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Taxation

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TAXATION

by

Richard C. Stark* and Joyce D. Slocum**

I. LIMITED SALES AND USE TAX

IN only one case decided during the survey period did a court consider the limited sales and use tax. In *Delta Pipe Fabricators, Inc. v. Bullock*¹ a corporation engaged in the construction and remodeling of oil refineries established a subsidiary to supply pipe to the parent's construction and remodeling business. The subsidiary primarily cut and bent pipe to the specifications of its parent company, but also did a small amount of work for other contractors. The comptroller apparently treated the subsidiary as a separate entity selling pipe to the parent company and included the cost of the labor expended in cutting and bending the pipe in the sales price of the pipe for purposes of the tax. The subsidiary urged its separate existence was a sham that should be ignored for tax purposes because it functioned merely as a department of its parent and that, in any event, the cutting and bending of the pipe was mere "remodeling," the receipts from which are excluded from the tax by reason of section 151.007(c)(8) of the Tax Code.² The Austin court of appeals rejected this argument, finding that the subsidiary served a valid business purpose and that the separate existence of the corporation could not be ignored at the behest of the taxpayer.³ The court accepted the argument, however, that the cutting and bending of the pipe was mere remodeling within the provisions of the statute.⁴

Although case law in the sales tax area was practically nonexistent, the Office of the Comptroller of Public Accounts handed down a series of administrative decisions and proposed or final rules on the subject. The comptroller took a rather expansive view of the jurisdictional reach of the

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1. 638 S.W.2d 652 (Tex. Ct. App.—Austin 1982, no writ).

2. TEX. TAX CODE ANN. § 151.007(c)(8) (Vernon 1982).

3. 638 S.W.2d at 653.

4. *Id.* at 654. The court quoted with approval the definition of "remodel" set forth in *Calvert v. Julian Gold, Inc.*, 479 S.W.2d 328, 329 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.), which provides: "'Remodel' is a word of broad signification, and is variously defined as meaning to model anew, to reform, reshape, reconstruct, to make over in a somewhat different way, to model, to shape, to form, to fashion, and to recast." *Id. But cf. Alamo Hardwoods, Inc. v. Bullock*, 614 S.W.2d 600, 604 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.) (article must retain its identity after work on it is performed).

sales tax in Decision 9,900.⁵ The decision imposed the use tax on a number of oil well servicing rigs temporarily brought into the state.⁶ The taxpayer was a New Mexico company that owned eighteen such rigs at the beginning of the audit period and acquired nine more during that period. In general, the taxpayer conducted business in New Mexico. New Mexico customers occasionally requested the taxpayer to service wells in Texas, however, and because of the existing business relationship, the taxpayer would accommodate these customers. Over the five-year audit period, the taxpayer's receipts from Texas sources averaged around seven percent of the taxpayer's total receipts. With two exceptions, less than five percent of the revenues produced by each of the seven rigs had derived from Texas sources. In the case of the other two rigs, revenues from Texas sources equaled less than thirty percent of the total revenues.

The comptroller assessed use tax on each rig brought into Texas within one year after its purchase, and the taxpayer argued in defense that use tax could be assessed only upon an item purchased for "storage, use, or other consumption in this state."⁷ The taxpayer challenged this assessment, and asserted that it did not have the requisite intent to use the rigs in Texas at the time of their purchase and that such use was simply incidental. The comptroller responded that the statute presumes, in the absence of evidence to the contrary, that tangible personal property a purchaser brings into the state was purchased for use or consumption in Texas.⁸ Although rule 026.02.20.066(c)(5)⁹ creates a contrary presumption for property used outside Texas for more than one year prior to the date of its entry into Texas, this presumption did not apply to the seven rigs that the taxpayer brought into Texas within twelve months after their purchase. Accordingly, the comptroller focused his opinion primarily on the issue of whether the taxpayer successfully bore the burden of proving that he did not have the intent at the time of purchase to use the rigs in Texas.¹⁰ Finding no Texas cases on point, the comptroller reviewed a series of out-of-state decisions dealing with similar issues.¹¹ The comptroller distilled from these cases a two-factor test to determine intent: first, whether the purchaser had an existing market or business need for the item in the taxing state at the time of purchase; and second, whether the taxpayer intro-

5. Tex. Comptroller's Administrative Decision No. 9,900 (1982).

6. *Id.*

7. TEX. TAX CODE ANN. § 151.101(a) (Vernon 1982).

8. *Id.*

9. Tex. Comptroller of Public Accounts, 34 TEX. ADMIN. CODE ANN. § 3.406 (Shepard's May 1, 1982).

10. Tex. Comptroller's Administrative Decision No. 9,900 (1982).

11. *Id.*; see *Larey v. Wolfe*, 242 Ark. 715, 416 S.W.2d 266 (1967); *Union Oil Co. v. State Bd. of Equalization*, 60 Cal. 2d 441, 386 P.2d 496, 34 Cal. Rptr. 872 (1963); *Chicago Bridge & Iron Co. v. Johnson*, 19 Cal. 2d 162, 119 P.2d 945 (1941); *Atchison, T. & S.F. Ry. v. State Bd. of Equalization*, 139 Cal. App. 2d 411, 294 P.2d 181 (1956); *Western Contracting Corp. v. Iowa State Tax Comm'n*, 253 Iowa 365, 112 N.W.2d 326 (1961); *Morrison-Knudsen Co. v. State Tax Comm'n*, 242 Iowa 33, 44 N.W.2d 449 (1950); *Comptroller of the Treasury v. James Julian, Inc.*, 215 Md. 406, 137 A.2d 674 (1958); *Rowan Drilling Co. v. Bureau of Revenue*, 60 N.M. 123, 288 P.2d 671 (1955).

duced the item into the state fairly promptly after purchase. The comptroller found that if both factors exist, the requisite intent is presumed to have existed. He dismissed the taxpayer's argument that the small proportion of Texas receipts and use supported the proposition that the Texas use was merely incidental, primarily based on the fact that the Texas market consistently produced six to ten percent of the taxpayer's total revenues.¹²

The remainder of the decision dealt with whether the assessment of the use tax violated the commerce clause of the United States Constitution¹³ in that it was not apportioned or fairly related to the services the state provided. While the taxpayer received credit for the two percent use tax New Mexico imposed, the statute provided no apportionment based on the portion of Texas use.¹⁴ A review of the relevant United States Supreme Court decisions led the comptroller to conclude that the tax as applied did not violate the commerce clause.¹⁵ Out-of-state taxpayers contemplating the use of taxable items in Texas should note the comptroller's interpretation of the use tax set forth in this decision, since this construction of the use tax's intent requirement could result in the imposition of substantial unexpected taxes. Requiring the owner/taxpayer of five well-servicing rigs, the Texas use of which represented a maximum of five percent of the taxpayer's total rig use, to bear the full brunt of the Texas use tax seems manifestly unfair. This requirement seems especially unfair when the taxpayer could have utilized a single rig a larger proportion of the time in Texas and thus have avoided tax on the remaining four.¹⁶

A number of administrative decisions considered procedural matters. Decision 11,799 provides an interesting restatement of the comptroller's procedural posture with respect to resale and exemption certificates under the Tax Code.¹⁷ The comptroller recognized that a resale or exemption certificate received contemporaneously with the sale effectively bars imposition of tax upon the seller so long as the certificate is received in good faith. The comptroller added, however, that an exemption certificate received after the time of sale compels the comptroller to examine whether or not the sale was, in fact, exempt.¹⁸ Decision 12,036 reviewed the comp-

12. Tex. Comptroller's Administrative Decision No. 9,900 (1982).

13. U.S. CONST. art. I, § 8, cl. 3.

14. TEX. TAX CODE ANN. § 151.303(c) (Vernon 1982).

15. Tex. Comptroller's Administrative Decision No. 9,900 (1982).

16. One other decision dealt with the question of when an out-of-state seller became engaged in business in Texas and thus became subject to sales tax. In Decision 11,751 the comptroller held that an out-of-state retailer's presence in a Texas trade convention display booth constituted engaging in business in this state and thus rendered the taxpayer liable for sales taxes on subsequent sales of dental equipment to Texas purchasers. Tex. Comptroller's Administrative Decision No. 11,751 (1981).

17. See TEX. TAX CODE ANN. § 151.054.151 (Vernon 1982).

18. Tex. Comptroller's Administrative Decision No. 11,799 (1981). Decision 11,245 reviewed the importance of resale certificates when tax is not collected. That decision held that the taking of a sales tax permit number, as opposed to receipt of a resale certificate, did not meet the taxpayer's burden of proof of showing that a sale was for resale. Tex. Comptroller's Administrative Decision No. 11,245 (1981). Decision 10,474 found that an out-of-state seller doing business in Texas is liable for the tax whether or not the seller obtained a

troller's present policy regarding formal advice given over the telephone. The taxpayer in that decision had received advice from the comptroller's office over the telephone, had written a contemporaneous memorandum recounting the conversation, but had failed to obtain a written confirmation of the advice from the comptroller's office. The advice proved to be erroneous, but the comptroller nevertheless upheld the tax assessment. The comptroller suggested, however, that had the taxpayer obtained a written confirmation of the advice given him, the tax would not have been imposed. The rationale behind this dictum is the comptroller's policy "to honor any such answers given by his employees, even if he later determines that the answer previously given was wrong."¹⁹

A series of four comptroller's decisions addressed the distinction between a taxable sale of tangible personal property and the nontaxable sale of a service. Two of the decisions involved commercial photographers who billed their services separately from the photographic negatives that they provided.²⁰ One decision concerned the sale of multiple listing books by a printer/distributor to an association of realtors.²¹ One decision involved an association's sale of credit cards to member banking institutions.²² Three of the decisions cited an article by Jerome Hellerstein²³ and distilled a tripartite test for distinguishing between a taxable sale of tangible personal property and a nontaxable sale of a service:

Accordingly, (1) where the tangible personal property stores information, an intangible, (2) where the cost of the storage medium is very small or insignificant compared to the charge alleged to be subject to tax, and (3) where the mode of transfer of the information is not critical to the transaction, then the courts of this State will hold that the "essence of the transaction" is the nontaxable sale of an intangible (information), which is the culmination of the performance of service (the gathering, translation, evaluation or correlation of the information).²⁴

In all four decisions the comptroller determined that the subject of the sale was tangible personal property, although the issue might reasonably have been answered in a contrary way, particularly in the context of the multiple listing books and credit cards.

certificate of registration and authorization to collect use tax, and that a seller may not contract away or avoid its duty to collect the tax, thereby forcing the state to look only to the purchaser. Tex. Comptroller's Administrative Decision No. 10,474 (1981).

19. Tex. Comptroller's Administrative Decision No. 12,036 (1981). In Decision 12,443 the comptroller refused to abate under TEX. TAX CODE ANN. § 111.103 (Vernon 1982) the 10% penalty imposed by *id.* § 151.703 upon a failure to pay and report taxes. The petitioner unsuccessfully contended that it had exercised reasonable diligence to comply with the tax laws because, pending a final decision concerning its tax liability, it had collected sales tax from its Texas customers and deposited it in an escrow account. Tex. Comptroller's Administrative Decision No. 12,443 (1982).

20. Tex. Comptroller's Administrative Decisions Nos. 10,816, 12,110 (1981).

21. Tex. Comptroller's Administrative Decision No. 11,925 (1982).

22. Tex. Comptroller's Administrative Decision No. 10,763 (1981).

23. Hellerstein, *The Scope of the Taxable Sale Under the Sales and Use Tax Acts: Sales as Distinguished from Services*, 11 TAX. L. REV. 261 (1956).

24. Tex. Comptroller's Administrative Decisions Nos. 10,763, 10,816, 12,110 (1981).

The definition of "tangible personal property" in a somewhat different context was considered in Decision 10,506.²⁵ The taxpayer sold portable buildings either with or without installing them; the installation method varied and included either simply setting the building on blocks, fastening them with screw-type anchors, or plumbing, electrifying, and attaching them to a residential structure. In determining whether the buildings constituted improvements to real property rather than tangible personal property, the comptroller applied the following tests:

1st. Has there been a real or constructive annexation of the article in question to the realty?

2d. Was there a fitness or adaptation of such article to the uses or purposes of the realty with which it is connected?

3d. Whether or not it was the intention of the party making the annexation that the chattel should become a permanent accession to the freehold?—this intention being inferable from the nature of the article, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and purpose or use for which the annexation is made.

And of these three tests, pre-eminence is to be given to the question of intention to make the article a permanent accession to the freehold, while the others are chiefly of value as evidence as to this intention.²⁶

Finding that the first two tests were met, the comptroller focused upon the intent test. The comptroller applied a five-part subtest and found that the mode of annexation to real property ultimately determined the customer's intention and, hence, whether or not the buildings became fixtures or improvements to real estate. If the building was plumbed, electrified, and either anchored or attached to an existing structure, then it constituted an improvement to real estate; otherwise, the building was tangible personal property and the sale taxable.²⁷

A number of other administrative decisions addressed sales tax exemptions. Three decisions construed the agricultural item exemption.²⁸ Section 151.316(9) of the Tax Code now provides for the exemption of: "[M]achinery and equipment exclusively used in the processing, packing, or marketing of agricultural products by the original producer at a location operated by the original producer exclusively for processing, packing, or marketing the producer's own products."²⁹ Decision 11,350 interpreted the word "exclusively" with respect to a computer that the taxpayer used primarily to write warehouse receipts for cotton bales, but used approximately five percent of the time to write payroll checks. The decision interpreted exclusive to mean singly or solely. While not foreclosing any subsequent argument that a *de minimus* use should be ignored, the comptroller found that five percent of total use was not *de minimus* and thus

25. Tex. Comptroller's Administrative Decision No. 10,506 (1981).

26. *Id.* (quoting *Hutchins v. Masterson*, 46 Tex. 551, 554 (1877)).

27. Tex. Comptroller's Administrative Decision No. 10,506 (1981).

28. See Tex. Comptroller's Administrative Decisions Nos. 11,120, 11,350, 11,907 (1981).

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

held that the computer was taxable. The decision also interpreted the term "marketing" as used in the exemption and gave it an expansive interpretation.³⁰

The remaining two decisions interpreted that portion of the agricultural exemption applying to "original producers."³¹ Decision 11,120 rejected a seed company's argument that it was an original producer, primarily because the company did not have operational control over the raising of the crop. In so holding, the comptroller applied a two-part test for original producer status: the taxpayer must (1) have a risk of loss of investment; and (2) have exclusive predominant operational control over the raising of the crop.³² Decision 11,907 focused on the item that an original producer must produce. The comptroller found that a feed company that bought grains and other materials and mixed them to produce animal feed was not an original producer within the meaning of the statute.³³

The occasional sale exemption provided for in section 151.304(b) of the Tax Code³⁴ was the subject of two comptroller decisions. In Decision 12,338 an out-of-state bank's sale of a repossessed drilling rig to a Texas purchaser was found not to be exempt as an occasional sale. The comptroller reasoned that the repossessed rig did not constitute the "entire operating assets" of a going business. The comptroller also noted that banks from time to time necessarily repossess and sell items of collateral; therefore, a sale of a repossessed item is a sale made in the regular course of the bank's business, not an occasional sale under subsection 151.304(b)(1).³⁵ The taxpayer in Decision 12,125 sought to qualify a lease as an occasional sale. The comptroller found that only transfers in the nature of sales, that is, transfer of title and complete dominion, can qualify for treatment under

30. Tex. Comptroller's Administrative Decision No. 11,350 (1981). The decision relied upon *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). The Ninth Circuit defined the term "marketing" as follows:

We think the term *marketing* is far broader than the word *sell*. A common definition of "marketing" is this: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including *among others* buying, selling, storing, transporting, standardizing, financing, risk bearing, and *supplying market information*."

Id. at 215 (emphasis in original) (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 514 (1953 ed.)).

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

32. Tex. Comptroller's Administrative Decision No. 11,120 (1981); *cf.* *Parks v. Federal Crop Ins. Corp.*, 416 F.2d 833, 837-39 (7th Cir. 1969) ("producer" for purposes of determining existence of insurable interest); *Tennessee Burley Tobacco Growers Ass'n v. Commodity Credit Corp.*, 350 F.2d 34, 41 (6th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966) ("producer" for purposes of establishing liability under federal statute); *Elm Spring Farm v. United States*, 127 F.2d 920, 926-27 (1st Cir. 1942) ("producer" under the Agricultural Adjustment Act).

33. Tex. Comptroller's Administrative Decision No. 11,907 (1981). For an additional discussion of the exemption for agricultural items, see Tex. Comptroller's Administrative Decision No. 12,232 (1982) (discussing distinction between "production" and "processing" under pre-1975 law and definition of "exclusively").

34. TEX. TAX CODE ANN. § 151.304(b) (Vernon 1982).

35. Tex. Comptroller's Administrative Decision No. 12,338 (1982); *see also* *Calvert v. Marathon Oil Co.*, 389 S.W.2d 153 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.).

the occasional sale exemption.³⁶

In Decision 11,245 the taxpayer contended that a letter obtained from a purchaser, stating that the purchaser is a nonprofit, charitable corporation, is sufficient to prove the sale to the purchaser was exempt under section 151.310.³⁷ The decision provided that a charity, which possesses an Internal Revenue Service determination letter exempting it from federal income tax under section 501(c)(3) of the Internal Revenue Code,³⁸ is not required to file an additional application with the comptroller for a sales tax exemption. The organization may instead give an exemption certificate by reason of its possession of the determination letter.³⁹

Decision 11,799 found the exemption for items used in the operation or maintenance of a ship engaged exclusively in foreign or interstate coastal commerce does not apply to shrimp boats that leave a Texas port to fish in international waters and later return to the same Texas port.⁴⁰ Decision 11,614 applied the exemption for property used in processing to fumigants and chemicals used to treat stored grain for insect infestations.⁴¹ Decision 11,741 upheld the exemption of certain diving bell systems used in providing services to offshore oil and gas drillers.⁴² Finally, Decision 11,738 found that certain tractors and mowers used to mow the grass on highway rights-of-way are not exempt from tax because mowing does not constitute an "improvement to realty" within the meaning of section 151.311 of the Tax Code.⁴³

II. FRANCHISE TAXES

During the survey period Texas courts did not decide any significant franchise tax cases. The comptroller, however, made a number of administrative decisions concerning franchise tax issues. The Tax Code imposes a franchise tax only upon corporations that do business or are chartered or authorized to do business in Texas.⁴⁴ In Decision 10,216⁴⁵ the taxpayer was a foreign corporation operating a worldwide containerized cargo freight line for both land and sea transportation. The taxpayer operated a Houston marine terminal facility, at which it employed 150 fulltime employees. The taxpayer also maintained sales offices in three Texas cities. All the taxpayer's cargo either originated outside the state or was destined

36. Tex. Comptroller's Administrative Decision No. 12,125 (1982).

37. TEX. TAX CODE ANN. § 151.310 (Vernon 1982).

38. I.R.C. § 501(c)(3) (1976).

39. Tex. Comptroller's Administrative Decision No. 11,245 (1982).

40. Tex. Comptroller's Administrative Decision No. 11,799 (1981); *see* TEX. TAX CODE ANN. § 151.329 (Vernon 1982).

41. Tex. Comptroller's Administrative Decision No. 11,614 (1981); *see* TEX. TAX CODE ANN. § 151.318 (Vernon 1982).

42. Tex. Comptroller's Administrative Decision No. 11,741 (1981); *see* TEX. TAX CODE ANN. § 151.324 (Vernon 1982).

43. Tex. Comptroller's Administrative Decision No. 11,738 (1981); *see* TEX. TAX CODE ANN. § 151.311 (Vernon 1982).

44. TEX. TAX CODE ANN. § 171.001 (Vernon 1982).

45. Tex. Comptroller's Administrative Decision No. 10,216 (1981).

to go out of state. The taxpayer argued its business was solely in interstate commerce; thus, it was not required to qualify to do business in Texas. The taxpayer argued further that the level of presence required before a business owes a franchise tax is the same as that required for qualification purposes; therefore, the taxpayer itself was not subject to such tax.⁴⁶

The taxpayer's case appeared to have some merit based upon rule 026.02.12.016, which states: "The Texas Business Corporation Act, article 8.01, provides a nonexhaustive list of activities which do not constitute transacting business in the State."⁴⁷ The comptroller, nevertheless, concluded that the test of presence for purposes of qualification and for purposes of the franchise tax are not synonymous. According to the comptroller, the taxpayer met a threshold level of presence.⁴⁸ In reaching this conclusion, the comptroller determined that since the taxpayer was engaged in the continuous pursuit of the business it was authorized to do, and since its business did not occur in casual, isolated, or single transactions, the taxpayer's presence was sufficiently extensive to justify imposition of the franchise tax. The comptroller based its decision on the fact that the state provided the taxpayer with the "benefits of a civilized society," which include police, fire, and court protection.⁴⁹ Decision 10,216 has prompted the comptroller's office to consider amendments to rule 026.02.12.016 that would substantially broaden the definition of "doing business" for franchise tax purposes.

A business must pay a franchise tax on the portion of the corporation's taxable capital that is allocated to Texas.⁵⁰ The amount a taxpayer owes thus turns, to a great extent, upon a determination of the corporation's taxable capital. Three comptroller's decisions addressed this issue. In Decision 11,601 the taxpayer voluntarily had revalued its assets upward. The issue was whether this revaluation was binding upon a taxpayer for purposes of the franchise tax. Even though the reappraisal was not made in accordance with generally accepted accounting principles, the comptroller found that the taxpayer was bound by the reappraisal because it was based

46. See TEX. BUS. CORP. ACT ANN. art. 8.01(B) (Vernon 1980), which provides: Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one (1) or more of the following activities:

(9) Transacting any business in interstate commerce.

47. Tex. Comptroller of Public Accounts, 34 TEX. ADMIN. CODE ANN. § 3.406 (Shepard's May 1, 1982).

48. Tex. Comptroller's Administrative Decision No. 10,216 (1981); see Ramsey v. Investors Diversified Servs., Inc., 248 S.W.2d 263, 267 (Tex. Civ. App.—Austin 1952, writ ref'd n.r.e.).

49. See Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978); National Geographic Soc'y v. State Bd. of Equalization, 430 U.S. 551 (1977); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940); J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION 307 (1978); CT CORPORATION, WHAT CONSTITUTES DOING BUSINESS (1976).

50. TEX. TAX CODE ANN. § 171.002 (Vernon 1982).

on something more than pure fiction.⁵¹

The two other comptroller decisions addressed another aspect of the definition of taxable capital: the treatment of liabilities as an offset to surplus. Decision 11,984 held that reserves for anticipated losses do not represent actual liabilities and thus are to be included in surplus for purposes of determining taxable capital.⁵² The taxpayer in this decision sought to come within an exception providing that a reserve for bad debts is not a surplus account. The decision held, however, that the reserve in question, a reserve for the anticipated loss on the disposal of assets, was not analogous to a reserve for bad debts.⁵³ Decision 12,186, the second decision addressing the treatment of liabilities, held that a public utility's investment tax credit, which state and federal law require the utility to pay its customers in the form of lower rates, does not constitute a debt for purposes of determining taxable capital.⁵⁴

An apportioning fraction based upon the production of the taxpayer's gross receipts from business done in Texas is used to determine the portion of a corporation's taxable capital allocable to Texas.⁵⁵ Decision 8,328 considered the question of whether certain proceeds from the sale of inventory constitute Texas gross receipts under the Tax Code. Section 171.103(1) of the Code treats a corporation's receipts from the sale of tangible personal property as gross receipts from Texas "if the property is delivered or shipped to a buyer in this state regardless of the FOB point or another condition of the sale."⁵⁶ The taxpayer's purchaser was not located in Texas, but the purchaser directed delivery of the goods to a third party in Texas. The taxpayer argued that since the property was not shipped to the purchaser, the receipts were not receipts from business done in Texas. Noting that an analogous issue was pending in a Texas court,⁵⁷ the comptroller reviewed case law from other states.⁵⁸ The comptroller concluded that the third-party destination sales receipts are receipts from business

51. Tex. Comptroller's Administrative Decision No. 11,601 (1982); *see* United N. & S. Dev. v. Heath, 78 S.W.2d 650, 652 (Tex. Civ. App.—Austin 1934, writ ref'd); Tex. Comptroller's Administrative Decisions Nos. 10,756 (1980), 11,165 (1981) (determination of "cost" of subsidiary).

52. The inclusion of reserves in surplus is generally consistent with rule 026.02.12.015. *See* Tex. Comptroller of Public Accounts, 34 TEX. ADMIN. CODE ANN. § 3.393 (Shepard's May 1, 1982).

53. Tex. Comptroller's Administrative Decision No. 11,984 (1982); Huey & Philip Hardware Co. v. Shepperd, 151 Tex. 462, 251 S.W.2d 515 (1952) (treatment of bad debt reserve for purposes of determining taxable capital).

54. Tex. Comptroller's Administrative Decision No. 12,186 (1982); *see also* Bullock v. Dallas Power & Light Co., 589 S.W.2d 486 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

55. *See* TEX. TAX CODE ANN. §§ 171.103, .105, .106 (Vernon 1982).

56. *Id.* § 171.103(1).

57. *See* Bullock v. Enserch Exploration Inc., 614 S.W.2d 215 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.). The destination sale language was also the subject of Tex. Comptroller's Administrative Decision No. 9,899 (1981), in which the receipts from sales of peanuts to out-of-state purchasers were included in Texas receipts.

58. *See* New Jersey Mach. of New Hampshire, Inc. v. State Dep't of Revenue Admin., 117 N.H. 262, 372 A.2d 604 (1977) (ultimate destination test approved).

done in Texas.⁵⁹ The comptroller also considered two constitutional challenges to its construction of section 171.103(1) raised by the taxpayer; first, whether the risk of multiple taxation existed in violation of the commerce clause, and second, whether the application of the ultimate destination test violated the due process clause in that the petitioner was not doing business in Texas with respect to such sales. Relying primarily on a series of United States Supreme Court decisions, the comptroller rejected these constitutional challenges.⁶⁰

Another decision considered the definition of Texas receipts. In Decision 10,287 receipts from services the taxpayer had provided were allocated based upon the place where the services were provided.⁶¹ The decision placed the burden on the taxpayer to show the services were actually performed outside Texas.⁶² The decision also addressed the nature of the receipts of a corporation acting as banker for related corporations and held that the taxpayer's characterization of the receipts as interest or fees is controlling.⁶³

III. PROPERTY TAX

The dispute over the state's authority to tax the shares of commercial banks, the value of which includes the value of Treasury notes and bills and U.S. bonds,⁶⁴ continued during the survey period in *Bank of Texas v. Childs*,⁶⁵ *Wynnewood Bank & Trust v. Childs*,⁶⁶ and *American Bank & Trust v. Dallas County*.⁶⁷ The Supreme Court of Texas denied the plaintiff-taxpayer's application for writ of error in each of these cases; normally, the court of appeals would then have issued its mandate in each case.⁶⁸ All three plaintiff-taxpayers, however, applied to the court of appeals for a stay of that mandate and an injunction restraining any attempt to collect the disputed taxes, citing their intention to file a petition for writ of certiorari in the United States Supreme Court. The court of appeals recognized that a reversal by the United States Supreme Court would require the issu-

59. Tex. Comptroller's Administrative Decision No. 8,328 (1982).

60. *Id.*; see *Mobile Oil Corp. v. Commissioner of Taxes*, 455 U.S. 425 (1980); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

61. See *Humble Oil & Ref. Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967).

62. Tex. Comptroller's Administrative Decision No. 10,287 (1982).

63. *Id.*

64. See Stark, *Taxation, Annual Survey of Texas Law*, 36 Sw. L.J. 571, 585-87 (1982).

65. 634 S.W.2d 2 (Tex. Ct. App.—Dallas 1982, writ ref'd).

66. 634 S.W.2d 4 (Tex. Ct. App.—Dallas 1982, no writ) (opinion withdrawn).

67. 634 S.W.2d 4 (Tex. Ct. App.—Dallas) (opinion withdrawn), *cert. granted*, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (No. 81-1717).

68. TEX. R. CIV. P. 507 provides:

When a judgment or decree of the supreme court has become final, the clerk of the court shall issue and deliver the court's mandate in the cause to the lower court without further payment of costs. In cases in which the supreme court declines to grant an application for writ of error, costs of the supreme court shall be paid in the court of civil appeals and the mandate issued from that court. Every mandate issued by the supreme court shall contain the file number in the trial court.

ance of a mandate different from that which would be issued based on the Texas decisions. The court also recognized the multiplicity of litigation that would occur if taxes were collected in accordance with the decisions by the Texas courts. The court, therefore, agreed to stay its mandate and granted an injunction restraining the defendant county officials from attempting to collect the disputed taxes pending a decision of the Supreme Court.

Plaintiffs did apply for certiorari.⁶⁹ The Supreme Court agreed to review the court of appeals decisions allowing the banks to continue using the method of taxation of bank shares that taxes the value of federal securities held by the bank.⁷⁰ The challenge in the Supreme Court is that the tax violates federal law exempting obligations of the United States from taxation by state or local authorities.⁷¹

Three property tax cases decided during the survey period involved challenges to statutes under either the Texas or United States Constitutions. In *Shaw v. Phillips Crane & Rigging of San Antonio, Inc.*⁷² the taxpayer challenged, on due process grounds, the Texas statute authorizing the forced sale of property to collect delinquent ad valorem taxes.⁷³ The trial court held for the taxpayer and granted an injunction against the sale of personal property seized pursuant to article 7266. The Texas Supreme Court reversed the judgment of the trial court and dissolved the injunction,⁷⁴ noting that the statute satisfied due process requirements set forth in *Fuentes v. Shevin*⁷⁵ and other related cases.⁷⁶

69. *American Bank & Trust Co. v. Dallas County*, 634 S.W.2d 4 (Tex. Ct. App.—Dallas) (opinion withdrawn), cert. granted, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (No. 81-1717).

70. The challenged tax was imposed under arts. 7150.6 and 7166 of the Texas Revised Civil Statutes, which were repealed with the enactment of the Property Tax Code. Prior to its repeal, art. 7166 provided:

Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the assessor of taxes all shares owned by him in such bank. . . .

Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

1885 Tex. Gen. Laws, ch. 111, § 2a, at 106, 9 H. GAMMEL, LAWS OF TEXAS 726 (1898).

Article 7150.6 generally exempted intangible property from ad valorem taxation, except as provided by certain other articles, and specifically art. 7166. 1979 Tex. Gen. Laws, ch. 302, § 1, at 686-87.

71. 3 U.S.C. § 742 (1976) provides:

Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

72. 636 S.W.2d 186 (Tex. 1982).

73. The statute in question was TEX. REV. CIV. STAT. ANN. art. 7266 (1960). This statute was repealed effective Jan. 1, 1982, but a similar provision is contained in the new Tax Code. See TEX. TAX CODE ANN. § 33.21 (Vernon 1982).

74. 636 S.W.2d at 189.

75. 407 U.S. 67 (1972).

76. See, e.g., *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

The *Fuentes* line of cases requires that the taxpayer have notice of and an opportunity to contest the seizure and sale of his property. The supreme court decided that article 7266 satisfied these due process requirements, even though the taxpayer's property seized for nonpayment of taxes could be sold after a ten-day period without any type of "special hearing either before or after the seizure for the taxpayer to contest" any error by the assessor.⁷⁷ The court based its decision on the safeguards provided the taxpayer earlier in the assessment process. First, the taxpayer is on constructive notice no later than October 1st each year of the exact amount of taxes due, because the tax rolls are required to be posted as of that date. Second, no increase in the valuation of a taxpayer's property above the value at which he has rendered it may be made unless the Board of Equalization first gives the taxpayer ten days notice of the meeting at which the increase is made. Third, the taxpayer may pay the tax under protest and then sue for recovery.⁷⁸ Finally, the taxpayer can bring a declaratory judgment action to determine the accuracy and legality of the tax imposed and can seek an injunction against the collection of the taxes pending the resolution of the declaratory judgment action. While holding these remedies sufficient to meet due process requirements, the supreme court also noted that the collection of ad valorem taxes falls within the exceptions to the requirements enunciated in *Fuentes*, which include: "(1) a necessity to secure an important governmental or general public interest; (2) a special need for prompt action; and (3) strict control by the state over its monopoly of legitimate force."⁷⁹

In the second ad valorem tax case involving constitutional issues, the Texas Supreme Court upheld the decision of the court of appeals in *Parker County v. Spindeltop Oil & Gas Co.*⁸⁰ The court held that the action of Parker County taxing officials in placing the taxpayer's mineral properties on the tax rolls at 100% of market value while all other property on the rolls was valued at something less than market value violated the Texas Constitution. The court found that the valuation defied the constitutional mandates that all taxation be equal and uniform, that all property be taxed in proportion to its value, and that all assessed valuations be equal and based upon market value.⁸¹ The supreme court did not, however, agree with the lower court's remedy, which required that the taxpayer pay the challenged tax and receive a credit for such payment against the next year's tax. The supreme court held this remedy to be an improper judicial reassessment; the court, therefore, ordered the improper assessments be set aside without prejudice to the county's right to reassess the property in

77. 636 S.W.2d at 188.

78. The court noted that consent of the legislature to such a suit would not be necessary because an increase due to a mathematical error would not be a legal tax. *Id.*

79. *Id.* at 187.

80. 628 S.W.2d 765 (Tex. 1982).

81. *See* TEX. CONST. art. VIII, § 1.

accordance with the law.⁸²

The third case involving a constitutional challenge was *Superior Oil Co. v. City of Port Arthur*.⁸³ The taxpayer oil company attacked the annexation of its property by the City of Port Arthur, claiming that the annexation was accomplished solely to allow the city to collect taxes on the annexed property. The taxpayer further claimed that the city's failure to include the taxpayer's property in an industrial development district was a denial of equal protection under the law. The trial court granted the city's summary judgment motion. The court of appeals affirmed, holding that because the city had complied with the statutory provisions regarding annexation of the property,⁸⁴ the taxpayer failed to present a justiciable matter under the fourteenth amendment to the United States Constitution.⁸⁵ Calling annexation a "purely political matter"⁸⁶ and noting the Texas courts' consistent refusal to examine the purpose of an annexation to determine its validity, the court held that the disannexation statutes provided the taxpayer's remedy.⁸⁷

The Texas Supreme Court affirmed the decision of the court of appeals in *Davis v. City of Austin*.⁸⁸ At issue were the factors to be considered when a taxpayer claims a tax situs for his personal property that is different from his domicile. The supreme court noted the general rule to be that personal property should be taxed at its owner's domicile, but that exceptions to the rule exist when: (1) tangible personal property has acquired a tax situs of its own different from its owner's domicile; or (2) a statute directs that the personalty be taxed at a situs other than its owner's domicile.⁸⁹

The taxpayer in *Davis* was domiciled in Austin and owned an aircraft that was hangered there. During the fall preceding the tax year in question, the taxpayer arranged for hanger space at an airport in another jurisdiction and informed the Austin hangar he would not need the space after the end of the year. The taxpayer did not move his airplane to the new hangar space on January 1st, but left it for repairs at another airport in a third taxing jurisdiction until January 9th. When the city of Austin assessed ad valorem taxes on the plane, however, the taxpayer claimed the plane had acquired a tax situs in the jurisdiction where he had obtained new hangar space. The taxpayer failed to support his claim that the personal property had acquired a tax situs apart from his domicile. He failed to show the property, as of January 1st of the tax year in question, had

82. 628 S.W.2d at 767-68.

83. 628 S.W.2d 94 (Tex. Ct. App.—Beaumont 1981, writ ref'd n.r.e.).

84. See TEX. REV. CIV. STAT. ANN. art. 970(a) (Vernon Pam. Supp. 1963-1982).

85. See U.S. CONST. amend. XIV.

86. 628 S.W.2d at 96 (quoting *Hammonds v. City of Corpus Christi*, 226 F. Supp. 456, 458-59 (S.D. Tex. 1964), *aff'd*, 343 F.2d 162 (5th Cir.), *cert. denied*, 382 U.S. 837 (1965)).

87. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 970(a), § 10 (Vernon Pam. Supp. 1963-1982).

88. 632 S.W.2d 331 (Tex. 1982). For a discussion of the opinion of the court of appeals, see Stark, *supra* note 64, at 591-92.

89. 632 S.W.2d at 333.

become situated at the claimed situs with a "degree of permanency" sufficient to distinguish it from "personalty having a purely temporary or transitory basis within that jurisdiction."⁹⁰ The court noted that in order to meet this test the taxpayer must have physically brought the personalty into the jurisdiction he claims as its tax situs. The court further indicated that the taxpayer's subjective intentions and preparatory acts are insufficient to establish a tax situs for personalty under the exceptions to the general rule.

In *Missouri-Kansas-Texas Railroad v. City of Dallas*⁹¹ the Texas Supreme Court recognized the validity of the income approach, the stock and debt approach, and the cost approach to valuing railroad property for the purpose of imposing the ad valorem tax. The court held that the deposition testimony of the taxpayer railroad's expert appraisal witnesses concerning the value of the railroad's property using these three approaches (a value equal to approximately one-sixth to one-eighth of that determined by the taxing authorities using comparison sales of real estate in fee near the right-of-way) was sufficient to present a material fact question. The fact question was whether the assessments by the taxing authorities were arbitrary or grossly excessive. In reversing the summary judgment granted by the trial court and affirmed by the court of appeals, the supreme court noted that the methods of valuation used by the railroad's witnesses were "valid and helpful" and that the state "has no rigid standard governing the assessment method to be used by taxing authorities in this state in determining railroad value."⁹² In addition the court recognized that railroad right-of-way is not bought and sold in the same manner as other real property.

The Houston [1st District] court of appeals in *Hale v. City of Los Fresnos*⁹³ held that a mere deferral of a tax lien foreclosure on property owned and occupied as the homestead of a person aged sixty-five years or older is not sufficient to satisfy the purpose of article 7329a,⁹⁴ which protects such property. In *Hale* the city successfully sued to collect delinquent taxes against the taxpayers' property. Finding that the taxpayers qualified for protection under article 7329a, the court held the plaintiff-homeowners were "entitled to have the suit [against them for delinquent taxes] abated until the home was no longer owned and occupied by them."⁹⁵ The court, therefore, recognized that the purpose of article 7329a is to protect elderly homeowners from suits for delinquent taxes as well as from tax lien foreclosure.

The San Antonio court of appeals allowed a suit for refund of ad valorem taxes paid in *San Antonio Independent School District v. National*

90. *Id.* at 334.

91. 623 S.W.2d 296 (Tex. 1981).

92. *Id.* at 300.

93. 623 S.W.2d 745 (Tex. Ct. App.—Houston [1st Dist.] 1981, no writ).

94. TEX. REV. CIV. STAT. ANN. art. 7329a (Vernon Supp. 1982-1983).

95. 623 S.W.2d at 747.

Bank of Commerce.⁹⁶ The bank unknowingly paid taxes based on a valuation different from the valuation it had rendered to the taxing authorities. The circumstances, however, were such that the bank personnel did not know and should not have known that the taxes had been computed on a figure different from the figure that they had provided. Accordingly, the court held that the bank did not make a voluntary payment of taxes within the meaning of the general rule denying a refund for taxes paid without compulsion.

In *Fender v. Moss*⁹⁷ the Dallas court of appeals held that as a matter of law, a taxpayer's own pleadings and summary judgment proof established her negligence and lack of diligence in preventing execution of an order of sale for delinquent ad valorem taxes against her real property. The taxpayer failed to make any effort to ascertain or pay delinquent taxes. As a result, she did not discover a judgment against the property, which had been outstanding for two years at the time she purchased the property, or the sheriff's sale of the property, which had taken place eight months after her purchase. The taxpayer first learned of the suit when she was served with a writ of possession and eviction by the sheriff's sale purchaser over two and one-half years after she had purchased the property. The court held that the inclusion of the requirement that the taxpayer "*shall assume the responsibility of payment of delinquent taxes*" in the conveyance to the taxpayer should have put the taxpayer on notice that certain taxes were delinquent and that suits might be pending with respect to such taxes.⁹⁸

The Texas attorney general's office published several significant opinions during the year. One attorney general's opinion held that when a deed of trust places the responsibility for paying taxes on a mortgage lender, the mortgage lender is the authorized agent entitled to receive the original tax bill from the taxing unit.⁹⁹ The attorney general also opined that the section of the Property Tax Code, which sets forth procedures for calculating potential tax increases,¹⁰⁰ requires an adjustment for taxable value lost as a result of the granting of partial exemptions as well as that lost due to granting total exemptions.¹⁰¹ In response to a question regarding the exemption for "implements of farming or ranching . . . [used] in the production of farm or ranch products,"¹⁰² the attorney general reached several conclusions. First, items of equipment or machinery primarily designed and used by a farmer or rancher in conducting farming or ranching operations are implements of farming or ranching under the Property Tax Code;¹⁰³ the determination of whether a particular item falls within this category is a question of fact, rather than a question of law.¹⁰⁴ Sec-

96. 626 S.W.2d 794 (Tex. Ct. App.—San Antonio 1981, no writ).

97. 629 S.W.2d 192 (Tex. Ct. App.—Dallas 1982, writ ref'd n.r.e.).

98. *Id.* at 194.

99. Op. Tex. Att'y Gen. No. MW-503 (1982).

100. See TEX. TAX CODE ANN. § 26.04 (Vernon 1982).

101. Op. Tex. Att'y Gen. No. MW-495 (1982).

102. TEX. TAX CODE ANN. § 11.161 (Vernon 1982).

103. *Id.*

104. Op. Tex. Att'y Gen. No. MW-451 (1982).

ond, the "individual" to whom the exemption is granted¹⁰⁵ does not include either partnerships or corporations, but only natural persons. Finally, the limitation restricting the amount of personal property subject to an exemption¹⁰⁶ applies to this particular exemption.¹⁰⁷

With regard to ad valorem taxes the attorney general rendered an opinion that property may be exempted from ad valorem taxation only by a constitutional provision or a statute adopted pursuant to the relevant provisions of the constitution.¹⁰⁸ Furthermore, the legislature is without power to add to this group of exemptions.¹⁰⁹ Thus, the attorney general concluded that the Property Tax Code provision exempting from ad valorem taxation buildings owned and used by veterans organizations¹¹⁰ is unconstitutional.¹¹¹ In another opinion the attorney general considered circumstances in which a hospital authority planned to construct an office building and parking lot immediately adjacent to an existing hospital facility. The hospital authority then planned to lease or sell space in the existing hospital facility as condominiums to doctors practicing at the hospital and to lease the parking lot space. The attorney general concluded that property owned by a political subdivision is not denied ad valorem tax exempt status merely because it charges for the use of the property or because a profit is generated thereby.¹¹² If, however, the political subdivision leases such property to a private person for the purpose of private commercial enterprise, it will not be entitled to the exemption. Additionally, because the exemption is dependent upon the property's being owned by a political subdivision,¹¹³ if the political subdivision sells the property to a private person, even as a condominium, it will no longer qualify for the exemption.¹¹⁴

The State Property Tax Board adopted numerous new rules during the year; many of these rules were aimed at providing more information to the taxpayer. Certain new rules require appraisal offices to maintain a physical copy of appraisal and tax rolls, in addition to computer records.¹¹⁵ Appraisal offices must also now maintain new lists for properties receiving special valuation.¹¹⁶ New rules change the information required in the ex-

105. See TEX. TAX CODE ANN. § 11.161 (Vernon 1982).

106. See TEX. REV. CIV. STAT. ANN. art. 3836 (Vernon Supp. 1982-1983).

107. Op. Tex. Att'y Gen. No. MW-451 (1982).

108. Op. Tex. Att'y Gen. No. MW-436 (1982) (citing *River Oaks Garden Club v. City of Houston*, 370 S.W.2d 851 (Tex. 1963)).

109. Op. Tex. Att'y Gen. No. MW-436 (1982) (citing *City of Amarillo v. Amarillo Lodge No. 731, A.F. & A.M.*, 488 S.W.2d 69 (Tex. 1972); *Leander Indep. School Dist. v. Cedar Park Water Supply Corp.*, 479 S.W.2d 908 (Tex. 1972); *City of Amarillo v. Love*, 356 S.W.2d 325 (Tex. Civ. App.—Amarillo 1962, writ ref'd n.r.e.); *Dickison v. Woodmen of the World Life Ins. Soc'y*, 280 S.W.2d 315 (Tex. Civ. App.—San Antonio 1955, writ ref'd)).

110. See TEX. TAX CODE ANN. § 11.23(a) (Vernon 1982).

111. Op. Tex. Att'y Gen. No. MW-436 (1982).

112. Op. Tex. Att'y Gen. No. MW-430 (1982).

113. See TEX. CONST. art. VIII, § 2; *id.* art. XI, § 9.

114. Op. Tex. Att'y Gen. No. MW-430 (1982).

115. Tex. Property Tax Bd., 34 TEX. ADMIN. CODE §§ 155.3-.5 (Shepard's May 1, 1982).

116. *Id.* § 155.12.

emption application forms.¹¹⁷ Certain minimum information must now be provided to property owners with regard to exemptions that must be applied for annually.¹¹⁸ The board also made changes regarding the information that must be provided by a property owner on the tax rendition form; the property owner must now furnish the information necessary to identify the property and to determine its ownership, taxability, and situs.¹¹⁹ Finally, the board adopted a definition by which interstate personal property can be identified and guidelines for establishing the value of interstate personal property to be allocated to the State of Texas.¹²⁰

IV. INHERITANCE TAX

The Texas Comptroller of Public Accounts promulgated new rules that clarify the new inheritance tax law. The rules detail the requirements and deadlines for filing a Texas tax return in compliance with the new statute.¹²¹ With regard to determining the Texas inheritance taxes due, two comptroller's decisions addressed the deductibility of interest expenses accrued after the date of the decedent's death.¹²² The decisions held that the interest expense on deferred federal estate taxes or Texas inheritance taxes, and the interest expenses on income tax deficiencies accrued and paid after death, are not permissible deductions. The only permissible deductions for debts of the estate are for those owed at the time of the decedent's death.

V. MISCELLANEOUS

A comptroller's decision with regard to the gas production tax considered the total tax burden between a working interest and royalty interest when the working interest pays post-production transportation and processing costs, and a down-stream sale of the processed gas has been made to a third party. The decision held that the total tax burden should be in the same proportion as the split of the net proceeds of the down-stream sale, rather than the proportion of the working interest and royalty interest in the mineral estate.¹²³ In addition the fuels tax division of the comptroller's office passed several new rules to reflect amendments to the fuels tax statutes and changes made by the Texas Tax Code.¹²⁴

117. *Id.* §§ 155.16-30.

118. *Id.* § 155.34.

119. *Id.* § 155.31.

120. *Id.* § 161.8.

121. Tex. Comptroller of Public Accounts, 34 TEX. ADMIN. CODE §§ 3.225-.230 (Shepard's May 1, 1982).

122. Tex. Comptroller's Administrative Decisions Nos. 11,355, 11,928 (1981).

123. Tex. Comptroller's Administrative Decision No. 11,660 (1982); *cf.* Op. Tex. Att'y Gen. No. M-968 (1971).

124. See Tex. Comptroller of Public Accounts, 7 Tex. Reg. 2543 (1982), *adopted*, 7 Tex. Reg. 3064 (1982) (amending 34 TEX. ADMIN. CODE § 3.175); *id.*, 7 Tex. Reg. 2436 (1982), *adopted*, 7 Tex. Reg. 3064 (1982) (amending 34 TEX. ADMIN. CODE § 3.179); *id.*, 7 Tex. Reg. 2472 (1982), *adopted*, 7 Tex. Reg. 3065 (1982) (to be codified at 34 TEX. ADMIN. CODE § 3.191).

A new area of taxation emerged with the Texas Legislature's passage of a statute authorizing local jurisdictions to legalize bingo games for charitable purposes.¹²⁵ The attorney general considered an apparent conflict in the statute. The statute sets a single game limit of \$1,000 in prizes and a \$5,000 prize limit in all games on a single occasion.¹²⁶ The attorney general concluded that the comptroller, before issuing a license, must determine that the applicant will not violate the section¹²⁷ of the statute that provides a limit of \$500 in any single game and a \$2,500 aggregate in all games on a single occasion.¹²⁸ The attorney general also opined that when a jurisdiction legalizes bingo but does not subsequently impose the authorized two percent gross receipts tax,¹²⁹ a smaller jurisdiction within the legalizing jurisdiction may impose the tax without holding its own election.¹³⁰ The comptroller adopted rules that establish guidelines for determining permissible areas for bingo games, the effect of the imposition of the two percent gross receipts tax, the notification requirements, the procedures for collection and transmittal, and the investigation of applicants for licenses.¹³¹

The comptroller promulgated several new rules regarding the cigarette tax. One rule provides procedures for investigating criminal records of applicants for permits as distributors of cigarettes or as wholesale or retail dealers of cigarettes.¹³² A second rule allows the Alcoholic Beverage Commission to collect cigarette tax on untaxed cigarettes at ports of entry into the state.¹³³ Finally, upon discovering that the meters used by cigarette distributors to stamp cigarettes to evidence payment of the cigarette tax had been tampered with and abused, the comptroller revoked the distributors' authority to use such meters.¹³⁴

125. See TEX. REV. CIV. STAT. ANN. art. 179d (Vernon Supp. 1982-1983).

126. See *id.* art. 179d, § 13.

127. See *id.* art. 179d, § 11.

128. Op. Tex. Att'y Gen. No. MW-413 (1981).

129. TEX. REV. CIV. STAT. ANN. art. 179d, § 3 (Vernon Supp. 1982-1983).

130. Op. Tex. Att'y Gen. No. MW-413 (1981).

131. See Tex. Comptroller of Public Accounts, 7 Tex. Reg. 1689 (1982), *adopted*, 7 Tex. Reg. 2549 (1982) (to be codified at 34 TEX. ADMIN. CODE § 3.541); *id.*, 7 Tex. Reg. 3498-99 (1982) (to be codified at 34 TEX. ADMIN. CODE § 3.542).

132. *Id.*, 7 Tex. Reg. 2625 (1982), *adopted*, 7 Tex. Reg. 3497 (1982) (to be codified at 34 TEX. ADMIN. CODE § 3.114).

133. *Id.*, 34 TEX. ADMIN. CODE §§ 3.110-.112 (Shepard's May 1, 1982).

134. *Id.*, § 3.103.