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Texas Comptroller of Public Accounts STAR System

**201703017H**

**SOAH DOCKET NO. 304-16-4544.26**
**CPA HEARING NO. 109,892**

RE: **************
TAXPAYER NO: **************
AUDIT OFFICE: **************
AUDIT PERIOD: October 1, 2005 THROUGH October 31, 2012

Sales And Use Tax/RDT

BEFORE THE COMPTROLLER
OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS

GLENN HEGAR
Texas Comptroller of Public Accounts

JANICE CAHALANE
Representing Tax Division

**************
Representing Petitioner

**COMPTROLLER’S DECISION**

For a hearing under the APA set by SOAH on and after September 1, 2015:

This decision is considered final on April 4, 2017, unless a motion for rehearing is timely filed; this date of finality is calculated based on the Administrative Procedure Act (APA).[1] See attached:
“Frequently Asked Questions Related to Motions for Rehearing.” The failure to timely file a motion for rehearing may result in adverse legal consequences.

Administrative Law Judge (ALJ) Victor J. Simonds of the State Office of Administrative Hearings (SOAH) issued a Proposal for Decision (PFD) that includes Findings of Fact and Conclusions of Law. SOAH served the PFD on each party and each party was given an opportunity to file exceptions and replies with SOAH in accordance with SOAH’s rules of procedure. The ALJ recommended that the Comptroller adopt the PFD as written.

After review and consideration, IT IS ORDERED that the PFD is adopted as changed.[2]

The result from this Decision is Attachment A. The ALJ’s letter to the Comptroller is Attachment B. The PFD as changed is Attachment C. Attachments A, B and C are incorporated by reference.

Attachment A reflects a liability.

The total sum of the tax, penalty and interest is due and payable 20 days after a comptroller’s decision becomes final.[3] If such sum is not timely paid, an additional penalty of 10 percent of the taxes due will accrue.

SIGNED on this 10th day of March 2017.

GLENN HEGAR
Comptroller of Public Accounts

By: Mike Reissig
Deputy Comptroller

Attachment A, Texas Notification of Hearing Results
Attachment B, ALJ’s letter to the Comptroller
Attachment C, Proposal for Decision as changed
Publication: “Frequently Asked Questions Related to Motions for Rehearing”

ATTACHMENT B

State Office Of Administrative Hearings
Lesli G. Ginn
Chief Administrative Law Judge

January 26, 2017

The Honorable Glenn Hegar
Comptroller of Public Accounts
LBJ Building
111 E. 17th Street, 1st Floor
Austin, TX 78701

RE: SOAH Docket: 304-16-4544.26
TCPA Hearing No.: 109,892
Taxpayer No.: ****************
*************** v. Texas Comptroller of Public Accounts

Dear Comptroller Hegar:

Please be advised that Petitioner filed certain documents after the Proposal for Decision (PFD) was issued in the above-referenced matter. Staff filed a response and correctly noted that Petitioner’s submission does not identify or discuss the PFD. It appears that Petitioner’s submission is an attempt to submit additional evidence. However, because the submission was made after issuance of the PFD, the documents cannot be admitted or reviewed by the ALJ. See 1 Tex. Admin. Code 155.153(10). Therefore, the ALJ recommends that the PFD be adopted as written.

Sincerely,

Victor John Simonds
Administrative Law Judge

ATTACHMENT C

SOAH DOCKET NO. 304-16-4544.26
TCPA DOCKET NO. 109,892

***************

Taxpayer No. ***************
v.
TEXAS COMPTROLLER OF PUBLIC ACCOUNTS

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Business Activity Research Team (BART) of the Texas Comptroller of Public Accounts (Comptroller) determined that *************** (Petitioner) had an employee working in Texas, and a BART auditor wrote to Petitioner asking that it complete a Texas Nexus Questionnaire. When Petitioner failed to respond, the Tax Division (Staff) used the information that was available and estimated Petitioner’s Texas sales and use tax liabilities for the examination period October 1, 2005, through October 31, 2012. Petitioner concedes that it had at least one employee in Texas in the period but argues that it sold only nontaxable services. Staff contends Petitioner’s argument should be dismissed because the company failed to provide any documentation to establish the nature of its Texas transactions. In this Proposal for Decision, the Administrative Law Judge (ALJ) finds that Staff presented a prima facie case demonstrating that Petitioner was selling taxable items in the state. Petitioner did not demonstrate that the assessment is erroneous; therefore, it should be affirmed.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

Staff referred the contested case to the State Office of Administrative Hearings (SOAH) and, on June 8, 2016, issued a Notice of Hearing by Written Submission. On June 9, 2016, ALJ Victor John Simonds
issued Order No. 1, which set the written submission hearing. Staff was represented by Assistant General Counsel Janice Cahalane, and Petitioner was represented by its president, **********. The contested case record closed on December 19, 2016. There are no issues of notice or jurisdiction; therefore, those matters are set out in the Findings of Fact and Conclusions of Law without further discussion.

II. REASONS FOR DECISION

Evidence Presented

Staff offered the following exhibits as evidence:

1. Texas Notification of Exam Results;
2. Sixty-Day Notification Letter;
3. Exam and BART Documents;
4. Texas Workforce Commission Employer Tax System Query Results, re: Petitioner; and
5. Business Inquiry Results (LexisNexis, re: Petitioner).

Staff also submitted the pleadings the parties exchanged prior to referring the case to SOAH. Petitioner’s Reply to the Position Letter included the following exhibits:

1. Texas Franchise Tax Reports, 2009 through 2013;
2. Subcontracting Agreement; and
3. Professional Services Agreement.

Each party’s exhibits were admitted without objection.

B. Agreed Adjustments

Staff did not agree to make any assessment adjustments.

C. Material Facts and Issues Presented

In the periods at issue, Petitioner was a corporation with its headquarters located out of state. In November 2012, an auditor assigned to BART reviewed business reports issued by the Texas Workforce Commission and observed that Petitioner had an employee in Texas. Yet, Petitioner was not filing franchise tax returns or remitting sales and use tax. The BART auditor wrote to Petitioner requesting that it complete a Texas Nexus Questionnaire. When Petitioner failed to respond, the auditor used the information that was available and concluded that Petitioner had substantial nexus in Texas and that it was selling taxable items, i.e., computer software or related services. For example, the Texas Workforce Commission reports indicated that Petitioner’s North American Industry Classification System (NAICS) Code was 541512, which describes computer system design companies. An Experian Business Report concerning Petitioner indicated that its Standard Industrial Codes (SIC) were 5734 and 7389, which describe computer and software stores, and business service companies, respectively.

On January 25, 2013, Staff issued a Texas Notification of Exam Results to Petitioner assessing a sales and use liability for the period October 1, 2005, through October 31, 2012. The sales tax assessment consisted of $85,000 in tax (based on an estimate of $1,000 per month), 10% late penalties, and interest that had accrued to the account as of the statement date. Petitioner’s president, **********, admits
that Petitioner had an employee in Texas, and it submitted Texas Franchise Tax Returns for report years 2009 through 2012. However, Petitioner contends the sales tax assessment should be dismissed. Petitioner asserts that it provided nontaxable information technology consulting.

D. ALJ’s Analysis and Recommendation

Texas imposes a tax on each sale of a taxable item in this state, and all gross receipts of a seller are presumed to have been subject to the sales tax unless a properly completed resale or exemption certificate is accepted by the seller. Tex. Tax Code §§ 151.051, .054(a). Additionally, a use tax is imposed on the use of a taxable item in this state. Id. § 151.101(a). Each seller, including an out-of-state seller, who is engaged in business in this state must apply to the Comptroller and obtain a sales and use tax permit. Tex. Tax Code § 151.202; 34 Tex. Admin. Code § 3.286(b)(1)-(2). Additionally, each seller must collect sales or use tax on each separate retail sale. See Tex. Tax Code §§ 151.052, .103; 34 Tex. Admin. Code § 3.286(d)(1). Petitioner concedes that it had at least one employee in Texas in the period at issue, and it does not dispute the fact that it was making sales to Texas residents during the assessment period. Those two facts, when coupled with Staff’s evidence, support an inference that Petitioner was engaged in business in Texas and had a responsibility to collect and remit Texas sale or use tax on its taxable item sales.

Staff contends Petitioner was selling computer software (or “apps”). Sales tax is due on the sale, lease or license of a computer program. Tex. Tax Code §§ 151.009, .010, .051; 34 Tex. Admin. Code § 3.308(b)(2). A completed computer program includes any modification, installation, or maintenance charges made in connection with the sale of the program. 34 Tex. Admin. Code § 3.308(b)(1). Thus, for example, charges for computer program maintenance by the person who sold the computer program are taxable. Id. § 3.308(b)(3). Maintenance means providing error correction, improvements, or technical support. Id.

Petitioner asserts that it was only selling nontaxable information technology consulting services. When the contested case issue involves the taxability of a service, Staff must demonstrate not only that a service was sold but that the service is taxable. See, e.g., Comptroller’s Decision No. 102,386 (2014). However, a taxpayer cannot defeat an assessment based on the burden of proof by withholding documents. Id. In the instant matter, Staff repeatedly asked Petitioner to provide documents that would establish the nature of Petitioner’s Texas sales. In response, Petitioner provided two contracts. Both contracts involve out-of-state customers, and do not add any clarity as to what Petitioner was selling in Texas. Therefore, the ALJ finds that the evidence demonstrates, prima facie, that during the periods at issue, Petitioner sold taxable items in Texas and, Petitioner failed to demonstrate, by a preponderance of evidence, that the sales tax assessment is erroneous. 34 Tex. Admin. Code § 1.40(2)(B). And based on the fact that Petitioner failed to provide any business records, it is clear that Staff was authorized to estimate the liability and that the estimate was based on the best information available. See Tex. Tax Code §§ 111.0042(d) and 151.0042(d); 151.025. Therefore, the assessment should be affirmed.

III. FINDINGS OF FACT

1. In the periods at issue, ************* (Petitioner) was a corporation with its headquarters located out of state.

2. In November 2012, an auditor assigned to the Business Activity Research Team (BART) of the Texas Comptroller of Public Accounts (Comptroller) reviewed business reports issued by the Texas Workforce Commission and observed that Petitioner had an employee in Texas.

3. The BART auditor wrote to Petitioner requesting that it complete a Texas Nexus Questionnaire.
4. When Petitioner failed to respond, the auditor used the information that was available and concluded that Petitioner had substantial nexus in Texas and that it was selling taxable items, computer software or related services.

5. Texas Workforce Commission reports indicated that Petitioner’s North American Industry Classification System (NAICS) Code was 541512, which describes computer system design companies.

6. An Experian Business Report on Petitioner indicated that its Standard Industrial Codes (SIC) were 5734 and 7389, which describe computer and software stores, and business service companies, respectively.

7. On January 25, 2013, the Tax Division (Staff) issued a Texas Notification of Exam Results to Petitioner assessing a sales and use liability for the period October 1, 2005, through October 31, 2012. The sales tax assessment consisted of $85,000 in tax (based on an estimate of $1,000 per month), 10% late penalties, and interest that had accrued to the account as of the statement date.

8. Petitioner’s president, **************, admitted that Petitioner had an employee in Texas in the period at issue.


11. Staff referred the above-referenced case to the State Office of Administrative Hearings (SOAH).

12. On June 8, 2016, Staff issued a Notice of Hearing by Written Submission. The notice contained a statement of the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted.

13. On June 9, 2016, the Administrative Law Judge issued Order No. 1, which set the written submission hearing.

14. On December 19, 2016, the contested case record closed.

15. Staff repeatedly asked Petitioner to provide documents that would establish the nature of Petitioner’s Texas sales.

16. Petitioner provided two contracts. Both contracts involve out-of-state customers and do not add any clarity as to what Petitioner was selling in Texas.

IV. CONCLUSIONS OF LAW

1. The Comptroller has jurisdiction over this matter pursuant to Texas Tax Code ch. 111.

2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law pursuant to Texas Government Code ch. 2003.


4. Texas imposes a tax on each sale of a taxable item in this state, and all gross receipts of a seller are presumed to have been subject to the sales tax unless a properly completed resale or exemption certificate is accepted by the seller. Tex. Tax Code §§ 151.051, .054(a).
5. A use tax is imposed on the use of a taxable item in this state. Tex. Tax Code § 151.101(a).


8. Petitioner was engaged in business in Texas and had a responsibility to collect and remit Texas sale or use tax on its taxable item sales.

9. Sales tax is due on the sale, lease or license of a computer program. Tex. Tax Code §§ 151.009, .010, .051; 34 Tex. Admin. Code § 3.308(b)(2).

10. A completed computer program includes any modification, installation, or maintenance charges made in connection with the sale of the program. 34 Tex. Admin. Code § 3.308(b)(1). Thus, for example, charges for computer program maintenance by the person who sold the computer program are taxable. Maintenance means providing error correction, improvements, or technical support. 34 Tex. Admin. Code § 3.308(b)(3).

11. When the contested case issue involves the taxability of a service, Staff must demonstrate not only that a service was sold but that the service is taxable. See, e.g., Comptroller’s Decision No. 102,386 (2014).

12. A taxpayer cannot defeat an assessment based on the burden of proof by withholding documents. See, e.g., Comptroller’s Decision No. 102,386.

13. The evidence demonstrates, prima facie, that during the periods at issue, Petitioner sold taxable items in Texas.


15. Staff was authorized to estimate the liability and that the estimate was based on the best information available. See Tex. Tax Code §§ 111.0042(d) and 151.0042(d); 151.025.

16. The assessment should be affirmed.

SIGNED December 20, 2016.

VICTOR JOHN SIMONDS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

ENDNOTES:

[1] The date calculated is 25 days after this decision is signed. See APA, Tex. Gov’t Code § 2001.146(a); S.B. 1267, Acts 2015, 84th Leg., Sec. 7 and 9 (for a hearing set by SOAH on and after September 1, 2015).