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Taxation

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TAXATION

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T was the best of times, it was the worst of times, as Charles Dickens
might have said. The best? A budget surplus. The worst? Trying to
divide all that "extra" money among so many good causes and con-
stituents. The result? A state tax bill that provides significant sales tax
and franchise tax changes, as well as some significant property tax
changes. Those legislative changes, as well as several significant judicial
and administrative decisions, once again changed the Texas tax landscape.

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I. SALES TAX
A. Application of the Tax

Texas taxpayers were often on the winning side when it came to statutory construction of the Tax Code by the courts. In Rylander v. Associated Technics Co., the court of appeals refused to accept the comptroller’s narrow construction of the tax exemption provided for removal of hazardous waste. The taxpayer in this case provided asbestos-abatement services, including asbestos removal services, without charging sales tax. The comptroller argued that asbestos is not hazardous waste until it is removed from a building. Based on this conclusion, the comptroller classified the services provided by the taxpayer as two separate services, describing the separation of the asbestos from the building as real property repair and remodeling, a taxable service, and treating the removal of the asbestos from the property as removal of hazardous waste, a separate nontaxable service. The taxpayer argued that the entire service was hazardous waste removal and therefore not taxable. The district court agreed with the taxpayer.

The court of appeals affirmed the taxpayer’s victory based on statutory construction. The court determined, as a matter of fact, that the asbestos-abatement process was a continuous process rather than two separate activities. Thus, the remaining issue before the court was whether this activity qualified for the hazardous-waste tax exemption. Of the factors used to determine a statute’s proper construction, the court focused on the object sought to be attained by the legislature and the administrative construction of the statute. The court maintained that the purpose of the tax exemption for hazardous waste removal was to encourage the removal of asbestos and therefore control and minimize the public’s exposure to asbestos. The comptroller’s interpretation of the statute effectively removed this tax incentive, which was clearly provided by the legislature. In reviewing the administrative construction of the statute, the court found the comptroller’s interpretation to be unreasonable as contrary to the clear intent of the statute. The case is significant not only for its factual holding, but also because it demonstrates the court’s recognition that the comptroller can go too far in asserting that a nontaxable service has taxable components.

1. 987 S.W.2d 947 (Tex. App.—Austin 1999, no pet. h.).
3. See Associated Technics, 987 S.W.2d at 950.
5. See Associated Technics, 987 S.W.2d at 950. The other factors mentioned by the court include the legislative history, the circumstances under which the statute was enacted, the title, preamble, and emergency provisions of the law, the common law or former statutory provisions, and the consequences of a particular construction. See id.
7. See id. at 950-51.
8. See Tex. Comp. Pub. Acc’ts, Hearing No. 35,578 (Oct. 5, 1998) as an example of the lengths to which the Tax Division may go in asserting that a nontaxable item contains a
In another statutory construction case, the Texas Supreme Court reversed the lower court's ruling against the taxpayer. *Fleming Foods of Texas, Inc. v. Rylander* involved the ability of a taxpayer that paid sales tax to a vendor to request a tax refund directly from the state without obtaining an assignment of refund rights from the vendor. In this case, the taxpayer had agreed to extensions of the statute of limitations for several periods during an audit. These extensions specifically provided that the extension of time also applied to the taxpayer's ability to receive refunds or credits for those same periods. Under these agreements, the taxpayer timely filed refunds for sales taxes that it claimed it had erroneously paid to vendors on exempt packing materials. The comptroller's office denied a portion of these claims based on its assertion that since the vendors, through which these taxes were paid, had not timely assigned their refund rights to the taxpayer, the refunds were barred by the four-year statute of limitations. The taxpayer correctly argued that under the clear language of the statute, it was a taxpayer and was allowed to seek refunds directly from the state regardless of whether it received assignments from the vendors.

The statutory issue raised in this case involved a review of the former article 1.11A, the predecessor to the Tax Code section at issue. The predecessor statute provided that only those paying tax directly to the state could request a refund. Based on former article 1.11A, the comptroller promulgated rules that prohibited a request for refund to be filed by a taxpayer who had paid the tax through a vendor, requiring instead

taxable and a nontaxable component. In this case, the tax division conceded that an enema solution is exempt, but asserted that the container it came in is taxable. Fortunately, the administrative law judge recognized that the tax division's position "defies common sense." (This lengthy decision addresses numerous examples of exempt drugs, medicines, and prosthetic devices.) All cited Texas Comptroller decisions are available on the Internet at <http://www.cpa.state.tx.us>.

9. 6 S.W.3d 278 (Tex. 1999). The initial opinion, which was delivered on June 10, 1999, was withdrawn and replaced by this current opinion, which addresses the amici (including ten members of the 79th Legislature), with no substantive changes.

10. The disallowed refunds were those on which the taxpayer's vendors executed the assignment of refund rights either more than four years after the tax was paid or after the taxpayer's extension agreements with the comptroller had expired. See infra note 129 and accompanying text for a discussion of relevant legislative changes that prospectively allow certain "indirect taxpayers" to seek a refund from the state. Thus, *Fleming Foods*' significance is primarily its impact on pre-1999 legislation periods and on its articulation of statutory construction principles in the context of legislative language that is inconsistent with explicit legislative intent.

11. See Tex. Tax Code Ann. § 111.104(b) (Vernon Supp. 2000). The trial court rendered a take-nothing judgment against the taxpayer, which the court of appeals affirmed. See Fleming Foods of Tex., Inc. v. Sharp, 951 S.W.2d 278 (Tex. App.—Austin 1997). For another interesting discussion of refund claims in the context of "who paid the tax?," see Tex. Comp. Pub. Acc'ts, Hearing No. 31,865 (May 21, 1999) (focusing on sales taxes owed in connection with leases that had been assigned; the administrative law judge observed that the case "represents the point where legal fictions collide with the reality of proof, or, the lack thereof.")


13. See id.
that such refund request be made directly to the vendor.\textsuperscript{14} Although the legislature stated that the promulgation of the Tax Code was for recodification purposes only and that no substantive changes were intended,\textsuperscript{15} the legislature did change the wording of the statute when it codified the provision in the Tax Code; as revised, the statute no longer required direct payment to the state as a prerequisite to requesting a refund of sales tax.\textsuperscript{16} Thus, the court held that the current statute on its face clearly and unambiguously allows a taxpayer to file a refund claim with the comptroller even if the tax was originally collected through a vendor.\textsuperscript{17}

The court's decision is significant both because it reversed the comptroller's long-standing refusal to honor refund requests from indirect taxpayers and because it focused so carefully on statutory analysis. Although the court of appeals had concluded that the doctrine of legislative acceptance supported the comptroller's interpretation,\textsuperscript{18} the supreme court rejected this conclusion on the ground that there was a "substantial change in verbiage" when former article 1.11A(3) was codified in section 111.104 and also because the statute was not ambiguous.\textsuperscript{19} Significantly, the court explained that "[c]itizens, lawyers who represent them, judges, and members of the Legislature should not be required to research the law that preceded every codification . . . . We must be able to accept and to rely upon the words written by the Legislature" if the words are clear and do not produce absurd results.\textsuperscript{20} The court noted that a review of prior law, legislative history, and the circumstances under which the current law was enacted\textsuperscript{21} cannot be used to construe an unambiguous statute to mean something other than what it plainly says.\textsuperscript{22} Although the change in the language upon the codification of former article 1.11A into sections 111.104 and 111.107 was contrary to the legislature's mandate with respect to codification, the court stated that by adopting these statutes the legislature expressly repealed former article 1.11A.\textsuperscript{23} The court, in its revised opinion, addressed the claim of amici who argued that if an inadvertent substantive change were made in the codification process, the old law, rather than the new law, should apply.\textsuperscript{24} Rejecting this argument, the Court stated that "[f]ar more harm would occur if we were to

\begin{itemize}
\item \textsuperscript{14} See 34 Tex. Admin. Code § 3.325(b) (1999). All current, cited rules from the Texas Administrative Code are available on the Internet at \texttt{<http://www.cpa.state.tx.us>}.\textsuperscript{15} See Act of May 29, 1981, 67th Leg., R.S., ch. 389, § 40, 1981 Tex. Gen. Laws 1490, 1787.\textsuperscript{16} See Tex. Tax Code Ann. § 111.104 (Vernon Supp. 2000).\textsuperscript{17} See Fleming Foods, 6 S.W.3d at 280.\textsuperscript{18} The doctrine of legislative acceptance provides that if an ambiguous statute has been construed by the proper administrative officers and it is subsequently re-enacted without any substantial change, it will ordinarily be given the same construction. See id. at 282 (citing Sharp v. House of Lloyd, Inc., 815 S.W.2d 245, 248 (Tex. 1991)).\textsuperscript{19} Id. at 282.\textsuperscript{20} Id. at 285.\textsuperscript{21} See Tex. Gov't Code Ann. § 311.023 (Vernon 1998), made applicable through Tex. Tax Code Ann. § 101.002(a) (Vernon 1992).\textsuperscript{22} See Fleming Foods, 6 S.W.3d at 283-84.\textsuperscript{23} See id. at 284.\textsuperscript{24} See id.
hold that prior, repealed law overrides a subsequent, unambiguous codification.25

In *Residential Information Services Ltd. Partnership v. Rylander*,26 the court of appeals affirmed the comptroller's successful motion for summary judgment against the taxpayer for sales tax due on a payment made for the early termination of a computer equipment lease. The taxpayer in this case claimed that a lump sum payment made at the end of the lease was either a penalty paid for releasing future contractual obligations (an intangible benefit and therefore not taxable) or a stand-alone payment separate from the underlying lease (also nontaxable). The appellate court rejected the taxpayer's first argument by stating that a termination payment reflects the additional amount due on the lease, taking into account the shortened lease period, and is therefore payment of the same character (tangible property lease) as the lease payments.27 The court rejected the taxpayer's second argument with the more tenuous rationale that the original lease provided for amendments and this transaction was properly executed as an amendment under the lease, thus making the payment taxable as part of the lease.28 The court held that the application of comptroller rule 3.294(d)(5), which specifically states that lease termination payments are taxable as part of the lease price, was reasonable under these circumstances.29 Assuming the decision is factually correct, the possibility that the rationale could be unfairly stretched to extend to other types of contracts, such as service contracts, is troubling.30

The taxpayer in *Turnkey Construction, Inc. v. Sharp*31 prevailed on its claim that the installation of new vapor recovery systems for service stations is considered nontaxable new construction. The comptroller had argued that the installation of these new systems constituted taxable real property repair and remodeling.32 The taxpayer, however, countered that the new systems were designed to perform functions that the old system could not, that the piping for the new systems was located in new trenches, and that the taxpayer did not connect these new systems to the existing fuel pumps. Thus, the installation of these systems should be treated as new construction. In reviewing the comptroller's rules, the taxpayer noted that the installations of the vapor recovery systems did not meet the definition of repair, restoration, remodeling, or modification,

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25. *Id.*
27. *See id.* at 470 (relying in part on 34 Tex. Admin. Code § 3.294(d) (1999)).
28. *See id.* at 471.
30. The court placed great weight on the comptroller's administrative rules; however, it also relied on Tex. Tax Code Ann. § 151.007 (Vernon Supp. 2000). Fortunately for taxpayers, a case released after the survey period confirmed that section 151.007 does not have an unlimited reach. *See Rylander v. San Antonio SMSA L.P.*, 11 S.W.3d 484 (Tex. App.—Austin Jan. 6, 2000, no pet.) (engineering services not "part of the sale" of tangible personal property and therefore not taxable).
but did satisfy the definition of new construction. By ruling in favor of the taxpayer, the district court rejected the conclusion in the comptroller's hearing that the installation was merely an upgrade or modification to existing real property.

In an administrative hearing to determine if leases should be classified as either real or personal property leases, the tax division failed to convince the administrative law judge that classification should be determined solely from the lease contract language. The judge in Comptroller Decision 36,177 instead held that the established precedent requires the court look at three factors to determine if property should be classified as real property, including: (1) whether the item has actually or constructively been annexed to real property; (2) whether the item has been fitted or adapted for the specific use or purpose of the realty; and (3) the party's intent to make the annexation to the real property permanent. While the court agreed that the party's intent is the most important factor in making this determination, it refused to look solely to the lease contract language, or the intent of the party, to make this determination. The administrative law judge noted in his opinion that both the Texas Attorney General and the comptroller's office had previously used the three-pronged Hutchins test to determine whether property is classified as real or personal, and that the comptroller had informed the taxpayer in this case during a prior audit that this is the proper test to be used.

Decision 36,775 is one that all ticket-issuing vendors should note. In this case, the theater operator/taxpayer occasionally allowed non-profit organizations with valid exemption certificates to use the theater. The non-profit organization would establish the ticket prices and receive all the net proceeds from the ticket sales. The taxpayer issued the tickets for these events using its equipment, which is standard in the industry. All tickets issued by the taxpayer stated "price and taxes incl." and the taxpayer's equipment was not capable of issuing different tickets for exempt and non-exempt events. The taxpayer argued that it did not intend to charge sales tax on the tickets even though the face of the ticket stated that such taxes were included in the ticket price. The administrative law judge summarily ruled, citing section 111.016 of the Tax Code, that because the customers purchased a ticket stating that tax was included, the taxpayer is liable for the amount represented to be tax. The decision

34. See Tex. Comp. Pub. Acc'ts, Hearing No. 36,044 (July 29, 1998). The distinction between nontaxable new construction and taxable real property repair and remodeling continues to be an elusive one, as both taxpayers and comptroller staff work (unsuccessfully?) to establish meaningful distinctions.
36. See id. (citing Hutchins v. Masterson, 46 Tex. 551 (1877)).
37. See id.
38. See id.
40. See id.
41. See id. (citing TEX. TAX CODE ANN. § 111.016(a) (Vernon Supp. 2000)); see also 34 Tex. Admin. Code § 3.3 (1999).
did not consider the fact that the taxpayer's equipment was not capable of issuing substitute tickets to exclude the sales tax language.

In Decision 37,133, the taxpayer challenged the sales tax exemption claimed under the agricultural exemption. In this case, the taxpayer operated a retail tire store that sold tires primarily to agricultural customers. During the audit period, the taxpayer did not collect sales tax on tires mounted on vehicles with agricultural motor vehicle tags or on tires sold and carried out of the store by customers with a blanket sales tax exemption certificate on file with the taxpayer. Although the uses of such tires may have been tax exempt, the taxpayer did not know and did not inquire about the use by the customer of these tires before making the tax-free sales. In upholding the audit assessment on the mounted tires, the administrative law judge pointed to the fact that the Tax Code section and the rule providing for exempt agricultural sales have additional requirements that the Transportation Code does not contain. Thus, these differences prohibit the taxpayer from relying merely on the fact that a vehicle has an agricultural tag in reaching its conclusion that the sale of tires for such vehicles is tax exempt. Only tires that are tractor tires, tires for vehicles not licensed for highway use, and tires designated by the manufacturer to be used only for farm or off-highway use qualify for the sales tax exemption. The administrative law judge rejected the taxpayer's argument that tires qualify for the exemption for equipment used exclusively to maintain exempt equipment since tires are specifically included in the definition of replacement parts. As for the tax-free sales made to customers for which the taxpayer had blanket sales tax exemption certificates, the judge held that the taxpayer could not rely on the blanket sales tax exemption for sales of tires that may not have qualified for that exemption. For such sales, the taxpayer must either receive a separate exemption certificate or stamp the receipt with the words “exempt agricultural purposes” and require the customer to sign the receipt. The judge also rejected the taxpayer’s claim that repairs to tires and equipment of forklifts, front-end loaders, backhoes, and other like equipment was a tax exempt repair of a motor vehicle.

In Decision 36,707, which introduced a “novel twist” that had never been fully addressed in a decision before, the administrative law judge denied a tax exemption for the taxpayer’s gas and electricity use. The

46. See id.
taxpayer in this case, a limited partnership, owned both a food processing division and a restaurant division. The taxpayer requested a refund of sales tax paid on its gas and electricity usage in its food processing division, claiming that the gas and electricity were not used for preparing or storing food for immediate consumption since the food was sent to the restaurant division for preparation or storage for immediate consumption.\(^{53}\) The judge’s decision characterized the transaction as preparation of food at a separate facility for immediate consumption in a restaurant owned by the same taxpayer. Under these facts, the judge found the conclusion “quite clear” and held that under the plain language of the statute, the taxpayer in this case was using the gas and electricity to prepare or store food for immediate consumption and was therefore not entitled to the sales tax exemption.\(^{54}\) The fact that this use occurred in two different locations and was billed to different meters was held to be irrelevant because the same taxpayer operated both the food processing division and the restaurants that prepared or served the food for immediate consumption.\(^{55}\) Although interesting for its own facts, the decision is also interesting because of the judge’s willingness to collapse the two locations.

B. LEGISLATIVE DEVELOPMENTS

The budget surplus, Internet issues, and social policy combined to trigger several significant changes in the sales tax laws during the regular session of the 76th Legislature. The Legislature modified the tax treatment of Internet access services by adding several new provisions. Two new definitional sections were added to define the terms “Internet” and “Internet access service.”\(^{56}\) Internet access service is defined as a “service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.”\(^{57}\) The term specifically does not include telecommunications services,\(^{58}\) and the definition of telecommunications services was amended to specifically exclude Internet access services from its definition as well.\(^{59}\)

Additionally, the definitions of data processing services and information services as of October 1, 1999, no longer include Internet access services.\(^{60}\) Although Internet access services are now explicitly included on

\(^{55}\) See id.
\(^{57}\) Id. § 151.00394(a).
\(^{58}\) See id. The exclusion for telecommunications services was added to ensure that telecommunications providers could not escape taxation by asserting that their services “enable users to access” the Internet.
\(^{59}\) See id. § 151.0103(3).
\(^{60}\) See id. § 151.00394(c).
the list of taxable services in Texas, the Legislature provided, effective October 1, 1999, a tax exemption for the first $25 of the taxpayer's monthly service charge. This exemption applies regardless of the billing period used or the other services that may be bundled with the Internet access service. A significant limitation on this exemption is that the exemption amount is applied to the total amount billed to the taxpayer, regardless of whether the charge is a lump-sum charge for multiple users or separately stated for each user.

Because Texas is one of only a handful of states that tax data processing and information services, the Legislature considered repealing the tax on these services during its 1999 session. Although budget concerns precluded a full repeal, the Legislature passed a new exemption for twenty percent of the value of data processing and information services. This new exemption became effective on October 1, 1999.

The Legislature enacted additional exemptions for health care supplies. Effective April 1, 2000, the list of tax exempt items includes nonprescription drugs or medicines labeled with a national drug code issued by the Food and Drug Administration and blood glucose monitoring test strips. An additional exemption for adjustable eating utensils purchased and used to facilitate independent eating by a person without full use or control of his or her hands or arms was also added, to be effective July 1, 1999.

In what was likely the most publicized tax relief, the Legislature added a new section to provide what is popularly termed a "sales tax holiday" for a three-day period in August. Articles of clothing and footwear with a total sales price of less than $100 are exempt from tax under this new provision. Excluded from this exemption are special clothing or footwear primarily designed for athletic activity or protective use that is not

61. See id. § 151.0101(a)(16).
62. See id. § 151.325(a).
63. See id. § 151.325(b).
64. See id. § 151.325(c).
65. See id. § 151.351.
66. A draft amendment to 34 TEX. ADMIN. CODE § 3.330 would have limited the exemption to services provided under contracts entered into after October 1, 1999. However, recognizing that the numerous "grandfather clauses," enacted by the Legislature to protect existing contracts from increased tax rates, would have been superfluous if a law failed to reach pre-existing contracts, comptroller representatives indicated orally that the draft would be revised to make it clear that services would be exempt on and after October 1, without regard to the date of any underlying contract. For an example of a grandfather provision, see 34 TEX. ADMIN. CODE § 3.319 (1999).
67. See TEX. TAX CODE ANN. §§ 151.313(a)(3), (12) (Vernon Supp. 2000). The comptroller's staff was working with the industry to find possible solutions to the apparent inequity created by the fact that some drug companies use the FDA Drug Code, but others do not.
68. See id. § 151.313(a)(11) (note that the Legislature gave this amendment a duplicate section number).
69. See id. § 151.326(a). Like many of the other tax relief provisions, this holiday represented a compromise compared to early drafts of the legislation that called for longer holidays.
70. See id.
normally worn for other purposes, accessories including jewelry, and any rental clothing or footwear. The statute authorizes local taxing authorities to repeal the exemption, as it applies to local taxes, on or after January 1, 2000. Any services performed on tangible personal property sold under this exemption remain taxable.

The Legislature added a new chapter to the Texas Tax Code to give local taxing authorities the authority to repeal a state sales tax exemption for the purposes of local sales tax. Only a sales tax exemption that specifically provides that it may be repealed by the governing body of a local taxing authority may be repealed. To repeal an exemption, the governing body of the taxing authority must hold a public hearing and then adopt an appropriate order to repeal the exemption by a majority vote, which must be recorded in the minutes of the governing body's meeting. A copy of the order adopted by the governing body must be sent by certified or registered mail to the comptroller. A state sales tax exemption that has been properly repealed under this procedure may also be reinstated in this same manner. A repeal or reinstatement of state sales tax under these provisions, which are effective as of October 1, 1999, will be effective the first day of the first calendar quarter after the comptroller receives a copy of the order from the governing body of the taxing authority.

The 1999 Legislature rewrote much of the section that provides an exemption for gas and electricity. As rewritten, the law provides that the sale of gas and electricity will be exempt only when sold for specified uses. A sale will be considered exempt if it is sold to a person using the gas or electricity in an exempt manner or used by an independent contractor who is engaged by the purchaser to perform such exempt activities. If natural gas or electricity from a single meter is used during a normal billing period for both exempt and taxable purposes, the sale will be considered either totally taxable or totally exempt based on the predominant use of the natural gas or electricity measured by the meter.

71. See id. § 151.326(b). Testimony during the legislative hearings made it clear that it would be necessary to specify that shoes may not be sold separately (rather than as a pair) to fall below the $100 limit.
72. See id. § 151.326(c). This provision addresses the local jurisdictions, several of which feared the fiscal impact of reduced sales tax revenue. Note, however, that localities may repeal only certain specified exemptions. See infra note 74 and accompanying text.
73. See TEX. TAX CODE ANN. § 151.3111(b)(6) (Vernon Supp. 2000).
74. See id. §§ 326.001 -.004.
75. See id. § 326.002.
76. See id. §§ 326.003(a), (b), (d).
77. See id. § 326.003(d).
78. See id. § 326.003(c).
79. See id. § 326.004. This increasing local autonomy, which addresses certain concerns of the local jurisdictions, is at cross purposes with the goal of simplifying tax compliance and illustrates again the difficulty of moving toward a uniform local tax base.
80. See id. § 151.317.
81. See id. § 151.317(a).
82. See id. § 151.317(d).
83. See id. § 151.317(e).
The manufacturing exemption is another provision that the 76th Legislature substantially changed. The revisions to the manufacturing exemption reflect a "re-do" of the 1997 legislative changes to that provision. Despite multiple conferences among legislators, comptroller staff, and industry, the 1999 changes produced widespread confusion, particularly because taxpayers believed the comptroller was construing the revised exemption too narrowly. In 1999, industry and comptroller representatives again worked to redraft and clarify the exemption. The list of property "sold, leased, or rented to, or stored, used, or consumed by a manufacturer" that is considered exempt from tax was significantly expanded to include: additional devices used at an electric generating facility, an expansion of property eligible for the exemption as necessary and essential to a pollution control process, lubricants and chemicals used to prevent deterioration of exempt equipment, gases used at a manufacturing plant to prevent contamination of raw materials or products or to prevent hazardous situations in the manufacturing process, tangible personal property necessary to the quality control process, certain safety apparel, tangible personal property used in the actual manufacturing, processing, or fabrication if the use is necessary to comply with public health laws, and tangible personal property that is specifically installed to conserve water in the manufacturing process. Additional exemptions include conveyor systems for piping that is a component part of a single item of exempt manufacturing or pollution control equipment, certain piping between a single item of manufacturing equipment and ancillary equipment that operate together to perform a specific step in the manufacturing process, and piping through which the product or an intermediate product that will become a component part of the product is recycled back to another single item of manufacturing equipment and its ancillary equipment. For purposes of this exemption for piping, an integrated group of machines is not treated as a single item of manufacturing equipment, and piping through which material is transported between single items of manufacturing equipment is not considered a component part of a single item of manufacturing equipment, and is therefore not exempt. Additional exemptions are now provided for certain specific...
cally listed items used in a printing process. To qualify for this exemption, these items must be purchased by a person engaged in either printing or imprinting tangible personal property for sale, or producing a free newspaper that is distributed to the general public. Additions to the list of items excluded from the manufacturing exemption are maintenance supplies and equipment, janitorial supplies and equipment, and tangible personal property used in transmitting or distributing electricity.

Although the comptroller had previously confirmed that the section 151.318(p) exemption, a subsection of the manufacturing exemption, applies to broadcasters, industry and comptroller representatives worked together to recommend legislative changes to clarify this exemption. Accordingly, the legislature added new section 151.3185 to include the exemptions for these industries. This new provision separates the broadcast/motion picture exemption from the general manufacturing exemption. It exempts the sale, lease, rental, storage, use, or other consumption of tangible personal property that will become an ingredient or component part of or is necessary or essential to producing a motion picture or video or audio recording that is either sold, licensed, distributed, exhibited, or broadcast to the general public or to cable television subscribers. This exemption also applies to services that are necessary and essential to and used directly in such productions, unless the services are specifically excluded under the new statute. Some specific examples of exempt items are cameras, film, lights, teleprompters, and similarly necessary items. Items specifically listed as not eligible for the exemption include office equipment or supplies, transportation equipment, or taxable items used only incidentally in the production.

Section 151.354, another new section added to the Texas Tax Code, exempts services performed by certain employees of property management companies. The employee must be permanently assigned by the company to one rental property and remain assigned to that property while employed by successive owners or companies. The property management company also must be reimbursed on a dollar-for-dollar basis for the services provided. Further, the property management company must be contractually obligated to the property owner to exercise control

97. See id. § 151.318(t).
98. See id. § 151.318(t).
99. See id. § 151.318(c)(3).
100. See id.
101. See id. § 151.318(c)(5).
104. See id. § 151.3185(a).
105. See id. §§ 151.3185(a)(3), (c).
106. See id. § 151.3185(b).
107. See id. § 151.3185(c).
108. See id. § 151.354.
109. See id.
110. See id. § 151.354(a).
over the activities of the employee providing the service and also must manage and direct the employee’s day-to-day activities.\textsuperscript{111} A person will be considered an employee of a property management company if he is an employee of the property management company or an affiliate.\textsuperscript{112} The property management company or its affiliate, however, must continue to pay tax on the taxable items purchased and provided to employees performing services on the managed property.\textsuperscript{113}

The provision entitling a retailer to a credit or refund for taxes paid on the portion of an account determined to be worthless or an item that has been repossessed now includes any person who extends credit to a purchaser under a retailer’s private label credit agreement, or an assignee or affiliate of such a person or retailer.\textsuperscript{114} To be entitled to a credit or reimbursement, the person must meet the specific requirements listed in the statute, which generally include that the retailer maintains a valid sales or use tax permit and remits the tax for which the credit or reimbursement is sought, all payments on the account are prorated between taxable and nontaxable charges, and the retailer or other person provides detailed records.\textsuperscript{115} The detailed records must contain the information specifically listed in the statute, unless persons whose volume and character of uncollectible accounts warrant an alternate method and the comptroller approves such method.\textsuperscript{116} Comptroller approval, however, is subject to being revoked due to a substantive or interpretive change in the law or a change in the taxpayer’s operations.\textsuperscript{117}

The provision that allows for the tax-free sale of certain taxable items at a one-day sale of a religious, educational, or public service organization was amended to allow for the tax-free sale of any item at such an event, as long as the item was manufactured by or donated to the organization and is sold to any purchaser other than the donor.\textsuperscript{118} The description of requirements for a nonprofit hospital or hospital system to be exempt from sales tax was reduced extensively and currently requires the provision of community benefits that include charity care and government-sponsored indigent health care as provided in the Texas Health and Safety Code.\textsuperscript{119}

Another new code section added in 1999 relates to the taxpayer’s ability to participate in a managed sales tax audit.\textsuperscript{120} These managed audits, which take place by written agreement between the comptroller and the

\begin{enumerate}
\item \textsuperscript{111} See id. § 151.354(d).
\item \textsuperscript{112} See id. § 151.354(c).
\item \textsuperscript{113} See id. § 151.354(e).
\item \textsuperscript{114} See id. § 151.426(c).
\item \textsuperscript{115} See id. § 151.426(e).
\item \textsuperscript{116} See id. § 151.426(f).
\item \textsuperscript{117} See id. § 151.426(g).
\item \textsuperscript{118} See id. § 151.310(c).
\item \textsuperscript{119} See id. § 151.310(e); see Tex. Health & Safety Code Ann. §§ 311.041-.048 (Vernon Supp. 2000).
\item \textsuperscript{120} See Tex. Tax Code Ann. § 151.0231 (Vernon Supp. 2000). 
\end{enumerate}
taxpayer, may be limited to certain categories of tax liability. Such categories may include: sales of certain types of taxable items, purchases of assets or expense items, purchases under a direct payment permit, or another category specified in the comptroller's agreement with the taxpayer. The comptroller, who has the sole right to determine whether to authorize a managed audit, may consider the taxpayer's history of tax compliance, the taxpayer's time and resources available to commit to the audit, the amount and availability of the taxpayer's records, the taxpayer's ability to pay any expected liability, and any other factors considered relevant by the comptroller.

Taxpayers that hold direct payment permits may also choose an optional percentage-based method to report taxable transactions. If the comptroller authorizes this method, it must be used for three years unless otherwise revoked by the comptroller. The comptroller may revoke the authorization if the percentage used to calculate the tax is no longer representative due to a change in the law's substance or interpretation or a change in the taxpayer's operations, and the comptroller's decision regarding this is not appealable.

Also effective October 1, 1999, a taxpayer may calculate overpaid sales and use taxes by using a projection based on a sampling of transactions and methods approved by the comptroller. The methods used by the taxpayer and the supporting records must be recorded and made available to the comptroller upon request. An overpayment of taxes paid by a person holding a permit, including an erroneous tax payment to a retailer, can be recovered by the taxpayer either as a credit on future sales tax returns or by filing a refund claim with the comptroller.

The Legislature placed additional limitations on the ability of purchasers who pay sales tax on property to be exported to receive a refund of such taxes. The retailer must now wait until either twenty-four hours after the time of export as shown on the export documentation if the retailer is located in a county bordering Mexico, or seven days after the day of export as shown on the export documentation for all other retail-

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121. See id. §§ 151.0231(b), (c). The comptroller had already entered into several such agreements by the end of 1999.
122. See id. § 151.0231(b).
123. See id. §§ 151.0231(d), (e).
124. See id. § 151.4171.
125. See id. § 151.4171(b).
126. See id. §§ 151.4171(c), (d).
127. See id. § 151.430(b). This legislation is a follow-up to the settlement of an earlier litigation case. See Cynthia M. Ohlenforst & Jeff W. Dorrill, Taxation, 52 SMU L. Rev. 1453, 1459 (1999).
128. See TEX. TAX CODE ANN. § 151.430(d) (Vernon Supp. 2000).
129. See id. §§ 151.430(a), (c). The comptroller has pointed out that this provision allows taxpayers, on a prospective basis, the relief sought in Fleming Foods (see supra note 10). Note, however, that the provision provides such relief only to taxpayers with a Texas tax permit.
Any retailer that prematurely makes a refund, or that makes an undocumented or improperly documented refund, is held liable for the refund amount with interest.\textsuperscript{132}

The Legislature also added several other miscellaneous and technical amendments to the Tax Code during the recent session. In connection with the exemption for amusement services, the Legislature added a definition for educational organizations to include an entity described by section 61.003(8) or (15) of the Texas Education Code.\textsuperscript{133} The exemption for periodicals and writings of religious, philanthropic, charitable, historical, scientific, and similar organizations now extends to periodicals and writings that are presented on audiotape, videotape, and computer disk.\textsuperscript{134} However, such periodicals and writings must now be both published \textit{and} distributed.\textsuperscript{135} The dollar limit on the amount of tangible personal property sold through coin-operated bulk vending machines that is treated as exempt has been increased from twenty-five cents to fifty cents.\textsuperscript{136} The exemption for university and college student organizations was amended to exempt all sales of taxable items manufactured by or donated to the organization, regardless of sales price, unless sold to the donor.\textsuperscript{137} Another new exemption provided by the 1999 Legislature makes the sale of an animal by nonprofit animal shelters exempt from sales tax.\textsuperscript{138} The definition of “restore,” for purposes of the exemption for labor to restore certain property, was amended to include a service to repair, restore or apply a protective chemical to an item.\textsuperscript{139} The Legislature also added to the list information that can be released from a taxpayer’s records.\textsuperscript{140} Effective September 1, 1999, information in or derived from a governmental body’s record, report, or other required instrument may be released.\textsuperscript{141} Additionally, several sections were amended to change references to Department of Commerce to the Department of Economic Development.\textsuperscript{142}

\section{C. Regulatory Developments}

In an effort to help clarify the much publicized sales tax holiday under section 151.326, the comptroller issued regulatory guidance before the

\footnotesize{\textsuperscript{131} See id.}
\footnotesize{\textsuperscript{132} See id. § 151.307(e).}
\footnotesize{\textsuperscript{133} See id. § 151.3101(c); see TEX. EDUC. CODE ANN. §§ 61.003(8), (15) (Vernon Supp. 2000).}
\footnotesize{\textsuperscript{134} See TEX. TAX CODE ANN. § 151.312 (Vernon Supp. 2000).}
\footnotesize{\textsuperscript{135} See id. Like many other legislative provisions, this provision addresses contested issues; the comptroller had previously asserted that the “published or distributed” language was equivalent to the newly-enacted “published \textit{and} distributed” standard.}
\footnotesize{\textsuperscript{136} See id. § 151.305(a).}
\footnotesize{\textsuperscript{137} See id. § 151.321(a).}
\footnotesize{\textsuperscript{138} See id. § 151.343.}
\footnotesize{\textsuperscript{139} See id. § 151.350(d)(1).}
\footnotesize{\textsuperscript{140} See id. § 151.027(c)(7).}
\footnotesize{\textsuperscript{141} See id.}
\footnotesize{\textsuperscript{142} See id. §§ 151.429, 151.4921, 151.431.}
first holiday in August of 1999. The new rule, which became effective on July 5, 1999, and expired on November 2, 1999, addressed many of the issues that arose during the legislative hearings process. A new rule, entitled the "Taxpayer's Bill of Rights," was also adopted during the survey period. This new rule provides, among other things, that the comptroller's office will provide responses to telephone calls and written requests within certain set periods of time, that comptroller rules and regulations will be readily available and easy to understand, that a fair and timely complaint system will be implemented, that interest will be paid on refunds beginning in January 2000, and that the comptroller will continue to foster a close working relationship with the business community.

II. FRANCHISE TAX

A. APPLICATION OF THE TAX

What the district court giveth, the appellate court taketh away—that's the message facing taxpayers in Rylander v. 3 Beall Bros. 3, Inc. and in Rylander v. B&A Marketing. Both cases focus on the validity of the "additional tax" imposed by section 171.001. When Beall Brothers ceased doing business in Texas on August 2, 1993, the "additional tax" it owed was based on eighteen months. However, corporate taxpayers with a calendar year-end that dissolved on the same date paid "additional tax" based on only seven months. The taxpayer therefore argued that section 171.001 imposed unequal tax burdens on similarly situated taxpayers. B&A Marketing, on the other hand, focused its challenge to the statute on statutory interpretation—arguing that because B&A was not subject to the taxable capital tax for the year at issue, it could not be liable under the literal statutory language for the additional tax. The district court decisions in these two cases held in favor of the taxpayers.

However, the comptroller appealed—and won—both cases. The B&A Marketing court noted that section 171.001 includes two requirements: that a corporation "is subject to the tax imposed under section 171.001," and that the corporation "is no longer subject to the taxing jurisdiction of

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144. See id. (including the single shoe issue; see supra note 71 and accompanying text).
146. See id. Some of these changes, e.g., with respect to interest payments, are based on 1999 legislative provisions.
147. 2 S.W.3d 562 (Tex. App.—Austin 1999, no pet. h.).
this state in relation to the tax on net taxable earned surplus.\textsuperscript{151} The taxpayer had argued (rather reasonably) that these two requirements effectively impose tax only on corporations that remain subject to the franchise tax, but not subject to the earned surplus. As a practical matter, as the court feared, B&A's interpretation of the statute would limit the statute's application to corporations that are doing business in Texas but are protected from the income tax component of the tax (i.e., the earned surplus component) by Public Law 86-272.\textsuperscript{152}

B&A, by contrast, emphasized that the comptroller's reading of the statute would enable Texas to impose tax on a corporation that is no longer "doing business" in Texas, despite the fact that the doing-business test has long been the standard for imposition of the tax.\textsuperscript{153} The comptroller responded that the statute requires that a taxpayer be doing business only "at the time the event occurs that causes the entity to cease to be subject to the tax,"\textsuperscript{154} not that the taxpayer continue to be doing business in Texas. In accepting the comptroller's interpretation, the court paid significant deference to the comptroller's construction of the tax; the court also paid somewhat more attention to the statutory rule of construction that taxing statutes should be liberally construed to raising revenue than to the equally important rule that taxing statutes are to be strictly construed against the taxing authority.\textsuperscript{155}

The court further held that B&A failed to carry the burden of rebutting the presumption of constitutionality, alternately holding that the statute does not create double taxation, creates a rational basis for imposing an income tax, and does not violate the Commerce Clause or discriminate against interstate commerce.

It is noteworthy that the court appears to treat the "additional tax" as different from the franchise tax,\textsuperscript{156} noting that "[a]lthough the tax is essentially an income tax, it is not improper that the statute is included in the Franchise Tax Act, because the additional tax will apply only to those entities already subject to the franchise tax."\textsuperscript{157}

In \textit{Rylander v. 3 Beall Bros. 3, Inc.},\textsuperscript{158} issued the month after \textit{B&A Marketing}, the court again found the additional tax statute constitutional. Although the court's reasoning and the cases upon which it relies vary from the \textit{B&A Marketing} decision, the court ultimately concluded that the tax is constitutional, observing that "[b]ecause the tax was tied to earnings, it was in proper proportion to Bealls' activities in Texas and therefore to the consequent enjoyment of the opportunities and protec-
tion which the state has afforded." 159

Nabisco, Inc. v. Rylander focused on the apportionment of gross receipts for franchise tax purposes. 160 Nabisco, Inc. and Planters/Lifesavers Company brought suit for franchise tax refunds, arguing that sales of food manufactured outside Texas, shipped to Texas for storage, and then sold to Texas buyers should be treated as sales from the out-of-state facilities to the Texas buyers, rather than (as the comptroller argued) sales from inside the state. The distinction is crucial because section 171.104 161 allows a taxpayer to deduct from its Texas receipts certain food exempted from sales tax "if the items are shipped from outside the state." 162 The comptroller agreed that, but for the out-of-state shipping requirement, the food receipts at issue could be deducted from Texas receipts. Nabisco and Planters contended that the sale and shipment from out of state need not be simultaneous, while the comptroller asserted that they must. 163 After a thorough analysis that looked back to the 1969 version of the statute, 164 the court found that the comptroller's rule that sale and shipment of the food occur simultaneously represents "a reasonable and longstanding interpretation of section 171.004 that does not contradict the plain language of the statute." 165

Several decisions issued during the Annual Survey period reflect the continuing difficulty of consistently interpreting the franchise tax as it involves partnerships.

Decision 36,495 166 illustrates this confusion. The corporate taxpayer in this case held a fifty percent interest in a joint venture treated as a general partnership. The joint venture was engaged in the refining petroleum products. The taxpayer had taken credits on its 1994 and 1995 franchise tax reports for property purchased by the joint venture as refinery. Before that time, the taxpayer had secured a ruling from the comptroller confirming that corporate partners of a partnership doing business in an enterprise zone as a qualified business "may take a deduction against taxable capital subject to the requirements of 171.1015 of the Tax Code," 167 and noting that the deduction for the corporate partner would be limited to fifty percent of its prorata capital investment in the partnership. As the findings of fact pointed out, the taxpayer in this case historically determined its receipts from the joint venture based on the gross method for apportionment purposes, thereby disregarding the separate

159. Id. (citation omitted).
160. 992 S.W.2d 678 (Tex. App.—Austin 1999, pet. denied).
162. Id.
163. Note the contrast between the comptroller's position in this case and the comptroller's position in B&A Marketing that statutory requirements (i.e., being subject to franchise tax but not subject to the earned surplus component of the tax, see supra note 154 and accompanying text) need not be met simultaneously.
164. See Nabisco, 992 S.W.2d at 683.
165. Id. at 684.
167. Id.
existence of the partnership. The tax division disagreed with the ruling letter, and argued that section 171.0021, at issue in the administrative hearing, is distinguishable from section 171.1015, referred to in the letter ruling. The comptroller relied on the statutory language of section 171.0021(d), which provides explicitly that a corporation "may not convey, assign or transfer the credit allowed under this section to another entity." The administrative law judge ultimately concluded that the taxpayer was not a manufacturer and that the sales tax paid by the joint venture should not pass through to the taxpayer. As to the prior ruling the taxpayer had received, the administrative law judge concluded that the comptroller has interpreted section 171.0021 differently from section 171.1015, and that an exemption could be strictly construed.

Decision 37,454 also focused on whether a corporate partner was entitled to take a credit attributable to sales tax on manufacturing equipment purchased by the joint venture in which it held an interest. This taxpayer also lost, as the judge followed the precedent established in Hearing 36,495. In essence, these decisions accept the comptroller's interpretation that partnerships are separate legal entities whose tax attributes do not flow through to the corporate partners.

Another partnership decision rendered during the survey period, Decision 36,497, addresses the issue of whether and how a corporate partner reports receipts from a controlled partnership for franchise tax purposes, particularly in the taxable capital context. In this case, the comptroller aggregated all the gross receipts of several downstream partnerships (including receipts from sales between the partnerships), effectively requiring the corporate partner to report more gross receipts than the entities had under the GAAP standards that the applicable statute refers to. Thus, the comptroller's holding would require a corporation that chooses the gross receipts method of reporting its receipts to include the receipts not only from its first tier partnership, but also receipts between that partnership and a lower tier partnership as well as the receipts from the lower tier partnership's sales to third parties. The effect of forcing the corporate investor to report the gross receipts of each of these partnerships is effectively to triple report receipts, as the receipts move upstream from the third-party customer, through a mid-tier partnership, to the top partnership. This case presents a particularly interesting juxta-

170. Penalty was waived.
172. See supra note 166 and accompanying text.
173. See also Tex. Comp. Pub. Acc'ts, Hearing No. 37,795 (Mar. 15, 1999). This decision is yet another case in which the taxpayer claimed that, as a corporate partner of a Texas general partnership, it was entitled to claim its pro rata share of sales tax paid by the partnership on certain manufacturing materials.
175. Tex. Tax Code Ann. § 171.112 (Vernon Supp. 2000) (specifically allowing a corporate partner to report the gross receipts of a partnership, but only to the extent the receipts are revenue for generally accepted accounting purposes).
position to the three cases previously discussed, each of which focused on
the comptroller's view that a partnership is a separate legal entity whose
tax characteristics do not "flow through" to the corporate partner. 176

The case is also noteworthy because it reflects the comptroller's posi-
tion that the prohibition in section 171.112(d) on consolidated reporting
effectively means that a partnership may not consolidate its receipts with
those of related partnerships or corporations. However, as the taxpayer
pointed out, if the prohibition on consolidation truly prohibited a corpo-
ration and a partnership from consolidating their receipts, there would
appear to be no basis for requiring the corporate partner to report the
partnership's gross receipts as its own. 177

Decision 37,294178 illustrates a different result for trusts and partner-
ships on similar facts. This case focused on the sourcing of receipts from
grantor trusts. Taxpayers had argued that these were look-through enti-
ties and that the taxpayer's corporate receipts should therefore be
sourced based on the actual investments of the trusts. Because the invest-
ments (including interest, dividends, and gains from sales of marketable
securities) were intangibles, the taxpayer hoped to rely on the location of
payor test. The comptroller argued, on the other hand, that the trusts
were Texas trusts so the receipts should be sourced to Texas. The admin-
istrative law judge concluded that "[t]he bottom line here is that there is
no rule provision comparable to the partnership rule for treatment of re-
ceipts from trusts." 179

Further finding that there was nothing in the statute that required the
comptroller to treat partnerships as flow-through entities, 180 the judge
congrued that the taxpayer's position must be rejected "regardless of
any philosophical merit." 181 The result of this case is that partnerships
and trusts, while treated similarly for federal income tax and other pur-
poses, including certain franchise tax purposes, are treated differently for
gross receipts purposes in the earned surplus context. This decision is one
of several that illustrates the difficulty the comptroller has in finding a
consistent approach to partnership and trust cases, and appears to under-

176. The actual facts of Decision 36,497 involved a corporate partner that owned a con-
trolling interest in a first tier partnership that sold gas and crude oil to second tier part-
nerships. The second tier partnerships then marketed and resold the gas and crude oil to third
parties.

177. The administrative law judge's conclusion that the "no consolidation rule" prohib-
its a partner from consolidating receipts with related partnerships or corporate partner
appears inconsistent not only with the statutory requirement that a corporate partner re-
port the partner's receipts, but also with the language of several earlier decisions. See
generally Tex. Comp. Pub. Acc'ts, Hearing No. 34,567 (Feb. 2, 1998); Hearing No. 33,972
(Aug. 15, 1996); and Hearing No. 33,258 (May 19, 1995).


179. Id.

180. Does this case mean that the relevant rule, 34 TEX. ADMIN. CODE § 3.557(e)(24),
is not required by the statute? This case also points to the difficulty in finding consistent
interpretations in the partnership context.

score inconsistency in the comptroller's position with respect to these entities.

B. REGULATORY DEVELOPMENTS

Although the comptroller issued numerous rules in draft or proposed form shortly after the survey period (most in response to legislative changes), the comptroller did not adopt any significant franchise tax rules during the survey period.

C. LEGISLATIVE DEVELOPMENTS

Legislators struggled mightily during the 1999 session to provide tax relief to individuals and to businesses. The result is a mix of franchise tax credits that address both. The 1999 Legislature amended section 171.002 to provide that, effective January 1, 2000, a corporation is not required to pay any franchise tax if: (1) the amount of tax computed for the corporation is less than $100; or (2) the amount of gross receipts from the corporation's entire business is less than $150,000. However, even corporations exempt from franchise tax under this provision must continue to file a public information report. In addition, the comptroller may require an officer of a corporation exempt from franchise tax under this provision to file an abbreviated information report stating the amount of the corporation's gross receipts from its entire business, although the comptroller cannot require the corporation to report or compute its earned surplus or taxable capital. This provision was drafted as relief for small taxpayers, and that goal will likely be achieved. Although the provision could provide the opportunity to avoid franchise taxes even for corporations with a multi-million dollar taxable capital (but no receipts), a sale or other receipts-triggering event by such a corporation, absent careful tax planning for the event, could trigger substantial franchise tax liability.

Another of the 1999 Legislature's several tax relief provisions appears in new subchapter N of chapter 171 of the Tax Code. This new subchapter provides a credit for corporations that provide a day-care facility or that purchase child-care services for children of their employees on or after January 1, 2000. Qualifying expenditures by a corporation include payments to plan, construct, renovate, or maintain a day-care center that primarily provides care for children of employees of the corporation or of

183. See id. § 171.203(a).
184. For example, a company that holds a billion dollars of Texas real property, but has no receipts, would owe no franchise tax.
185. TEX. TAX CODE ANN. § 171.204(b) (Vernon Supp. 2000). For this reason (among others), partnerships and trusts will likely remain popular entities in Texas because those entities are not subject to the tax. As legislators have recognized in the past, the availability of nontaxable structures may result in some loss of tax revenue, but it also contributes to significant business growth in Texas.
186. See id. §§ 171.701-.707.
the corporation and one or more other entities that share the costs of establishing and maintaining the day-care center. 187 Other qualifying expenditures are purchases of child-care services that are actually provided to children of employees of the corporation at a day-care center or family home that is registered or listed with the Department of Protective and Regulatory Services. 188

A corporation must apply for the credit on a form to be prescribed by the comptroller with its report for the period for which the credit is claimed. 189 The credit is equal to the lesser of $50,000 or fifty percent of the corporation’s qualifying expenditures, but in no event may it exceed ninety percent of the tax due for the reporting period. 190 There is no carryover of unused credits, and assignment or any other transfer of the credit is prohibited unless all of the assets of the corporation are transferred in the same transaction. 191 The comptroller will be required to file a report detailing various information about use of the credit at the beginning of each regular session of the Legislature. 192

Several new research and development credits are also available to taxpayers. New subchapter O in chapter 171 of the Tax Code, for example, reflects the Legislature’s recognition of the interrelationship between research and development credits and the growth of businesses in Texas. 193 This subchapter provides a credit for corporations that make qualified research expenditures in Texas on or after January 1, 2000. This new exemption was part of one of the most heavily debated tax relief proposals of the 1999 session. Although draft legislation appeared in many different forms, the enacted provision provides that “base amount,” “basic research payment,” and “qualified research expense” have the same meanings as in Internal Revenue Code section 41, except that all qualifying expenses must be for research conducted within Texas. 194 The credit is equal to five percent of the sum of excess qualified research expenses over the base amount and basic research payments. 195 A corporation may instead elect to compute its credit for qualified research expenses in a manner consistent with the alternative incremental credit in Internal Revenue Code section 41(c)(4). 196 In either case, if the qualified research expenses are made in a strategic investment area, defined as a county designated by the comptroller that has below state average per capita income or is a federally designated urban enterprise community or urban enhanced enterprise community, then the qualified research ex-

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187. See id. §§ 171.703(a)(1), (b).
188. See id. § 171.703(a)(2).
189. See id. § 171.704.
190. See id. § 171.703(c).
191. See id. §§ 171.705-.706.
192. See id. § 171.707.
193. See id. §§ 171.721-.730.
194. See id. § 171.721(1).
195. See id. § 171.723(a).
196. See id. § 171.723(b).
penses and basic research payments are doubled.\textsuperscript{197}

The total credit taken in any reporting period may not exceed fifty percent of the amount of franchise tax due before any other applicable credits, and the aggregate credits for research expenses, job creation activities, and capital investments cannot exceed the amount of franchise tax due for the reporting period after any other applicable credits.\textsuperscript{198} Any unused credit may be carried forward for up to twenty consecutive reporting periods.\textsuperscript{199} The research and development credit will expire on December 31, 2009, but the expiration will not affect any unused carryforwards. As with the child-care credit, the comptroller will be required to file a report detailing various information about use of the credit at the beginning of each regular session of the Legislature.\textsuperscript{200} A corporation eligible for this credit will not be eligible for the job creation credit described below.\textsuperscript{201} There are temporary reduced credit rates that apply for reports originally due before January 1, 2002.

New subchapter P, added to chapter 171 of the Tax Code, provides a credit for corporations in certain lines of business that create new jobs in strategic investment areas on or after January 1, 2000.\textsuperscript{202} A corporation will be eligible for the credit if:

(1) it is a qualified business, meaning a business primarily engaged in “agricultural processing,” “central administrative offices,” “distribution,” “data processing,” “manufacturing,” “research and development,” or “warehousing” as those terms are defined in section 171.751;\textsuperscript{203}

(2) it creates a minimum of 10 “qualifying jobs” as that term is defined in section 171.751;\textsuperscript{204} and

(3) it pays an average weekly wage, in the year when the credit is claimed, of at least 110 percent of the county average weekly wage where the qualifying jobs are located.\textsuperscript{205}

The credit equals twenty-five percent of the total wages and salaries paid by the corporation for the qualifying jobs for the reporting period and must be taken in five equal installments over five consecutive reports.\textsuperscript{206} Like the other credit incentives, this one is limited. The total credit claimed may not exceed fifty percent of the amount of franchise tax

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\textsuperscript{197} See id. \S 171.723(d).

\textsuperscript{198} See id. \S 171.724.

\textsuperscript{199} See id. \S 171.725.

\textsuperscript{200} See id. \S 171.727. Several similar report-by-the-comptroller provisions were enacted in 1999, in response, to some degree, to critics arguing that the state should not retain tax credits without being able to demonstrate the value of such credits.

\textsuperscript{201} See id. \S 171.724(c).

\textsuperscript{202} See id. \S 171.725.

\textsuperscript{203} See id. \S 171.751. (Note that these definitions do not necessarily match definitions for these terms that appear elsewhere in the Tax Code; see e.g., “data processing” as defined for sales tax purposes by \textsc{Tex. Tax Code Ann.} \S 151.0035).

\textsuperscript{204} \textsc{Tex. Tax Code Ann.} \S 171.751 (Vernon Supp. 2000).

\textsuperscript{205} See id. \S 171.752(a)(3).

\textsuperscript{206} See id. \S\S 171.753-.754.
due before any other applicable credits, and the aggregate credits for re-
search expenses, job creation activities, and capital investments cannot
exceed the amount of franchise tax due for the reporting period after any
other applicable credits. 207 Any unused credit may be carried forward for
up to five consecutive reporting periods. 208 For each report in which a
credit is claimed, the corporation must file a statement in a form provided
by the comptroller and demonstrate its eligibility for the credit. 209

If, in one of the five years during which equal installments of the credit
are being taken, the number of the corporation’s full-time employees falls
below the number of full-time employees that the corporation had in the
year in which the corporation qualified for the credit, the credit will ex-
pire and the corporation will not be able to take any more installments of
the credit. 210 This limitation will not affect carryforwards of the credit
other than the installments at issue (for example, carryforwards based on
job creation in another strategic investment area will not be affected). 211

The corporation may not assign or otherwise transfer the credit unless
all of the assets of the corporation are transferred in the same transac-
tion. 212 The job creation credit will expire on December 31, 2009, but the
expiration will not affect any unused carryforwards. 213 As with the other
new credits, the comptroller will be required to file a report detailing va-
rious information about use of the credit at the beginning of each regular
session of the Legislature. 214 A corporation eligible for this credit will
not be eligible for the research and development credit described
above. 215

New subchapter Q of chapter 171 of the Tax Code provides a credit for
corporations in certain lines of business that make significant capital in-
vestments in strategic investment areas on or after January 1, 2000. 216
This provision, together with the R&D credit and the job creation credit,
comprise the core of the franchise tax package on which legislators
worked long and hard. To be eligible, a corporation must:

1. be a qualified business (same definition as for the job creation
   credit);
2. pay an average weekly wage that is at least 110 percent of the
   county average weekly wage at the location with respect to which
   the credit is claimed;
3. offer a group health benefit plan to all full-time employees at the
   location with respect to which the credit is claimed, for which the

207. See id. § 171.755.
208. See id. § 171.756.
209. See id. § 171.757(a).
210. See id. § 171.757(c).
211. See id. § 171.757(d).
212. See id. § 171.758.
214. See id. § 171.759.
215. See id. § 171.755(c).
216. See id. §§ 171.801-.811.
corporation pays at least eighty percent of the premiums for its employees; and

(4) make a minimum $500,000 capital investment in depreciable tangible personal property described in Internal Revenue Code section 1245(a) in a strategic investment area.\(^{217}\)

The amount of the credit equals seven and one-half percent of the qualified capital investment and must be taken in five equal installments over five consecutive reports.\(^{218}\) The total credit claimed may not exceed fifty percent of the amount of franchise tax due before any other applicable credits, and the aggregate credits for research expenses, job creation activities, and capital investments cannot exceed the amount of franchise tax due for the reporting period after any other applicable credits.\(^{219}\) Any unused credit may be carried forward for up to five consecutive reporting periods.\(^{220}\) For each report in which a credit is claimed, the corporation must file a statement in a form provided by the comptroller and demonstrate its eligibility for the credit.\(^{221}\)

If, in one of the five years during which equal installments of the credit are being taken, the corporation disposes of the qualified capital investment, moves the qualified capital investment out of the state, or fails to pay the required minimum average weekly wage, the credit will expire and the corporation will not be able to take any more installments of the credit for that qualified capital investment.\(^{222}\) This limitation will not affect carryforwards of the credit other than the installments at issue (for example, carryforwards based on a qualified capital investment in another strategic investment area will not be affected).\(^{223}\)

The corporation may not assign or otherwise transfer the credit unless all of the assets of the corporation are transferred in the same transaction.\(^{224}\) The capital investment credit will expire on December 31, 2009, but the expiration will not affect any unused carryforwards.\(^{225}\) As with the other new credits, the comptroller will be required to file a report detailing various information about use of the credit at the beginning of each regular session of the Legislature.\(^{226}\) A corporation eligible for this credit will not be eligible for the franchise tax reduction of taxable capital for investment in an enterprise zone authorized by section 171.1015.\(^{227}\)

Subchapter R, also added to chapter 171 of the Tax Code, provides a credit for corporations that make contributions to support before and after school programs conducted by school districts or certain non-profit

\(^{217}\) See id. § 171.802.

\(^{218}\) See id. §§ 171.803-804.

\(^{219}\) See id. § 171.805.

\(^{220}\) See id. § 171.806.

\(^{221}\) See id. § 171.807(a).

\(^{222}\) See id. § 171.807(c).

\(^{223}\) See id. § 171.807(d).

\(^{224}\) See id. § 171.808.


\(^{226}\) See id. § 171.809.

\(^{227}\) See id. § 171.805(c).
entities on or after January 1, 2000. To be eligible, the corporation must make qualifying expenditures for construction, supplies, or operation of a school-age child-care program operated by certain nonprofit organizations, accredited educational facilities, or counties and municipalities that adopt certain standards of care.

The amount of the credit is equal to thirty percent of qualifying expenditures but may not exceed more than fifty percent of the amount of net franchise tax due after application of other credits. A corporation must apply for the credit on a form to be prescribed by the comptroller with its report for the period for which the credit is claimed. There is no carryover of unused credits, and assignment or any other transfer of the credit is prohibited unless all of the assets of the corporation are transferred in the same transaction.

Several other legislative changes, for example, some "technical amendments," modified various provisions. Similar to the changes made in the sales tax context, the lengthy requirements for nonprofit hospitals to be exempt from the franchise tax were deleted and replaced. As revised, the statute provides that a nonprofit hospital will be exempt from franchise tax if it provides community benefits that include charity care and government-sponsored indigent health care as set forth in subchapter D, chapter 311 of the Health and Safety Code. It further specifies that this requirement may be satisfied by a donation of money to the Texas Healthy Kids Corporation established by chapter 109 of the Health and Safety Code if the money donated is to be used for a purpose stated in section 109.033(c) of the Health and Safety Code, and not more than ten percent of the charity care required under any provision of section 311.045 of the Health and Safety Code is satisfied by such a donation.

In one of several changes the Legislature labeled as a "clarification" of existing law, the Legislature added new subsection (i) to section 171.110 of the Tax Code to state a presumption that a person is an officer of a corporation (for purposes of the compensation add-back) if the person holds an office created by the board of directors or under the corporate charter or bylaws and "has legal authority to bind the corporation with third parties by executing contracts or other legal documents."

New subsection 171.110(j) provides that a corporation may rebut the presumption by showing that the person "does not participate or have authority to participate in significant policy making aspects of the corporate operations." To some extent, this amendment is designed to allow non-bank taxpayers to follow standards similar to those applicable to

\[228. \text{See id. §§ 171.831-.836.}\]
\[229. \text{See id. § 171.833.}\]
\[230. \text{See id. §§ 171.834(a), (c).}\]
\[231. \text{See TEX. TAX CODE ANN. § 171.835 (Vernon Supp. 2000).}\]
\[232. \text{See id. §§ 171.834(b), 171.836.}\]
\[233. \text{See id. § 109.033(c).}\]
\[234. \text{Id. § 171.110(i).}\]
\[235. \text{Id. § 171.110(j).}\]
banks, that is, to exclude from the compensation add-back certain personnel who are not "real" officers. Given the several pending cases, both judicial and administrative, on the issue of officer and director add-backs, it is unlikely that this new language will resolve the controversy.236

Once upon a time, banks were subject to a local property tax on bank stock rather than to franchise tax. In 1984, when the franchise tax was extended to banks, Texas law did not allow branch banking or interstate banking; at the time, the state adopted the franchise tax requirement that a bank source interest and dividends to the bank's "commercial domicile." With the arrival of interstate banking, however, the location of payor rule as applied to banks produced different results than it had in earlier days. For example, banks that had been Texas-based at one time but were no longer Texas-based were able to source their interest and dividends to their non-Texas commercial domicile. By contrast, banks with Texas headquarters continued to source their dividends and interest to Texas, even if those dividends were from out-of-state banking activity.

To put Texas banks and non-Texas banks on a more even basis—as well as to put banks under the same location of payor rules as other taxpayers—the Legislature modified several provisions of the Tax Code that deal with banking corporations so that that they, as well as savings and loan associations, are no longer subject to a different location of payor rule than other taxpayers; the banking industry supported these changes. To accomplish this goal, the Legislature repealed section 171.1031237 and amended several other sections.238

One of the few cases to discuss Tax Code section 171.1061,239 Decision 37,231,240 follows the comptroller's policy of construing unitary income broadly and finding that sales of intangible assets fall within the definition of unitary income. The facts of this case involve a corporation that, prior to merging into another corporation, sold certain proprietary technical information, patent rights, and copyrights to affiliated foreign corporations doing business entirely outside the United States. At issue was whether the corporation's gain from the sale of these intangibles was subject to apportionment; the taxpayer argued that because the sale of intangibles was unrelated to the corporation's in-Texas enterprise (development and sale of software), the intangibles could not be included in the apportioned tax base. The administrative law judge concluded, however, that the corporation's Texas business activity, which involved

236. These statutory changes track regulatory changes made in 1998. The regulatory changes, like the statutory changes, were described as clarifications; however, they appeared to reflect a change in comptroller interpretation of the original statutory language. Notwithstanding this change in verbiage, the comptroller's hearings attorneys appear to view the change as virtually without meaning as they continue to assert that virtually everyone (with the possible exception of investment bankers) who has the title of "officer" is an officer for purposes of the add-back.
238. See id. §§ 171.001, 171.106, 171.259, 171.260.
239. See id. § 171.1061.
the development and sale of software used worldwide by the oil and gas industry, "apparently related" to the income from the sale of proprietary technical information and other intangibles; therefore, the income qualified on its face as unitary income subject to apportionment "when viewed within the context of the 'unitary business principle,' set forth by the United States Supreme Court in Allied Signal, Inc." Indeed, although there continues to be scant interpretation of this section, what interpretation exists (including the directions on the franchise tax form) indicate, consistent with oral confirmation by comptroller representatives during the Survey period, that the comptroller treats sales of intangibles as producing unitary income. The disadvantage for taxpayers is that such income may not be removed from the apportionable tax base. The advantage for taxpayers, at least for those whose commercial domicile is Texas, is that the comptroller appears to recognize that such intangible income should not be allocated entirely to Texas.

Decision 38,005 involves a taxpayer who argued that including gross receipts from food sales for earned surplus purposes but not for taxable capital purposes was unconstitutional. However, the administrative law judge held in favor of the comptroller, noting that the Texas Tax Code explicitly provides in section 171.104 for an exclusion of receipts from food shipped from outside Texas, but the Tax Code does not include a corresponding exemption for the earned surplus.

III. PROPERTY TAX

A. APPLICATION OF THE TAX/EXEMPTIONS

The Austin Court of Appeals, in Circle C Child Development Center, Inc. v. Travis Central Appraisal District, held that a child development center did not qualify for the school exemption under section 11.21 of the Tax Code because the center was not used exclusively for educational functions. The child development center primarily serviced children age four and under, but also offered an after-school program for school-age children. Section 11.21 provides a property tax exemption for buildings and tangible personal property used exclusively for educational functions. The center asserted that it qualified for the exemption because its property is used as a school with age-appropriate education. Although the center was licensed as a "day care center," the center believed that

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241. Id. (quoting Allied Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992)).
242. These directions for Item 24 provide that "income is presumed to be unitary."
246. 981 S.W.2d 483 (Tex. App.—Austin 1998, no pet. h.).
248. See Circle C, 981 S.W.2d at 487.
the license should not be viewed as a negative factor in determining whether it qualified for the school exemption.\textsuperscript{250} The court concluded that the center did not qualify for the school exemption, reasoning that the center operated primarily as a child care facility and secondarily as an educational facility.\textsuperscript{251} In making this determination, the court relied on the fact that custodial care was a substantial component of the center’s programs, as is evidenced by its hours of operation that are much longer than normal school hours.\textsuperscript{252}

In \textit{Fullers Jewelry, Inc. v. Dallas Central Appraisal District},\textsuperscript{253} the Dallas Court of Appeals addressed the determination of market value of inventory. Under section 23.12(a) of the Tax Code,\textsuperscript{254} the market value of inventory for property tax purposes is the price for which the inventory would sell as a unit to a purchaser continuing the business.\textsuperscript{255} In \textit{Fullers Jewelry}, the trial court held that the market value of the inventory at issue equaled the value of the inventory as shown on Fullers’ books.\textsuperscript{256} Fullers contended that the trial court incorrectly interpreted section 23.12(a) to mean that, as a matter of law, book value equals market value. Fullers believed that its book value overstated the market value of inventory for property tax purposes, as its expert witness asserted that the market value of the inventory was forty-three percent of its cost.\textsuperscript{257} The court of appeals rejected Fullers’ contention, concluding that the trial court merely

\textsuperscript{250} See Circle C, 981 S.W.2d at 486.

\textsuperscript{251} See \textit{id.} The court noted that custodial care of pre-school age children is always substantial. Thus, the court implies that it would be difficult for any pre-school program that offers full-day service to qualify for the school exemption. See \textit{id.}

\textsuperscript{252} See \textit{id.} at 487. In another case addressing whether a taxpayer is entitled to a property tax exemption, the Beaumont Court of Appeals, in \textit{Texas VIA Elderly Housing, Inc. v. Montgomery County Appraisal District}, 990 S.W.2d 938 (Tex. App.—Beaumont 1999, no pet. h.), held that a nonprofit organization claiming a charitable exemption under section 11.18 of the Tax Code did not qualify for the exemption because its articles of incorporation did not direct that on dissolution its assets be transferred to the state or to another charitable organization qualifying under section 501(c)(3) of the Internal Revenue Code. See \textit{id.} at 940-41. Rather, the articles provided that on dissolution the entity’s assets could be transferred to any for-profit entity or individual so long as the conveyance is for fair value and the remaining assets are conveyed to a similar non-profit organization. See \textit{id.} at 939 n.2. This case emphasizes the strict construction applied to exemptions and that an exemption can be lost by failing to apply carefully the requirements of the exemption under section 11.18.

\textsuperscript{253} No. 05-96-01776-CV, 1999 WL 199341 (Tex. App.—Dallas Apr. 12, 1999, no pet. h.) (not designated for publication).

\textsuperscript{254} \textit{TEX. TAX CODE ANN.} § 23.12(a) (Vernon Supp. 2000).

\textsuperscript{255} See \textit{id.}

\textsuperscript{256} Fullers Jewelry, 1999 WL 199341, at *4.

\textsuperscript{257} See \textit{id.} Fullers also contended that the evidence was insufficient to support the trial court’s finding that the market value of Fullers’ inventory equaled its book value. See \textit{id.} In support of Fullers’ position, Fullers relied on: (i) testimony that Fullers did not measure the book value of its inventory under generally accepted accounting principles (GAAP), and (ii) the testimony of Fullers’ expert witness that jewelry inventories usually trade for forty to sixty percent of cost. See \textit{id.} at *2. In rejecting Fullers’ contention, the court appeared to give weight to the fact that the Dallas Central Appraisal District’s expert witnesses testified that the use of GAAP usually results in a conservative estimate of value and that Fullers’ expert relied on forced sales in determining that jewelry inventories usually sell for a large discount from cost. See \textit{id.} at *5.
made a finding of fact and not a legal conclusion that, in this case, the market value of Fullers' inventory equaled its book value.  

B. Procedure

Two interesting cases concerning the much litigated provisions of section 25.25(c) of the Tax Code were decided during the Annual Survey period. Section 25.25(c) provides for the late correction of appraisal rolls under three limited circumstances: (1) certain clerical errors, (2) multiple appraisals of a property, and (3) the inclusion of property that does not exist in the form or at the location described in the appraisal roll. In Second Avenue Properties, Ltd. v. Dallas Central Appraisal District, the taxpayer sought to correct the appraisal roll for unimproved property under section 25.25(c)(3) because of its belief that the property did not exist in the form described in the appraisal roll. Specifically, the taxpayer asserted that the rolls contained an inadequate description of the unimproved property because they did not list the property as having gasoline contamination, which rendered seventy-five percent of the property unbuildable. The court rejected the taxpayer's assertion, concluding that the physical description of the property as "land" was sufficient. The court reasoned that a description of "form" does not include a description of the property's use or factors influencing value.

In Handy Hardware Wholesale, Inc. v. Harris County Appraisal District, the Houston Court of Appeals for the First District of Texas considered what is probably a closer call than Second Avenue. The case in Handy Hardware concerned real property that included a warehouse. In 1995, the appraisal district discovered that the warehouse was over 200,000 square feet, rather than the approximately 20,000 square feet listed in the appraisal district's records. Thus, the appraisal district relied on section 25.25(c)(1) (clerical errors) in attempting to increase the subject property's value for the five previous years. The appraisal roll for the property was actually correct because it did not list the square footage of the warehouse; rather, the error was set forth in the appraisal

258. See id.
260. See id.
262. See id. at *1.
263. See id. at *2. Any other conclusion by the court in this case would enable virtually any property owner asserting that the property's condition affected its value (such as an improved property in poor condition) to make a rational argument that it qualified under section 25.25(c).
264. See id. at *2. Indeed, the Dallas Court of Appeals ruled in 1995 that the "form" of property means "its identification as a type of property . . ., such as real property, personal property or some other physical description of the property on the appraisal roll, other than its appraised value or its use." Dallas Cent. Appraisal Dist. v. G.T.E. Directories Corp., 905 S.W.2d 318, 321 (Tex. App.—Dallas 1995, writ denied).
265. 985 S.W.2d 618 (Tex. App.—Houston [1st Dist.] 1999, no pet.).
266. See id. at 618.
district's supporting records. Handy Hardware contended that section 25.25(c)(1) did not apply because of its belief that a "clerical error" must appear on the appraisal roll itself. Handy Hardware relied on three cases in this regard: (1) in G.T.E. Directories, the court of appeals held that under section 25.25(c)(3) the form of property was not listed incorrectly merely because the appraisal roll did not specify that a ground shift had rendered the building useless; (2) in Collin County Appraisal District v. Northeast Dallas Associates, the court of appeals held that section 25.25(c)(1) did not apply when the landowner improperly indicated that the property was owned by a foreigner and thus was not eligible for open-space land appraisal; and (3) in Matagorda County Appraisal District v. Conquest Exploration Co., the court of appeals held that a listing of improper mineral working interest percentages was not a clerical error as a matter of law.

The court considered G.T.E. Directories not to be controlling because it concerned section 25.25(c)(3) and not section 25.25(c)(1), and it considered Northeast Dallas Associates to be unpersuasive because that court interpreted the clerical error provision under section 25.25(c)(1) to apply only to errors by the appraisal district, not the taxpayer, and thus could have reached a different conclusion if the same error had been made by the appraisal district. Although the court believed that Conquest Exploration provided strong support for the taxpayer's argument in Handy Hardware, the court decided that the conclusion and reasoning in Comdisco, Inc. v. Tarrant County Appraisal District was more persuasive. In Comdisco, the taxpayer sought relief under section 25.25(c)(1) because it overpaid property taxes due to a mistaken rendition form that listed the value of the taxpayer's property at $13 million instead of $1.3 million. The court granted relief even though the "clerical error" was in a form that underlies the appraisal roll as opposed to an error in the appraisal roll itself. The court in Handy Hardware concluded that if the property owner can use section 25.25(c)(1) to correct an error that is not actually in the appraisal roll, so should the appraisal district.

The Attorney General, in Letter Opinion 98-083, addressed the

268. See Handy Hardware, 985 S.W.2d at 619.
269. See id.
270. See G.T.E. Directories, 905 S.W.2d at 319.
271. 855 S.W.2d 843 (Tex. App.—Dallas 1993, no writ).
272. See id. at 848.
273. 788 S.W.2d 687 (Tex. App.—Corpus Christi 1990, no writ).
274. See id. at 691-92.
276. See Handy Hardware, 985 S.W.2d at 620.
277. 927 S.W.2d 325 (Tex. App.—Fort Worth 1996, writ ref'd).
278. See Handy Hardware, 985 S.W.2d at 620.
279. See Comdisco, 927 S.W.2d at 326.
280. See id. at 327.
281. See Handy Hardware, 985 S.W.2d at 621.
amendment of section 33.52 of the Tax Code\textsuperscript{283} by three different bills during the 1997 session of the Texas Legislature.\textsuperscript{284} Prior to its amendment in 1999, section 33.52 addressed the use of foreclosure proceeds to pay current tax year property taxes. The three bills at issue each amended section 33.52 in different and meaningful ways. House Bills 2587 and 3306 permitted payment of the unpaid tax for the current year from foreclosure proceeds,\textsuperscript{285} but House Bill 2622 required payment from foreclosure proceeds of all taxes (in addition to current year’s taxes) accrued in the future until the time of the sale.\textsuperscript{286} House Bills 2587 and 3306 differed in that House Bill 3306 gave the judge discretion to determine whether foreclosure proceeds would be used to pay current year’s taxes, but House Bill 2587 gave the discretion to the taxing unit.\textsuperscript{287} The Attorney General stated that if amendments to the same statute are enacted during the same legislative session without referring to each other, the amendments must be harmonized with each other if possible.\textsuperscript{288} If harmonization is not possible, then the bill with the latest date of enactment prevails.\textsuperscript{289} In this case, House Bills 2587 and 2622 were each enacted on the same date, one day after House Bill 3306; however, House Bill 2622 was enacted later in the day than House Bill 2587.\textsuperscript{290}

In \textit{Atascosa County v. Atascosa County Appraisal District},\textsuperscript{291} the Texas Supreme Court held that an appraisal district is required to back-appraise and assess taxes on property erroneously exempted for the past five years, irrespective of the reason for the erroneous exemption.\textsuperscript{292} In \textit{Atascosa County}, the county and the school district challenged the property tax exemption granted to a hospital for years 1990 through 1995 and ultimately won.\textsuperscript{293} The county and the school district requested that the appraisal review board add the property’s value to the roll for each of these years, but the appraisal review board revoked the exemption for only

\textsuperscript{283} \textsc{Tex. Tax Code Ann.} § 33.52 (Vernon Supp. 2000).
\textsuperscript{289} See id.
\textsuperscript{290} See id. In 1999, the Texas Legislature went a completely different direction by amending section 33.52 to provide that foreclosure proceeds may be used to pay only taxes (and related penalties and interest) that are delinquent. See \textsc{Tex. Tax Code Ann.} § 33.52 (Vernon Supp. 2000).
\textsuperscript{291} 990 S.W.2d 255 (Tex. 1999).
\textsuperscript{292} See id. at 259.
\textsuperscript{293} See id. at 257.
year 1995. The court held that section 11.43(i) of the Tax Code mandates that the appraisal district back-appraise and assess erroneously exempted property. The appraisal district argued that section 11.43(i), which requires back-appraisal if the appraisal district “discovers” an erroneous exemption, was intended to apply only if the improper granting of the exemption was due to an inadvertent action. The supreme court rejected this argument, reasoning that the term “discover” has a meaning much broader than the one given to it by the appraisal district. Thus, the chief appraiser’s learning that the exemption had been improperly granted in the past (for whatever reason), even if the chief appraiser knew of the exemption when granted, was still a “discovery.”

In Harris County Appraisal District v. Coastal Liquids Transportation, L.P., the Houston Court of Appeals for the First District of Texas held that a foreign limited partnership that transacted business in Texas but had not registered in Texas could still defend the valuation of its property for property tax purposes and file suit to challenge the alleged overvaluation of its property. Under Texas law, a foreign limited partnership transacting business in Texas cannot maintain an action or suit in Texas until it has registered in Texas and paid the appropriate fees. However, a foreign limited partnership’s failure to register “does not impair ... defense by the foreign limited partnership of any action, suit or proceeding in any Texas court.” The court concluded that the limited partnership’s acts with respect to the property tax valuation of its Texas property were defensive in nature, and even though the partnership was the titular plaintiff, it was more in the essence of a defendant because filing suit was the only way to defend against what it believed was an excessive appraisal.

294. See id.
296. See Atascosa County, 990 S.W.2d at 257.
297. See id. at 258.
298. See id. at 258-59. The Texas Supreme Court also concluded that the county and school district had standing to sue the appraisal district to cause it to perform its duty to back-appraise and back-assess under sections 41.03(2) and (3) of the Tax Code, which allow a taxing unit to challenge an exclusion of property from the rolls or the granting of an exemption. See TEX. TAX CODE ANN. § 41.03 (Vernon Supp. 2000). The inability to challenge the appraisal district’s failure to back-assess would render taxing units’ challenges to exemptions much less meaningful and thus would be inconsistent with the intent of the statutes. See Atascosa County, 990 S.W.2d at 259-60.
299. See id. at 259. The court also concluded that the statute of limitations did not bar the taxing unit’s challenge to the appraisal district’s failure to back-assess because a back-assessment due to an improper exemption is a current year tax, and thus the statute of limitations requiring challenges to appraisal district decisions to be made in the tax year in question is not applicable. See id. at 260.
300. See Coastal Liquids, 7 S.W.3d at 187. The court also held that 1995 amendments to section 42.015 of the Tax Code enabling lessees to challenge property valuations in certain circumstances are not retroactive. See id.; TEX. TAX CODE ANN. § 42.015 (Vernon Supp. 2000).
C. Legislation

Over sixty property tax bills were passed during the 76th Texas Legislature.\(^{305}\) A vast majority of these bills addressed procedural matters. Although many of the procedural changes are meaningful, probably the most significant property tax legislation in 1999 addressed exemptions and special appraisals of property.

In November of 1999, voters approved an amendment to the Texas Constitution allowing the Texas Legislature to exempt from property tax any leased motor vehicles not held by the lessee primarily for the production of income.\(^{306}\) However, the Texas Legislature did not enact during 1999 any enabling legislation with respect to this exemption; thus, Texas residents leasing their automobiles must wait for the 2001 regular session before the Texas Legislature can consider actually adopting such an exemption. Voters also approved an amendment to the Texas Constitution that provides that a public charity is no longer required to be a “purely public charity” in order to be eligible for a property tax exemption as a public charity.\(^{307}\) As a result of this amendment, the Texas Legislature may exempt institutions that engage primarily in public functions but that also conduct auxiliary activities to support their charitable functions.\(^{308}\)

The Texas Legislature added a new special appraisal provision for certain timber land.\(^{309}\) The special appraisal applies to timber land on which timber harvesting is restricted: (1) for aesthetic or conservation purposes, (2) to provide benefits or protections for plant and certain animal wildlife, or (3) to protect water quality or preserve a waterway.\(^{310}\) In addition, land qualifies for special appraisal under this provision if the timber was harvested from the land in a year in which the land qualified for special appraisal or if the land has been regenerated for timber production to the degree of intensity generally accepted in the area for commercial timber land.\(^{311}\) Land qualifying under this special appraisal provision is valued at fifty percent of the appraised value that would have otherwise been determined.\(^{312}\) As with other special appraisal provisions, rollback taxes apply if the use changed.\(^{313}\) This legislation also added timber to the items that qualify for the farm products exemption under section 11.16.\(^{314}\)

The tax abatement statute was amended to provide that counties may enter into tax abatement agreements having different terms than tax

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306. See Tex. Const. art. VIII, §§ 1(d), (e) (amended 1999).
307. See id. art. VIII, § 2(a) (amended 1999).
308. See id.
310. See id. § 23.9802.
311. See id. § 23.9802(b).
312. See id. § 23.9803.
313. See id. § 23.9807.
314. See id. § 11.16(c).
abatement agreements entered into by municipalities.\textsuperscript{315} Prior to this amendment, abatement agreements entered into by a county could have different terms than the abatement agreement entered into by the relevant municipality only if the property were located in an enterprise zone.\textsuperscript{316} New section 311.0125 now allows a taxing unit other than a school district to enter into a tax abatement agreement with an owner of property within a tax increment financing (TIF) reinvestment zone if all taxing units participating in the TIF agree.\textsuperscript{317}

The Tax Code was also amended to exempt incomplete real property improvements owned by charitable organizations, youth development associations, religious organizations, and certain other exempt organizations.\textsuperscript{318} The incomplete improvements are exempt for up to three years if certain conditions are met.\textsuperscript{319} Section 11.18 was amended to expand the types of charitable functions that qualify under the charitable exemption by adding the provision of support to the elderly or handicapped to the list of qualifying activities.\textsuperscript{320} The homestead exemption for individuals age sixty-five and over now applies for the entire year that the person turns sixty-five instead of being pro rated as before.\textsuperscript{321} New section 11.183 was added to provide an exemption for associations providing assistance to ambulatory health care centers.\textsuperscript{322}

One of the noteworthy procedural property tax amendments also touches on exemptions. The Tax Code was amended to provide that the filing of certain property tax exemptions, such as religious organizations, private schools, charitable organizations, and veterans' organizations, will be accepted so long as the application is made within five years of the tax year in which the taxes for which the exemption is claimed were imposed.\textsuperscript{323} Prior law allowed for these late applications to be made within six years of the tax year in which taxes are imposed.\textsuperscript{324}

New section 21.055 of the Tax Code requires appraisal districts to allocate to Texas the portion of the value of an aircraft used for a business purpose that fairly reflects its use in Texas.\textsuperscript{325} This section presumes that this fair allocation should be done based on the number of take-offs in

\textsuperscript{315} See id. § 312.206(a). This amendment also effectively allows a county to grant a tax abatement even if the relevant municipality does not desire to grant a meaningful tax abatement, so long as the city is willing to grant a 0.1% abatement in the property tax for one year.


\textsuperscript{317} See Tex. Tax Code Ann. § 311.0125 (Vernon Supp. 2000). Prior to this amendment, in order to grant a tax abatement to property within the boundaries of a tax increment reinvestment zone, the zone would have to be amended to delete the abated property from the TIF zone.

\textsuperscript{318} See id. §§ 11.18, 11.19, 11.20(f), 11.21, 11.23.

\textsuperscript{319} See id. §§ 11.18, 11.19, 11.20(f), 11.21, 11.23.

\textsuperscript{320} See id. § 11.18(d).

\textsuperscript{321} See id.

\textsuperscript{322} See id. § 11.183.

\textsuperscript{323} See id. §§ 11.433, 11.434, 11.435, 11.438.


Texas as compared to the total number of take-offs. This provision does not apply to commercial aircraft.

In yet another attempt to address the ad valorem taxation of property lying within overlapping appraisal districts, section 6.025 was amended to provide that appraisal districts with properties that are appraised by more than one appraisal district must share information, eliminate differences in the information set forth in their appraisal records, and, to the extent practicable, coordinate their appraisal activities so as to encourage the districts' arriving at the same appraised value of the property. The provision requiring the averaging of appraised values if the appraisal districts disagreed on the value of overlapping property was repealed.

New section 23.24 provides that if real property is appraised by a method that takes into account the value of furniture, fixtures, and equipment located on such real property, then such tangible personal property is not subject to additional appraisal as personal property. Amended section 23.0101 now requires the appraisal district to use the most appropriate appraisal method in determining fair market value, not the method the appraisal district "considers" the most appropriate. New section 31.081 provides that the purchaser of a business is required to withhold from the purchase price sufficient money to pay the personal property taxes (and interest and penalties) of the business unless the seller has provided the purchaser with either a tax receipt showing all such taxes are paid or tax certificates showing that no such taxes are due. The purchaser can request a tax certificate or statement from the relevant taxing unit(s), and if they are not received within ten days from the request, the purchaser is relieved of liability under this section.

Section 33.07 was amended to provide that taxing units may impose a fifteen percent collection fee on any delinquent taxes. New section 33.43 removes current and later imposed taxes from a delinquent tax judgment. Section 34.01 was amended significantly to alter the rules on the sale of property at a tax foreclosure sale. Section 34.02 provides that the proceeds of a tax foreclosure sale shall be disbursed in the following order: (1) advertising costs and court costs; (2) fees due the officer conducting the sale; (3) taxes, penalties, and interest owed to the taxing units; (4) any other amounts owed to the taxing units; and (5) ex-

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327. See id. § 21.055(c).
328. See id. § 6.025.
331. See id. § 23.0101.
332. See id. § 31.081. This statute is a significant trap for the unwary purchaser. The statute also raises many unanswered questions, such as whether a merger is a purchase of a business or an interest in a business and whether a purchase of a partnership interest in a partnership that owns personal property is an indirect purchaser of a business.
333. See id. § 31.081(d).
334. See id. § 33.07.
335. See id. § 33.43.
336. See id. § 34.01.
cess amounts, if any, to the court clerk. Finally, section 34.04 was amended to reduce to two years (from seven years) the period during which a person can claim excess proceeds from a property tax foreclosure sale.338

IV. PROCEDURE AND LIABILITY

A. STATUTE OF LIMITATIONS

One of the most significant taxpayer victories of the Annual Survey period involves procedure and statutes of limitation. In Fleming Foods of Texas, Inc. v. Rylander,339 the Texas Supreme Court held that the Tax Code permits an indirect taxpayer to seek refunds of sales tax from the state.340 Although this case is a taxpayer victory, it may create a trap for the unwary (or even the wary). Taxpayers who had intended (as required by pre-Fleming comptroller interpretation) to rely on their vendor's statute of limitations may be surprised to discover that comptroller representatives have indicated that the vendor's statute of limitations is irrelevant post-Fleming, so that a taxpayer whose own statute of limitations has run may face challenges to a refund claim.341

The Austin Court of Appeals held that a letter from the comptroller notifying the taxpayer of the final results of an audit constituted a deficiency determination that triggered the six-month limitation period for filing a refund request. This case, Formosa Plastics Corp. of Texas, v. Sharp,342 illustrates the sometimes confusing complexity of Texas's statutes of limitations rules. Formosa had argued that because its refund request was filed less than a year after it overpaid its 1989 taxes, it should be entitled to a full refund of the payment with respect to its 1989 year. Unfortunately for Texas taxpayers, Texas law does not parallel the federal law in providing a period of time after which an overpayment is made in which a taxpayer can automatically seek a refund. Therefore, taxpayers who make payments with respect to past periods must be careful to ensure that they make the payments under protest, in connection with a request for redetermination, or in some other way that protects taxpayers from the statute of limitations.343

B. PERSONAL LIABILITY AND OTHER PITFALLS

Judicial cases continue to warn taxpayers about the dangers of failing to remit collected taxes. Two recent cases involving individual liability

337. See id. § 34.02.
338. See id. § 34.04.
339. 6 S.W.3d 278 (Tex. 1999).
340. See supra note 9 and accompanying text for a discussion of Fleming Foods.
341. Detrimental reliance arguments and the comptroller's newly enacted settlement authority may provide some relief to taxpayers facing this challenge.
342. 979 S.W.2d 410 (Tex. App.—Austin 1998, pet. denied).
343. Note that there are specific requirements for mailing payments under protest and requesting a redetermination hearing.
for unpaid sales taxes of a corporation should send a word of caution to corporate officers and directors. *Texas v. Mink*\(^{344}\) focused on a corporate taxpayer that failed to remit collected sales taxes. The state brought suit against Mink, an officer and director of the corporate taxpayer, under the trust fund provision.\(^{345}\) The trial court granted Mink's motion for summary judgment and denied the comptroller's. In the ensuing appeal, the appellate court reversed the trial court's judgment and rendered judgment for the state.\(^{346}\) In reaching its decision, the appellate court reviewed the trust fund provision in force during the audit period; the applicable section provided that a person who collects or receives taxes does so in trust for the state and is liable to the state for the full amount collected.\(^{347}\) The court held that the term "person" in the trust fund provision included a corporate taxpayer, and that any breach of this provision by a corporation is through the conduct of a corporate agent.\(^{348}\) Based on the undisputed facts that Mink was a signatory on the corporation's bank account in which the collected sales taxes were deposited and he controlled the financial affairs of the corporation, the court ruled that Mink caused the corporation to breach its fiduciary duty, making him liable for the taxes.\(^{349}\) The court specifically declined to rule on the issue of whether the status of a corporate officer or director could, by itself, be the basis of personal liability.\(^{350}\)

Subsequent to this decision, the Austin Court of Appeals heard another case with similar facts, *Marken Enterprises Inc. v. Texas*.\(^{351}\) The *Marken* trial court found the corporate taxpayer and the corporation's owner, who was president and director, jointly and severally liable for sales taxes that were collected but never remitted to the state. The comptroller argued that, because the owner had breached his fiduciary duty to the state and committed the tort of conversion by failing to remit the taxes, the owner was individually liable under the trust fund provision.\(^{352}\) Based on the *State v. Mink* reasoning,\(^{353}\) as well as on its own conclusion that using the tax funds for other purposes constitutes conversion, the court affirmed the trial court's ruling that the owner was jointly liable for the unremitted sales taxes based on his tortious conduct.\(^{354}\) Once again, however, the court noted that it was not basing the owner's liability on his

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\(^{344}\) 990 S.W.2d 779 (Tex. App.—Austin 1999, pet. denied).


\(^{346}\) See *Mink*, 990 S.W.2d at 784.

\(^{347}\) See TEX. TAX CODE ANN. § 111.015 (Vernon 1992).

\(^{348}\) See *Mink*, 990 S.W.2d at 783.

\(^{349}\) See *Mink*, 990 S.W.2d at 783-84.

\(^{350}\) See *Mink*, 990 S.W.2d at 784.

\(^{351}\) No. 03-98-00352-CV, 1999 WL 162809 (Tex. App.—Austin Mar. 25, 1999, no pet. h.).

\(^{352}\) See id. at *3.

\(^{353}\) See *Mink*, 990 S.W.2d 779.

\(^{354}\) See *Marken*, 1999 WL 162809 at *3.
status as a corporate officer.355

Several comptroller hearings provide a continuing warning to “successor” taxpayers who acquire businesses that the acquirer may step into the shoes of its target corporation for purposes of paying outstanding (even if not yet assessed) sales and franchise taxes. As during past Survey periods, several of the cases focus on how many assets the taxpayer must buy before it is considered a successor and is required to pay its “predecessor’s” tax liabilities.356 The tax division frequently takes an aggressive view of what comprises the purchase of a business, arguing in one case, for example, that the purchase of the Federal Communications Commission (FCC) license of a radio station, by itself, constitutes “the purchase of a business” for purposes of successor liability. Based on the facts of this case, Decision 37,326,357 the administrative law judge concluded that he did not need to address this assertion, because the taxpayer had purchased more than simply the FCC license. Although the case’s holding is a fact-based one, it illustrates that a purchase of far less than all the assets of a business may, in the comptroller’s view, give rise to successor liability.358

Another successor liability case, Decision 37,737,359 involved an unusual fact pattern that, the taxpayer argued unsuccessfully, did not constitute a purchase of assets sufficient to trigger successor liability. In this case, one vending company (“Buyer”) agreed to pay certain amounts owed by another vending company (“Seller”) as commissions to a university, in exchange for Seller’s thirteen snack machines located on the campus. The administrative law judge held that the Buyer’s assumption of Seller’s liability constituted a purchase of assets, so that Buyer became liable for Seller’s unpaid sales taxes. The message: assumption of debt can constitute consideration for sales tax purposes.

The tax division failed to prevail in its debt-assumption argument against the taxpayer in Decision 38,019.360 The taxpayer in this case had taken over the physical location of his brother’s business, taken over the debt associated with six trucks that had been used by his brother’s business, and had paid some of his brother’s business debts to certain vendors with whom both he and his brother did business. Based on these facts,

355. See id. at *3 n.4.
356. See Tex. Tax Code Ann. § 111.020 (Vernon 1992), which provides that when a person sells “the business or the stock of goods of the business” to a successor, the successor is to withhold an amount of the purchase price sufficient to pay the tax amounts due. A purchaser who fails to withhold the amount and who fails to follow procedures for requesting a no-tax-due statement from the comptroller, is liable for the amount of the predecessor’s taxes, to the extent of the purchase price. See also 34 Tex. Admin. Code § 3.7 (1999).
358. The taxpayer had argued that it purchased only some assets from the radio station at issue; it had also purchased assets from other stations to form its own new station with new call letters and a new format (religious talk format instead of modern rock music). See id.
the tax division asserted that the taxpayer was responsible for his brother's unpaid sales taxes. The judge, however, looked carefully enough at the facts to determine that the debt assumed was not that of the brother's business, but was instead that of the brothers' father. Similarly, the leasehold obligation the taxpayer assumed was the father's obligation, not the brother's. Moreover, there was no agreement for purchase, and no inventory or assets were acquired from the alleged predecessor company. Indeed, the only amount paid by the taxpayer for his brother's liabilities was the amount paid to the common vendors; however, as the judge noted, that payment was not consideration to the "predecessor company." Rather, the payment was simply a means of enabling the taxpayer to purchase items from vendors who refused to sell to a family member until the brother's business debts had been paid.

Several cases illustrate the repercussions of losing a corporate charter as a result of the failure to pay franchise taxes. In Yetiv v. Harris County Appraisal District, for example, the plaintiff was a sole shareholder of a corporation that had filed a property tax suit against the Houston County Appraisal District. The appraisal district successfully moved to dismiss the suit on the ground that the corporation forfeited its charter to pay franchise taxes. The court concluded that Yetiv could have maintained the suit on behalf of the corporation in a representative capacity, but because he failed to do so, the case should be dismissed. Administrative decisions further confirm that officers and directors may be held responsible for corporate debts where a corporation loses its charter to do business.

C. TAXPAYER RIGHTS—LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

Having campaigned on the promise that taxpayers deserve more rights in Texas, Comptroller Carole Keeton Rylander proposed, and the Texas Legislature adopted, numerous changes to the Tax Code that involve both procedure and interest payments by the state (finally!). The Texas Legislature finally remedied what taxpayers, especially taxpayers from outside Texas, have been complaining about for years: the
fact that Texas does not pay interest on amounts refunded to taxpayers pursuant to administrative claims for refund. Virtually all other states (i.e., all other states except Wyoming) pay interest to taxpayers on refunds. Texas's failure to pay interest was particularly unfair to taxpayers caught in the position of trying to decide whether to report their tax liability in accordance with a pending, unfavorable audit or to continue to report taxes in a manner consistent with the taxpayer's pre-audit methodology. Thus, in the past, the comptroller has essentially required a taxpayer to choose between a penalty (if the comptroller's position is ultimately upheld) or making an interest-free loan to the state (if the taxpayer's position is ultimately upheld). Faced with this Hobson's choice, taxpayers felt particularly prejudiced in view of the twelve percent interest rate charged by the state on delinquent sales and franchise taxes.

The new provisions not only add the taxpayer-interest section, but also change the interest rate, which is the same for both taxpayers and the State, to the prime rate (as published in the Wall Street Journal on the first working day of January each year) plus one. A refund for a report due before January 2000 does not accrue interest.

In the context of administrative proceedings, the comptroller has not had the authority to settle cases based on typical litigation considerations such as "hazards of litigation." Although the comptroller's authority to settle cases continues to be limited, new legislation opens the door a bit wider for the comptroller and taxpayers to settle cases when litigation costs are expected to be higher than the amount of taxes owed, allowing the comptroller to settle a claim for refund of tax, penalty, or interest if the "total costs of defending a denial of the claim, as conclusively determined by the comptroller, would exceed the total amount claimed." The expanded settlement authority provisions are effective at the end of August 1999, and the interest provisions are effective January 1, 2000. On the one hand, the comptroller's continuing concern that a settlement in one case may create adverse precedent in another case is likely to continue to make settlement of some cases more difficult than the facts or dollars involved would indicate. On the other hand, now that the comptroller has increased authority to settle, that authority may enable taxpayers and comptrollers to settle cases on a more frequent and faster basis than in the past.

Another set of provisions in the new legislation concerns tax auditing and collection procedures. This new legislation, contained in Senate Bill 1319, allows certain companies to conduct managed sales tax audits.
use percentage-based reporting to calculate sales tax liabilities, use sampling techniques to calculate refunds on overpaid taxes.

Another campaign promise by Comptroller Rylander had been to make the hearings process more accessible to taxpayers. Although the comptroller has offices around the state, hearings have traditionally been held in Austin. Hearings may now be held in other cities. While it remains to be seen how many sophisticated taxpayers will prefer venues outside of Austin, several hearings have already been held in other cities, indicating that at least some taxpayers prefer home to Austin.

D. A Word About Penalties

In many respects, the Annual Survey period marked great progress towards Comptroller Carole Keeton Rylander’s repeated promise that Texas taxpayers will not be treated as second-class citizens, and the comptroller and her staff are to be commended for this progress. As the comptroller continues to seek (and even more importantly, consider seriously) recommendations from various committees, including the Taxpayer Advisory Group and the Electronic Technology Advisory Group, the comptroller will be asked to analyze more carefully the instances in which penalty is imposed in sales and franchise tax audits. The aggressive nature with which certain auditors and hearings attorneys pursue penalties is evidenced by the number of cases in which penalty appears to be imposed simply because the taxpayer is a large, sophisticated entity, as well as by the number of cases in which taxpayers with seemingly good reporting history must resort to an administrative hearing in order to have penalty waived.

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371. See id. § 151.4171.
372. See id. § 151.4330.
373. The Legislature made several other changes to various provisions of the Tax Code that deal with procedure. For example, “tax” was defined in new section 101.003(13) as “a tax, fee, assessment, charge, or other amount that the comptroller is authorized to administer;” the record maintenance requirement was amended to clarify that it prevails over any other conflicting state taxation provision, including section 191.024(b), which was formerly excluded; new section 111.0041(b); and new section 111.023(b) which permits an officer, director, or employee of the taxpayer whose duties include administering the taxpayer’s rights and responsibilities with the comptroller to sign a written authorization for a representative of the taxpayer to submit a report or other document. New § 111.023(c) permits the comptroller to impose a similar requirement for assignment of a claim for refund.
374. Actually, an entire paragraph.
375. See 34 TEX. ADMIN. CODE § 3.5(c)(4) (listing “size and sophistication of the taxpayer” as one (but only one) of several factors to be taken into account in determining whether penalties should be waived).
376. See, e.g., Tex. Comp. Pub. Acc’ts, Hearing No. 36,680 (Jan. 15, 1999) (waiving penalty for taxpayer who was 98.69% accurate when reporting and remitting sales taxes on sales made during the audit period); Tex. Comp. Pub. Acc’ts, Hearing 37,743 (Jan. 27, 1999) (penalty waived for taxpayer whose overall reporting and remitting on sales and purchases was 99.88% accurate). In both of these cases, the tax division relied in part on reporting error rates with respect to only a portion of the audit (e.g., purchases, rather than overall sales tax reported). Perhaps future cases and administrative guidance will give credence to the very reasonable approaches taken by the administrative law judges in these cases, indicating that the overall error rate should be taken into account.
Texas legislators and other policy makers continue to work during this interim period to address issues raised by recent legislation and to consider additional legislative proposals for the 2001 session. In some respects, the issues are familiar (how to balance local jurisdictions' needs with tax incentives). In other areas, particularly with respect to electronic commerce, the issue may be familiar, but the context has changed dramatically in only a handful of years. As working on the comptroller's electronic commerce and technology advisory group has made clear, it's a changing world, and Texas tax laws must (and will) change too.