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Katherine C. Hall

Charles M. Meadows Jr.

TAXATION

by

Katherine C. Hall and Charles M. Meadows, Jr.***

I. FRANCHISE TAXES

A. *Cases*

Texas utilizes the location-of-payor rule to determine whether receipts from interest or dividends should be allocated to a corporation's gross receipts from business done in Texas for the purpose of computing the franchise tax.[1] Under the location-of-payor rule, the domicile of the payor or debtor is dispositive: interest or dividends paid by a Texas corporation are included in the payee's gross receipts from business done in Texas. If paid by a foreign corporation, however, the receipts are excluded from the payee's receipts for business done in Texas.[2] Prior to 1974, interest and dividend income paid by national banks located in Texas was not included in a corporate payee's Texas gross receipts since national banks were treated as foreign corporations.[3] Effective January 1, 1973, however, the United States Congress, through Public Law 91-156, declared that for purposes of any state law a national bank should be treated as if organized and existing under the laws of the state within which its principal office is located.[4] In reliance on this legislation, the Texas comptroller determined in 1974 that dividends and interest received from national banks located in Texas should be included in the Texas gross receipts of the corporate payee.[5]

The validity of the 1974 comptroller's ruling was put into issue in *Bul-*

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* B.A., Southern Methodist University; M.L.S., Texas Women's University; J.D., Southern Methodist University. Attorney at Law, Kasmir, Willingham & Krage, Dallas, Texas.

** B.B.A., J.D., Baylor University. Attorney at Law, Durant, Mankoff, Davis, Wolens & Francis, Dallas, Texas.

1. Humble Oil & Ref. Co. v. Calvert, 414 S.W.2d 172, 179-80 (Tex. 1967).
2. *Id.* at 175, 180.
3. *See, e.g.*, Silco, Inc. v. Calvert, 482 S.W.2d 56, 58-59 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).
4. Public Law No. 91-156, as amended, is codified at 12 U.S.C. § 548 (1976).
5. In 1974 the comptroller issued rule 80.0.18, which, as amended by Comptroller of Public Accounts, Rule 026.02.12.013(2)(t) (1976), provides:

> The "location of payor" test is used in determining whether dividends and interest are attributable as receipts from business done in Texas. In accordance with that test, dividends and interest paid by a domestic corporation are includible in gross receipts from business done in Texas, whereas dividends and interest paid by a foreign corporation do not constitute Texas gross receipts. Consequently: . . . (2) Dividends and interest paid on or after January 1, 1973 by a national bank whose principal office is located within Texas are includible in gross receipts from business done in Texas.

lock v. National Bancshares Corp.[6] Taxpayers, several national bank holding companies and one ordinary business corporation, had sought to recover in excess of $2,000,000 in franchise taxes that were paid under protest on interest received from their national bank subsidiaries located in Texas. Although the trial court denied relief,[7] the court of civil appeals reversed,[8] holding that the taxpayers could recover all sums paid. Upon review, the Texas Supreme Court upheld the 1974 comptroller's ruling holding that, under the location-of-payor rule, interest and dividends received by a corporation from a national bank located in Texas are includable in the corporation's gross receipts for the purpose of assessing a franchise tax.[9] Thus, the court reasoned that the interest and dividends were properly included in determining the allocation percentage used to compute the gross receipts taxable by Texas under article 12.02(1)(b), concluding that the taxpayers could not recover the taxes paid earlier.[10]

Accounting Methods. In *Bullock v. Enserch Corp.*[11] the Waco court of civil appeals approved a taxpayer's use of the cost method of accounting for franchise tax reporting purposes even though the taxpayer had used temporarily the equity method in its general ledger account to reflect the earnings of its subsidiaries. The comptroller's rules in effect during the disputed taxable years had required the taxpayer to report and calculate the franchise tax using the same accounting method that the taxpayer used to maintain its general ledger account. Before 1973, the taxpayer used the cost method to reflect both its actual cost of investing in the stock of its subsidiaries and to determine the amount of franchise tax due.[12] In 1973, the Federal Energy Regulatory Commission (FERC) ordered the taxpayer to report its unappropriated, undistributed subsidiary earnings. The taxpayer responded to the order by amending its system of accounting to reflect a subaccount entry, reporting these earnings under the equity method of accounting. The subaccount entry was eliminated after the close of the accounting year since its only purpose was to provide the information required by the FERC. After elimination of the subaccount entry, the bal-

6. 584 S.W.2d 268 (Tex. 1979).

7. 584 S.W.2d at 269. The district court opinion in *National Bancshares* is discussed in Rosenbaum, *Taxation, Annual Survey of Texas Law*, 32 SW. L.J. 515, 518-19 (1978).

8. National Bancshares Corp. v. Bullock, 569 S.W.2d 584 (Tex. Civ. App.—Austin 1978). The court of civil appeals decisions and the historical development of the legislative and administrative actions affecting the imposition of the franchise tax on the dividends and interest in question are discussed in Rosenbaum, *Taxation, Annual Survey of Texas Law*, 33 SW. L.J. 569, 572-74 (1979).

9. 584 S.W.2d at 274.

10. *Id.*

11. 583 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.). The district court decision is noted in Rosenbaum, *supra* note 8, at 575.

12. The franchise tax is based on the amount of a corporation's stated capital, surplus, and undivided profits as multiplied by a percentage allocation formula that reflects the percentage of gross receipts from business done in Texas. TEX. TAX.-GEN. ANN. art. 12.01(1)(a) (Vernon Supp. 1980). Since the corporation's "surplus" includes its investments in its subsidiaries, 583 S.W.2d at 951, its franchise taxes can be substantially increased if, as the comptroller sought to do in *Enserch*, the tax is imposed on the unappropriated undistributed subsidiary earnings in addition to the actual cost of investing in the stock of the subsidiaries.

ance of the general ledger account reflected the taxpayer's investment in its subsidiaries on the cost method. The comptroller nevertheless insisted on assessing the amount of the taxpayer's franchise tax based on the taxpayer's financial report that reflected the equity accounting method.[13] In affirming the trial court's decision in favor of the taxpayer, the Waco court of civil appeals held that the comptroller's method of assessing the tax had been arbitrary and fundamentally wrong.[14] The court apparently characterized the assessment as arbitrary because the taxpayer's use of the equity method was both temporary and involuntary. Thus, this opinion may provide some support for the position that an accounting method must be used consistently by a taxpayer before the comptroller can require that the franchise tax, or other taxes, be computed on the basis of that method.

The court in *Enserch* also noted that in 1977 the comptroller amended the ruling in question to assess in accordance with the cost accounting method franchise taxes on corporations in the same category as the taxpayer.[15] This change was made upon the realization that the ruling as previously written was unfair because it taxed a parent corporation on the same earnings that had been taxed to its subsidiary corporations.[16] The court probably based its description of the assessment as fundamentally wrong on the subsequent amendment and the rationale leading to the amendment therefor. In light of this holding, taxpayers litigating against the comptroller may find it profitable to analyze the comptroller's subsequent changes in position in order to discern a basis for challenging rulings in issue as "fundamentally wrong."

Procedure. Two franchise tax cases dealt with procedural aspects of litigating franchise tax liability. In *Cine-Matics, Inc. v. State*[17] the taxpayer appealed from a default judgment that had resulted in an assessment of $60,000 for unlawfully transacting business in Texas without a certificate of authority, as well as an order to pay all overdue franchise taxes, penalties, and interest. Prior to the default judgment, the taxpayer had been enjoined permanently from transacting business in Texas without a certificate of authority. Subsequently, the taxpayer obtained a certificate of authority that was later forfeited for failure to pay franchise taxes. The taxpayer nevertheless allegedly continued to transact business within Texas. The taxpayer's attorney was served with notice directing the taxpayer to appear at a show cause hearing. The taxpayer failed to appear and was held in contempt, fined $500 therefor, and assessed the above amounts. The Austin court of civil appeals reversed the trial court's assessment for the $60,000 judgment, interest, penalties, and overdue franchise taxes, concluding that article 8.18.C of the Texas Business Corporation Act

13. Under the equity method, the taxpayer's franchise tax liability would have been increased by over $400,000.
14. 583 S.W.2d at 952.
15. *Id.*
16. *Id.*
17. 578 S.W.2d 530 (Tex. Civ. App.—Austin 1979, no writ).

required the filing of a new suit to recover these amounts.[18] The court further concluded that the relaxed rules of service for a show cause hearing for contempt were inapplicable and that, in the absence of a showing that the corporation's attorney was authorized to accept service for the corporation, such service would be unlawful.[19] The court therefore held that the trial court could not enter an order assessing liability for overdue taxes of this nature, together with penalties and interest.[20]

On the issue of the validity of the trial court's finding of contempt and the $500 fine imposed therefor, the court of civil appeals held that it lacked jurisdiction to review that portion of the trial court's order. The court noted that the settled law of Texas prohibited review of a contempt order by any means other than a writ of habeas corpus.[21] Although this rule foreclosed the taxpayer and others in a similar position from obtaining judicial review of a trial court's contempt order,[22] the court concluded that it would be inappropriate for it to change such a long-standing rule.[23] The significance of *Cine-Matics* is that foreign corporations may be held in contempt for violating an injunction that prohibits doing business in Texas without a certificate of authority. Further, the relaxed rules of service allowed for a show cause hearing for contempt may apply in such an instance.[24] A more stringent service of process requirement must be met, however, before the corporation can be fined for transacting business without this certificate or assessed for overdue franchise taxes.[25]

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18. *Id.* at 531. TEX. BUS. CORP. ACT ANN. art. 8.18.C (Vernon 1956) provides:
> A foreign corporation which transacts business in this State without a certificate of authority shall be liable to this State, for the years or parts thereof during which it transacted business in this State without a certificate of authority, in an amount equal to all fees and franchise taxes which would have been imposed by law upon such corporation had it duly applied for and received a certificate of authority to transact business in this State . . . plus all penalties imposed by law for failure to pay such fees and franchise taxes. In addition to the penalties and payments thus prescribed, such corporation shall forfeit to this State an amount not less than One Hundred Dollars ($100) nor more than Five Thousand Dollars ($5,000) for each month or fraction thereof it shall have transacted business in this State without a certificate.

19. 578 S.W.2d at 531.

20. *Id.*

21. *Id.* at 531-32.

22. *Id.* at 532. Since the taxpayer was not imprisoned, the writ of habeas corpus was unavailable as a means of judicial review.

23. *Id.*

24. The propriety of utilizing relaxed rules of service in a show cause hearing is left unanswered by the court's opinion because it lacked jurisdiction to address the validity of the contempt order. It appears, therefore, that until direct appeal is accepted by the Texas courts as a proper method of review of contempt orders or until the question is challenged successfully by a person imprisoned as a result of a contempt finding, the trial courts may continue to authorize the use of relaxed service methods.

25. The court noted that the service of process requirements for a new suit under TEX. BUS. CORP. ACT ANN. art. 8.18(C) (Vernon 1956) were provided by TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964) and TEX. BUS. CORP. ACT ANN. art. 8.10 (Vernon 1956). The court's rationale in referring to the latter is unclear. Article 8.10 deals with service of process on a foreign corporation "authorized to transact business in this State." Since the taxpayer here was unauthorized to do business in Texas, service could not have been made under this article. Article 2031b, however, is not limited to service on those corporations authorized to do business and properly would be applied in this instance. For a general

The second case dealing with the procedural aspects of litigation in connection with franchise tax liability was *Paris Milling Co. v. Bullock*.[26] The Waco court of civil appeals in *Paris Milling* affirmed the trial court's dismissal with prejudice of the taxpayer's two suits to have certain deficiency assessments set aside and to recover taxes paid under protest. The court held that the Administrative Procedure Act had not repealed the requirement of article 1.05 that a suit for refund of taxes paid under protest be brought within ninety days of payment.[27] Since the taxpayer had failed to pay the disputed taxes before filing its first suit, the court lacked jurisdiction under article 1.05. As to the second suit, the taxpayer paid the disputed taxes and filed suit against the comptroller within ninety days of the date that the taxes were paid under protest. The taxpayer failed, however, to join the state treasurer and attorney general within the ninety-day period as provided in article 1.05. The court concluded that the provision providing for joinder of all three officials within ninety days of the payment is a jurisdictional requirement. Since the taxpayers failed to meet this requirement, the court held that it lacked jurisdiction over the suit under article 1.05(2).[28]

Although the court's first holding regarding the Administrative Procedure Act dealt with a point twice considered previously by the Austin court of appeals,[29] the holding with respect to joinder appears to be a decision of first impression. The court reasoned that the language regarding suits for recovery of taxes expressly required the joinder of the three officials, basing its conclusion on the sentence: "Such suit shall be brought against the public official charged with the duty of collecting such tax or fees, the State Treasurer and the Attorney General."[30] The court's holding requires not only joinder of these three parties, but also joinder within the ninety-day period specified in article 1.05(2).

B. *Legislative Developments*

Short Form Franchise Tax Return. During the survey period, the Texas legislature amended four provisions pertaining to franchise taxes. An amendment to article 12.19 extends the optional use of the short form

discussion of this provision, see Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process Is Due*, 30 SW. L.J. 747 (1976).

26. 583 S.W.2d 487 (Tex. Civ. App.—Waco 1979, no writ).

27. *Id.* at 489. The 90-day limitation on seeking the refund of taxes is provided by TEX. TAX.-GEN. ANN. art. 1.05(2) (Vernon Supp. 1980), which states:

> Upon the payment of such taxes or fees, accompanied by such written protest, the taxpayer shall have ninety (90) days from said date within which to file suit for the recovery thereof in any court of competent jurisdiction in Travis County, Texas, and none other. Such suit shall be brought against the public official charged with the duty of collecting such tax or fees, the State Treasurer and the Attorney General.

28. 583 S.W.2d at 489.

29. The argument that the Administrative Procedure Act repealed article 1.05 had previously been rejected. Dan Ingle, Inc. v. Bullock, 578 S.W.2d 193, 194 (Tex. Civ. App.—Austin 1979, writ ref'd); Robinson v. Bullock, 553 S.W.2d 196, 198 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), *cert. denied*, 436 U.S. 918 (1978).

30. 583 S.W.2d at 488 (citing TEX. TAX.-GEN. ANN. art. 1.05(2) (Vernon Supp. 1980)).

franchise tax return to those corporations having total assets of less than $1,000,000 on the last day of their taxable year for federal income tax purposes.[31] Previously, optional use was restricted to those corporations with total assets of less than $150,000.[32] The amendment also changes a timing requirement, since the last day of the corporation's taxable year must fall within the twelve-month period preceding January 1 of the year in which the franchise tax is due.[33] Before this change, the last day had to fall within the twelve-month period preceding February 1.[34]

Prepayment of Initial $100 Franchise Tax Deposit. An amendment to article 12.06 requires the prepayment of an initial $100 franchise tax deposit by all domestic corporations that incorporate under the Texas Business Corporation Act or the Texas Professional Corporation Act or foreign corporations qualifying under the Texas Business Corporation Act.[35] Under article 12.06, a foreign corporation is required to make a $500 security deposit to insure that all franchise taxes, penalties, and interest will be paid by the corporation.[36] Prior to the 1979 amendments, the security deposit was refundable only in the event the corporation ceased doing business in the State of Texas before forfeiture of its certificate of authority and if the corporation had paid all franchise taxes, penalties, and interest.[37] The 1979 amendments provide, however, that the deposit is refundable upon a finding by the comptroller that the corporation has maintained continuous good standing for a period of three years or upon a determination that the corporation is exempt from tax.[38]

Information Obtained from the Taxpayer for Franchise Tax Purposes. Article 12.10 was amended to extend the protection of confidentiality to all information, except information contained in liens filed pursuant to title 122A, obtained from the taxpayer's records that are required to be furnished to comply with the franchise tax provision.[39] Additionally, the amendment provides that all information obtained by the state from an examination of the taxpayer's personal and business records or from interviews with its employees is confidential and not open for public inspection.[40] Article 12.06 continues to provide, however, exceptions to the rule of confidentiality that are similar to those that were provided for prior to 1979.[41]

Interest Rate on Delinquent Franchise Taxes. Finally, the legislature

31. TEX. TAX.-GEN. ANN. art. 12.19(1) (Vernon Supp. 1980) (effective Jan. 1, 1980).
32. 1969 Tex. Gen. Laws, Tax.-Gen., ch. 801, § 14, at 2375.
33. TEX. TAX.-GEN. ANN. art. 12.19(2) (Vernon Supp. 1980).
34. 1959 Tex. Gen. Laws, Tax.-Gen., 3d Spec. Sess., ch. 1, at 316.
35. TEX. TAX.-GEN. ANN. art. 12.06(1) (Vernon Supp. 1980) (effective Sept. 1, 1979).
36. *Id.* art. 12.06(3).
37. 1969 Tex. Gen. Laws, Tax.-Gen., ch. 801, § 3, at 2368.
38. TEX. TAX.-GEN. ANN. art. 1206(4) (Vernon Supp. 1980).
39. *Id.* art. 12.10(a) (effective June 13, 1979).
40. *Id.* art. 12.10(a)-(b).
41. *Id.*

amended article 12.14 to increase the statutory rate of interest from six percent to seven percent on delinquent franchise taxes.[42]

C. *Administrative Rules and Decisions*

The comptroller has amended rule .013, which deals with the determination of a corporation's gross receipts derived from doing business in Texas.[43] Under the former rule, gross receipts were determined in part by aggregating the profits and losses from two or more partnerships or joint ventures of which a corporation was a member. If a net loss resulted or if the corporation participated in only one such entity that recognized a loss, this loss resulted in zero receipts for purposes of calculating the franchise tax. The amended rule, however, effectively precludes netting of the gains and losses produced by different entities.[44] Thus, losses from one partnership or joint venture will not reduce profits from others.

In addition to the amendment of rule .013, the comptroller has proposed an amendment to rule .011 in connection with the county ad valorem assessed value measure of the franchise tax.[45] The rule presently, and as proposed, requires a corporation to report its franchise tax based on the assessed value for county ad valorem tax purposes of all Texas property owned by the corporation only when the tax based on this method exceeds the applicable minimum tax and also exceeds the amount of franchise tax that would be payable on the corporation's taxable capital.[46] Under the existing rule, ownership of property is attributable to a corporation if it has legal title.[47] As proposed, however, the rule would treat the possession of legal title as creating a presumption that the holder is the owner, but would allow this presumption to be overcome by a showing that equitable title is vested in another entity.[48] In the event the amendment is adopted, a corporation holding equitable title to Texas property would be required to

42. *Id.* art. 12.14(1) (Vernon Supp. 1980) (effective Jan. 1, 1980).

43. Comptroller of Pub. Accounts, Rule 026.02.12.013, 4 Tex. Reg. 1471 (1979).

44. *Id.* Rule 026.02.12.013(b)(19), 4 Tex. Reg. 1471 (1979), provides:

> A corporation's share of the net profit from a partnership or joint venture in which the corporation is a partner or joint venturer constitutes receipts to the corporation. If the partnership or joint venture operates at a net loss, the corporation's share of the loss results in zero receipts for franchise tax calculations. For the purpose of allocating receipts under article 12.02, receipts from partnerships or joint ventures having their principal place of business in Texas are considered Texas receipts.

45. *Id.* Proposed Rule 026.02.12.011, 4 Tex. Reg. 2125 (1979).

46. *Id.* Rule 026.02.12.011(1). Taxable capital is defined in TEX. TAX.-GEN. ANN. art. 12.01 (Vernon Supp. 1980), and is to be allocated to Texas gross receipts in accordance with *id.* art. 12.02 (Vernon 1969).

47. Comptroller of Pub. Accounts, Rule 026.02.12.011(5).

48. *Id.* Proposed Rule 026.02.12.001(e), 4 Tex. Reg. 2125 (1979). The proposed rule provides that an entity has equitable title where it has such a present right to legal title that a court could properly transfer legal title to the entity or where the entity is entitled to and, by court order, could compel the performance of certain duties and the exercise of certain powers by the holder of the legal title. *Id.* The proposed rule lists several examples of circumstances to be considered in establishing equitable title, including but not limited to contracts of sale, and the use of such entities as trusts, partnerships, and joint ventures. *Id.* Proposed Rule 026.02.12.12.011(g), 4 Tex. Reg. 2125 (1979).

include the property in its franchise tax return. Finally, during the survey period, the comptroller issued several administrative decisions regarding gross receipts generally,[49] the allocation formulas applied to gross receipts,[50] the definition of a corporation's surplus,[51] and procedural matters.[52]

II. SALES AND USE TAXES

A. *Cases*

Exemptions from Sales Tax. In *Bullock v. Lone Star Industries, Inc.*[53] the Waco court of civil appeals concluded that a cement manufacturer could recover sales tax paid under protest upon the purchase of a floating clamshell dredge and carbon steel grinding balls. To support its holding that the purchase price of the dredge was exempt from sales tax,[54] the court

49. The comptroller issued five administrative decisions regarding the general determination of gross receipts: Comptroller's Administrative Decision No. 9002 (1979) (since chrome plating of aircraft cylinders by a corporation for customers is a service rather than a sale, receipts from plating should be included as part of corporation's Texas receipts to extent that services are performed in Texas); Comptroller's Administrative Decision No. 10407 (1979) (actual monies received under long-term construction contracts must be included in Texas receipts where the taxpayer uses percentage of completion method of accounting for purposes of reporting income from these contracts); Comptroller's Administrative Decision No. 9838 (1979) (corporation's total gross receipts for franchise tax purposes include corporation's proportionate share of net profits from joint venture rather than its proportionate share of gross receipts from venture) (Note the correlation between Comptroller's Administrative Decision No. 9838 and amended Comptroller of Pub. Accounts, Rule 026.02.12.013(b)(19), 4 Tex. Reg. 1471 (1979).); Comptroller's Administrative Decision No. 10464 (1979) (payments made on installment sales are includable in corporation's gross receipts and Texas receipts for purposes of determining franchise tax in period during which corporation receives payments); Comptroller's Administrative Decision No. 9534 (1979) (amounts received by corporation represented loans rather than part of gross receipts where corporation had obtained financing from banks for construction projects, received advances from banks on financing as work was completed, and booked advances as liabilities).

50. Four administrative decisions dealt with allocation formulas and inclusion of property in tax base: Comptroller's Administrative Decision No. 9552 (1978) (where property was under construction and was not being used by corporation, the corporation, which used a three-factor formula in reporting franchise tax, did not have to include property in the property factor); Comptroller's Administrative Decision No. 10231 (1979) (corporation that was required to report franchise tax based on assessed value for county ad valorem tax purposes had to include all inventory and noninventory Texas real estate owned by corporation); Comptroller's Administrative Decision No. 10388 (1979) (corporation, which was required to compute franchise tax based on assessed value of property owned, had both legal and equitable title to property it contracted to sell because purchaser of property did not make full payment after close of corporation's accounting year; therefore, corporation had to include property in its tax base); Comptroller's Administrative Decision No. 10062 (1979) (corporation that manufactured prescription drugs and shipped to a Texas warehouse from which they were sold had to include sales receipts in calculating Texas receipts since exempt items being sold had not been shipped to Texas purchaser from outside state).

51. Comptroller's Administrative Decision No. 9005 (1979) (corporation need not include in surplus for franchise tax purposes profit reflected on books with respect to transfers between divisions since profit does not represent realized income but is a matter of internal accounting control).

52. Comptroller's Administrative Decision No. 9197 (1978) (before corporation's petition for alternative allocation formula will be considered, procedure in Comptroller's Franchise Tax Rule 3 must be followed).

53. 584 S.W.2d 386 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

54. *Id.* at 388.

relied on the pre-1975 statutory language of article 20.04(P)(1).[55] Prior to 1975, article 20.04(P)(1) exempted from sales tax the receipts from a sale of a vessel that was both built in the State of Texas and purchased from the builder of the vessel.[56] Although this article did not define vessel, a comptroller's ruling defines it to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[57] Since no Texas court had previously analyzed article 20.04(P)(1) or the comptroller's definition of vessel, the court examined the federal cases that had analyzed the meaning of the term vessel under a federal statute[58] defining vessel with language identical to that used in the comptroller's ruling. The court noted that these cases had held that dredges with physical characteristics similar to those of the taxpayer were vessels. Relying on these federal decisions[59] and the comptroller's definition of a vessel, the court concluded that the taxpayer's dredge was a vessel within the meaning of article 20.04(P)(1) and, therefore, the taxpayer could recover the sales tax that it had previously paid under protest.[60]

Relying on article 20.04(E)(1),[61] the court also held that the sales receipts from the taxpayer's purchase of the carbon steel grinding balls were

55. 1969 Tex. Gen. Laws, 2d Spec. Sess., ch. 1, § 25, at 77. In 1977 art. 20.04(P)(1) was amended to provide:

> There are exempted from the taxes imposed by this Chapter the receipts from the sale, lease or rental of, or the storage, use or other consumption in this State of materials, equipment and machinery which enter into and become component parts of ships or vessels exclusively and directly used in a commercial enterprise, including commercial fishing vessels, and vessels used commercially as vessels for pleasure fishing by individuals as paying passengers thereon, of eight (8) tons displacement and over, and the receipts from the sale of such ships or vessels exclusively and directly used in a commercial enterprise when sold by the builder thereof, and repair services, renovation, and/or conversion, including labor and materials to such ships or vessels exclusively and directly used in a commercial enterprise.

TEX. TAX.-GEN. ANN. art. 20.04(P)(1) (Vernon Supp. 1980). The court's holding is not affected by the 1975 amendments since the dredge was used exclusively in a commercial enterprise and the taxpayer apparently purchased the dredge from the builder.

56. 1969 Tex. Gen. Laws, 2d Spec. Sess., ch. 1, § 25, at 77.

57. Comptroller of Pub. Accounts Rule .026.02.20.017(a)(2) (1978) (previously Rule 95-.0.14).

58. 1 U.S.C. § 3 (1976).

59. One Supreme Court case cited as support for this statement did not analyze whether the dredge involved constituted a vessel. Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 371 n.1 (1957) ("No question has been raised at any time as to whether the dredge involved here had the status of a 'vessel' at the time of petitioner's injury.") The dissenting justices, however, made the assumption that the dredge could be regarded as a vessel. *Id.* at 375 n.1 (Harlan, J. dissenting). Similarly, authority from the Fifth Circuit, McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953), contained no analysis of whether the dredge could be defined as a vessel. Presumably, therefore, there has never been a real issue, under the definition noted above, of whether a dredge is a vessel; its status as such is unquestionable. The real question, then, is why the comptroller in *Lone Star* attempted to tax the taxpayer's dredge and, on appeal, asserted that the trial court erred in holding that the dredge was a vessel. Unfortunately, the rationale, if any, for the comptroller's position was not discussed by the court.

60. 584 S.W.2d at 388.

61. TEX. TAX.-GEN. ANN. art. 20.04(E)(1) (Vernon 1969) provides in part:

> There are exempted from the taxes imposed by this Chapter the receipts from

tax exempt. Article 20.04(E)(1) exempts from sales tax the sales receipts from tangible property that becomes a component part of tangible personal property[62] manufactured for retail sale. The evidence showed that the grinding balls were used to grind down raw materials during the manufacturing process, and as a result of the grinding process, ninety-eight percent of the material of each ball became a necessary component part of the taxpayer's finished product. On these facts, the court concluded that the grinding balls were tangible personal property that became component parts of the taxpayer's finished product and, therefore, fell within the tax exemption provided by article 20.04(E)(1).[63]

In *First National Bank v. Bullock*[64] the taxpayer sought to recover sales taxes paid under protest on payments it made to obtain a license to use certain computer programs that were delivered on magnetic tapes. More than $109,000 had been paid to four computer software companies for a program or set of instructions on magnetic tape that would enable the bank's computer to perform essential banking functions. The trial court held that the bank could not recover its payments of tax for the licenses. On appeal, the Austin court reversed, holding that the sale of a license for computer software on magnetic tapes was exempt from sales tax even though the magnetic tapes were tangible personal property.[65] The court of civil appeals applied the "essence of the transaction" test, which provides an approach for determining whether a sale is of tangible or intangible property.[66] Under this test, when the object or essence of the sale is intangible property, the transaction will not be taxable since intangible property is exempt from tax.[67] The court decided that the essence of the transaction was the purchase of the computer process, rather than the purchase of four tapes. The court then concluded that the "process" was not tangible personal property within the meaning of article 20.01(P),[68] but intangible property, which is exempt from the limited sales tax.[69] In support of its

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the sale, lease or rental of, and the storage, use or other consumption in this State of:

(a) tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed or fabricated for ultimate sale at retail within or without this State . . . .

62. TEX. TAX.-GEN. ANN. art. 20.01(P) (Vernon 1969) defines tangible personal property as "personal property which may be seen, weighed, measured, felt or touched, or which is in any other manner perceptible to the senses."

63. 584 S.W.2d at 388.

64. 584 S.W.2d 548 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

65. *Id.* at 551.

66. *Id.* at 550.

67. *Id.*

68. TEX. TAX.-GEN. ANN. art. 20.01(P) (Vernon 1969). For the statutory definition of tangible personal property, see note 62 *supra*.

69. *Id.* The court noted that the information also could have been transmitted by keypunch cards, telephone, or other methods and considered this fact important in arriving at its decision that the essence of the transaction was the sale of an intangible. The court apparently reasoned that since the programs could have been transmitted by other methods, including intangibles, the essence of the transaction could not have been the means by which the programs would be transmitted. Perhaps a better explanation for the court's holding is found in its reliance on Bullock v. Statistical Tabulating Corp., 549 S.W.2d 166 (Tex. 1977),

holding, the court reasoned that "[u]nlike a phonograph record or filmstrip, when the information on the tape, in the present case, is transferred to the computer, the tape is no longer of any value or importance to the user."[70] Whether the programs or information sold is "canned" or "customized," is of no relevance; the relevant question in each case is whether the object of the sale is tangible personal property. Without specifically so stating, the court appears to have rested its characterization of the sale of a license for software as an intangible on the basis of viewing the transaction as one in which services were performed.[71]

The taxpayer in *First National Bank* also challenged the comptroller's assessment of sales taxes on payments made by the taxpayer to a corporation that provided and prepared food on the taxpayer's premises for the taxpayer's employees and guests. The taxpayer argued that the corporation used the taxpayer's cooking and serving equipment, was controlled to some extent by the taxpayer, and was claimed by the taxpayer to be its agent.[72] Therefore, none of the payments made to the corporation should be subject to sales tax. The appellate court concluded, however, that the facts showed that the corporation was an independent contractor and the charges for preparing and serving the food were indeed subject to sales tax.[73]

In *Davis-Kemp Tool Co. v. Bullock*[74] the taxpayer appealed from a judgment denying him relief for sales taxes paid under protest on consideration paid by the taxpayer for the rental of tools and equipment from its suppliers. In its business, the taxpayer leased equipment from various suppliers and subsequently furnished the equipment, with operators, to its customers. The taxpayer claimed that its lease of tools to its customers was exempt from tax under article 20.04(O)(1),[75] which exempts from sales and use tax the receipts from a re-lease that is an integral part of a taxable service rendered in the ordinary course of business. The district court held that the transactions between the taxpayer and its suppliers were taxable leases and found in favor of the comptroller. The Beaumont court of civil

and Williams & Lee Scouting Serv., Inc. v. Calvert, 452 S.W.2d 789 (Tex. Civ. App.—Austin 1970, writ ref'd). In each case the court looked to the essence of the transaction and found that providing data by tangible means constituted a nontaxable service rather than the sale of tangible property. These cases and *First National Bank* should not be construed, however, as authority for the proposition that all sales of services are not subject to sales tax. The cases clearly indicate that if the underlying object of the service is the sale of tangible rather than intangible property, the receipts from the services are subject to the sales tax.

70. 584 S.W.2d at 550.

71. *See* note 69 *supra*.

72. 584 S.W.2d at 552. The court stated that the question of whether an independent contractor or agency relationship exists depends on the question of who has control and that the determination of who has control depends on who has control over how it shall be done, not what shall be done. *Id.* at 551-52.

73. *Id.* at 552. Once the court found that the corporation was an independent contractor, it had little difficulty in establishing the taxability of the payments since the food constituted a sale of tangible personal property. *Id.* at 551.

74. 584 S.W.2d 579 (Tex. Civ. App.—Beaumont 1979), *writ ref'd n.r.e. per curiam*, 23 Tex. Sup. Ct. J. 87 (Nov. 28, 1979).

75. TEX. TAX.-GEN. ANN. art. 20.04(O)(1) (Vernon 1969).

appeals affirmed the trial court, but based its affirmance on entirely different grounds. The court of appeals concluded that the taxpayer was an independent contractor. As a result, the court decided that the tax was incurred not when the tools were leased from the suppliers, but rather when the plaintiff used the tools and operators as an independent contractor to service its customers' needs.[76] In a per curiam refusal of the taxpayer's petition for writ of error, the supreme court affirmed both the trial court and court of civil appeals. The supreme court concluded, however, that the court of civil appeals had erred in concluding that the transactions between the taxpayer and its customers were taxable.[77] Rather, the court concluded, the customer transactions were exempt, but the taxpayer's transactions with its suppliers were taxable.[78]

Credits and Refunds. The Austin court of civil appeals in *Amoco Production Co. v. Bullock*[79] held that the comptroller's failure to follow the statutory procedure for credits and refunds relieved the taxpayer of the obligation to pay additional taxes that must normally be paid under article 1.05 before a suit for recovery of taxes paid under protest may be brought. Although the comptroller had tendered credit for substantial overpayments by the taxpayer, these were refused and a request for refund was made. The comptroller failed, however, to refund the overpayment as he was authorized to do under article 1.11A.[80] His failure to refund provided a basis for relieving the taxpayer of the payment that generally is required to provide a court with jurisdiction before it can entertain a suit for refund.[81] The Austin court stated that a suit may be maintained for the protection of rights under an inherent right of appeal, which exists where a vested property right has been affected adversely by the action of an administrative body or where officials act without lawful authorization to deny or violate rights such as those involved here.[82] The significance of this case is that the comptroller, in his efforts to increase or protect state revenues, must act in accordance with the statutes governing the exercise of his responsibilities to taxpayers as well as to the state.

76. 584 S.W.2d at 581. In rejecting the taxpayer's argument that the entire transaction should be viewed as a re-lease, the court of civil appeals relied on a 1969 comptroller's ruling that provided that a transaction in which equipment was leased with an operator was not a lease. *Id.* at 580. In 1977, however, the comptroller issued a ruling that provides that (1) where equipment is leased with an operator and the customer is billed separately for the equipment and the operator, a taxable lease will be presumed to exist as to the equipment, and (2) where equipment is leased with an operator and the customer is billed a single charge for both, the receipts shall be presumed to be charges for services and tax exempt. Comptroller of Pub. Accounts, Rule 026.02.20.014 (1)(b)-(c). The rule also provides, however, certain criteria that will rebut the above presumptions. *Id.* Rule 026.02.20.014(1)(d).

77. 23 Tex. Sup. Ct. J. at 87-88.

78. *Id.*

79. 584 S.W.2d 388 (Tex. Civ. App.—Austin 1979, writ granted).

80. TEX. TAX.-GEN. ANN. art 1.05 (Vernon 1969 & Supp. 1980).

81. 584 S.W.2d at 391.

82. *Id.* at 391-92.

B. *Administrative Rules and Decisions*

Rulemaking. During the survey period, the comptroller issued four new rules, amended several existing rules,[83] and repealed others.[84] The first

83. Following is a brief summary of some of the amendments made to the comptroller's sales and use tax rulings during the survey period. Comptroller of Pub. Accounts, Rule 026.02.20.004 has been amended to incorporate the new statutory exemption for certain equipment and supplies used to enable deaf persons to communicate through an ordinary telephone. 4 Tex. Reg. 3985 (1979). This provision is retroactive to Aug. 27, 1979, the effective date of the statutory amendment providing the new exemption. Comptroller of Pub. Accounts, Rule 026.02.20.006, relating to seller's responsibilities in the collection of sales tax, has been amended effective Jan. 30, 1980, to clarify the existing rule, as well as to add definitions of "retainer" and "place of business," define the responsibilities of the seller, and change the interest rate from six percent to seven percent on penalties assessed against taxpayers who are more than 60 days delinquent in filing a monthly return together with payment. 5 Tex. Reg. 135-36 (1980). Comptroller of Pub. Accounts, Rule 026.02.20.008, relating to direct payment procedures, has been amended to add a provision on storage facilities that brings the rule in conformity with rule 026.02.20.066, 4 Tex. Reg. 993 (1979). The amendment also deletes all references to local tax allocation, which the comptroller has determined to be more appropriately addressed by rule 026.02.20.066. The amendment became effective on May 25, 1979. Comptroller of Pub. Accounts, Rule 026.02.20.009, relating to alcoholic beverage exemptions, has been amended to incorporate the statutory presumption in TEX. TAX.-GEN. ANN. art. 20.021(F) (Vernon Supp. 1980) that certain sales of liquor, wine, beer, or malt liquor constitute sales for resale and that no resale certificate will be required. 3 Tex. Reg. 2562-63 (1978). This amendment is retroactive to Aug. 29, 1977, the effective date of the statutory change creating this presumption. Comptroller of Pub. Accounts, Rule 026.02.20.015, relating to natural gas and electricity, has been amended to incorporate the 1978 statutory change that provided the residential exemption for gas and electricity. 3 Tex. Reg. 3571 (1978). This amendment is retroactive to Oct. 1, 1978, the effective date of the statute creating this exemption. Comptroller of Pub. Accounts, Rule 026.02.20.017, concerning carriers, has been amended to define the term "licensed course of instruction" to mean "pilot training or instruction conducted by a flight training school which has been certified or granted provisional certification under Federal Aviation Administration regulations." 3 Tex. Reg. 3353-54 (1978). This change is effective prospectively. Comptroller of Pub. Accounts, Rule 026.02.20.020, relating to manufacturing, has been amended effective Nov. 16, 1979. 4 Tex. Reg. 3985-87 (1979). The amendment clarifies and outlines the exemptions for materials necessary and essential to the manufacturing process from the requirement that manufacturers must collect sales tax on the price of their manufactured products. An exemption is specifically provided for machinery, equipment, replacement parts, and accessories having a useful life of less than six months. Comptroller of Pub. Accounts, Rule 026.02.20.020(d)(6). 4 Tex. Reg. 3987 (1979). To make clear the meaning of "useful life," the amendment codifies the comptroller's present definition. *Id.* Comptroller of Pub. Accounts, Rule 026.02.20.044, relating to oil, gas and related well service, has been amended to clarify the sale tax policy on oil well servicing. 4 Tex. Reg. 2142-43 (1979). This amendment, too, is retroactive. Comptroller of Pub. Accounts, Rule 026.02.20.045, relating to refunds and payments under protest, has been amended to reflect the comptroller's position that only persons who have paid taxes directly to the state are in a position to claim refunds from the state and also provides procedures for obtaining refunds from sellers on taxes that were paid directly to the seller. In addition, the amendment states that where taxes are paid under protest pursuant to art. 1.05, the amount protested will be placed in a suspended fund until the disputed issue is resolved. 4 Tex. Reg. 1105 (1979). Comptroller of Pub. Accounts, Rule 026.02.20.059, which deals with the statute of limitations, has been amended to reflect the court's decision in Lorenzo Textile Mills, Inc. v. Bullock, 566 S.W.2d 107 (Tex. Civ. App.—Austin 1978, no writ), that the limitations period for assessment by the comptroller of sales and use tax deficiency determinations is four years, while the limitations period for collection of the deficiency is three years. This amendment also addresses the limitations periods regarding successor liability, notices of delinquency, and seizure power. 3 Tex. Reg. 3837 (1978). The amendment is effective retroactive to the date of the *Textile Mills* decision. Comptroller of Pub. Accounts, Rule 026.02.20.065, dealing with solar energy devices, has been amended to clarify that component and repair and replacement parts that

new rule, rule .066, relates to the use tax and incorporates and organizes all existing statutory references to that tax.[85] The effective date of rule .066 is retroactive to March 7, 1979. In part, the rule creates a presumption that tangible personal property purchased and used outside of Texas for more than one year before the date of entry into Texas will not be presumed to have been purchased for use in Texas. The rule requires that the taxpayer establish four factors: (1) the property was purchased outside of Texas; (2) the property was used outside of Texas for more than one year from the date of purchase; (3) such use was substantial; and (4) the use was a primary use for which the property was purchased.[86] Since property may frequently be used in several ways, taxpayers contemplating the purchase and use outside of Texas of property that might otherwise incur a substantial use tax should document carefully the purposes for which the property was purchased. Such documentation could be of significant importance in the event of subsequent litigation regarding the issue of the "primary use" for which the property was purchased.

The second new rule, rule .067, defines activities that constitute improvements to realty as well as those that do not qualify as improvements to realty.[87] This rule, too, is retroactive and was made effective February

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are made integral parts of solar energy systems will qualify for exemption. 4 Tex. Reg. 553 (1979). This amendment is retroactive.

84. Comptroller of Pub. Accounts, Rules 026.02.20.050 and 026.02.20.063 were repealed and incorporated into Comptroller of Pub. Accounts, Rule 026.02.20.020, which concerns manufacturing, custom manufacturing, and fabricating processes. 4 Tex. Reg. 4536 (1979). Comptroller of Pub. Accounts, Rule 026.02.20.030 was repealed and incorporated into Comptroller of Pub. Accounts, Rule 026.02.20.006, which relates to sales tax permits. 4 Tex. Reg. 4536 (1979).

85. Comptroller of Pub. Accounts, Rule 026.02.20.066(b)(5), 4 Tex. Reg. 554 (1979).

86. *Id.*

87. Comptroller of Pub. Accounts, Rule 026.02.20.067, 4 Tex. Reg. 218 (1979). This rule provides:

> (a) "Contract for the improvement to realty" includes a contract with the intended purpose to:
>
> (1) erect, construct, alter, or repair any building or other structure, project, development, or other permanent improvement on, under the surface of, or to real property, whether fee or leasehold; or
>
> (2) furnish and install property becoming a part of any building or other structure, project, development, or other permanent improvement on or to such real property including tangible personal property, which after installation becomes real property by virtue of being embedded in or permanently affixed to the land or to a structure constituting realty and which property after installation is necessary to the intended usefulness of the building or other structure; or
>
> (3) alter the land surface of real property by such means as creating roads, earthen dams, and stock tanks. However, mining or timber operations do not, in and of themselves, constitute improvements to realty.
>
> (b) "Contract for the improvement to realty" does not include:
>
> (1) a contract for the sale and installation of tangible personal property; this includes a contract to furnish and install machinery, equipment, or other tangible property not essential to the building or structure, nor adapted or intended to become a part of the realty, but which incidentally may, on account of its nature, be temporarily attached to the realty without losing its identity as a particular

7, 1979. Rule .067 provides that a contract for the improvement to realty includes contracts entered into "with the intended purpose" to engage in several kinds of activity in three different categories.[88] The rule does not state that the permissible activities are limited to those contained in the rule. Presumably, however, because of the "intended purpose" language, a taxpayer who intended to engage in any of the specified activities could do things other than those set forth in the rule and yet successfully maintain that he had made improvements to realty. The rule also provides three categories of activities that do not qualify as improvements to realty.[89]

The third rule, rule .068, clarifies the tax consequences resulting from the purchase of tangible personal property for the purpose of adding accessories to motor vehicles.[90] The effective date of the rule is April 4, 1979. Rule .068 provides that "the term 'accessories' includes but is not limited to bodies, cement mixers, C.B. radios, refrigeration units, fertilizer spreaders, and oil well servicing equipment."[91] Although the purchase of a motor vehicle and all accessories attached thereto at the time of sale is subject to the provisions of the Motor Vehicle Sales and Use Tax, where accessories are purchased and attached after the time of sale, the purchase is subject to the provisions of the Limited Sales, Excise and Use Tax.[92]

Finally, the fourth rule, rule .069,[93] clarifies the distinction between a motor vehicle, which is subject to the Motor Vehicle Sales and Use Tax,[94] and moveable specialized equipment, which is taxed under the Limited Sales, Excise and Use Tax provisions.[95] This rule, as are the first two rules, is retroactive, having been made effective April 4, 1979. The rule defines motor vehicle to mean a "self-propelled unit which may transport property separate from itself or persons other than the driver upon the public highways."[96] Various kinds of trailers are also included in this definition.[97] The rule prevents the loss of a unit's identity as a motor vehicle by specifically providing that the addition to the vehicle of tangible personal prop-

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piece of machinery, equipment, or property and, if attached, is readily removable without substantial damage to the unit or to the realty or without destroying the intended usefulness of the realty;

(2) the furnishing of tangible personal property if the person furnishing the property is not responsible for the final affixation or installation of any of the property furnished; or

(3) the furnishing of tangible personal property if the person furnishing the property is only responsible for supervision or warranty of installation without contractual responsibility for installation.

88. *See* note 87 *supra*, subsections (a)(1)-(3).

89. *See* note 87 *supra*, subsections (b)(1)-(3).

90. Comptroller of Pub. Accounts, Rule 026.02.20.068, 4 Tex. Reg. 929-30 (1979). Rule .068 was subsequently amended to add a provision that addresses the taxability or nontaxability of a motor vehicle that is produced by combining items of tangible personal property. 4 Tex. Reg. 2143 (1979).

91. Comptroller of Pub. Accounts, Rule 026.02.20.068(a)(4), 4 Tex. Reg. 930 (1979).

92. *Id.* Rule 026.02.20.068(a)(1).

93. Comptroller of Pub. Accounts, Rule 026.02.20.069, 4 Tex. Reg. 930 (1979).

94. *Id.* Rule 026.02.20.069(a)(3).

95. *Id.* Rule 026.02.20.069(b)(2).

96. *Id.* Rule 026.02.20.069(a)(1).

97. *Id.*

erty that allows the unit to perform a specialized function, but which also prohibits the vehicle from transporting separate property or persons other than the driver, will not cause the loss of its identity as a motor vehicle.[98] For example, the rule provides that a flat-bed truck upon which oil well servicing equipment is attached retains its identity as a motor vehicle.[99]

Moveable specialized equipment, on the other hand, is defined as "[a] unit designed and built specifically to perform a specialized function which does not include transporting property separate from itself or persons other than the driver."[100] In December of 1979, the comptroller amended rule .069 to provide clearer examples of moveable specialized equipment, including motorized cranes, motorized oil well servicing units, and mobile auto crushers.[101] As noted above, these units are taxed under the limited sales, excise and use tax provisions.

Administrative Decisions. The comptroller issued a substantial number of administrative decisions in connection with sales and use taxes during this survey period. In connection with the imposition of such taxes, these decisions include holdings on the transfer of property in the form of a dividend,[102] leased property,[103] the rendering of custodial services for the United States government,[104] and numerous other matters.[105] Several decisions dealt with exemptions in connection with occasional sales,[106] ex-

98. *Id.* Rule 026.02.20.069(a)(2).
99. *Id.*
100. *Id.* Rule 026.02.20.069(b)(1).
101. *Id.*, 4 Tex. Reg. 4536 (1979).
102. Comptroller's Administrative Decision No. 8768 (1978) (transfer of airplane did not constitute taxable sale where subsidiary corporation at special meeting of board of directors declared airplane as a dividend to its parent corporation and then transferred possession pursuant to this declaration).
103. Comptroller's Administrative Decision No. 10193 (1979) (under art. 20.031 lessee was liable for payment of use tax on lease payments where aircraft, which was leased from out-of-state seller, was delivered to the lessee in Texas, hangared in state as home base, and was used for 17 maintenance flights, for 3 intrastate flights, and for 100 interstate flights).
104. Comptroller's Administrative Decision No. 10163 (1979) (in absence of contractual provision reflecting that title had passed to United States government prior to use, materials and supplies purchased and used by taxpayer in performance of custodial service contract with government were subject to sales and use tax).
105. Comptroller's Administrative Decision No. 8764 (1978) (coating of pipe constitutes processing under art. 20.01(K)(2)(a) and is taxable as sale of tangible personal property); Comptroller's Administrative Decision No. 10293 (1979) (company engaged in spraying weeds and grasses with chemicals was performing service and owed sales or use tax on purchases of chemicals used for this service); Comptroller's Administrative Decision No. 10110 (1979) (making seat covers in accordance with a customer's special order constitutes manufacturing or fabrication and is subject to sales and use tax); Comptroller's Administrative Decision No. 9952 (1979) (where a vendor refused to submit records for audit in order to establish his reported deductions from gross receipts, his total gross receipts were taxable under the presumption in art. 20.021(F) "that all gross receipts are subject to the tax until the contrary is established").
106. Comptroller's Administrative Decision No. 8036 (1978) (sale of aircraft by out-of-state seller was not occasional sale since seller was making more than two sales of tangible personal property and would have been required to have sales and use permit if operating in Texas); Comptroller's Administrative Decision No. 8273 (1978) (for the purposes of the occasional sale exemption in article 20.01(F)(2), the phrase "expenses attributable to such 'separate division, branch or identifiable segment' " contemplates more than just the initial

empt entities,[107] resales,[108] property necessary to the manufacturing

expense of purchasing said division, branch or segment being sold); Comptroller's Administrative Decision No. 9269 (1978) (vendor holding sales tax permit in another state(s) could not make an occasional sale under art. 20.02(F)(1)); Comptroller's Administrative Decision No. 10206 (1979) (seller holding sales tax permit does not come within the terms of the occasional sale definition in art. 20.01(F)(1) even though he makes only two or fewer sales of tangible personal property during a 12-month period); Comptroller's Administrative Decision No. 9670 (1978) (well servicing operator engaged in performing nontaxable service for customers was responsible for paying tax on purchases of tangible personal property used in servicing operations); Comptroller's Administrative Decision No. 9406 (1978) (purchase of tangible personal property from Texas vendor by out-of-state corporation that took possession of property in Texas was taxable sale under article 20.01(K)(a), even though title to property passed to purchaser under sale contract after property was installed at location outside of Texas); Comptroller's Administrative Decision No. 8289 (1979) (making uniforms for consideration constitutes processing of tangible personal property under art. 20.01(K)(2)(a), resulting in taxable sale for sales and use tax purposes); Comptroller's Administrative Decision No. 7476 (1979) (purchases of electricity used for heating, cooling, lighting, operation of office machines, and other administrative uses, are taxable unless (1) electricity purchased flows through same meter as electricity that is purchased and used in actual processing operations and (2) electricity purchased for, and used in, the actual processing operations predominates over the electricity purchased for use in a taxable manner); Comptroller's Administrative Decision No. 9913 (1979) (overprinting of new address or phone number on top of old one on letterhead, when done for consideration, constitutes printing under art. 20.01(K)(2)(a) and is taxable sale for sales and use tax purposes); Comptroller's Administrative Decision No. 9367 (1979) (both charge for fabrication labor and materials charge on customer's billing are included in sales price when tangible personal property is made by vendor for customer and he separates two charges); Comptroller's Administrative Decision No. 9524 (1979) (production of scale models for engineering companies, architects and other businesses, constitutes taxable sale for sales and use tax purposes since production constitutes processing or manufacturing); Comptroller's Administrative Decision No. 9472 (1979) (where contractor makes improvements to realty under lump-sum contract, he is consumer of all materials used in performance of contract under article 20.01(T) and must pay sales and use tax on purchase price of materials); Comptroller's Administrative Decision No. 9404 (1979) (where subsidiary transferred tangible personal property to a parent corporation for consideration, transfer is not exempt under art. 20.04(v) and is taxable for sales and use tax purposes, unless, before or after sale, purchasing company owns joint or undivided interest with selling corporation in property transferred and can show that sales and use tax has previously been paid on property); Comptroller's Administrative Decision No. 9987 (1979) (purchases used in performance of real estate improvement contract that provided that the contractor would perform his obligations in exchange for lump-sum amount covering both labor and materials and in which change order specified lump-sum; contract was lump-sum contract within meaning of art. 20.01(T) and therefore subject to sales and use tax even though section entitled "project recap" reflected separate amounts for labor and materials); Comptroller's Administrative Decision No. 10368 (1979) (in absence of evidence establishing that sales and use tax was not due, where audit of company revealed that it had more taxable sales on records than it reported to comptroller, additional sales were presumed taxable pursuant to arts. 20.021(F) and 20.031(F)); Comptroller's Administrative Decision No. 10354 (1979) (transaction was not exempt as occasional sale where company sold operating assets of separate division of business, but did not sell all operating assets of division, and under sale contract retained right to, and, in fact, did replace some operating assets with property never used in division).

107. Comptroller's Administrative Decision No. 10337 (1978) (purchases by governmental, religious, or eleemosynary entities as identified in art. 20.04(H) exempt from sales and use tax; sales by entities, however, are subject to tax unless otherwise exempt under specific provision of art. 20.04); Comptroller's Administrative Decision No. 10579 (1979) (sales of tangible personal property to employee of entity exempt from sales and use tax under art. 20.04(H) nonetheless taxable where exempt entity had no obligation to seller for payment of purchase price and employee was not reselling purchased property to exempt entity); Comptroller's Administrative Decision No. 10445 (1979) (pursuant to enactment of art. 20.04(H)(7), purchases by organizations exempt from federal income tax under I.R.C. § 501(c)(3) are exempt from sales and use tax effective Aug. 29, 1977, but not before); Comp-

process,[109] and other categories.[110] Three holdings addressed the issue of a

troller's Administrative Decision No. 8426 (1979) (where vendor sold tangible personal property, collecting tax from entity exempt on purchases under art. 20.04(H), vendor was required to remit tax to state though sale was entitled to exemption from sales and use tax).

108. Comptroller's Administrative Decision No. 8713 (1978) (resale certificate is required to reflect sale or use tax permit number of vendor; however, exemption certificate is not required to contain such number, but should cite basis for exemption of purchase); Comptroller's Administrative Decision No. 10371 (1979) (where purchaser of equipment provided exemption certificate to seller reflecting equipment was purchased for farm use and also furnished seller financial information indicating that purchaser was in business other than farming, seller could accept certificate in good faith since purchaser's engagement in business other than farming did not establish that purchaser would not be using equipment for farm use); Comptroller's Administrative Decision No. 8866 (1979) (sales tax is due on transaction in which purchaser buys property from Texas vendor (for resale purposes), takes possession of property in Texas, and then transfers it outside Texas for use); Comptroller's Administrative Decision No. 10018 (1979) (where contractor improves realty of customer under a lump-sum contract, it cannot accept resale certificate from customer for purchases it uses in order to perform the improvements, since, under art. 20.01(T), contractor is consumer of purchases and owes sales or use tax on them); Comptroller's Administrative Decision No. 9978 (1978) (sales tax permit number of purchaser is by itself insufficient to establish that purchase is for resale under art. 20.021(F)); Comptroller's Administrative Decision No. 9678 (1979) (where exemption certificate given after sale by organization claiming exempt status under art. 20.04(H) and comptroller had made previous determination that organization did not qualify for exempt status under that article, seller could not accept exemption certificate in good faith).

109. Comptroller's Administrative Decision No. 9102 (1979) (taxpayer's purchase of gloves used during electrostatic plating operation to protect hands of employees from toxic materials was exempt from sales and use tax as property necessary to manufacturing process and which had useful life of less than six months).

110. Comptroller's Administrative Decision No. 9525 (1979) (taxpayer's purchases of steel rods used to aid in the manufacturing of cast iron and having useful life of less than six months were exempt from sales and use tax under art. 20.04(E)); Comptroller's Administrative Decision No. 9102 (1979) (electrostatic plating constitutes processing and is thus taxable as sale for sales and use tax purposes); Comptroller's Administrative Decision No. 8750 (1978) (taxpayer who purchased scrap metal, crushed and cut metal into a product, then sold product, was manufacturer or processor within meaning of art. 20.04(E)); Comptroller's Administrative Decision No. 10380 (1979) (purchaser is not entitled to exemption from sales and use tax under art. 20.04(B) where he takes delivery of advertising supplements instead of having them sent directly to newspaper for distribution); Comptroller's Administrative Decision No. 8891 (1979) (chemicals purchased to remove impurities from press roller and plates during printing process in order to create sharper printed images were necessary to the manufacturing process and, therefore, exempt under art. 20.04(E)(1)(b)); Comptroller's Administrative Decision No. 9955 (1979) (providing equipment and an operator for a single charge presumed to be service rather than rental of tangible personal property and sales and use tax is not imposed upon the charge); Comptroller's Administrative Decision No. 9791 (1979) (taxpayer purchasing tangible personal property from a Texas vendor and who takes possession of property within Texas, owes sales tax even though taxpayer immediately removed property from Texas); Comptroller's Administrative Decision No. 9885 (1979) (purchase of diving bell used outside Texas territorial limits to transport divers underwater to recover blow-out preventers and marine risers dropped by drilling contractors, as well as to survey ocean bottom to insure that proposed well location was suitable for installing blow-out preventer, was not exempt under art. 20.04(X) and was subject to sales and use tax since bell was not tangible personal property used directly in exploration or production, but rather a transportation device only indirectly involved in exploration or production); Comptroller's Administrative Decision No. 8836 (1979) (taxpayer who purchased an aircraft for use as certificated or licensed carrier of persons or property, but never improved aircraft to meet FAA requirements to obtain certification, was subject to sales tax on the purchase price since the aircraft was never used as a certificated or licensed carrier); Comptroller's Administrative Decision No. 9806 (1979) (where coolant purchased was used by taxpayer in cooling machines that cooled the taxpayer's manufactured product so that it could be wrapped, purchases were exempt from sales or use tax under art. 20.04(E)(2) as property necessary

successor's liability for the taxes,[111] while one required the remittance of tax to the state even though it had been erroneously collected.[112] Finally, the comptroller published decisions regarding the applicability of the use tax to prizes awarded to contest winners,[113] a change in the use of an item initially purchased for resale,[114] and other miscellaneous situations.[115]

C. *Legislative Developments*

During the survey period, several statutes were amended in connection with sales and use taxes, three of which concern local tax matters rather than state matters.[116] In regard to state sales tax matters, the legislature

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and essential to manufacturing process); Comptroller's Administrative Decision No. 9890 (1979) (where certificated airline carrier purchased coffee makers, ovens, trays and bar carriers for use on aircraft, purchases were subject to sales or use tax as supply items rather than being exempt under art. 20.04(G)(3)(a) since not part of the aircraft); Comptroller's Administrative Decision No. 10011 (1979) (where corporation purchased nonstick polyethylene film to cover products for purpose of transporting them to finished goods plant for further processing, purchases were not exempt from sales and use tax as wrapping and packaging material under art. 20.04(E)(2) since they did not further sale of product in its packaged form); Comptroller's Administrative Decision No. 10019 (1979) (where Texas corporation purchased yacht outside of Texas without paying sales tax, then brought it into Texas waters within five months from date of purchase and designated Texas as home port when registering yacht, corporation owed use tax on purchase price since purchased for use in Texas).

111. Comptroller's Administrative Decision No. 10228 (1978) (where purchaser bought delinquent taxpayer's business assets at foreclosure sale, he was not successor within meaning of successor liability provisions under art. 20.09(I)); Comptroller's Administrative Decision No. 9324 (1979) (where purchaser bought business from owner, rather than from taxpayer who had been operating business under lease from owner, and who had defaulted on lease, purchaser was not successor within meaning of successor liability provisions under art. 20.09(I)); Comptroller's Administrative Decision No. 10316 (1979) (under authority of art. 20.09(I) purchaser cannot alter his statutory liability as successor for delinquent sales and use taxes of seller by relying upon provision in sales contract that purchaser of business will not be responsible for seller's debts).

112. Comptroller's Administrative Decision No. 10050 (1978) (where retailer charges and collects sales tax from purchaser, even though tax is not due on transactions involved, he must remit tax to state under art. 1.07(2)).

113. Comptroller's Administrative Decision No. 10322 (1978) (where company purchased tangible personal property and gave it away to contest winners, company was subject to sales and use tax on purchase price of property since giving it away constituted a taxable use under arts. 20.031 and 20.04(E)(1)(b)(iv)).

114. Comptroller's Administrative Decision No. 10043 (1979) (where corporation purchased machine under resale certificate, but made divergent use of it by utilizing in research and development, corporation was responsible for payment of use tax on purchase price).

115. Comptroller's Administrative Decision No. 10176 (1979) (where purchaser purchased paintings from out-of-state vendors and brought into Texas for its own use, purchase price was taxable since taxpayer was unable to rebut presumption in art. 20.031(L) that tangible personal property purchased from vendor and then brought into Texas is presumed to have been purchased for storage, use, or consumption in state).

116. Effective June 13, 1979, the legislature amended art. 1066c to extend local use tax liability to items brought or shipped directly into a local taxing jurisdiction, even though the original sale was consummated outside of that local taxing jurisdiction. TEX. REV. CIV. STAT. ANN. art. 1066c, § 4(E)-(F) (Vernon Pam. Supp. 1963-1979). Nonetheless, a vendor must have had a nexus with the taxing jurisdiction to which the goods are brought in order to incur responsibility for collecting the tax. *Id.* art. 1066e, § (4)(C). The amendments also define the "place of business of the retailer," listing various places at which a sale may be consummated. *Id.* art. 1066c, § 6(B)(1). This amendment, however, is not effective until Aug. 31, 1981. The amendments to article 1066c were enacted in response to two recent

made significant changes in the Limited Sales, Excise and Use Tax Act.[117]

An addition to article 20.04 provides an exemption from sales and use taxes for specialized equipment that is used to enable the deaf to communicate with an ordinary telephone.[118] All material, papers, and printing ribbons used in the operation of the equipment are similarly exempt from these taxes.[119] Article 20.05 was amended to increase the interest rate on taxes that are over sixty days delinquent from six percent to seven percent.[120] Article 20.08, relating to petitions for redetermination of tax, also was amended to reflect the increase in interest rate for failure to pay taxes within the statutory period.[121] Finally, article 20.11 relating to administration of the act was amended to eliminate the misdemeanor penalty for an employee or official who discloses to the public certain information concerning the taxpayer's business that was obtained from the taxpayer's required reports or an investigation of a taxpayer's business.[122] The amendatory language does, however, continue to provide that such information is confidential and not open to public inspection.

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cases, one of which was Dunigan Tool & Supply Co. v. Bullock, 588 S.W.2d 633 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.). For an in-depth discussion of the district court's opinion in that case, see Rosenbaum, *supra* note 8, at 582-85.

The other amendments dealing with local sales and use taxes address matters dealing with rapid transit authorities. Art. 1118x, relating to the powers, duties and administration of the Metropolitan Rapid Transit Authorities, was amended in several respects. First, the legislature provided four permissible rates of local sales and use tax, up to a maximum of one percent, that could be levied by the board of a rapid transit authority. TEX. REV. CIV. STAT. ANN. art. 1118x, § 11B (Vernon Pam. Supp. 1963-1979) (effective Sept. 1, 1979). Secondly, the legislature extended a rapid transit authority's power to assess a use tax to items brought or shipped directly into the authority's geographical area, even though the original sale was consummated outside of the authority's jurisdiction. *Id.* art. 1118x, § 11B (C)(4)-(5) (effective June 13, 1979). This extension of authority to assess use tax is identical to the extension granted localities by the amendment to art. 1066c, and similarly, art. 1118x provides that a vendor must have a nexus with the taxing authority to which the goods are brought in order to incur responsibility for collecting the tax. *Id.* art. 1118x, § 11B(C)(3). Finally, art. 1118x has been amended to provide a procedure for allowing certain incorporated cities or towns to draw from a rapid transit authority. *Id.* art. 1118x, § 6D (effective Aug. 22, 1979). The legislature also enacted an entirely new article, art. 1118y, which permits the creation of regional transportation authorities. The article also addresses the authority's organization, management, powers and duties, as well as the methods by which the authority may be financed. *Id.* art. 1118y (Vernon Pam. Supp. 1963-1979) (effective Aug. 27, 1979). Similar to the statutory taxing powers of metropolitan transit authorities, art. 1118y provides (1) permissible sales and use tax rates that the regional authorities may assess, *id.*, art. 1118y, § 16(a), (2) taxing authority on tangible personal property purchased outside of but brought into their geographical areas, *id.* art. 1118y, §§ 16(f)(2)(D)-(E), and (3) a vendor must have a nexus with the regional taxing authority to which the goods are brought in order to incur responsibility for collecting the tax, *id.* art. 1118y, § 16(f)(2)(C).

117. TEX. TAX.-GEN. ANN. arts. 20.01-.17 (Vernon 1969 & Supp. 1980).

118. *Id.* art. 20.04(M)(3) (Vernon Supp. 1980) (effective Aug. 27, 1979).

119. *Id.*

120. *Id.* art. 20.05(H) (effective Jan. 1, 1980).

121. *Id.* art. 20.08(G) (effective Jan. 1, 1980).

122. *Id.* art. 20.11(G)(1) (effective June 13, 1979).

III. AD VALOREM TAXES

A. *Cases*

During this survey period more court opinions dealt with ad valorem taxes than with any other area of state taxation. Many of these cases involved taxpayers seeking injunctive relief against such activities as the collection of taxes under allegedly discriminatory and illegal plans of taxation and improper evaluation and reassessment procedures. Additionally, a number of cases dealt with exemptions from ad valorem taxes[123] and procedural aspects of litigation pertaining to ad valorem taxes.[124] Other cases dealt with miscellaneous matters such as the validity of a tax ordinance,[125] the taxable situs of property,[126] and the payment of court costs by tax authorities.[127]

Injunctive Relief. The majority of taxpayers seeking injunctive relief alleged that the tax authorities were proceeding under a discriminatory and illegal plan of taxation. In *Crystal City Independent School District v. Griffith-Williams Cattle Co.*[128] the San Antonio court of civil appeals held that a plan of taxation of real property for ad valorem tax purposes as author-

123. Davies v. Meyer, 573 S.W.2d 873 (Tex. Civ. App.—Fort Worth 1978, no writ) (bishop's land used as church campground was not exempt from ad valorem taxes under TEX. REV. CIV. STAT. ANN. art. 7150-2a since evidence did not establish that property was used exclusively for threefold purpose of religious, educational, and physical development of young people).

124. Rhodes v. City of Austin, 584 S.W.2d 917 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (where actions or suits are brought for collection of delinquent ad valorem taxes, TEX. REV. CIV. STAT. ANN. art. 7345b-1 provides for venue in county in which taxes are levied and plea of privilege regarding such a proceeding will not lie under TEX. REV. CIV. STAT. ANN. art. 1995); Commerce Independent School Dist. v. Hampton, 577 S.W.2d 740 (Tex. Civ. App.—Eastland 1979, no writ) (failure to serve attorney general with notice of proceeding in suit where tax ordinance allegedly violated Texas Constitution deprived trial court of jurisdiction to rule on validity of ordinance); State v. General Am. Life Ins. Co., 575 S.W.2d 602 (Tex. Civ. App.—Waco 1979, writ dism'd) (where neither state nor county seizes or levies upon taxpayer's personal property, county court's jurisdiction is determined by amount of debt owed in connection with such property rather than value of property that is assessed); Texas E. Transmission Corp. v. Sealy Independent School Dist., 572 S.W.2d 49 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (trial court's failure to file findings of fact on which legal conclusion was based was error where appellant made timely request to file such findings).

125. Commerce Independent School Dist. v. Hampton, 577 S.W.2d 740 (Tex. Civ. App.—Eastland 1979, no writ); *see* note 124 *supra*.

126. County of Dallas v. Yellow Cab of Dallas, Inc., 573 S.W.2d 44 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (summary judgment precluded where there was a material issue of fact whether taxicabs had acquired taxable situs separate from tax situs of company).

127. El Campo Independent School Dist. v. Kimmey, 571 S.W.2d 865, 866 (Tex. 1978) (school districts are exempt under TEX. REV. CIV. STAT. ANN. arts. 7297, 7343 from liability for costs in a collection suit for taxes); State v. General Am. Life Ins. Co., 575 S.W.2d 602, 605 (Tex. Civ. App.—Waco 1979, writ dism'd) (state and county not liable for costs in suit for collection of delinquent ad valorem taxes); City of Corpus Christi v. Davis, 575 S.W.2d 46, 57 (Tex. Civ. App.—Corpus Christi 1978, no writ) (taxing authorities, including the city, independent school district, and junior college district of Corpus Christi, are exempt from payment of any court costs in suit to recover delinquent taxes); County of Dallas v. Yellow Cab of Dallas, Inc., 573 S.W.2d 44, 46 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (tax authorities are exempt from payment of court costs even though claim for delinquent ad valorem taxes arises by way of cross claim).

128. 575 S.W.2d 336 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.).

ized by that district's board of trustees was invalid and void as to the taxpayers. The taxpayers alleged that the school district's levy of taxes assessed by the board of equalization was invalid because the levy had not been made in accordance with the formalities required by law. Texas law requires that such a levy be made by ordinance rather than by motion or resolution.[129] The trustees, however, had levied the tax by resolution, subsequently arguing that the resolution qualified as an ordinance since it was vested with the "formalities, solemnities and characteristics of an ordinance."[130] The court disagreed with the trustees. The mere fact that the levy was made by resolution, however, did not cause it to be invalid. The court stated that it would have been valid had the minutes of the meeting indicated that the resolution had been acted on or passed by the board, signed by any member of the board, corresponded to or bore any relationship to the minutes, or stated the purposes for which it was levied.[131] The minutes, however, failed to reflect even the amount of the tax, the purpose for which it was levied, or whether a vote was ever taken on the tax rate. Because of the absence of minimal formalities, the levy was declared invalid and void as to the taxpayers.[132] This case highlights the importance of advising taxing authorities of the formal requirements necessary to properly authorize a plan of taxation.

In *Anderson County Taxpayer's League v. City of Palestine*[133] the Tyler court of civil appeals held that a plan of taxation was discriminatory and illegal since it violated the constitution and statutes of Texas by denying the taxpayers the equal protection of these laws. A deliberate decision by the taxing authorities to exclude all personal property from the tax rolls violated article VIII, section 1 of the Texas Constitution, which requires equal and uniform taxation.[134] By establishing this violation of Texas law,

129. *E.g.*, Mercedes Independent School Dist. v. Nolen, 536 S.W.2d 662, 664 (Tex. Civ. App.—Corpus Christi 1976, no writ); Flower Grove Independent School Dist. v. Koger, 77 S.W.2d 602, 603 (Tex. Civ. App.—El Paso 1934, writ dism'd).

130. 575 S.W.2d at 338.

131. *Id.* at 339.

132. *Id.* Note that although the taxpayers established that the plan was illegal because of the lack of formalities, the court did not require that they establish probable injury in order to obtain an injunction. *Cf.* Commissioner's Court v. Calhoon, 575 S.W.2d 72 (Tex. Civ. App.—Tyler 1978, no writ), discussed *infra* at text accompanying notes 150-56, which required such showings before a temporary injunction could be granted.

133. 576 S.W.2d 679 (Tex. Civ. App.—Tyler 1979, no writ).

134. *Id.* at 683. The Tyler court had reached a similar conclusion in an earlier case involving a deliberate decision to exclude certain personal property from assessment. Hutt v. City of Rocksprings, 552 S.W.2d 583, 585 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). The testimony of taxing authorities in *Anderson* indicated only the absence of an effort to place personal property on the tax rolls rather than a deliberate decision to exclude such items. In addition, one member of the city's Board of Equalization testified that he was unaware of the necessity for placing this property on the tax rolls. The court held, however, that the facts established a "scheme, or plan, wilfully followed." 576 S.W.2d at 683. The court concluded that "[i]t is not necessary that the taxing officials intend specifically to discriminate against or injure [taxpayers]. It is sufficient that by their action they [deny taxpayers] the equal protection of the Constitution and laws of this state." *Id.* Perhaps the court is indicating that taxing authorities within its jurisdiction must take affirmative action to insure the adoption of a nondiscriminatory plan of taxation, and that even an unconsidered omission can constitute a "deliberate decision" for purposes of determining whether a plan of

the taxpayers met the first half of the burden of proof required for an injunction since they established a probable right to relief on a trial on the merits of their case. The taxpayers were unable, however, to establish the second part of their burden of proof that probable substantial injury would result to them if the illegal plan of taxation were implemented. This injury must be pecuniary, rather than a mere deprivation of constitutional rights.[135] Specifically, the taxpayers should have shown that the plan would result in payment by them of more than their fair share of the taxes.[136] Since no showing of probable injury to the taxpayers was made, the court of civil appeals affirmed the trial court's denial of the application for a temporary injunction.

During an earlier part of the survey period, the Tyler court granted a temporary injunction in *Burklund v. Hackett*.[137] Taxpayers sought to enjoin the defendants from placing proposed values for the taxpayers' property on the tax rolls and approving the rolls, as well as from levying or attempting to collect taxes based upon these values. The taxpayers alleged that the defendants intended to apply an unconstitutional plan of taxation to their property, and that implementation of the plan would result in immediate, irreparable, and substantial injury to them. Upon appeal from an interlocutory order granting the temporary injunction, the court stressed the limited standard of appellate review applicable under these circumstances. The sole question in connection with such a review was whether the trial court's action constituted a clear abuse of discretion.[138]

The defendants' first point of error stated that the court had erred in granting the injunction since the defendants had not announced which values would be placed on the taxpayers' land for tax purposes or when the Board of Equalization would adjourn. Thus, the defendants argued, the trial court's conclusion that the taxpayers were entitled to a preservation of the status quo was based upon pure speculation; the taxpayers had simply filed their suit too early. The defendants further argued that there was no evidence establishing that the Board of Equalization would have approved the submission of the appraised values by the tax assessor, certified the tax rolls, and adjourned before the taxpayers could institute a suit for injunc-

taxation is illegal. This approach certainly appears to be reasonable because illegality, or discrimination against taxpayers, should rest upon an examination of the equality and uniformity with which property is taxed, as opposed to an examination of the intent of the taxing authority.

135. 576 S.W.2d at 685.

136. The court required the taxpayers to make only a showing that more than their "fair share" of taxes would be paid in order for them to establish probable substantial injury. In Hutt v. City of Rocksprings, 552 S.W.2d 583 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.), however, the Tyler court described a more specific standard that must be met. The court in *Hutt* held that a taxpayer must "prove that because of the illegal plan his taxes are excessive or substantially higher than they would have been had the plan followed the proper statutory and constitutional guidelines." *Id.* at 586. Although *Hutt* was not cited in *Anderson* for this proposition, presumably the court intended that the earlier standard, or a similar test, provide a method for determining whether a taxpayer would pay more than his fair share.

137. 575 S.W.2d 389 (Tex. Civ. App.—Tyler 1978, no writ).

138. *Id.* at 391.

tive relief.[139] The court of appeals disagreed, however, noting that while past acts and practices of the defendants would not furnish a basis for injunctive relief in the absence of a showing that they would probably recur, the evidence presented established that the defendants were likely to follow their previous course of conduct and fully implement their plan of taxation before the taxpayers could obtain injunctive relief.[140]

An important factor in the court's reliance upon the probable recurrence of past practices was that the defendants had deliberately placed the taxpayers in an untenable position by refusing to inform them of when the board would adjourn or whether an opportunity to file suit would be afforded. Had the taxpayers awaited the board's disposition of their case, the tax plan might have been put into effect, thus eliminating the availability of a preliminary injunction and burdening the taxpayers with the more onerous requirement of proving the excessiveness of taxes.[141] On the other hand, because of the defendants' refusal to provide necessary information, the taxpayers were faced with the dilemma that their suit might be premature if filed before the plan was put into effect. This refusal of the defendants to communicate appears to have caused the court to rely upon past practices in disregarding the premature timing of the suit.[142]

Since the taxpayers would have suffered a tremendous increase in the burden of proof had they waited to seek relief until after the fundamentally erroneous plan was put into effect, the court held that their diligent prosecution of the constitutional challenge was all that was required.[143] Even though the defendants had not, in fact, made any determination regarding the values to be placed upon the taxpayer's land, the court concluded that the taxing scheme was arbitrary and unconstitutional because the appraisal and assessment of property was based upon a system of five categories of value ranges, rather than upon the fair market value of the property.[144] The taxpayers established that the application of a uniform and equal system of taxation based upon fair market value would reduce their estimated tax burden by more than $4,000. Thus, they established evidence of probable injury that was required to support the issuance of the temporary injunction.

Burklund is significant because it indicates that taxpayers need not wait for a final determination regarding the valuation of their land before they seek a temporary injunction. If they can establish that past acts and practices of the taxing authority indicate that such values probably will be determined and adopted, adversely affecting their estimated tax burden, then they may seek a temporary injunction with its lighter burden of proof

139. *Id.*
140. *Id.* at 392.
141. Following the implementation of a fundamentally erroneous plan of taxation, taxpayers may no longer obtain a temporary injunction to defeat the plan. They may defeat the recovery of taxes, but only to the extent that the taxes and valuations are excessive. *Id.* at 391-92.
142. *Id.* at 393.
143. *Id.* at 392-93.
144. *Id.* at 394.

rather than waiting for the adoption of a fundamentally erroneous plan of taxation and incurring a heavier burden of proof.

Three other cases during the survey period involved suits for injunction based upon allegations of improper valuation of property. In *Texas Eastern Transmission Corp. v. Sealy Independent School District*[145] the Houston (1st District) court of civil appeals held that the Board of Equalization had not engaged in an arbitrary and fundamentally erroneous valuation of the taxpayers' natural gas pipeline because it had determined the fair market value of this property from the testimony of expert witnesses based upon recognized appraisal procedures. The taxpayer had sought an injunction to prevent the district from imposing and collecting ad valorem taxes for 1977 on the basis of valuations set by the Board of Equalization. Although the taxpayer had submitted the value of its pipeline as $192,764, the board rejected this value, relying instead upon a figure provided by an appraisal firm establishing that the value was $511,310. The appraiser had combined the cost approach value and the income approach value in determining an average cost per mile for the pipeline.[146] The appraiser failed, however, to take into account the impact that Federal Power Commission regulations could have on the future income-producing capacity of the pipeline.

The taxpayer's burden of proof required that it establish that the board had adopted an illegal, arbitrary, and fundamentally erroneous plan of valuation, or placed a grossly excessive valuation on the property.[147] The court concluded that the appraiser's income approach was an erroneous method of valuation since he had failed to consider the impact of the Federal Power Commission's rules and regulations on future income.[148] The exclusion of the appraiser's valuation left insufficient evidence to support the trial court's determination of fair market value. In the absence of such a determination, the court could not determine whether the valuation placed on the pipeline by the Board of Equalization was grossly excessive. Accordingly, the court reversed and remanded.[149] This case provides support for other taxpayers attempting to reduce the assessed value of their property as a result of the negative impact that restrictive agency regulations may have upon potential purchasers.

The Tyler court of civil appeals, in another suit for injunction based upon an alleged improper valuation of property, dissolved a permanent injunction granted against the commissioner's court and other officials of

145. 580 S.W.2d 596 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

146. *Id.* at 598-99. The cost and income approaches upon which the appraiser relied had been approved as permissible methods earlier by the Supreme Court of Texas in Polk County v. Tenneco, Inc., 554 S.W.2d 918 (Tex. 1977).

147. 580 S.W.2d at 603. To show that the valuation was grossly excessive, the taxpayer had to establish that the assessed value was "so far above the fair cash market value as to shock a correct mind and thereby raise a presumption that the valuation was fraudulent or does not represent a fair and conscientious effort on the part of the board to arrive at the fair cash market value." *Id.* at 604.

148. *Id.* at 606.

149. *Id.*

Anderson County. In *Commissioner's Court v. Calhoon*[150] the taxpayer sought to enjoin an allegedly unlawful plan of taxation that was arbitrary and discriminatory and would result in substantial injury to taxpayers whose property consisted primarily of improved residential property. The proposed plan of taxation would value all rural unimproved property at $48 per acre, which equaled approximately one-sixth of its market value, and would value improved property at its fair market value. The taxpayer, who owned primarily improved property, argued that if the plan was implemented, he would be substantially injured because his residence would carry at last three times the tax burden as would unimproved property of equal value.[151] While the defendants did not dispute the arbitrary and illegal nature of the plan, they asserted that injunctive relief was unavailable since there was no evidence that it would cause substantial injury to the taxpayer.

Although the court acknowledged that the plan was arbitrary and illegal, it concluded that the taxpayer had to show "that the plan would discriminate against him by deliberately causing his property to be assessed at a greater percentage of its true value than the percentage assessed for other properties subject to the tax."[152] To meet this standard the court held that the taxpayer must produce evidence showing the fair market value of all property he owned that was subject to the discriminatory plan.[153] The tax-

150. 575 S.W.2d 72 (Tex. Civ. App.—Tyler 1978, no writ).

151. *Id.* at 73-74.

152. *Id.* at 75.

153. Although the court required the actual market value of all of the plaintiff's property, the cases cited for this proposition do not clearly establish that the value of all classes of the taxpayer's property must be presented. In Montgomery County v. Humble Oil & Ref. Co., 245 S.W.2d 326, 334 (Tex. Civ. App.—Beaumont 1951, writ ref'd n.r.e.), the Beaumont court of civil appeals stated that a showing of property tax valuations based upon different percentages for mineral property and nonmineral property was not sufficient to justify injunctive relief. To show substantial injury, the court required the taxpayer to present "some evidence" of the market value of its mineral property in Montgomery County to establish that the assessed value of the mineral property exceeded the fair market value by at least 10%, which was the assessment rate for all nonmineral property. *Id.* at 334-35. There is no clear indication in the court's opinion that the taxpayer had the burden of establishing the fair market value of its nonmineral property. The court merely stated that "there is adequate proof in the record that the nonmineral property was all assessed at approximately one-tenth of its true market value." *Id.* at 335. The court does not state who produced the proof or who was required to prove the fair market value of the nonmineral property. *Montgomery County*, therefore, does not appear to be strong authority for the proposition that a taxpayer is required to present proof of the fair market value of all classes of property when he is attacking a plan on the ground of inequality of assessment.

In State v. Whittenburg, 153 Tex. 205, 265 S.W.2d 569 (1954), the taxpayer claimed that the court adopted an arbitrary plan of taxation by valuing the taxpayer's interest in a limited oil payment and an unlimited royalty at substantially equal market values. Citing *Montgomery County*, the court held that the taxpayer was required to produce evidence establishing the market value of both interests since the board may have grossly undervalued the unlimited royalty interest, which would have benefitted the taxpayer rather than injured him. *Id.* at 213, 265 S.W.2d at 575. In *Calhoon*, however, the taxpayer was not complaining of unequal assessments as to classes of his property, but was complaining of unequal assessments as to his improved property in comparison to *all* other unimproved property in the county. The evidence in *Calhoon* showed that *all* unimproved property in the county had a minimum fair market value between $250.00 and $325.00 per acre. 575 S.W.2d at 75. In *Whittenburg* the supreme court stated that "to prevail on the basis of unlawful discrimina-

payer in *Calhoon* had introduced evidence showing the fair market value of his residence, but failed to produce evidence concerning the fair market value of other improved and unimproved property that he owned within the county.[154] The court concluded that this lack of evidence precluded a determination of whether the taxpayer had paid more than his fair share of taxes.[155] Accordingly, the court of civil appeals reversed the trial court, dissolved the injunction, and dismissed the action.[156]

In *Parker v. Board of Trustees*[157] a taxpayer challenged as arbitrary and discriminatory a reappraisal plan by which the fair market value of all properties within the county were to be redetermined on a district-by-district basis. The different areas of each district were reevaluated by an appraisal firm at varying times, but no property was to be reevaluated again until the completion of the initial reevaluation of all property in a given district. The taxpayer sought an injunction against the collection of taxes, arguing that his tax burden exceeded that of taxpayers whose property would not be reappraised until a year or more after the reevaluation of his own property. Although the court agreed that taxation should be equal and uniform, it noted that exact evaluation cannot be achieved.[158] Therefore, unless the taxpayer could establish that the plan was arbitrary and illegal, and that he would be substantially injured by it, the court would not enjoin the collection of taxes. Since the taxpayer failed to provide sufficient evidence establishing either requirement, the court denied the injunction. As was the case in *Calhoon*, the court here stated that proof of the fair market value of all of the plaintiff's property was necessary in order to establish substantial injury.[159]

Reimbursement for Payment of Taxes. In *Henry S. Miller Co. v. Wood*[160] the trial court held the defaulting purchasers of land must reimburse the seller for delinquent ad valorem taxes assessed prior to default and paid by the seller after he had recovered the land through foreclosure. The defendants appealed the trial court's decision and obtained a reversal. The

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tion it is not necessary that the taxpayer make a comparative showing with all other property in the county, . . . but he must make at least a *reasonable* showing in that respect." 153 Tex. 210, 265 S.W.2d at 573. In *Calhoon* the evidence presented concerning unimproved property appears to come well within the *Whittenburg* standard.

Finally, the last case cited to support the requirement that the value of all property must be established involved taxpayers who owned property in one class, and sought an injunction to restrain the city and school district from raising the value of property in that class without a corresponding revaluation of other property. Lancaster Independent School Dist. v. Pinson, 510 S.W.2d 380 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). Thus, at best *Pinson* provides only limited support for the statement that a taxpayer owning property in more than one class must establish the value of all property in each class.

154. 575 S.W.2d at 75-76.

155. *Id.* at 76.

156. *Id.*

157. 584 S.W.2d 569 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

158. *Id.* at 571. *See also* Darby v. Borger Independent School Dist., 386 S.W.2d 572 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.).

159. 584 S.W.2d at 572; *see* discussion in note 153 *supra*.

160. 584 S.W.2d 302 (Tex. Civ. App.—Texarkana 1979, writ granted).

defendants argued on appeal that they were not personally liable for the taxes paid because the deeds of trust and notes executed in conjunction with the purchase expressly provided that the makers of the note had no personal liability on the note in the event of default. The court agreed, concluding that the amount paid for taxes became a part of the lien on the land. The court relied on early Texas cases holding that a mortgagee in such circumstances is entitled to be subrogated to the lien created by the assessment of taxes, as well as to be reimbursed, but that the mortgagee could only enforce his tax lien as a part of the mortgage debt.[161] Therefore, if a personal judgment were not obtained against the mortgagors at the time of the foreclosure, no right to reimbursement would exist afterwards due to the discharge of the debt.

Even if the deed of trust and underlying note had not expressly provided against personal liability, the Texarkana court of civil appeals might well have reached the same result. The court stated that it "appears to be the rule in Texas that one who forecloses under a deed of trust is not entitled to a personal judgment against a mortgagor for taxes paid by the mortgagee either before or after foreclosure under a deed of trust."[162]

The Dallas court of civil appeals considered a similar issue a month after the *Wood* case. In *Smart v. Tower Land & Investment Co.*[163] the court affirmed the trial court's judgment granting reimbursement for taxes paid by a vendor. To prevent foreclosure by the taxing authorities, the plaintiff had paid delinquent ad valorem taxes after repurchasing the land at a trustee's sale due to the defendant's default. Following payment of the taxes, the plaintiff brought suit for reimbursement. Although the defendant argued that he was not personally liable for payment of the taxes under the language of the contract, the court disagreed, quoting a provision from the promissory note by which he had agreed "to pay and discharge as they are or may become payable all and every taxes and assessments that are or may become payable."[164] The court distinguished the *Wood* case on the ground that the note in *Wood* provided that the holder had the right to pay taxes, and any sums so expended would become a part of the debt. In *Smart*, however, the covenant between the parties did not provide that payment of taxes by the mortgagee would become merged with the secured debt. To the contrary, the covenant in *Smart* was held to create a separate right of action for reimbursement.[165] The Dallas court distinguished the cases relied upon in *Wood*, noting that in the case at bar the mortgagee had not voluntarily paid the debt of another without his consent, as had occurred in the cases distinguished.

Both *Smart* and *Wood* highlight the importance of carefully phrasing

161. Stone v. Tilley, 100 Tex. 487, 489, 101 S.W. 201, 201 (1907); The Praetorians v. State, 53 S.W.2d 334, 334-35 (Tex. Civ. App.—Waco 1932, writ ref'd); Wood v. Scott, 48 S.W.2d 1024, 1025 (Tex. Civ. App.—Waco 1932, writ ref'd).

162. 584 S.W.2d at 305.

163. 582 S.W.2d 543 (Tex. Civ. App.—Dallas 1979, writ granted).

164. *Id.* at 546.

165. *Id.*

the terms of contracts, deeds of trust, or promissory notes executed in connection with a purchase of land. The *Wood* case states a rather broad rule that a party who forecloses under a deed of trust is not entitled to a personal judgment against the mortgagor for reimbursement of taxes paid by the mortgagee either before or after such foreclosure. This holding appears to have been narrowed by the Dallas court's opinion in *Smart* that a separate right of reimbursement can, in fact, be created under the terms of a promissory note that expressly provides for repayment. Thus, taxpayers would be well advised to specify clearly the extent to which they can seek reimbursement of payments made in connection with property purchased.

The Texas Supreme Court has granted writ in both *Wood* and *Smart*.[166] In *Smart* the court specifically granted review of defendant's point five, which contends that as a matter of law the plaintiff's only recourse under the contract was against the property and not the defendant personally.[167] In *Wood* the court specifically granted plaintiff's point two, which contends that the Texarkana court erred in construing the contractual provisions that provided against personal liability to include nonliability as to taxes, and since the plaintiff was contractually authorized to pay the taxes, the amount paid became a demand obligation collectible under the deed of trust or as otherwise provided by law.[168] Although both points address the interpretation of the controlling contracts, it appears that the supreme court will at least have to address the validity of the broad rule announced by the court in *Wood*. In any event, the decisions may provide some guidance as to terms which should be included in the deed of trust and underlying note to insure reimbursement of taxes paid by the vendor of the property.

IV. THE NEW PROPERTY TAX CODE

One of the most significant actions taken by the Texas Legislature during this survey period was the enactment of the Property Tax Code.[169] This Code was enacted as a result of the approval by the voters on November 7, 1978, of the Tax Relief Amendment to the Texas Constitution. The constitutional amendment requires all real and tangible property to be taxed according to its value and authorizes the legislature to provide for the taxation of intangible personal property.[170]

Prior to the enactment of the new Code, implementing legislation was passed in order to put into effect the provisions of the Tax Relief Amendment. Article 7174A, for example, provides that agricultural land is to be valued on the basis of certain factors relative to agricultural use.[171] Simi-

166. 23 Tex. Sup. Ct. J. 38 (Oct. 27, 1979).
167. *Id.* at 41.
168. *Id.*
169. TEX. PROP. TAX CODE ANN. §§ 1.01 to 43.03 (Vernon Pam. 1979) [hereinafter referred to as the Code].
170. TEX. CONST. art. VIII, § 1.
171. TEX. REV. CIV. STAT. ANN. art. 7174A (Vernon Supp. 1980) basically provides for the taxation of open-space land used for agricultural purposes "to the degree of intensity

lar provisions were passed in connection with the valuation of qualified timberland[172] and the exemption from ad valorem taxation of certain in-

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generally accepted in the area and that has been devoted principally to agricultural use for at least five of the preceding seven years." *Id.* art. 7174A, § 1(1). The agricultural activities for which the land must be used include, but are not limited to,

> cultivating the soil, producing crops for human food, animal feed, planting seed, and for the production of fibers; floriculture, viticulture, and horticulture; raising or keeping livestock; and planting cover crops or leaving land idle for the purpose of participating in any governmental program, or normal crop or livestock rotation procedure.

Id. art. 7174A, § 1(2). In addition to agricultural land, art. 7174A also qualifies land that is used principally for ecological laboratories by colleges and universities. *Id.* art. 7174A, § 1(1). Open-space land is valued by the tax assessor for the taxing unit on the basis of the category in which the land is principally used, applying accepted income capitalization methods to the average annual net income that would have been derived from the land over the preceding five years by a person using ordinary prudence in managing the land. *Id.* art. 7174A, § 2(a). This value must not exceed the fair market value as determined by other generally accepted valuation methods. *Id.*

In order to obtain appraisal for land under this special valuation method, a valid application must be filed with the tax assessor for each taxing unit in which the land is taxable. *Id.* art. 7174A, § 4(a). Land is ineligible for designation as qualified open-space land if the land is (1) not within certain exceptions provided for land located inside the corporate limits of an incorporated city or town, (2) owned by certain nonresident aliens or foreign governments, or (3) owned by corporations, partnerships, trusts, or other business entities that must register their ownership or acquisition of the land under federal law and a nonresident alien or foreign government owns a majority interest in the entity. *Id.* art. 7174A, § 6.

Except for a few minor changes, the Code adopts art. 7174A. TEX. PROP. TAX CODE ANN. §§ 23.51-.57 (Vernon Pam. 1979) (effective Jan. 1, 1982). Note that a taxpayer seeking to have his property appraised under § 23.51 must file a valid application before April 1 in the year for which special appraisal is sought. *Id.* § 23.54(d).

172. TEX. REV. CIV. STAT. ANN. art. 7174B (Vernon Supp. 1980). The value for ad valorem tax purposes of property that qualifies for appraisal under this section is determined on the basis of the category of the land, applying accepted income capitalization methods to the average annual net income that would have been earned from the land over the preceding five years if managed by a person using ordinary management prudence. *Id.* art. 7174B, § 3(a). This method is similar to that used for assessing qualified agricultural land. Property qualifies for appraisal under this article

> if, with the intent to produce income, it is currently and actively devoted principally to production of timber or forest products to the degree of intensity generally accepted in the area and has been devoted principally to production of timber or forest products for at least five of the proceeding seven years.

Id. art. 7174B, § 2. If the use of land that has been appraised under this section later changes, an additional tax is imposed on the property. *Id.* art. 7174B, § 6(a). Land is ineligible for productivity appraisal if it is (1) located inside the corporate limits of an incorporated city or town, with certain exceptions, (2) land owned by certain nonresident aliens or foreign governments, or (3) land owned by corporations, partnerships, trusts, or other legal entities if they are required by federal law to register their ownership or acquisition of the land and if nonresident aliens or foreign governments own a majority interest in the entity. *Id.* art. 7174B, § 7.

The Property Tax Code adopts the basic provisions of art. 7174B, but does make certain clarifications. TEX. PROP. TAX. CODE ANN. §§ 23.71-.78 (Vernon Pam. 1979) (effective Jan. 1, 1982). For example, art. 7174B does not make clear whether the requirement of intent to produce income applies to both the current use of the land and the past use of the land for five of the preceding seven years, or if it merely applies to the former. Section 23.72 of the Code makes clear, however, that the intent to produce income relates only to the current use of the property. The Code carries over the minimum appraisal requirement for timber land that is contained in art. 7174B. That requirement basically provides that the value of such property may not be less than the appraised value of the land for the 1978 tax year. TEX. PROP. TAX CODE ANN. § 23.78 (Vernon Pam. 1979). The value used for any tax year, however, may not exceed the fair market value of the land as determined by other generally

tangible property.[173] Some provisions of the implementing legislation have already been repealed by the Property Tax Code,[174] but others remain in effect until January 1, 1982.[175] This survey article will deal primarily with the new provisions regarding exemptions.[176] Some definitions that will be effective in 1982 will also be discussed to make clear the changes that will come about under the Code.

Of considerable significance, however, is the fact that the Code's definitions necessary for proper interpretation of the exemptions do not become effective until January 1, 1982, while the exemptions became effective January 1, 1980. This produces a dilemma, because many of the Code's definitions vary from prior law. Courts, attorneys, and individuals are therefore faced with the current problem of determining whether the Code's exemptions should be interpreted by utilizing prior statutory definitions or by giving immediate effect to the definitions supplied by the Code. Since the use of prior definitions would not promote the legislative intent behind the Code, it is strongly suggested that the courts give effect to the new definitions of words that are used in the sections of the Code that became effective January 1, 1980, and utilize currently effective definitions when interpreting provisions of present law that are not repealed until January 1, 1982.

The Code's definition of real property, while in many ways similar to the present definition,[177] describes real property as including:

(A) land;
(B) an improvement;
(C) a mine or quarry;
(D) a mineral in place;

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accepted methods of appraisal. *Id.* As is the case with the application for valuation as qualified agricultural land, a taxpayer seeking to have his property appraised under the provision dealing with timber land must file an application before April 1 of the year for which the special appraisal is sought. *Id.* § 23.75.

173. 1979 Tex. Gen. Laws, ch. 302, art. 3, § 1, at 686 (art. 7150.6).

174. *Id.* (article 7150.6 exemption for intangible property); *id.* ch. 302, art. 4, § 1, at 687 (art. 7150.2 exemption for household goods and personal effects); *id.* ch. 302, art. 5, §§ 1-4, at 688-89 (art. 7150.3 exemption for automobiles); *id.* ch. 302, art. 6, § 1, at 689 (art. 7150.4 defining residence homestead); *id.* ch. 302, art. 7, §§ 1-8, at 690-92 (art. 7150.5 exemption for residence homestead).

175. TEX. REV. CIV. STAT. ANN. arts. 7174A, 7174B (Vernon Supp. 1980).

176. The following articles dealing with exemptions have been repealed effective Jan. 1, 1980, due to the enactment of the Code: art. 7150 (miscellaneous exemptions from taxation); art. 7150.2 (exemption of household goods and personal effects); art. 7150.3 (exemption for automobiles); art. 7150.4 (defining residence homestead); art. 7150.5 (exemption for residence homesteads); art. 7150.6 (exemption for intangible property); art. 7150b (exemption of property owned by church for minister's residence); art. 7150c (university lands subject to tax for county purposes); art. 7150d (exemption of headquarter buildings of Texas Congress of Parents and Teachers); art. 7150e (exemption of property of the Girl Scouts of America); art. 7150f (property moving in interstate commerce); art. 7150g (exemption of property of nonprofit educational corporations maintaining theater schools); art. 7150h (exemption of property of disabled and deceased veterans); art. 7150i (exemption of historic sites). Many of the exemptions granted by the now repealed articles have been carried over to the Property Tax Code. *See* TEX. PROP. TAX CODE ANN. §§ 11.11-.26 (Vernon Pam. 1979).

177. The definition of real property contained in TEX. REV. CIV. STAT. ANN. art. 7146 (Vernon Supp. 1980) will remain in force until Jan. 1, 1982.

(E) standing timber; or

(F) an estate or interest, other than a mortgage or deed of trust creating a lien on property or an interest securing payment or performance of an obligation, in a property enumerated in Paragraphs (A) through (E) of this subdivision.[178]

This definition alters the present definition for real property in three ways. First, standing timber is now expressly defined as real property.[179] Secondly, a mortgage or deed of trust that creates a lien to secure a payment or performance of an obligation is excluded from the definition of real property.[180] The latter provision adopts a distinction, recognized by early Texas cases, between a taxable interest in land and the interest of a lienor.[181] Finally, mobile homes are no longer specifically included in the Code's definition of real property. They will remain taxable as real property, however, since they are within the definition of improvements,[182]

178. TEX. PROP. TAX CODE ANN. § 1.04(2) (Vernon Pam. 1979) (effective Jan. 1, 1982).

179. *Id.* § 1.02(2)(E). The inclusion of standing timber in the definition of real property raises an interesting question with regard to valuation of land that has valuable timber standing upon it. Under TEX. PROP. TAX CODE ANN. §§ 23.71-.78 (Vernon Pam. 1979) (effective Jan. 1, 1982), which adopts the basic provisions of TEX. REV. CIV. STAT. ANN. art. 7174B (Vernon Supp. 1980), certain land that has timber standing upon it may be valued under a special appraisal method. *See* discussion at note 172 *supra*. Under the Code, land qualifies for the special appraisal method provided it is "currently and actively devoted principally to production of timber or forest products to the degree of intensity generally accepted in the area with intent to produce income and has been devoted principally to production of timber or forest products for five of the preceding seven years." TEX. PROP. TAX CODE ANN. § 23.72 (Vernon Pam. 1979). If the timber land qualifies under § 23.72, the appraised value of the land may be determined on the basis of accepted income capitalization methods applied to average net to land, and such appraised value may not exceed the market value of the land as determined under other appraisal methods. *Id.* § 23.73(a). Thus, special valuation will be made for the land of taxpayers whose property qualifies for this appraisal, but how the standing timber on other land will be valued if it does not qualify is unclear. If the property is qualified open-space land devoted principally to agricultural use, then it will be valued in a manner similar to the method provided for timber land. *Id.* § 23.51. If the land has valuable timber upon it, but qualifies neither as qualified timber land nor as agricultural land, it will presumably be appraised at its market value, as defined in § 1.04(7), by using generally accepted appraisal techniques. *Id.* § 23.01.

In determining the fair market value of cut timber for purposes of computing gain or loss on the sale of such timber under I.R.C. § 631, factors examined include: comparable sales data, quality of timber, location and accessibility, and the value of the whole tree. *See* H. J. Kane, *Problems of the Timber Operator: Capital Costs—Valuation of Standing Timber—Cutting Rights*, 19 N. Y. U. INST. FED. TAX. 1115, 1121 (1961). Although these factors relate to cut timber rather than to standing timber, they may provide an idea of some factors to examine in determining the value of the latter.

180. TEX. PROP. TAX CODE ANN. § 1.02(2)(F) (Vernon Pam. 1979).

181. *See, e.g.*, State v. Quintana Petroleum Co., 134 Tex. 179, 133 S.W.2d 112 (1939); Prince Bros. Drilling Co. v. Fuhrman Petroleum Corp., 150 S.W.2d 314 (Tex. Civ. App.—El Paso 1941, writ ref'd). The Code's exclusion of certain mortgages and deeds of trusts from the definition of real property should not result in a decrease of tax revenues since these cases indicated such property was not a taxable interest.

182. TEX. PROP. TAX CODE ANN. § 1.04(3) (Vernon Pam. 1979), defines improvement to include:

(A) a building, structure, fixture or fence erected on or affixed to land; or

(B) a transportable structure that is designed to be occupied for residential or business purposes, whether or not it is affixed to land, if the owner of the structure owns the land on which it is located, unless the structure is unoccupied and held for sale or normally is located at a particular place only temporarily.

which are included in the Code's definition of real property.[183]

The Code also incorporates the intangible personal property definition that was enacted under the implementing legislation. This property is defined to include:

> [A] claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses, although its existence may be evidenced by a document. It includes a stock, bond, note or account receivable, franchise, license or permit, demand or time deposit, certificate of deposit, share account, share certificate account, share deposit account, insurance policy, annuity, pension, cause of action, contract, and goodwill.[184]

Section 11.02 of the Code provides that intangible personal property is not taxable except as provided by subsection (b) of that section.

Intangible personal property that is taxable under subsection (b) consists of stock in a banking corporation, intangible property of unincorporated banks, intangible property of certain transportation businesses, and intangible property of insurance companies and savings and loan associations.[185] Although the intangible personal property of these businesses is taxable unless exempt by law, the state must have jurisdiction to tax the intangibles.[186] Under the Code, Texas will have jurisdiction to tax intangible personal property, other than stock in a banking corporation, if the property is owned by a resident of Texas or is located here for business purposes.[187] In addition, Texas has jurisdiction to tax the stock of a banking corporation that is incorporated in the state or of a national bank located in Texas.[188]

A question may arise as to how long a mobile home may be located at a particular place in order to qualify as a temporary location. Article 7146(a) presently exempts those that are located within the boundaries of an assessing unit for less than sixty days. TEX. REV. CIV. STAT. ANN. art. 7146(a) (Vernon Supp. 1980). It is unclear whether sixty days will continue to be a guideline, or whether the legislature intended that "temporarily" should consist of a time either less or more than sixty days.

183. Where the improvements on land are owned by a person other than the owner of the land, the Code has provisions directing the manner in which the improvements will be listed on the tax rolls. The Code requires improvements, which include mobile homes, to be listed in the name of the owner of the improvement if such owner is not entitled to an exemption under the Code. TEX. PROP. TAX CODE ANN. § 25.08(b) (Vernon Pam. 1979). The Code otherwise permits the land and improvements to be listed in the name of the owner, *id.* § 25.08(a), or, upon proper request, the land and improvements shall be listed separately in the name of the owner of the land and the owner of the improvements. *Id.* §§ 25.08(a), (c).

184. TEX. PROP. TAX CODE ANN. § 1.04(6) (Vernon Pam. 1979).

185. *Id.* § 11.02(b). Certain property of these entities is also taxable under current law. *See* TEX. REV. CIV. STAT. ANN. arts. 7147, 7165 (Vernon 1960) (repealed by Code effective Jan. 1, 1982); TEX. INS. CODE ANN., art. 4.01 (Vernon Pam. Supp. 1963-1979); TEX. REV. CIV. STAT. ANN. art. 852a, § 11.09 (Vernon 1964).

186. TEX. PROP. TAX CODE ANN. § 11.02(c) (Vernon Pam. 1979).

187. *Id.*

188. *Id.* § 11.02(d). Taxing authorities currently have jurisdiction to tax such property owned by Texas residents or located in the state for business purposes. *See* TEX. REV. CIV. STAT. ANN. art. 7147 (Vernon 1960); First Trust Joint Stock Land Bank v. City of Dallas, 167 S.W.2d 783 (Tex. Civ. App.—Dallas 1943, writ ref'd).

The Code also provides a new definition for market value, effective January 1, 1982.[189] This definition will affect future determinations of the values at which property is assessed for taxation. Section 26.02, effective January 1, 1981, provides that property may no longer be assessed for taxation on the basis of a percentage of its appraised value.[190] All property will be assessed on the basis of 100% of its appraised value.[191] Since section 23.01 of the Code provides that unless otherwise provided for all taxable property must be appraised at its market value,[192] the definition of market value becomes significant in determining the appraised value upon which the property must be assessed. The Code defines market value to mean:

> [T]he price at which a property would transfer for cash or its equivalent under prevailing market conditions if:
>
> (A) exposed for sale in the open market with a reasonable time for the seller to find a purchaser;
>
> (B) both the seller and the purchaser know of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and
>
> (C) both the seller and purchaser seek to maximize their gains and neither is in a position to take advantage of the exigencies of the other.[193]

The reasonable time requirement will obviously preclude taxpayers from using a depressed market price that resulted from a forced sale. Although this is certainly a useful provision from the perspective of maximizing ad valorem revenues, a question arises as to how the ideal market value referred to in the definition will be determined in the event of a forced sale. Taxpayers who purchase property as a result of a forced sale, or who otherwise fail to meet the requirements of the definition, may need to provide evidence of comparable sales in order to support a disputed "market value."[194]

The reasonable time requirement in the definition has its roots in the present definition of "value" under article 7149.[195] This article defines the term "true and full value" as "the fair market value, in cash, at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale."[196] In enacting the Code the legis-

189. TEX. PROP. TAX CODE ANN. § 1.04(7) (Vernon Pam. 1979).

190. *Id.* § 26.02.

191. *Id.*

192. *Id.* § 23.01. In the past, assessments have generally averaged between 40% and 60% of the actual value of the property. 1 TEX. STATE TAX REP. (CCH) ¶ 20-321.

193. TEX. PROP. TAX CODE ANN. § 1.04(7) (Vernon Pam. 1979) (effective Jan. 1, 1982).

194. The market data or comparable sales approach was used in the following cases: Fawcett v. Commissioner, 64 T.C. 889 (1975); Whitehead v. Commissioner, 33 T.C.M. (CCH) 253 (1974); Spicer v. Commissioner 33 T.C.M. (CCH) 45 (1974); Adams v. Commissioner, 32 T.C.M. (CCH) 503 (1973).

195. TEX. REV. CIV. STAT. ANN. art. 7149 (Vernon 1960) (repealed effective Jan. 1, 1982).

196. *Id.*

lature has chosen to rely upon an open market standard, rather than a private sales standard. Presumably, this will preclude reliance upon a price set in a non-arms-length sale and will aid in establishing the value of property under prevailing market conditions. Additionally, the pre-Code requirement that value be determined at the situs of the property at the time of assessment is not carried over into the Code's definition.[197]

The second requirement of the Code's market value definition is that both the seller and purchaser know all of the present and potential uses and purposes of the property, as well as enforceable restrictions on its use.[198] This is similar to the practice engaged in by the Internal Revenue Service in determining the value of property to be included in a decedent's estate under section 2031(a) of the Internal Revenue Code.[199] The Service frequently measures the use in light of the "highest and best use" to which the property may be put.[200] For example, in a 1974 Tax Court memorandum decision regarding valuation of a Kerrville ranch at the time of the decedent's death, the valuation of the property was affected by the determination that its highest and best use was for recreational purposes.[201] As is the case with the open market and reasonable time requirements in the first part of the new definition, the full knowledge of both a seller and purchaser with regard to the uses and purposes of property is an ideal standard. This standard clearly provides considerable latitude for both the taxing authorities and taxpayers to either support or attack valuations on the basis of a broad range of uses and purposes. Similarly, the requirement of familiarity with the enforceable restrictions on the use of property provides additional room for strategy in arguing about the market value of property. Case law will almost certainly evolve regarding determinations of the enforceability of restrictions and whether knowledge of such restrictions would have affected the price for which property was transferred.

Finally, the third major requirement of the definition of market value is that both seller and purchaser seek to maximize their gains and that

197. TEX. REV. CIV. STAT. ANN. art. 7149 (Vernon 1960) clearly provides that the property's value will be determined at the place of assessment. In comparison, TEX. PROP. TAX CODE ANN. § 1.04(7) (Vernon Pam. 1979) does not so provide. Arguably, the situs at which a taxing unit may tax tangible personal property should not necessarily be the same as the place that determines the market value of the property.

198. TEX. PROP. TAX CODE ANN. § 1.04(7)(B) (Vernon Pam. 1979).

199. I.R.C. § 2031(a) provides: "The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." Value is defined as the "fair market value at the time of the decedent's death." Treas. Reg. § 20.2031-1(b) (1958). This regulation defines fair market value as the "price at which property would change hands between a willing buyer and willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." *Id. See also* United States v. Simmons, 346 F.2d 213, 216-17 (5th Cir. 1965). The fairly extensive case law regarding market value under this federal estate taxation section may prove useful to Texas attorneys by providing analogous guidelines that will be helpful in applying the definition of market value under the new Code.

200. *See, e.g.*, Spicer v. Commissioner, 33 T.C.M. (CCH) 45, 49 (1974).

201. *Id.*

neither is in a position to take advantage of the hardships of the other.[202] This, too, is clearly an arms-length requirement and may preclude the ability of family members to sell property to each other to estabish a market value different from that for which the property could have been transferred between unrelated parties. The maximization of gain requirement and the open market requirement noted above are probably intended to preclude reliance upon the value set by sales between family members.

Exemptions Generally. Before the enactment of the Property Tax Code, the primary authority for exemptions was article 7150 of the Texas Revised Civil Statutes. This article provided twenty-one categories of exemptions, over half of which have been omitted from the new Code as separate categories. Some of the property omitted will continue to be exempt if it qualifies under a new category. The major shift in approach between the old exemptions and the new, however, goes beyond changes in the names of categories. The legislature appears to be relying now upon a substance versus form approach, designating uses to which property must be put, rather than merely characterizing property type or form of ownership. Although some descriptions of the uses to which property should be put were included in parts of the earlier statute, the new Code provides more detailed descriptions.

The categories that have been omitted as separate exemptions are county buildings,[203] poor houses,[204] public charities,[205] public libraries,[206] market houses,[207] fire engines,[208] pensions,[209] art galleries,[210] property owned by Boy Scouts,[211] demonstration farms,[212] and state prison property.[213] Although property in these categories is no longer specifically designated as exempt by named category, as noted above, some of it may continue to be exempt if it meets the new requirements. For example, county buildings and poor houses may be exempt under section 11.11(a) as property owned by the state or a political subdivision thereof if they are used for public purposes.[214] Exemptions have remained available for cer-

202. TEX. PROP. TAX CODE ANN. § 1.04(7)(C) (Vernon Pam. 1979). This requirement is simliar to the requirement under Treas. Reg. § 20.2031-1(b) (1958) that neither the buyer nor the seller be under a compulsion to buy or sell.

203. 1907 Tex. Gen. Laws, ch. 159, § 1, at 303 (art. 7150(6)).

204. 1969 Tex. Gen. Laws, ch. 848, § 1, at 2545 (art. 7150(7)).

205. 1907 Tex. Gen. Laws, ch. 159, § 1, at 303 (art. 7150(8)).

206. *Id.* (art. 7150(8)).

207. *Id.* (art. 7150(9)).

208. *Id.* (art. 7150(10)).

209. *Id.* (art. 7150(12)).

210. 1973 Tex. Gen. Laws, ch. 87, § 1, at 185 (art. 7150(14)).

211. 1925 Tex. Gen. Laws, ch. 85, § 1, at 255 (art. 7150(15)).

212. 1926 Tex. Gen. Laws, 1st Spec. Sess., ch. 12, § 1, at 19 (art. 7150(16)).

213. 1930 Tex. Gen. Laws, 5th Spec. Sess., ch. 49, § 1, at 191-92 (art. 7150(17)); 1930 Tex. Gen. Laws, 5th Spec. Sess., ch. 47, § 1, at 190 (art. 7150(18)).

214. TEX. PROP. TAX CODE ANN. § 11.11 (Vernon Pam. 1979) provides:

> (a) Except as provided by Subsections (b) and (c) of this section, property owned by this state or a political subdivision of this state is exempt from taxation if the property is used for public purposes.
>
> (b) Land owned by the Permanent University Fund is taxable for county

tain cemeteries,[215] charitable organizations,[216] youth development associations,[217] religious organizations,[218] schools,[219] and others discussed below. The grounds for exemption for some categories have remained the same.[220] Organizations in other categories, however, must satisfy new requirements in order to continue to claim exemption from property taxes.[221] Moreover, the legislature has consolidated numerous provisions that were previously made available under the Texas Constitution or under Title 122 of the Taxation Code, dealing with federal exemptions,[222] residence homestead exemptions,[223] household goods and personal effects,[224] family supplies,[225] farm products,[226] disabled veterans,[227] historic sites,[228] homesteads of the elderly,[229] and certain other miscellaneous exemptions.[230]

Residence Homestead and Household Goods. The exemption for resi-

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purposes. Any notice required by Section 25.19 of this code shall be sent to the State Property Tax Board, and the board shall appear in behalf of the state in any protest or appeal relating to taxation of Permanent University Fund land.

(c) Agricultural or grazing land owned by a county for the benefit of public schools under Article VII, Section 6, of the Texas Constitution is taxable for all but state purposes. The county shall pay the taxes on the land from the revenue derived from the land. If revenue from the land is insufficient to pay the taxes, the county shall pay the balance from the county general fund.

Subsection (a) above apparently overrules Satterlee v. Gulf Coast Waste Disposal Auth., 576 S.W.2d 773 (Tex. 1978), in which the supreme court held that state property must be owned exclusively by the state to be entitled to exemption from ad valorem taxation. The court's holding was premised on art. 7150(4), which provided that land must belong exclusively to the state to be entitled to exemption from taxation. Section 11.11(a) has eliminated the word exclusively and requires only that the property be owned by the state. TEX. PROP. TAX CODE ANN. § 11.11(a) (Vernon Pam. 1979). In addition to the exemption of certain county buildings and poor houses under this statute, public libraries and fire engines may also be exempt. *Id.* The taxability of land held in connection with certain educational purposes is consistent with the exemption for schools under § 11.21. The latter exempts from taxation the buildings and tangible personal property owned and used in connection with a school, but does not exempt land. *Id.* § 11.21.

215. *Id.* § 11.17.
216. *Id.* § 11.18.
217. *Id.* § 11.19.
218. *Id.* § 11.20.
219. *Id.* § 11.21.
220. The exemptions for veterans' organizations, the Texas Federation of Women's Clubs, private enterprise demonstration associations, and buffalo and cattalo have remained basically the same under the new Code. *See* TEX. PROP. TAX CODE ANN. § 11.23(a), (b), (e), (f) (Vernon Pam. 1979).
221. For example, charitable organizations, youth development associations, religious organizations, and schools must meet stricter requirements under the new Code. *See* text accompanying notes 247-307 *infra*.
222. TEX. PROP. TAX CODE ANN. § 11.12 (Vernon Pam. 1979).
223. *Id.* § 11.13.
224. *Id.* § 11.14.
225. *Id.* § 11.15.
226. *Id.* § 11.16.
227. *Id.* § 11.22.
228. *Id.* § 11.24.
229. *Id.* § 11.26.
230. *Id.* § 11.23.

dence homesteads and household goods is contained in section 11.13 of the Code, which entitles a family or single adult to an exemption from taxation for both state and county purposes of $3,000 of the assessed value of his residence homestead.[231] Additionally, with regard to taxation by a school district, an adult is entitled to an exemption of $5,000 of the appraised value of his residence homestead.[232] Disabled adults or those adults who are sixty-five or older are entitled to a special exemption of $10,000 of the appraised value of their residence homesteads from taxation by a school district.[233] This $10,000 exemption is in addition to the $5,000 regular exemption from taxation by a school district.[234] In addition, section 11.13 provides that the governing body of a taxing unit or the qualified voters of a taxing unit may approve an additional exemption from taxation by a taxing unit, for persons who are disabled or over sixty-five, of $3,000 or more of the appraised value of the residence homestead.[235] Once adopted, this exemption may be either repealed, decreased, or increased by the governing body offering the exemption or by a majority of the voters of the taxing unit.[236] Section 11.13 provides that if this exemption is adopted by a county that has levied a tax under article VII, section 1-a of the Texas Constitution, the approved exemption may not be aggregated for county tax purposes with the section 11.13(a) exemption of $3,000 of the assessed value of the residence homestead.[237] Section 11.13 places further limitations on the exemptions available thereunder. For example, joint or community owners may not receive the same exemption for the same residence homestead in the same year under this section, and similarly, an eligible disabled person may not receive both a disabled person's exemption and an elderly person's residence homestead exemption.[238]

The exemptions from taxation by a school district for adults, as well as the exemption for individuals who are disabled or sixty-five years or older,

231. *Id.* § 11.13. Although the $3,000 residential homestead exemption was not provided for in art. 7150, the Texas Constitution exempts from taxation the first $3,000 of value of a residential homestead for all state and county purposes. TEX. CONST. art. VIII, §§ 1-a, 1-b. The constitution makes clear that for state purposes the exemption is based on the assessed value of the homestead. *Id.* art. VIII, § 1-b. As to county taxation, however, the constitution does not state whether the exemption is to be based on assessed value or fair market value. *Id.* art. VIII, § 1-a. Section 11.13, which incorporates the constitutional exemptions, makes clear that the county exemption is to be based on the assessed value of the residential homestead. TEX. PROP. TAX CODE ANN. § 11.13(a) (Vernon Pam. 1979).

232. TEX. PROP. TAX CODE ANN. § 11.13(b) (Vernon Pam. 1979). This provision incorporates the exemption provided by TEX. CONST. art. VIII, § 1-b(c).

233. TEX. PROP. TAX. CODE ANN. § 11.13(c) (Vernon Pam. 1979). The $10,000 exemption was apparently adopted pursuant to TEX. CONST. art. VIII, § 1-b(c), which permits the legislature by general law to exempt an amount not exceeding $10,000 of the market value of the residence homestead of a person who is disabled or over 65 years of age.

234. The $3,000 exemption permissible under § 11.13(d) pertains to exemption from a taxing unit, which is broader than the exemption from taxation by school districts as provided in subsections (b) and (c) of § 11.13.

235. TEX. PROP. TAX CODE ANN. § 11.13(d)-(e) (Vernon Pam. 1979). Section 11.13(d) provides an exemption for disabled individuals while § 11.13(c) limits its exemption to disabled adults.

236. *Id.* § 11.13(f).

237. *Id.* § 11.13(g).

238. *Id.* § 11.13(h).

may be disregarded by the assessor and collector for a taxing unit where two conditions are met.[239] The first is that, prior to adoption of the exemption, the taxing unit has pledged the taxes for the payment of a debt.[240] The second is that an allowance of the exemption would impair the contractual obligation creating the debt.[241]

An exemption for household goods and personal effects that are neither held nor used for the production of income is contained in section 11.14 of the Code.[242] Household goods are defined to include property that is used primarily in or around a residence by the residents and guests such as furnishings, utensils, appliances, and other tangible personal property.[243] Personal effects are defined to include only that tangible personal property that is normally worn or carried by an individual or used by him in personal, recreational, or other activities not involving the production of income.[244] The statute excludes from this definition such property as motor vehicles, boats, trailers registered for operation on a highway, or mobile homes designed for occupancy as a dwelling.[245] The Code provides separate exemptions for family supplies for home or farm use.[246]

Charitable Organizations. The exemption under prior law for institutions of purely public charity has been removed.[247] This exemption may continue to be available for such organizations, however, if they can meet the new tests under section 11.18.[248] To qualify for exemption, the organization must be organized exclusively for and engaged exclusively in performing one or more of the following charitable functions: (1) the provision of medical care;[249] (2) the provision of support or relief to orphans, impoverished persons, or victims of natural disaster;[250] (3) the provision of support

239. *Id.* § 11.13(i).
240. *Id.*
241. *Id.*
242. *Id.* § 11.14. Under prior law, taxpayers were entitled to an exemption not to exceed $250 per family with respect to all household and kitchen furniture. 1907 Tex. Gen. Laws, ch. 159, § 1, at 303 (art. 7150(11)). The effect of the Code is to remove the $250 limit, thus allowing an exemption for all property that qualifies under the new statute.
243. TEX. PROP. TAX CODE ANN. § 11.14(b)(1) (Vernon Pam. 1979).
244. *Id.* § 11.14(b)(2).
245. *Id.* The exclusion of mobile homes from the definition of personal effects is consistent with the legislature's intent to tax such property as an improvement that meets the definition of real property. *See* TEX. PROP. TAX CODE ANN. § 1.04(2) (Vernon Pam. 1979).
246. *Id.* § 11.15.
247. Under prior law, 1969 Tex. Gen. Laws, ch. 848, § 1, at 2545 (art. 7150(7)) exempted from taxation:

> All buildings and personal property belonging to institutions of purely public charity, together with the lands belonging to and occupied by such institutions, including hospital parking facilities, not leased or otherwise used with a view to profit, unless such rent and profits and all monies and credits are appropriated by such institutions solely to sustain such institutions and for the benefit of the sick and disabled members and their families and the burial of the same, or for the maintenance of persons when unable to provide for themselves, whether such persons are members of such institutions or not.

248. TEX. PROP. TAX CODE ANN. § 11.18 (Vernon Pam. 1979).
249. *Id.* § 11.18(c)(1)(A).
250. *Id.* § 11.18(c)(1)(B).

to elderly persons or the handicapped;[251] (4) preservation of an historical landmark or site;[252] (5) promotion or operation of a museum, library, zoo, dramatic arts theater, symphony, orchestra, or choir;[253] (6) promotion or provision of humane treatment for animals;[254] (7) acquisition, storage, transportation, sale, or distribution of water for public use;[255] (8) provision of services such as those provided by a volunteer fire department for little or no compensation;[256] (9) promotion of athletic development of young people under the age of 18;[257] and (10) preservation or conservation of wildlife.[258] Each of the first three functions must be performed without regard to the beneficiary's ability to pay.[259] In addition to providing one of the functions just noted, the organization must avoid the accrual of distributable profits or the realization of private gain in any form other than a reasonable allowance for compensation for services rendered.[260] Finally, the organization's charter, by-laws, or other regulations adopted to govern its affairs must pledge its assets for use in performing its charitable functions and direct that upon termination of the organization, the assets will be transferred to a qualified educational, religious, or other charitable organization in Texas.[261]

The requirements for exemption as a charitable organization resemble the tests provided by the Internal Revenue Code for determining whether an organization is exempt from federal income tax.[262] Section 501(c)(3), for example, requires that an organization be organized and operated ex-

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251. *Id.* § 11.18(c)(1)(C).

252. *Id.* § 11.18(c)(1)(D). The Code provides a separate exemption from taxation for part or all of the assessed value of such a structure if the structure qualifies under § 11.24. *Id.* § 11.24.

253. *Id.* § 11.18(c)(1)(E). Although the specific exemption for art galleries provided by art. 7150(14), 1973 Tex. Gen. Laws, ch. 87, § 1, at 185, has been removed, perhaps organizations previously exempt under that section may continue to qualify for exemption under § 11.18 if the organization qualifies as a charitable organization that promotes a museum or similar undertaking.

254. TEX PROP. TAX CODE ANN. § 11.18 (c)(1)(F) (Vernon Pam. 1979).

255. *Id.* § 11.18(c)(1)(G).

256. *Id.* § 11.18(c)(1)(H).

257. *Id.* § 11.18(c)(1)(I).

258. *Id.* § 11.18(c)(1)(J).

259. *Id.* § 11.18(c)(1)(A)-(C).

260. *Id.* § 11.18(c)(2). In addition, if the organization is engaged in performing one of the functions provided in the final seven categories, it must be organized as a nonprofit corporation as defined by the Texas Non-Profit Corporation Act. TEX. REV. CIV. STAT. ANN. arts. 1396—1.01 to —11.01 (Vernon 1962 & Pam. 1979).

261. TEX. PROP. TAX CODE ANN. § 11.18(c)(3) (Vernon Pam. 1979). The purpose of these requirements appears to be to insure that the organization will not be operated in a way that results in a distribution of profits or a realization of private gains by shareholders upon termination.

262. I.R.C. § 501(c)(3)provides:

> Charitable organizations that are exempt from federal income tax include: Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . .

clusively for specified purposes and that the net earnings of the organization must not inure to the benefit of a private individual or shareholder.[263] Because of this similarity, Texas charitable organizations attempting to comply with the new law may benefit by examining the case law that has developed under section 501(c)(3).

Both buildings and tangible personal property owned by a qualifying charitable organization are exempt from taxation.[264] With one exception, this property must, however, be used exclusively by the organization.[265] The exception is that the use of exempt property by persons other than charitable organizations will not result in the loss of an exemption where the use is incidental to use by qualifying charitable organizations and is limited to activities benefiting the beneficiaries of such organizations that own or use the property.[266] The description of property exempt from taxation includes land "reasonably necessary" for the use of the buildings.[267]

Additionally, although no specific exemption is provided for a charitable organization's endowment funds invested exclusively in bonds, mortgages, or certain other property,[268] the Code does exempt such funds owned by certain youth development organizations,[269] religious organizations,[270] and schools.[271] The legislature's failure to provide an exemption for a charity's endowment funds, however, raises two interesting questions. First, on what basis was this exemption provided to youth development associations, religious organizations, and schools, but not to charitable organizations? Secondly, is it possible for a charitable organization to obtain an indirect exemption for these funds? The answer to the latter question appears to be yes. If a charity invests its endowment funds in intangible personal property such as certificates of deposit, annuities, pensions, or other such property interests, the invested funds may be exempt under sec-

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In light of the similarities between the provision enacted by the Texas Legislature and that provided by Congress, it seems curious that the Texas Legislature did not simply provide a blanket exemption for organizations that qualify under I.R.C. § 501(c)(3). The legislature apparently made a policy decision that certain organizations merit exemption from ad valorem taxation whether or not they qualify under § 501(c)(3). With respect to those organizations granted an exemption, the restrictions under Texas law are not as strict as those under federal law. For example, although Texas law prohibits, to a certain extent, the realization of private gain, the legislature fails to prohibit self-dealing activities through which individuals can realize gain in forms other than those prohibited. *Cf.* I.R.C. § 4941 (self-dealing prohibited). Certainly, however, public policy motivations and the potential substantial loss of revenues have not motivated the Texas Legislature to the degree that they have the United States Congress.

263. I.R.C. § 501(c)(3).

264. TEX. PROP. TAX CODE ANN. § 11.18(a) (Vernon Pam. 1979).

265. *Id.* § 11.18(a)(2).

266. *Id.* § 11.18(b).

267. *See id.* § 11.18(e).

268. The absence of a specific exemption for endowment funds is in line with the previous statutory policy of taxing money as personal property. *See* 1879 Tex. Gen. Laws, ch. 40, § 3, at 39, 8 H. GAMMEL, LAWS OF TEXAS 1339 (1898).

269. TEX. PROP. TAX CODE ANN. § 11.19(c) (Vernon Pam. 1979); *see* notes 273-78 *infra* and accompanying text.

270. *Id.* § 11.20(b); *see* notes 279-95 *infra* and accompanying text.

271. *Id.* § 11.21(c).

tion 11.02.[272]

Youth Development Associations. The exemption under prior law for organizations that are engaged in providing the threefold religious, educational, and physical development of young persons has also been changed under the Code.[273] Section 11.19 now provides a partial exemption from taxation for the tangible property of such organizations.[274] Section 11.19 modifies prior law by requiring the association to operate in a manner that does not result in the accrual of distributable profits or the realization of private gain in any form other than a reasonable allowance for compensation for services rendered.[275] Additionally, the association's charter, bylaws, or other regulations adopted by it must both pledge its assets for use in performing its youth development functions and direct that upon termination of the association, its assets will be transferred to a qualified charitable, educational, religious, or youth development association in Texas.[276]

Although section 11.19 imposes new requirements for the youth development exemption, it provides additional protection for a qualified association. Exempt tangible property will not lose its exemption by reason of use by persons who are not qualified youth development associations, where such use is incidental to the use by qualified associations and benefits the individuals served by the qualified associations.[277] Additionally, endowment funds owned by the association are exempt if they are used exclusively to support the association and are invested exclusively in mortgages, bonds, or property purchased at a foreclosure sale in order to satisfy or protect the bonds or mortgages.[278]

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272. *Id.* § 11.02(a); *see id.* § 1.04(6), which defines intangible personal property to include, among others, stocks, bonds, notes, demands or time deposits, certificate of deposits, and pensions.

273. Prior law exempted the following from tax:

> [A]ll property owned or used exclusively and reasonably necessary, in conducting any association engaged in the joint and threefold religious, educational and physical development of boys and girls, young men and young women, operating under a State or National Organization of like character, and not leased or otherwised used with a view to profit other than for the purpose of maintaining the buildings and Association, and all endowment funds of the above mentioned religious institutions, not used with a view to profit but for the purpose of maintaining the Association and buildings in doing religious work and for the educational or physical development of boys and girls, young men and young women . . . .

1937 Tex. Gen. Laws, ch. 201, § 1, at 401 (art. 7150(2a)).

274. TEX. PROP. TAX CODE ANN. § 11.19 (Vernon Pam. 1979). Section 11.19 exempts from taxation only tangible property, which includes both real property and tangible personal property. As a general rule, it does not exempt from taxation such an association's intangible personal property. Nonetheless, certain endowment funds are exempted from taxation. *See* notes 269-71 *supra* and accompanying text.

275. TEX. PROP. TAX CODE ANN. § 11.19(d)(2) (Vernon Pam. 1979).

276. *Id.* § 11.19(d)(4). These prerequisites to qualified status are identical to those imposed on charitable organizations discussed at notes 260-61 *supra* and accompanying text.

277. TEX. PROP. TAX CODE ANN. § 11.19(b) (Vernon Pam. 1979).

278. *Id.* § 11.19(c). Note, however, that foreclosure-sale property held by an endowment fund in excess of two years following purchase at the foreclosure sale is not exempt from taxation. The section's language concerning investment of the funds gives rise to an interpretive problem. It is uncertain whether the section requires investment of the funds or

Religious Organizations. Certain property of religious organizations is exempt from taxation if the organization qualifies under section 11.20.[279] The new legislation has added three requirements necessary for such qualification. The first is that the organization must be organized and operated primarily to engage in religious worship or to promote the spiritual development or well-being of individuals.[280] Additionally, it must operate in a manner that would not result in the accrual of distributable profits or the realization of private gain in any form other than a reasonable allowance for compensation for services rendered.[281] Finally, the organization's charter, by-laws, or other regulations adopted by it must pledge its assets for use in performing its religious functions[282] and must direct that upon termination of the organization the assets be transferred to a charitable, educational, or religious organization in Texas.[283]

Certain real property and tangible personal property owned by religious organizations are expressly exempted from taxation by section 11.20. For example, a qualified organization's real property is exempt if it is used primarily as a place of regular religious worship and is reasonably necessary for engaging in such worship.[284] Similarly, such an organization's

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whether the funds, *if invested*, must be invested in bonds, mortgages, or property purchased at a foreclosure sale.

279. TEX. PROP. TAX CODE ANN. § 11.20 (Vernon Pam. 1979). Under prior law, art. 7150(1) exempted property used by a church or by a religious society, but only if the property was used exclusively as a dwelling place for ministers and the grounds attached to such buildings were necessary for the proper occupancy, use, and enjoyment thereof. Moreover, the property could yield no revenue to the organization. *See* 1931 Tex. Gen. Laws, ch. 124, § 1, at 211.

280. TEX. PROP. TAX CODE ANN. § 11.20(c)(1) (Vernon Pam. 1979). As in the case of charitable organizations, the legislature appears to have adopted standards similar to those used under I.R.C. § 501(c)(3). Since a qualified organization, however, need only be organized and operated "primarily" for the necessary purposes, the Texas test is not as strict as the "organized and operated exclusively" test under federal law. The emphasis on worship and individuals raises the question whether this statute will preclude exemption for property belonging to an association of churches. Arguably, such associations do not operate primarily to engage in religious worship or to promote the spiritual development or well-being of individuals. Instead, they may be viewed as operating primarily to promote denominational or other religious interests that are not centered on worship or individuals.

281. TEX. PROP. TAX CODE ANN. § 11.20(c)(2) (Vernon Pam. 1979).

282. The Code does not define the term "religious functions," but does define "religious worship." The latter means "individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage, and commitment in behalf of a religious faith." *Id.* § 11.20(e). Religious functions are likely to be those that are necessary or incidental to the implementation of religious worship.

283. *Id.* § 11.20(c)(3).

284. *Id.* § 11.20(a)(1). The Code does not define what constitutes regular religious worship. Presumably, weekly or monthly worship would suffice. To the extent that longer periods are involved, however, a showing that a cyclical time pattern was consistently followed might allow for qualification. For example, if a church holds religious seminars or fellowship meetings every three months on certain property, perhaps that property could qualify for exemption.

Many religious organizations own real property that may no longer qualify under the new statute. Organizations that own church camps or picnic grounds, for example, may be taxed on these properties unless they can meet the new test. In order to establish primary use of such locations as a place of regular religious worship, as well as to show that the property is reasonably necessary for engaging in such worship, the organization should begin to maintain records or logs of activities conducted thereon. Note, however, that religious organiza-

tangible personal property is exempt if it is reasonably necessary for engaging in worship at a place of regular religious worship.[285] The new real property exemption appears to be narrower than the prior exemption under article 7150.[286] The exemption for tangible personal property, however, is broader in some respects than under previous law. The previous exemption was limited to the books and furniture contained in property owned by a religious organization for the exclusive use as a dwelling place for ministers.[287] Tangible personal property under the new definition includes a number of additional kinds of property other than those in the two categories just noted. Section 11.20 requires, however, that the property must be reasonably necessary for engaging in worship.[288]

The real property used exclusively as a residence for clergymen remains exempt if it is reasonably necessary for use as such a residence.[289] The individual living therein must be able to establish that his principle occupation is to serve in the clergy of the religious organization.[290] Moreover,

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tions may be structured in a manner such that a subdivision thereof, which was organized to hold the property and to conduct activities theron, could be classified as a youth development association under *id.* § 11.19. A religious organization should therefore give consideration to this alternative when it holds property it intends to use primarily for youth development.

285. *Id.* § 11.20(a)(2). The exemption for tangible personal property reasonably necessary for engaging in worship provides a broader exemption for religious organizations than was available under prior law. The only such exempt property under prior law consisted of books and furniture in the dwelling place for ministers. 1931 Tex. Gen. Laws, ch. 124, § 1, at 211 (article 7150(1)). To the extent that tangible personal property can meet the new tests, however, additional property will be able to qualify for exemption.

286. TEX. PROP. TAX CODE ANN. § 1620(a)(1) (Vernon Pam. 1979). Prior law exempted "actual places of religious worship." 1931 Tex. Gen. Laws, ch. 124, § 1, at 211 (art. 7150(1)). There was no requirement that the property be used primarily as a place of regular religious worhip or that the property be reasonably necessary for engaging in religious worship. Therefore, real property that was used for religious worship on an annual basis would technically be exempt under the old law.

Since the statute does not provide a description of what quantum of use satisfies the requirement that property be used "primarily" as a place of regular religious worship, requirements regarding the intent of worshippers and the extent of their activities on the property will presumably be developed by case law.

287. 1931 Tex. Gen. Laws, ch. 124, § 1, at 211 (art. 7150(1)).

288. TEX. PROP. TAX CODE ANN. § 11.20(a)(2) (Vernon Pam. 1979).

289. *Id.* § 11.20(a)(3). This property must be owned by the religious organization, rather than by a clergyman. Under prior law, the exemption for church-owned property used as a clergyman's residence was limited to one acre. 1961 Tex. Gen. Laws, ch. 396, § 1, at 898. (art. 7150b). The Code has removed the one-acre limitation, instead requiring that the property be "reasonably necessary" for use as a residence.

290. TEX. PROP. TAX CODE ANN. § 11.20(a)(3)(A) (Vernon Pam. 1979). Under prior law, the exemption for a church residence was contained in two articles. Under art. 7150(1) such property was exempt if it was "for the exclusive use as a dwelling place for the ministers of such church." 1931 Tex. Gen. Laws, ch. 124, § 1, at 211. Similarly, art. 7150b provided an exemption if the church-owned property was "for the exclusive use as a dwelling place for the ministry of such church." 1961 Tex. Gen. Laws, ch. 396, § 1, at 898. Article 7150b further provided, however, that " 'ministry of such church' means . . . persons whose principal occupation is that of serving in the clergy, ministry, priesthood, or presbytery of an organized church or religion." *Id.* In McCreless v. City of San Antonio, 454 S.W.2d 393, 395 (Tex. 1970), the Texas Supreme Court held that this proviso exempted from ad valorem taxes a church-owned residence for a Methodist district superintendent who was an ordained minister, but whose principal duties were administrative and supervisory. The court in *McCreless* concluded that the superintendent was serving in the clergy of an organized

the real property will be exempt only if it produces no revenue for the organization.[291] Any tangible personal property owned by the organization that is reasonably necessary for use as a qualified residence is also exempt.[292]

The Code incorporates previous law allowing an additional exemption from taxation for those endowment funds owned by a qualified organization that are used exclusively to support the organization and are invested exclusively in mortgages, bonds, or property purchased at a foreclosure sale in order to satisfy or protect the bonds or mortgages.[293] Moreover, the legislation precludes the loss of exemption for real property used primarily as a place of worship and tangible personal property reasonably necessary to worship as a result of the use of such property for occasional secular purposes.[294] The Code further provides, however, that all income derived from use for occasional secular purposes must be devoted exclusively to the maintenance and development of the property as a place of religious worship.[295]

Schools. A school must now meet three requirements under section 11.21 in order to qualify for exemption from ad valorem taxes. The school must normally maintain a regular faculty and curriculum and have a regularly organized body of students attending the place where educational functions are carried on.[296] Additionally, the school must avoid the accrual of distributable profits or the realization of gain in any form other than a reasonable allowance for compensation for services rendered.[297] Finally, the organization's charter, bylaws, or other regulations adopted to govern its affairs must impose the same two restrictions upon its assets as required for religious and charitable organizations.[298] First, the organization must pledge its assets for use in performing its educational functions, and secondly, its assets must be transferred to a qualified charitable or religious

church even though he was not assigned to a particular church of the religious organization. *Id.* at 394. It would therefore appear that such persons will continue to be within TEX. PROP. TAX CODE ANN. § 11.20(a)(3)(A) (Vernon Pam. 1979), which requires the individual to be one "whose principal occupation is to serve in the clergy of the religious organization."

291. TEX. PROP. TAX CODE ANN. § 11.20(a)(3)(B) (Vernon Pam. 1979).

292. *Id.* § 11.20(a)(4).

293. *Id.* § 11.20(b). This property is not exempt from taxation, however, if it is held for more than two years immediately following the purchase at the foreclosure sale. *Id.*

294. *Id.* § 11.20(d).

295. *Id.*

296. TEX. PROP. TAX CODE ANN. § 11.21 (Vernon Pam. 1979). The requirement of a regular faculty and regularly organized body of students does not preclude individually-tutored or part-time educational programs that are conducted in addition to the regular program. *See id.* § 11.21(b). In fact, the legislature does not appear to preclude qualification for a school that lacks the requisites at one time or another. The requirement is that the faculty and body of students be "normally" maintained. Thus, disruptions in the school's regular schedule or the closing of an organization's activities for a short time should not disqualify the organization under this section.

297. *Id.* § 11.21(d)(2). As noted in the discussions regarding other exemptions, this requirement appears to be an adoption of the prohibition against the inurement of benefit to individuals under I.R.C. § 501(c)(3).

298. TEX. PROP. TAX CODE ANN. § 11.21(d)(3) (Vernon Pam. 1979).

organization or school in Texas upon termination.[299]

The buildings and tangible personal property owned by such an organization will be exempt if three other tests are met. First, the school must be operated exclusively by the person owning the property.[300] Moreover, with one exception, the buildings and tangible personal property must be used exclusively for educational functions.[301] Finally, the property must be reasonably necessary for the operation of the school.[302] The single exception to the requirement that the property be used exclusively for educational functions is provided by section 11.21(b).[303] This subsection precludes the loss of an exemption where the property is used for functions other than educational ones if such functions are incidental to the use of the property for educational purposes.[304] Any such incidental use, however, must benefit the students or faculty of the school.[305] Also exempt from taxation are endowment funds owned by a person who operates a school if such funds are used exclusively to support the school.[306] The funds must be invested exclusively in mortgages, bonds, or property purchased at a foreclosure sale to satisfy or protect the mortgages or bonds.[307]

Disabled Veterans. The legislature included in the Code, with minor modifications, the prior exemption for certain property of disabled veterans who are residents of Texas.[308] A disabled veteran is defined as a veteran of the armed services of the United States whom the Veterans' Administration or another branch of the armed services in which he served has classified as disabled and whose disability is service-connected.[309]

299. *Id.*

300. *Id.* § 11.21(a)(1). This provision appears to deny an exemption to the person owning the property if he rents the school or hires another organization to operate the school. This is not clear, however, and perhaps the legislature contemplated an exemption for an individual who operated the school exclusively, whether directly or indirectly. In the latter event, although the owner could obtain an exemption even though he hired another to operate the school, he could not obtain an exemption if he merely rented the property to a school operated exclusively by another individual or organization.

301. *Id.* § 11.21(a)(2).

302. *Id.* § 11.21(a)(3).

303. *Id.* § 11.21(b).

304. *Id.*

305. *Id.*

306. *Id.* § 11.21(c). The endowment funds must be owned by a person who operates a school that is qualified under this section. *Id.* This requirement is broader than the exemption for taxation of buildings and tangible personal property. The latter exemption is extended only to a person who operates the school exclusively. Under the endowment fund's exemption, however, a person who operates a school indirectly for the owner of the property would be entitled to an exemption. In fact, both he and the true owner of the property would be entitled to an exemption for any qualified endowment funds owned by either of them. Note also that although the funds must be used exclusively for the support of the school, there is no requirement that they be used exclusively to support the school's educational functions.

307. *Id.* Property acquired at such a foreclosure sale that is held by the endowment fund for more than two years immediately following purchase is not exempt from taxation. *Id.*

308. *Id.* § 11.22. The previous exemption may be found at 1975 Tex. Gen. Laws, ch. 719, art. XX, § 1, at 2316-18 (art. 7150(h)).

309. TEX. PROP. TAX CODE ANN. § 11.22(h)(3) (Vernon Pam. 1979).

These veterans are entitled to an exemption from taxation ranging from $1,500 to $3,000 of the assessed value of property owned and designated by them.[310] The amount of the exemption varies according to the veteran's percentage of disability.[311] Special provision, however, is made for disabled veterans who are (1) sixty-five years of age and have a disability rating of at least ten percent, (2) totally blind in one or both eyes, or (3) have lost the use of one or more limbs.[312] A veteran who is within one of these provisions is entitled to an exemption from taxation of $3,000 of the assessed value of property he owns and designates as the property he seeks to apply the exemption against.[313] Such an individual, however, is not entitled to both the special exemption and the exemption under the disability rating schedule, but he may take the greatest exemption for which he qualifies.[314]

The Code includes several exemptions provided under prior law[315] for the surviving spouse and surviving children of deceased members of the armed services and deceased disabled veterans. First, the surviving spouse of a person who dies while on active duty in the armed services is entitled to an exemption of $2,500 of the assessed value of property owned by the surviving spouse.[316] In addition, the Code provides a $2,500 exemption that is to be divided equally among the surviving children who are younger than eighteen years of age and unmarried.[317] This exemption, however, may be applied against only the property owned and properly designated by the surviving children.[318] The Code also provides that the surviving spouse of a deceased disabled veteran is entitled to an exemption in the amount previously claimed by the deceased so long as the surviving spouse remains unmarried.[319] In the event there is no surviving spouse, each of the veteran's surviving children who is under eighteen years of age and unmarried may apply his pro rata share of the veteran's exemption to a portion of the assessed value of property owned by the child.[320] Unlike the prohibition against aggregation of exemptions for the disabled veteran, both the surviving spouse and the surviving children may aggregate the exemptions they are entitled to under the Code,[321] with one exception. An individual may not aggregate an exemption received as a surviving spouse

310. *Id.* § 11.22(a). Under prior law, a qualified individual was not restricted as to the property that could be credited with the exemption. Under the Code, however, the individual may claim the exemption "against only one property, which must be the same for every taxing unit in which the individual claims the exemption." *Id.* § 11.22(f).

311. *Id.*

312. *Id.* § 11.22(b).

313. *Id.* § 11.22(b), (f).

314. *Id.* § 11.22(e)(1).

315. *See* 1975 Tex. Gen. Laws, ch. 719, art. XX, § 1, at 2317.

316. TEX. PROP. TAX CODE ANN. § 11.22(d)(1) (Vernon Pam. 1979).

317. *Id.* § 11.22(d)(2). Prior law provided that surviving children had to be under 21 years of age and unmarried. 1975 Tex. Gen. Laws, ch. 719, art. XX, § 1, at 2317.

318. TEX. PROP. TAX CODE ANN. § 11.22(d)(2) (Vernon Pam. 1979).

319. *Id.* § 11.22(c).

320. *Id.* Surviving children must designate property in the same manner as disabled veterans and surviving spouses.

321. *See* TEX. PROP. TAX CODE ANN. § 11.22(e) (Vernon Pam. 1979).

with an exemption received as a surviving child.[322]

Other Exemptions. Some of the exemptions provided for under previous law have been placed in a new category entitled "miscellaneous exemptions." Section 11.23 continues to provide exemptions for veterans' organizations, the Texas Federation of Women's Clubs, private enterprise demonstration associations, buffalo and cattalo, the Nature Conservancy of Texas, Inc., the Texas Congress of Parents and Teachers, theater schools, bio-medical research corporations organized under the Texas Non-Profit Corporation Act, and community service clubs.[323] The Code also allows taxing authorities to exempt from taxation part or all of the assessed value of certain historic sites and land.[324] Finally, the Code limits the amount of ad valorem tax that may be imposed by a school district on the residence homestead of individuals over sixty-five years of age.[325]

Pensions. Annual pensions granted by Texas or the United States have been omitted as a specific category from the exemption provisions of the Code.[326] There is, however, a basis for arguing that such pensions should remain exempt. Since pensions are included in the definition of intangible personal property under section 1.04(6),[327] they should be exempt under section 11.02(a), which exempts intangible property except as provided by subsection (b) of that section.[328] Although subsection (b) allows the taxation of, among other things, the intangible property of unincorporated banks, transportation businesses, insurance companies, and savings and loan associations, it does not include interests in intangible personal property that have been granted by the state or the United States to private

322. *Id.*

323. *Id.* § 11.23.

324. *Id.* § 11.24. This provision of the Code basically incorporates the prior law under art. 7150i, which may be found in 1977 Tex. Gen. Laws, ch. 358, § 1, at 950. Although the prior law provided that an exemption from property taxation could be granted for part or all of the value of a structure, the Code provides for an exemption of part or all of the "assessed" value.

325. TEX. PROP. TAX CODE ANN. § 11.26 (Vernon Pam. 1979). The Code mandates for persons over 65 years of age an exemption from taxation by a school district of $10,000 of the appraised value of his residence homestead. *Id.* § 11.13(a). At the discretion of a school district or its qualified voters, such a person may be entitled to a further exemption from school district taxation. *Id.* § 11.13(d). *See* discussion on resident homestead exemption in notes 231-46 *supra* and accompanying text. Section 11.26 of the Code effectively limits a school district's ability to tax persons over 65 years of age by providing that a school district may not increase the total annual amount of ad valorem taxes above the amount it imposed in the first year that the individual qualified his residence homestead for the exemption under § 11.13(c). There is an exception to the restriction against increasing ad valorem taxes if the individual improves his homestead. The improvements for which additional tax may be imposed are those other than improvements required to comply with governmental requirements or repairs. *Id.* § 11.26(b).

326. Pensions were previously exempt under art. 7150(12). 1907 Tex. Gen. Laws, ch. 159, § 1, at 303.

327. TEX. PROP. TAX CODE ANN. § 1.04(6) (Vernon Pam. 1979).

328. *Id.* § 11.02(a) provides the general rule that, except as otherwise provided, intangible personal property is not taxable.

individuals. Such pensions therefore should remain exempt from taxation on the basis of their status as intangible personal property.

V. OTHER LEGISLATION

In addition to enacting the Property Tax Code, the legislature amended one article and enacted two new articles. Article 7146 was amended to provide that, even though a mobile home is within the definition of real property, it is personal property for the purpose of enforcing a tax lien.[329] Article 7146, however, is repealed, effective January 1, 1982, by the Property Tax Code.

Article 7150.1 was enacted to provide an exemption from ad valorem taxes for solar and windpower energy devices.[330] The exemption of such devices applies to all ad valorem taxes levied by any taxing unit, including the state.[331] The definition of "solar energy device" is strictly limited to those devices that provide "for the collection, storage, or distribution of solar or wind energy for subsequent use as thermal, mechanical, or electrical energy."[332] To insure that the exemption is not abused, the legislature has provided that a solar energy device does not include energy devices that can be used regardless of the energy source.[333]

Finally, the legislature added article 7150*o*, which permits taxing units, other than the state, to reappraise property damaged in a natural disaster.[334] Such property must be located within an area declared to be a natural disaster area by the President of the United States or the Governor of Texas.[335] Additionally, if a taxing unit adopts the reappraisal, the taxes must be prorated for the year in which the property was damaged by the natural disaster.[336]

329. TEX. REV. CIV. STAT. ANN. art. 7146(b) (Vernon Supp. 1980). This legislation, among other things, enables the state to comply with less stringent notice and advertisement requirements in the event of a sale of the mobile home to satisfy a tax lien. The amendment also forecloses the taxpayer from utilizing the redemption statutes in *id.* arts. 7283-7291 in the event the mobile home is sold for payment of taxes.

330. *Id.* art. 7150.1.

331. *Id.* art. 7150.1(a).

332. *Id.* art. 7150.1(d).

333. *Id.*

334. *Id.* arts. 7150*o*(a), (c).

335. *Id.* art. 7150*o*(a).

336. *Id.* art. 7150*o*(b). For example, if the disaster occurred on July 1st of a taxable year, the taxing unit is required to assess full taxes from January 1 to June 30, and then may appraise the damaged property at a reduced value for the remaining six months of the taxable year.