposes of the Association as to invalidate its exemption.¹⁶³ Section 501(c)(3) of the Internal Revenue Code¹⁶⁴ provides for a number of different types of charitable activities, stated in the alternative, and the statute does not require an organization to perform all of the listed activities to qualify for Federal income tax exemption.¹⁶⁵ The appraisal district also asserted that the Association did not meet the requirements of a purely public charity set forth in *City of Houston v. Scottish Rite Benevolent Association*.¹⁶⁶ Classification as a purely public charity requires that the organization assume, to a material extent, services that otherwise might become an obligation or duty of the community or the state.¹⁶⁷ Based upon a number of affidavits supporting the Association’s motion for summary judgment, the court concluded that the Association qualified as a purely public charity as a matter of law.¹⁶⁸ The court noted that the appraisal district and the appraisal review board had not supported their assertion that if the Association ceased conducting its operations it would not become an obligation of the city or the state.¹⁶⁹ The affidavits supporting the Association’s summary judgment motion asserted that the needs of citizens include not only basic essentials services such as streets, police, and fire protection, but also include libraries, art museums, and other cultural activities. In addition the evidence showed that the city, state, and federal governments publicly supported the Association in recognition of its benefits to the community.

Finally, the second argument of the appraisal district contended that, under *Military Highway Water Supply Corp. v. Boone*,¹⁷⁰ the inclusion of the language “and of all allied and kindred activities” made the purpose clause overly broad.¹⁷¹ The court distinguished *Military Highway*, however, because the language in this case merely refers to activities carried on for the specific purpose of promoting and operating a symphony orchestra, and it does not add any additional, non-exempt, activities.¹⁷² Although the court noted that constitutionality of the statute under Article VIII, Section 2 of the Texas Constitution was not properly before the Court, the finding that the Association constituted a purely public charity specifically addressed the issue of whether the property tax code was being applied constitutionally to the exemption of the Association.¹⁷³

162. *Id.* at 596.

163. 695 S.W.2d at 597-98.

164. I.R.C. § 561(c)(3) provides that corporations organized solely for charitable purposes qualify for federal tax exemption. I.R.C. § 501(c)(3) (1982).

165. 695 S.W.2d at 597-98.

166. 111 Tex. 191, 230 S.W. 978 (1921).

167. *Id.* at 199, 230 S.W. at 981.

168. 695 S.W.2d at 599.

169. *Id.*

170. 688 S.W.2d 648 (Tex. App.—Corpus Christi 1985, no writ).

171. 695 S.W.2d at 600.

172. *Id.* at 601.

173. *Id.* at 600.

C. Procedure

Three courts addressed the exemption granted to certain taxing authorities from assessment of court costs. In *Aldine Independent School District v. Moore*¹⁷⁴ a Houston court of appeals ruled that section 33.49 of the Tax Code¹⁷⁵ prohibits a trial court from ordering a school district to deposit security for payment of attorney ad litem fees.¹⁷⁶ Section 33.49(a) provides that a taxing unit may not be assessed for court costs in a suit to collect taxes and may not require the taxing unit to post security for the costs.¹⁷⁷

In *Arnold v. Crockett Independent School District*¹⁷⁸ the Tyler court of appeals reconciled the apparent conflict between the exemption granted to taxing units under section 33.49¹⁷⁹ for lawsuits to collect taxes and the authority granted to the reviewing court under section 42.07¹⁸⁰ to allocate appeal costs to any or all of the parties.¹⁸¹ The court held that section 33.49(a) exempts a school district, in a suit to collect taxes, from court costs incurred both at the trial court and the appellate level.¹⁸² The court then held that chapter 42 of the Tax Code¹⁸³ only applies to appeals from determinations made by the appraisal review board.¹⁸⁴ The court reasoned that permitting the application of chapter 42 to delinquent tax suits would allow the court to assess court costs against taxing units.¹⁸⁵ Section 33.49 specifically prohibits such a result.¹⁸⁶

In *Plano Independent School District v. Oake*¹⁸⁷ the Dallas court of appeals, in dictum, also held that a school district could not be required to file an appeal bond in a delinquent tax suit.¹⁸⁸ The court noted that the Austin court of appeals reached the same conclusion in *Brady Independent School*

174. 694 S.W.2d 454 (Tex. App.—Houston [1st Dist.] 1985, no writ).

175. TEX. TAX CODE ANN. § 33.49 (Vernon 1982).

176. 694 S.W.2d at 455.

177. TEX. TAX CODE ANN. § 33.49(a) (Vernon 1982). Section 33.49(a) specifically prohibits a court from requiring a taxing unit to post security for costs. Section 33.49(b), however, permits assessment of publication and notice costs against taxing units. *Id.* § 33.49(b).

178. 688 S.W.2d 884 (Tex. App.—Tyler 1985, no writ).

179. TEX. TAX CODE ANN. § 33.49 (Vernon 1982).

180. *Id.* § 42.07. This provision authorizes the reviewing court to charge all or any part of the costs of an appeal under chapter 42 against any of the parties. *Id.*

181. 688 S.W.2d at 885-86.

182. TEX. TAX CODE ANN. §§ 42.01-.43 (Vernon 1982).

183. 688 S.W.2d at 885.

184. 688 S.W.2d at 885-86.

185. *Id.* Section 42.28 prohibits a court from requiring an appeal bond of certain parties: "[a] party may appeal the final judgment of the district court as provided by law for appeal of civil suits generally, except that an appeal bond is not required of the chief appraiser, the county, the State Property Tax Board, or the commissioners court." TEX. TAX CODE ANN. § 42.28 (Vernon 1982).

186. *See id.* § 33.49 (Vernon 1982); *see supra* note 177.

The court stated that it disagreed with the Austin court of appeals' reasoning in *Brady Indep. School Dist. v. Davenport*, 663 S.W.2d 637, 638-39 (Tex. App.—Austin 1983, no writ). The court in *Brady* implied that sections 42.07 and 42.28 would apply to a suit by a school district or other taxing unit to collect delinquent taxes, and would permit the court to require an appeal bond in such suits.

187. 682 S.W.2d 359, *rev'd on other grounds*, 692 S.W.2d 454 (Tex. 1985).

188. *Id.* at 361.

District v. Davenport.¹⁸⁹ The *Arnold* court, however, interpreted *Brady* to have reached the opposite result.¹⁹⁰

In *Rockdale Independent School District v. Thorndale Independent School District*¹⁹¹ the Austin court of appeals ruled that a party must pursue its administrative remedies under chapters 41 and 42 of the Tax Code,¹⁹² in strict compliance with the procedures of those chapters, to be entitled to judicial review.¹⁹³ In *Rockdale* two taxing districts had disputed the location of certain taxable property. The Milam County Appraisal Review Board determined that the situs of the property was within Rockdale's limits for 1982 and 1983. The Thorndale Independent School District received notice of the Board's decision and filed its notice of appeal more than fifteen days after the receipt of the notice of determination from the appraisal review board. Section 42.06 of the Tax Code requires that notice of appeal must be filed with the body issuing the order within fifteen days after receipt of the notice of the final order.¹⁹⁴ Thorndale argued that it had sent a notice of appeal within the required time limit, but the appraisal review board never received the initial notice. The Austin court of appeals ruled that the requirements of section 42.06 must be "strictly adhered to and failure to do so results in the non-complying party's losing the right to challenge the decision."¹⁹⁵ The court also held that Thorndale could not rely on section 1.08 of the Tax Code,¹⁹⁶ which permits a property owner to furnish satisfactory proof that a notice was deposited in the mail before the fifteen-day period had ended, because Thorndale was not a property owner.¹⁹⁷ Section 42.06 required Thorndale to prove actual delivery and receipt within the fifteen day period.¹⁹⁸

In a similar case the Dallas court of appeals ruled that compliance with the notice of appeal requirements of section 42.06 of the Tax Code is jurisdictional and that section 42.06 prohibits an appeal from a final order of an appraisal review board if such notice is not properly given.¹⁹⁹ In *Corchine Partnership v. Dallas County Appraisal District*²⁰⁰ the taxpayers served written notice on the appraisal district within the fifteen-day period, but notice was not properly served on the appraisal review board. The court noted that the board and the district constitute separate entities and since the lawsuit must be maintained against both the appraisal district and the review board, notice of appeal must be served upon both.²⁰¹

189. 663 S.W.2d 637 (Tex. App.—Austin 1983, no writ). See *supra* note 186.

190. *Arnold*, 688 S.W.2d at 885.

191. 681 S.W.2d 225 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

192. TEX. TAX CODE ANN. §§ 41.01-.69, §§ 42.01-.43 (Vernon 1982).

193. 681 S.W.2d at 227.

194. TEX. TAX CODE ANN. § 42.06 (Vernon 1982).

195. 681 S.W.2d at 227.

196. TEX. TAX CODE ANN. § 1.08 (Vernon 1982).

197. 681 S.W.2d at 227.

198. TEX. TAX CODE ANN. § 42.06 (Vernon 1982).

199. *Corchine Partnership v. Dallas County Appraisal Dist.*, 695 S.W.2d 734, 735-36 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

200. *Id.* at 734.

201. *Id.* at 735-36.

In *Texas Architectural Aggregate, Inc. v. Adams*²⁰² the Austin court of appeals held that the procedures of chapters 41 and 42 of the Tax Code²⁰³ provide the exclusive procedures for adjudication of property tax controversies.²⁰⁴ The taxpayer had failed to provide the notice of appeal required by section 42.06 of the Tax Code²⁰⁵ within the fifteen-day time period. The taxpayer also failed to file a lawsuit within forty-five days after receiving notice of entry of the final order, as required by section 42.41.²⁰⁶ The taxpayer argued that the district court had jurisdiction to grant equitable relief to the taxpayer on the grounds that the assessment was grossly excessive. Prior to enactment of the Texas Property Tax Code, the courts recognized a common-law cause of action to allow judicial review of an assessment made in violation of the Texas Constitution.²⁰⁷

The court determined, however, that the enactment of section 42.09 abolished the former common-law cause of action for equitable relief from assessment of such taxes.²⁰⁸ The court ruled that the administrative review process set forth in the property tax code provides the taxpayer with an opportunity to challenge the assessment and the procedures set forth in the property tax code for adjudication of the grounds of protest are exclusive.²⁰⁹

In two other cases decided during the Survey period, courts strictly construed the administrative procedures against taxing authorities. In *Herndon Marine Products, Inc. v. San Patricio County Appraisal Review Board*²¹⁰ the Corpus Christi court of appeals ruled that the fifteen-day period for the taxpayer to file his notice of appeal under section 42.06 of the Tax Code did not begin to run until the appraisal review board had delivered to the property owner and the chief appraiser a notice of the issuance of the order and a copy of the order.²¹¹ The court ruled that the appraisal review board must conclusively prove all essential elements of its claim to be entitled to summary judgment.²¹² In this case the appraisal review board could not prove that it had complied with section 41.47 by delivering a copy of the order.²¹³ In *Moody House, Inc. v. Galveston County*²¹⁴ a Houston court of appeals held that the taxpayer need not take any action under the administrative provisions of chapters 41 and 42 of the Tax Code until receiving specific notice that the chief appraiser had denied its application for exemption as a

202. 690 S.W.2d 640 (Tex. App.—Austin 1985, no writ).

203. TEX. TAX CODE ANN. §§ 41.45-.69; 42.01-.07, .09-20, .22-.25 (Vernon 1982); §§ 41.41-.44; 42.08, .21, .26-.29 (Vernon Supp. 1986).

204. 690 S.W.2d at 643.

205. TEX. TAX CODE ANN. § 42.06 (Vernon 1982).

206. 690 S.W.2d at 643; see TEX. TAX CODE ANN. § 42.41 (Vernon Supp. 1986).

207. TEX. CONST. art. VIII, § 20 provides that property will not be assessed for ad valorem taxes at a value in excess of its fair market value.

208. 690 S.W.2d at 642.

209. *Id.* at 643.

210. 695 S.W.2d 29 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

211. *Id.* at 32.

212. *Id.* at 33.

213. *Id.* at 33; see TEX. TAX CODE ANN. § 41.47 (Vernon 1982) (requiring appraisal board to deliver notice of issuance of order and copy of order to taxpayer and chief appraiser). *Id.*

214. 687 S.W.2d 433 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

charitable organization.²¹⁵ The chief appraiser had sent a letter to the taxpayer stating that he was withholding approval or disapproval until the outcome of a pending law suit. Section 11.45 of the Tax Code requires that the chief appraiser either approve or disapprove an application, or modify the exemption applied for.²¹⁶ The district court had agreed with the taxing authorities that failure to take any of these specific actions violated section 11.45(c) and that failure to act was in effect, a denial of the exemption application. The court of appeals disagreed, reasoning that the statute does not preclude a chief appraiser from postponing his determination pending the outcome of other proceedings.²¹⁷

D. 1985 Tax Legislation

During its 1985 regular session, the Texas Legislature made a number of significant amendments to the property tax laws. The legislature amended chapter 41, concerning property owner protests, by adding section 41.411.²¹⁸ This section permits a property owner to protest the failure of the chief appraiser or the appraisal review board to provide or deliver any notice to which the property owner is entitled.²¹⁹ Revised section 41.44 changes the deadline for a property owner to file a written protest with the appraisal review board to obtain a hearing to the later of July 1 or the 30th day after the date that notice of appraised value was given to the property owner.²²⁰ The legislature also added section 41.12(b) to require the appraisal review board to complete substantially all timely filed protests before approving the appraisal records.²²¹ In addition, section 41.12(b) states that appraisal records may not be approved if the total appraised values of all properties on which the taxpayer files protests is more than 5% of the total appraised value of all other taxable properties.²²² Section 42.21 now lists the parties who must be named in a petition for district court review of a property tax determination brought under section 42.02.²²³ Section 42.21(c) specifies the proper parties to be served in such an action.²²⁴ Section 25.25 now provides a procedure for securing a hearing before the appraisal review board for the purpose of determining whether the appraiser has made a substantial error

215. *Id.* at 437.

216. TEX. TAX CODE ANN. § 11.45 (Vernon 1982).

217. 687 S.W.2d at 437.

218. TEX. TAX CODE ANN. § 41.411 (Vernon Supp. 1986).

219. *Id.* The property owner must comply with the payment provisions of § 42.08 of the Tax Code to be entitled to a protest under this provision. *Id.* § 41.411(c).

220. *Id.* § 41.44.

221. *Id.* § 41.12(b).

222. *Id.* The legislature deleted the requirement in section 41.47(c) that the appraisal review board resolve all protests before approving the records.

223. *Id.* § 42.21(b).

224. *Id.* § 42.21(c). If the chief appraiser files a petition, he must bring the action against the appraisal review board and the property owner. *Id.* If the taxing unit files a petition, the unit must bring the action against the appraisal district, the appraisal review board, and the property owner. *Id.* Any other petitioners must bring the action against the appraisal district and appraisal review board. *Id.* Personal service on the chief appraiser operates as service on the appraisal district personal service on the chairman of the appraisal review board operates as service on the appraisal review board. *Id.*

in a property tax appraisal roll that requires correction.²²⁵ Section 25.25(d) requires that a motion be filed jointly by the chief appraiser and a property owner.²²⁶ Section 33.011 now permits the governing body of a taxing unit to waive penalties and interest on a delinquent tax if an officer, employee, or agent of the taxing unit caused the taxpayer to fail to pay the tax before it became delinquent.²²⁷ The legislature amended section 42.08 by adding subsection (c), which permits the district court to hold a hearing to determine whether the property owner has substantially but not fully complied with the section 42.08 requirement that the owner pay any tax due before it becomes delinquent to preserve his right to appeal.²²⁸

The legislature has also tightened the deadlines for various actions required to prepare the appraisal rolls. Taxpayers must deliver rendition statements before April 1 (formerly May 1) unless the taxpayer submits a written application for extension to April 30.²²⁹ The legislature also amended the dates for submission of the chief appraiser's certified estimate of appraised value and submission of approved changes by the appraisal review.²³⁰ Amended section 26.01(c) of the Tax Code provides that the appraisal district's board of directors may not extend the deadline for certification of the appraisal roll.²³¹

The legislature has substituted a new median appraisal method for the prior weighted average method for comparing appraisals within an appraisal district.²³² In addition, amendments to section 5.10(a) require an annual study by the state property tax board to determine the degree of uniformity of appraisals in each appraisal district.²³³ Amended section 23.01 adds an overriding valuation principle to the earlier general principles.²³⁴ The statute provides that the appraisal of each property must be based on the individual characteristics that affect its market value.²³⁵ Revised section 22.03 no longer requires the chief appraiser to actually view oil and gas properties reported to have decreased in value in order to verify the reported change.²³⁶ The legislature also amended sections 26.04, 26.05, and 26.06 to modify the

225. *Id.* § 25.25(d), (e), (f).

226. *Id.* § 25.25(d).

227. *Id.* § 33.011.

228. *Id.* § 42.08. If the court determines that the property owner has substantially complied with § 42.08, the court then allows the owner 30 days to comply fully before dismissing the action. *Id.*

229. *Id.* § 22.23. Section 22.23(b) provides that the property owner may receive an additional extension to May 15 upon a showing of good cause. *Id.* § 22.23(b).

230. *Id.* §§ 25.20(a), 25.22(a). These amendments merely remove the language "or as soon thereafter as practicable" from the statutes.

231. *Id.* § 26.01(c) (deadline may not be extended beyond July 25 of each year).

232. *Id.* § 1.12. Conforming changes have been made in §§ 41.41(2) (right of protest), 41.43 (protest of inequality of appraisal), and 42.26 (remedy for unequal appraisal). *Id.* §§ 41.41(2), 41.43, 42.26.

233. *Id.* § 5.10(a). Previously, the statute required a biennial study.

234. *Id.* § 23.01(b).

235. *Id.* The other two market valuation principles include application of generally accepted appraisal techniques and use of the same or similar techniques in appraising the same or similar kinds of property. *Id.*

236. *Id.* § 22.03(b), (d).

procedures that a taxing unit must follow in calculating a property tax rate, adopting the rate, and increasing the rate.²³⁷ Further, taxpayers now have the right to enjoin the adoption of a tax rate²³⁸ or collection of tax²³⁹ if the taxing authority acted in bad faith in failing to follow the proper procedure.²⁴⁰

Under new section 6.032, taxing units participating in appraisal districts may provide for staggered terms for the members of the board of directors.²⁴¹ The option of staggered terms is not available if the method of appointing members to the board of directors permits cumulative voting.²⁴² The legislature adopted a second section 6.032, which provides a procedure for the recall of a director of an appraisal district.²⁴³ Section 6.411 now authorizes the board of directors of an appraisal district for a county of at least 1,500,000 to add to the appraisal review board up to fifteen additional members who may hear tax protests.²⁴⁴ The statute mandates that the additional members be nonvoting.²⁴⁵ Amended section 6.06 specifies that an appraisal district's fiscal year will be the calendar year unless a different fiscal year is adopted by the governing body of at least three-fourths of the taxing units.²⁴⁶

The legislature amended section 31.04 to provide that the assessor will determine each taxpayer's delinquency date by the mailing date of the bill.²⁴⁷ If a tax assessor mails the bill by January 10, the delinquency date will be February 1.²⁴⁸ If the assessor mails the bill after January 10, however, the delinquency date will be the first day of the next month.²⁴⁹ This postponement will allow the taxpayer at least 21 days after the mailing date to pay the tax. Taxing units are no longer required to publish notice every five years for delinquent taxpayers whose names and addresses cannot be determined.²⁵⁰ Section 33.04 also relieves the taxing unit from providing annual notice of delinquency to a taxpayer if the tax collector does not know and cannot determine his name and address.²⁵¹

The legislature added a new category of charitable organizations to section 11.18. Revised section 11.18 authorizes an exemption from property tax for organizations that raise funds for several organizations for general charitable purposes and that are affiliated with state or national charities.²⁵²

237. *Id.* §§ 26.04, .05, .06.

238. *Id.* § 26.04(h).

239. *Id.* § 26.05(d).

240. *Id.* §§ 26.04(h), 26.05(d).

241. *Id.* § 6.032(a).

242. *Id.*

243. *Id.* § 6.032.

244. *Id.* § 6.411.

245. *Id.* § 6.411(b).

246. *Id.* § 6.06(i).

247. *Id.* § 31.04.

248. *Id.*

249. *Id.*

250. *Id.* § 33.04.

251. *Id.*

252. *Id.* § 11.18(r). To qualify for the exemption a volunteer board of directors must gov-

Amended section 11.13(n) provides that a residence homestead exemption will be available to a taxpayer for the year in which the taxing unit adopts the exemption provided that the governing body of the taxing unit adopts the exemption before May 1.²⁵³

The legislature amended section 22.27(a) to permit disclosure of confidential information to the state property tax board.²⁵⁴ In addition new subsection (d) to section 22.27 protects persons providing such confidential information from liability to other persons.²⁵⁵ Amendments to the Property Redevelopment and Tax Abatement Act allow cities to designate property outside their territorial jurisdictions as reinvestment zones²⁵⁶ and to designate unincorporated areas as reinvestment zones.²⁵⁷

III. FRANCHISE TAXES

A. Calculation of Taxable Capital

In an unpublished opinion the Austin court of appeals held that the comptroller's rule making the computation of franchise tax dependent upon the manner in which the taxpayer keeps its books violates the Texas Constitution's prohibition against unequal and nonuniform taxation.²⁵⁸ In *Bullock v. Samedan Oil Co.*²⁵⁹ the taxpayer stated that the Securities and Exchange Commission required it to capitalize intangible drilling and development costs on its books. This method of accounting resulted in a greater amount of capital subject to franchise tax than a similar corporation would be required to report if not regulated by the Securities and Exchange Commission.²⁶⁰ Rule 3.391(b)(1) requires that a taxpayer report and reflect the corporation's financial condition as shown in its books and records of account.²⁶¹ The comptroller has indicated that a new rule 3.413 will be pro-

ern the organization. In addition, the organization must contribute to at least five other associations that qualify under section 501(c)(3) of the Internal Revenue Code; and such associations must use the contributions for general charitable purposes. See I.R.C. § 501(c)(3) (1982). The legislature adopted an additional amendment to section 11.18(c)(3) to carve out an exception for organizations qualified under section 501(c)(12) of the Internal Revenue Code concerning distribution of assets upon discontinuance of the organization. TEX. TAX CODE ANN. § 11.18(c)(3) (Vernon Supp. 1986). Section 501(c)(12) provides that a qualifying organization may distribute to members and each member must be required by membership agreements to immediately transfer assets to the state or to a section 501(c)(3) charitable organization. I.R.C. § 501(c)(12) (1982).

253. TEX. TAX CODE ANN. § 11.13(n) (Vernon Supp. 1986).

254. See *id.* § 22.27(a).

255. *Id.* § 22.27(d).

256. TEX. REV. CIV. STAT. ANN. art. 1066f, § 3(c) (Vernon Supp. 1986).

257. *Id.* § 7A. Prior to designation by a county of a reinvestment zone, the commissioners court must first hold a public hearing and find that the designation would benefit the property included in the proposed zone, and that the anticipated development would contribute to the economic development of the county. *Id.*

258. [2 TEX.] ST. TAX REP. (CCH) ¶ 400-125, at 22,093 (Tex. App.—Austin 1985, no writ). The court has designated this case as not for publication and it may not be cited as precedent.

259. *Id.*

260. *Id.*

261. Tex. Comptroller of Public Accounts, Rule 3.391(b)(1), [1 TEX.] ST. TAX REP. (CCH) ¶ 14-001, at 994 (Oct. 18, 1979).

posed in the near future that will require all taxpayers to adopt certain uniform accounting conventions for purposes of computing franchise taxes.

In Decision 13,365²⁶² the comptroller ruled that a reserve established by a corporation for an early retirement program should be treated as a debt, reducing the corporation's taxable capital, rather than as a contingent liability.²⁶³ The tax division noted that, under the terms of the plan, payments would terminate if an employee later went to work for an unrelated corporation. The comptroller determined, however, that the obligations represented a fixed liability, subject to a condition subsequent.²⁶⁴ In Decision 12,055²⁶⁵ the comptroller reiterated his position that a parent corporation must report the value of a subsidiary corporation at its net book value unless the taxpayer can substantiate another basis for valuing the subsidiary.²⁶⁶

B. Apportionment of Capital—Business in Texas

In Decisions 9787 and 12,316²⁶⁷ the comptroller ruled that goods sold by a foreign corporation to a Texas purchaser were excludable from the calculation of the proceeds from business done in Texas because the goods were not delivered in Texas.²⁶⁸ Since the goods were purchased for shipment to Japan and the comptroller held that the purchaser did not take possession of, control over, or title to the goods in Texas, the proceeds were excluded under section 171.103(1) of the Tax Code.²⁶⁹ The tax division argued that delivery to a third party carrier leased by a Texas purchaser resulted in possession and control over the goods by the purchaser in Texas. The comptroller noted that the seller must transfer actual physical possession and control of goods to the purchaser in Texas for inclusion of the proceeds under section 171.103.²⁷⁰ In this case the purchaser did not exercise complete control over the barges and railroad tank cars used to transport the goods.²⁷¹

The comptroller has proposed a revised rule 3.406 that would greatly expand the definition of doing business in Texas for purposes of applying the franchise tax to foreign corporations.²⁷² Proposed rule 3.406 would signifi-

262. Tex. Comptroller's Administrative Decision No. 13,365 (1984).

263. *Id.*

264. *Id.*; cf. Tex. Comptroller's Administrative Decision No. 13,613 (1983) (holding an employer's bonus program should be treated as a debt).

265. Tex. Comptroller's Administrative Decision No. 12,055 (1985).

266. *Id.* Rule 3.405(c)(4) requires the parent company to value a subsidiary using the cost method of accounting. Tex. Comptroller of Public Accounts, Rule 3.405(c)(4), [1 TEX.] ST. TAX REP. (CCH) ¶ 14-071, at 1039 (Dec. 13, 1977).

267. Tex. Comptroller's Administrative Decision Nos. 9787 and 12,316 (1984).

268. *Id.*

269. *Id.*; see TEX. TAX. CODE ANN. § 171.103(1) (Vernon 1982).

270. Tex. Comptroller's Administrative Decision Nos. 9787 and 12,316 (1984); see *Bullock v. Enserch Exploration, Inc.*, 614 S.W.2d 215, 219 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.), cert. denied, 455 U.S. 946 (1982).

271. Tex. Comptroller's Administrative Decision Nos. 9787 and 12,316 (1984). In this decision the comptroller appears to take a more restrictive view of doing business than required under rule 3.403(e)(3). The rule provides that delivery in Texas to a vessel owned or leased by the purchaser constitutes business in Texas. Tex. Comptroller of Public Accounts, Rule 3.403(e)(3), [1 TEX.] ST. TAX REP. (CCH) ¶ 14-061, at 1023 (Feb. 4, 1985).

272. Tex. Comptroller of Public Accounts, 10 Tex. Reg. 3798 (1985).

cantly reduce the number and type of contacts for application of the franchise tax. Paragraph (b) provides that "[a] corporation is doing business in Texas, for purposes of the Texas Tax Code, chapter 171, when it has a constitutional nexus with Texas for the purpose of franchise taxation."²⁷³ This would result in much broader application than the present rule, which states that a corporation is doing business in Texas when it is "transacting some part of its ordinary business in Texas."²⁷⁴ Proposed rule 3.406(c) provides examples of specific activities that will constitute doing business in Texas, including (1) maintaining any inventory in the state; (2) providing any service in Texas; (3) soliciting through agents in Texas; (4) owning, acquiring, leasing, or disposing of any real estate in Texas; (5) maintaining a place of business or managing, directing or performing services for subsidiaries in Texas, (6) having employees, independent contractors, agents, or other representatives promoting sales in Texas, or (7) leasing tangible personal property used in Texas.²⁷⁵ Under the proposed rule, an out-of-state lender holding a security interest in Texas real estate could become liable for franchise taxes on acquisition of the property in a foreclosure.

C. 1985 Franchise Tax Legislation

Transportation companies became subject to the franchise tax on August 26, 1985.²⁷⁶ These companies were previously subject to the gross receipts tax, which the attorney general declared unconstitutional in 1983.²⁷⁷

The legislature also made a number of changes in the reporting periods and due dates for franchise taxes. The legislature amended section 171.202 to change the manner in which the minimum amount of franchise tax is computed for corporations whose initial report is its last filed report.²⁷⁸ Amended section 171.362(e) precludes application of penalties on the total amount actually paid by June 15 when a corporation obtains a filing exten-

273. *Id.* at 3799.

274. Tex. Comptroller of Public Accounts, Rule 3.406(b), [1 TEX.] ST. TAX REP. (CCH) ¶ 14-076, at 1040 (Sept. 5, 1983).

275. Tex. Comptroller of Public Accounts, 10 Tex. Reg. 3798, 3799 (1985).

276. See TEX. TAX CODE ANN. § 171.052 (Vernon Supp. 1986). The legislature amended § 171.052 by deleting language that exempted from franchise tax "any transportation company; or sleeping, palace, car, and dining company" subject to the gross receipts tax on utilities.

277. Op. Tex. Att'y Gen. No. JM-83 (1983). The legislature repealed subchapter C of chapter 182 of the Tax Code, which formerly subjected transportation companies to the gross receipts tax. Act of Jan. 8, 1985, ch. 31, § 3, 1985 Tex. Sess. Law Serv. 96, 97 (Vernon).

278. See TEX. TAX CODE ANN. § 171.202(d) (Vernon Supp. 1986). Previously, the statute required a corporation to remit either 90% of the amount to be reported on its return filed by June 15, or the amount resulting from multiplying the prior year's payment by the ratio of twelve divided by the number of months covered by the initial return. Now, the corporation must remit under the second alternative the amount resulting from multiplying the Texas portion of taxable capital and surplus required to be shown on the initial report by the general franchise tax rate in effect under section 171.002(a)(1). *Id.* § 171.002(a)(1). The legislature also amended sections 171.201 (initial report), 171.202 (annual reports), and 171.152 (date on which payment is due) to change the due dates for a corporation which is the survivor in a merger. *Id.* §§ 171.152, .201, .202. Sections 171.153 (business on which the tax is based) and 171.1531 new section establishing a credit for surviving corporation in a merger) also include conforming modifications. *Id.* §§ 171.153, .1531.

tion under section 171.202(c) and makes the payments required under that section by March 15.²⁷⁹

The legislature repealed the tax lien provisions of sections 171.356 through 171.360 effective August 26, 1985.²⁸⁰ Franchise taxes are now subject to the general lien provisions of chapter 113.²⁸¹ A major difference between the two sets of rules is that section 171.360 had required the comptroller to commence a suit to enforce a franchise tax lien against a corporation within two years after the corporation forfeits its corporate privileges,²⁸² while section 113.105 provides that a state tax lien continues in effect until the tax is paid.²⁸³

D. Franchise Tax Rules

The comptroller adopted several amendments to his franchise tax rules during the Survey period. The comptroller proposed a new paragraph (b)(2) to rule 3.391 specifying the books and records to be used in determining a corporation's financial condition.²⁸⁴ Amended rule 3.403(c)(18) provides that the comptroller will consider a foreign corporation's share of gross receipts from a joint venture to be Texas receipts if the partnership or joint venture has its principal place of business in Texas.²⁸⁵ Rule 3.410, effective February 25, 1985, sets forth procedures for obtaining an extension for filing an annual report.²⁸⁶ New rule 3.411 provides rules for application of the franchise tax to banking corporations.²⁸⁷ The comptroller will allocate dividends and interest received by a bank to the commercial domicile of the bank.²⁸⁸ The new rule requires banks to file a supplemental report showing the allocation of franchise tax for taxing units in which the bank's principal office is located.²⁸⁹ New rule 3.412 provides guidelines for reporting franchise tax by a corporation that is the survivor of a merger occurring after August 25, 1985.²⁹⁰

279. *Id.* § 171.362(e).

280. Act of Jan. 8, 1985, ch. 37, § 3, 1985 Tex. Sess. Law Serv. 128 (Vernon).

281. TEX. TAX CODE ANN. §§ 113.002-.008, .010-.104, .106-.206 (Vernon 1982) and §§ 113.001, .009, .105 (Vernon Supp. 1986).

282. *Id.* § 171.360.

283. *Id.* § 113.105 (Vernon Supp. 1986).

284. Tex. Comptroller of Public Accounts, 10 Tex. Reg. 238 (1985). These records consist of the general ledger and special journals of original entry.

285. Tex. Comptroller of Public Accounts, Rule 3.403(c)(18), [1 TEX.] ST. TAX REP. (CCH) ¶ 14-061, at 1023 (Aug. 4, 1985).

286. Tex. Comptroller of Public Accounts, Rule 3.410 [1 Tex] ST. TAX REP. (CCH) ¶ 14-094, at 1042 (Feb. 25, 1985).

287. Tex. Comptroller of Public Accounts, Rule 3.411, [1 TEX] ST. TAX REP. (CCH) ¶ 14-097, at 1043 (Feb. 20, 1985).

288. *Id.*

289. *Id.*

290. Tex. Comptroller of Public Accounts, Rule 3.412, [1 TEX] ST. TAX REP. (CCH) ¶ 14-099, at 1044 (Oct. 7, 1985).

IV. MISCELLANEOUS TAXES

A. Cases

In *Bullock v. Mid-American Oil & Gas, Inc.*²⁹¹ the Austin court of appeals held that the taxpayer must determine the market value of gas produced at the mouth of the well by the contract of sale between the producer and the first purchaser of the gas.²⁹² This method of determination applies even though the purchaser is closely related to the producer.²⁹³ A subsidiary of Mid-American purchased the gas under a long-term contract from an unrelated joint venture. Mid-American later purchased a majority interest in the joint venture and sold the gas to third parties at a much higher price than its original contract price. The comptroller attempted to assess the severance tax on the basis of the price that Mid-American sold the gas to the third parties. The court, however, stated that the severance tax is imposed upon the market value of gas produced and saved in Texas by the producer,²⁹⁴ and the value of the gas at the mouth of the well constitutes the market value.²⁹⁵ The court held that the contracts of sale between a producer and a purchaser determine the market value of the gas provided that the contract is an arms-length transaction, free from fraud or collusion.²⁹⁶

Two appellate courts reached opposite conclusions on whether a bank could enjoin assessment of tax on bank shares after the United States Supreme Court had declared the method of assessing the tax unconstitutional.²⁹⁷ In *American Bank & Trust Co. v. Dallas County*²⁹⁸ the Dallas court of appeals required the taxpayers to establish that the bank shares' value determined under the illegal formula caused substantial injury.²⁹⁹ The court held that the Texas Supreme Court had established this prerequisite in *City of Arlington v. Cannon*,³⁰⁰ in which the court stated: "to obtain relief from taxes arrived at through the use of an arbitrary, illegal and fundamentally erroneous plan of valuation, the taxpayer must show substantial injury."³⁰¹ The court of appeals thus refused to enjoin assessment of the tax, although the court did recognize that the United States Supreme Court has held the equity capital formula used in computing the bank shares tax unconstitutional to the extent that the formula takes into consideration the value of government obligations held by banks.³⁰² In a dissenting opinion one justice reasoned that the taxpayers had established substantial injury suf-

291. 680 S.W.2d 612 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

292. *Id.* at 616.

293. *Id.* at 617.

294. *Id.*; see TEX. TAX CODE ANN. § 201.052(a) (Vernon 1982).

295. 680 S.W.2d at 616; see TEX. TAX CODE ANN. § 201.101 (Vernon 1982).

296. 680 S.W.2d at 616; see *W.R. Davis, Inc. v. State*, 142 Tex. 637, 644, 180 S.W.2d 429, 432 (1944); *Calvert v. Union Producing Co.*, 402 S.W.2d 221, 225 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

297. See *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855 (1983).

298. 679 S.W.2d 566 (Tex. App.—Dallas 1984, no writ).

299. *Id.* at 572-73.

300. 153 Tex. 566, 571, 271 S.W.2d 414, 417 (1954).

301. 271 S.W.2d at 417.

302. 679 S.W.2d at 575.

ficient to authorize injunctive relief merely by showing the unconstitutionality of the assessment made on the bank shares.³⁰³

In *Charles Schreiner Bank v. Kerrville Independent School District*³⁰⁴ the San Antonio court of appeals held that taxpayers are not required to establish substantial injury when the taxing scheme is unlawful.³⁰⁵ The court noted that no prior court had given a precise definition to substantial injury, although cases indicate that the taxpayer must show that the assessment of his property results in taxation of a substantially higher percentage of its market value than the percentage used for other property.³⁰⁶ The court then considered alternate methods for valuing the bank shares that might be legal and concluded that any alternate method would necessarily include a consideration of the government obligations held by the bank.³⁰⁷ The court also concluded that imposition of the substantial injury requirement would place an impossible burden on the taxpayer to establish the market value of the shares and to show that the assessor taxed the bank shares at a higher percentage of market value than other property.³⁰⁸ The court ruled that when the taxing scheme is unlawful and fundamentally wrong, courts should not apply the substantial injury requirement to preclude an injunction against assessment of tax.³⁰⁹

B. Legislation

The legislature amended various sections of the motor rule tax under chapter 153 to increase the exemption for gasoline or diesel fuel transported into Texas in the fuel tank of a motor vehicle.³¹⁰ The legislature also amended section 153.210 to add a new category of vehicles subject to the pre-paid user permit: Class E for vehicles weighing 7001 pounds to 10,000.³¹¹

The legislature also made a number of amendments to chapters 154 and 155, cigarette and tobacco taxes, that take effect March 1, 1986. Amendments to section 154.058 exempt retail dealers from the inventory tax imposed by that section after a tax increase.³¹² The legislature has eliminated the requirement that retail dealers obtain permits for the sale of cigarettes, cigars, or tobacco products.³¹³ Solicitors are also exempt from obtaining the

303. *Id.* at 675 (Rowe, J., dissenting).

304. 683 S.W.2d 466 (Tex. App.—San Antonio 1984, no writ).

305. *Id.* at 471.

306. *Id.* at 469; see *City of Arlington v. Cannon*, 153 Tex. 566, 571-72, 271 S.W.2d 414, 417 (1954); *State v. Whittenburg*, 153 Tex. 205, 214, 265 S.W.2d 569, 573 (1954).

307. 683 S.W.2d at 469.

308. *Id.* at 470-71.

309. *Id.* at 471.

310. These amendments appear in TEX. TAX CODE ANN. §§ 153.104, .108, .109, .206, .211, .212, .220 (Vernon Supp. 1986).

311. *Id.* § 151.210.

312. *Id.* § 154.058.

313. Act of Jan. 8, 1985, ch. 58, §§ 4, 8, 23, 1985 Tex. Sess. Law Serv. 197, 200-10 (Vernon). This act repealed section 154.102 of the Tax Code and amended sections 154.111 (cigarette tax) and 155.041 (cigars and tobacco products). See TEX. TAX CODE ANN. §§ 154.102, .111 (Vernon Supp. 1986).

cigarette tax permit or paying annual permit fees, but solicitors must obtain permits for cigar and tobacco products.³¹⁴ The statute no longer requires distributors of cigarettes and other tobacco products to make daily reports of deliveries.³¹⁵ The legislature also repealed certain requirements applicable to distributors, wholesale dealers, and retailers who sell tobacco products from vending machines, trains, boats, and airplanes.³¹⁶ The legislature repealed numerous provisions of chapters 154 and 155 as unnecessary and provided that the general provisions of chapters 111 and 113 will apply to tobacco taxes. The repealed statutes include provisions governing tax lien,³¹⁷ confidential information,³¹⁸ and admissibility of certain reports in evidence in tax proceedings.³¹⁹

The legislature also made a number of changes in statutes governing administration of state taxes. Amendments to sections 113.001 and 113.105 provide the state with a lien for state taxes on after-acquired property, as well as property the taxpayer owns at the time the state files the lien.³²⁰ New paragraphs (b) and (c) of section 111.011 authorize the attorney general to seek an injunction to prohibit a person from continuing a business when the business collects or withholds more tax than the law authorizes.³²¹ The same remedy is available when the business collects or withholds tax under a false claim.³²² A new section 111.0081 establishes the date payment becomes due and payable after a deficiency determination.³²³ The legislature added new provisions to chapter 111 to authorize the comptroller to refuse to issue or renew a permit or license to any person who is in violation of any other state permit or licensing permit or to any person delinquent in

314. Act of Jan. 8, 1985, ch. 58, §§ 21, 27, 39, 1985 Tex. Sess. Law Serv. 197, 207-13 (Vernon); see TEX. TAX CODE ANN. §§ 155.049, .112, .001, .042 (Vernon Supp. 1986).

315. Act of Jan. 8, 1985, ch. 58, §§ 16, 18, 20, 40, 1985 Tex. Sess. Law Serv. 197, 205-06 (Vernon). This act repealed sections 154.212 (cigarette tax) and 155.113 (cigar and tobacco products) of the Tax Code and adopted conforming changes in sections 154.501 and 154.516. See Tex. Tax Code Ann. §§ 154.212, .501, .516, 155.113 (Vernon Supp. 1986).

316. Act of Jan. 8, 1985, ch. 58, §§ 29, 30, 31, 37, 38, 1985 Tex. Sess. Law Serv. 197, 211-13 (Vernon). See TEX. TAX CODE ANN. §§ 155.056, .110(b), .053, .057, .109 (Vernon Supp. 1986).

317. Act of Jan. 8, 1985, ch. 58, § 45, 1985 Tex. Sess. Law Serv. 197, 215 (Vernon). This act repealed sections 154.413 and 154.414 (tax liens for cigarette taxes) and 155.153 and 155.154 (tax liens for cigar and tobacco products). These taxes are secured by liens under the general administrative provisions of TEX. TAX CODE ANN. § 113.001 (Vernon Supp. 1986).

318. Act of Jan. 8, 1985, ch. 58, § 44, 1985 Tex. Sess. Law Serv. 197, 215 (Vernon). This act repealed sections 154.308, 154.521, and 155.185. Information obtained by the attorney general or comptroller from taxpayer documents will remain confidential under TEX. TAX CODE ANN. § 111.006 (Vernon 1982).

319. Act of Jan. 8, 1985, ch. 58, § 46, 1985 Tex. Sess. Law Serv. 197, 215 (Vernon). This act repealed sections 154.401, 154.402, 155.141, and 155.142. TEX. TAX CODE ANN. § 111.014 (Vernon 1982) generally covers the admissibility of evidence in tax proceedings.

320. *Id.* §§ 113.001, .105 (Vernon Supp. 1986).

321. *Id.* § 111.011(b). Before beginning an action for injunctive relief under Tax Code § 111.011, the attorney general must send written notice by certified mail requesting that the person cease any wrongful collections, and allow fifteen days for compliance. *Id.* § 111.011(c).

322. *Id.* § 111.011(b).

323. *Id.* § 111.0081. If the taxpayer does not request a redetermination hearing, the tax will become due and payable ten days after it becomes final. *Id.* If a redetermination hearing occurs, the tax will be due twenty days after the comptroller's decision. *Id.* The comptroller will add a ten percent penalty if the taxpayer does not pay the tax when due. *Id.*

paying any state tax.³²⁴ Finally, the legislature amended section 112.060(c) to permit payment of tax refunds from general revenue funds of the state provided insufficient funds exist in the state's expense account.³²⁵

The legislature has also amended section 182.083 of the gross receipts tax to revise the reporting requirements for a business that changes form during a reporting period.³²⁶ The legislature also amended the premium receipts tax under article 1.14-1 of the Insurance Code to require corporations covered by insurance issued by companies not authorized to transact business in Texas to report the amount of taxes due and payable to Texas directly to the State Board of Insurance, rather than including the information in the franchise tax reports.³²⁷

324. *See id.* §§ 111.0047, .0048, .0049. Section 111.0049 allows a taxpayer to appeal such a decision in the same manner as an appeal from a final deficiency determination. *Id.*

325. *See id.* § 112.060(c).

326. *See id.* § 182.083. The report of gross receipts submitted under section 182.081 to the comptroller must show the combined gross receipts of the two corporations. The taxpayer must pay taxes on the combined gross receipts. *Id.*

327. TEX. INS. CODE ANN. art. 1.14-1, § 12A (Vernon Supp. 1986).

