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Taxation

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I. Administrative Procedure and Texas Register Act

Changes in the area of state taxation have arisen due to the enactment of article 6252-13a, the Administrative Procedure and Texas Register Act. This Act became effective on January 1, 1976, and applies to all agencies having statewide jurisdiction which make rules or determine contested cases. The purpose of the Act is:

[to] afford minimum standards of uniform practice and procedure for state agencies, to provide for public participation in the rule-making process, to provide adequate and proper public notice of proposed agency rules and agency actions through publication of a state register, and to restate the law of judicial review of agency action.

Since the Texas Comptroller's Office and Alcoholic Beverage Commission have rule-making powers and statewide authority, they are within the definition of agency and are covered by the provisions of the Act. The Texas Employment Commission is financed by federal funds and, therefore, takes the position that it is exempt from the application of the Act.

A. Rules

The Administrative Procedure and Texas Register Act defines an agency rule as including both substantive and procedural rules but not as encompassing statements concerning only the internal management or organization of an agency. An agency must index and make its rules available for public inspection, and if it does not, the rules cannot be invoked by the agency except against persons who have actual knowledge of the rules. An agency, therefore, has an affirmative duty to promulgate, file, and index its rules. If a statute is clear, it is the opinion of this author that no rule has to be promulgated. The secretary of state's office has set up a division to handle the filing of rules under article 6252-13a.

By instruction of the secretary of state's office those rules of an agency covered by the act which were in effect prior to January 1, 1976, were to be

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2. Id. art 6252-13a(3)(1) defines "Agency" to mean:
any state board, commission, department or officer having statewide jurisdiction, other than an agency wholly financed by federal funds, the legislature, the courts, the Industrial Accident Board, and institutions of higher education, that makes rules or determines contested cases.

4. Id. art. 6252-13a(7).
5. Id. art. 6252-13a(4)(b).
filed with that office no later than December 31, 1975. Any new rules filed by an agency with the secretary of state after January 1, 1976, are subject to the notice and hearing provisions of article 6252-13a. In accordance with article 6252-13a the comptroller’s office has filed rules for the taxes which it administers and procedural rules for its administrative hearings and rule-making procedures.

B. Contested Cases

Under the Administrative Procedure and Texas Register Act a contested case is defined as “a proceeding, including but not restricted to ratemaking and licensing, in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing.” In a contested case all parties must be offered an opportunity for a hearing and must be given not less than ten days’ notice. The comptroller’s office considers contested cases to have a broad meaning and grants hearings on refund, redetermination request, and petitions for special reporting methods under article 12.02.

Article 6252-13a specifies definite procedures and means for conducting contested cases. The notice of hearing must comport with specific requirements. Matters may be stipulated to by the agency and the party requesting the hearing, and depositions and subpoenas are now available for discovery purposes. Prior to the Act the comptroller did not have the power to utilize subpoenas except in motor fuel tax and special fuel tax proceedings.

6. Id. arts. 6252-13a(5), -13a(6).
7. Id.
8. The comptroller cites its tax rules in the following manner:
   Comptroller’s Sales Tax Ruling .001
   Comptroller’s Inheritance Tax Ruling .002
   Comptroller’s Ad Valorem Tax Ruling .003
   Comptroller’s Business Tax Ruling .004

The comptroller’s administrative hearing rules are cited as: Comptroller’s Legal Services Ruling .005. The rulings can also be found in the following looseleaf services: TEX. STATE TAX REP. (CCH); STATE & LOCAL TAXES (P-H); [TEXAS] INH. EST. & GIFT TAX REP. (CCH).

9. The comptroller’s rules on its hearings and rules procedures are available in a booklet entitled “Rules of Practice and Procedure,” copies of which may be obtained from the Comptroller’s Legal Services Division.
11. Id. art 6252-13a(3)(2) (Vernon Supp. 1976). See also PEN. CODE ANN. art. 66-12 (Vernon 1975) (cancellation or suspension of permits by Alcoholic Beverage Commission requires “notice and hearing”).
13. Comptroller’s Legal Services Ruling .001(5).
15. TEX. REV. CIV. STAT. ANN. art. 6252-13a(13)(b) (Vernon Supp. 1976-77) provides:
   The notice must include:
   (1) a statement of time, place and nature of the hearing;
   (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
   (3) a reference to the particular sections of the statute and rules involved; and
   (4) a short statement of the matters asserted.
See TEX. ATT’Y GEN. OP. NO. H-858 (1976) holding that the Railroad Commission is required to comply with the notice and hearing procedures of the Administrative Procedure Act in order to issue a formal declaratory ruling which requires an interpretation of a previously adopted commission rule.
After a contested case is closed a decision must be issued within sixty days.\textsuperscript{18} In a recent case a rule promulgated by the savings and loan commissioner providing that a decision should be issued within forty-five days after a hearing was closed was held not to be mandatory.\textsuperscript{19} The court did not speak directly to the sixty-day period in article 6252-13a. It appears, however, that the rule announced by the supreme court may likewise apply to it. Decisions in contested cases must state fact findings separately from legal conclusions.\textsuperscript{20} The comptroller's office has changed its decision format to comply with this requirement.

A motion for rehearing is a prerequisite for appeal in a contested case and must be filed within fifteen days from the issuance of a decision. If a motion is not filed within that period the decision becomes final at its expiration.\textsuperscript{21} In the case of a sales and use tax redetermination hearing\textsuperscript{22} the decision according to the comptroller's construction of article 6252-13a would be final after fifteen days had elapsed with no rehearing motion having been filed. The tax liability would then be subject to an additional ten percent penalty if not paid within twenty days\textsuperscript{23} from the expiration of the fifteen-day period.

The denial of a motion for rehearing sets the appeal process in motion. The question of the manner of perfecting appeal is an open question in the area of state taxation. The attorney general's office has filed jurisdictional pleas or special exceptions to appeals which were filed directly from orders of the comptroller and not in accordance with the provisions of articles 1.05 and 20.10.\textsuperscript{24} The uncertainty in this area has not yet reached the appellate stage. One special exception was, however, recently sustained by a Travis County district court.\textsuperscript{25} If the attorney general is successful on appeal in requiring that the liability be paid prior to filing suit, the nature of the appeal for fact questions would arguably no longer be in question since the suit would not be

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  \item \textsuperscript{18} TEX. REV. CIV. STAT. ANN. art. 6252-13a(16)(d) (Vernon Supp. 1976-77).
  \item \textsuperscript{19} Lewis v. Nacogdoches Sav. & Loan Ass'n, 540 S.W. 2d 313 (Tex. 1976). See also companion case, Lewis v. Jacksonville Bldg. & Loan, 540 S.W. 2d 307 (Tex. 1976).
  \item \textsuperscript{20} TEX. REV. CIV. STAT. ANN. art. 6252-13a(16)(b) (Vernon Supp. 1976-77). Comptroller's Legal Services Ruling .037 provides:

All final decisions and orders of the agency shall be in writing or stated in the record and when in writing shall be signed by the Comptroller. A final decision shall include findings of fact and conclusions of law, separately stated. Any party, within 10 days after the conclusion of the hearing, may submit proposed findings of fact. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with the agency rules, a party has submitted proposed findings of fact, the decision shall include a ruling on each proposed finding. Parties shall be notified either personally or by mail of any decision or order. On written request, a copy of the decision or order shall be delivered or mailed to any party and to the party's representative of record.

See Guinn, Post Hearing State, State Bar of Texas, Workshop Guide for Institute on Administrative Law and Procedure (March 19, 1976) (cassette on file at Underwood Law Library, Southern Methodist University School of Law, Dallas, Texas, in Texas Administrative Law and Procedure, Professional Development Program (1976)).


22. TEX. TAX.-GEN. ANN. art. 20.08 (Vernon 1969).

23. Id. art. 20.08(E).

24. Id. arts. 1.05, 20.10. See also TEX. TAX. ANN. art. 7057b (Vernon Supp. 1976-77).

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an appeal from the administrative decision but would be tried de novo based on those grounds raised in the protest letter or refund request. It will undoubtedly take further litigation to clarify this question.

C. Rule Making

An agency is required by the Administrative Procedure and Texas Register Act to hold an open meeting on any substantive rule promulgated after January 1, 1976, and on any amendment to or repeal of any substantive rule when the meeting is requested by at least twenty-five persons, by a governmental subdivision or agency, or by an association having at least twenty-five members. The procedure for requesting a hearing from the comptroller is specified by ruling.


27. See generally Hamilton, The Administrative Procedure and Texas Register Act; Contested Cases and Judicial Review, 54 TEXAS L. REV. 285 (1976). In the Report of Committee of Administrative Practice, 10 STATE BAR OF TEXAS, NEWSLETTER OF THE SECTION OF TAXATION, No. 1, Oct. 1976, at 11-12, it is stated:

The point to remember is the Attorney General's Office has taken a firm position that the money must be paid in prior to judicial review and that the only judicial review authorized is pursuant to Article 1.05 the 'protest statute.' Assuming that the Attorney General's position is correct, i.e., that the protest statute is the 'method provided by law for review' of tax cases, then it would seem to logically follow that the protest statute provides for trial de novo—it certainly has been so applied by the District Courts of Travis County in the past. The administrative action, to-wit, the Comptroller's Certification of tax due has previously, by statute, given rise to a prima facie case that the tax is due and the burden is on the taxpayer to show in what manner the Comptroller has unlawfully demanded the payment of tax. However, the taxpayer has been able to show this in the past through the evidence presented at the trial of the case on the merits and the previous administrative action is only part of the relevant evidence considered. On the other hand, a strong case can be made that Article 1.05 does not specifically refer to trial de novo. Therefore, the law being silent as to the type of judicial review authorized, the case will be tried under the substantial evidence rule. Insofar as the Committee on Administrative Practices is aware, the case will be reviewed as a case 'other than by trial de novo.'

28. Comptroller's Legal Services Ruling .044 provides:

Sec. 4. Prior to the adoption, repeal of, or amendment to any rule, the agency shall afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing.

In the case of substantive rules, opportunity for public hearing shall be granted if requested by at least 25 persons, by a governmental subdivision or agency, or by an association having at least 25 members. The petition for a public hearing by the parties, who can request such a hearing, should be in writing addressed to the Legal Services Division and should state the grounds asserted for the amendment to, repeal, or promulgation of a rule. The agency will notify the petitioning party of the date, time, and place of public hearing. The agency in giving notice will abide by the requirements of the Open Meetings Act. A Hearings Examiner of the Legal Services Division shall preside over any public hearing on such rule and will prepare a proposed recommendation on such proposed amendment, repeal, or promulgation of such rule. The agency shall consider fully all written and oral submissions concerning the proposed rule. All oral submissions should be made at the public hearing. All written submissions should be made to the Legal Services Division no later than 15 days after the public hearing. On adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within 30 days after adoption, shall issue a concise statement of the principal reasons for and against its adoption, incorporating in the statement its reasons for overruling the considerations urged against its adoption. . . .
II. Franchise Taxes

A. Cases

The frequent question of how to determine what receipts are receipts from business done in Texas has again been raised. In *Bullock v. General Dynamics Corp.*, the court was faced with determining whether receipts from a corporation’s operation on a federal enclave located in Texas should be considered part of the corporation’s Texas receipts. General Dynamics had been engaged primarily in the manufacture and sale of defense equipment, and during the years in question its operations were performed in several Texas cities as well as within a federal enclave located in Tarrant County, Texas.

The Buck Act allows states to impose certain taxes, including “income taxes,” on business conducted within federal enclaves. The Act defines “income taxes” to mean “any tax levied on, with respect to, or measured by, net income, gross income or gross receipts.” Relying heavily on a previous supreme court decision, the court determined that the Texas franchise tax was an “income tax” within the meaning of the Buck Act because it varies in direct proportion to changes in gross income or gross receipts. If the Texas Supreme Court affirms the court of civil appeals decision, the *General*
Dynamics case would have a decided effect on the franchise tax liability of government contractors operating within the State of Texas.

Under a rather confusing state of facts the court in Bullock v. Electro-Science Investors, Inc. refused relief to the taxpayer who had brought a protest suit to recover $6,779.64. In 1968 Electro-Science had sought recovery of $97,820.86 which represented franchise taxes paid under protest. Three cases were consolidated in the litigation, but prior to the consolidation Electro-Science moved in Cause No. 127,416 to sever two issues pertaining to two different tax periods. These issues were (1) in one period the comptroller had employed a wrong method of computation resulting in an excess payment of $9,842.79, and (2) in the other period an overpayment had been made in the sum of $6,743.70. The trial court ordered the severance of these issues into Cause No. 127,416A. In the other causes judgment was entered on appeal against the plaintiffs.

In Cause No. 127,416A motions for summary judgment were filed by both parties. The court granted the motion of Electro-Science and awarded judgment for $9,842.79. The $6,743.70 sum was not covered by this judgment. The judgment for $9,842.79 was affirmed on appeal. Electro-Science brought a separate action to recover the amount of $6,779.64 and the trial court awarded judgment for $6,743.70, which was the sum ordered severed in 1968. It appears that the entire amount of money paid under protest by Electro-Science was $107,663.65. The sum of $9,842.79 recovered in the second case was precisely the difference between $107,663.65 and the amount of $97,820.86 as to which the taxpayer had been denied recovery. The state contended that the $6,743.70 amount was not separated from the funds in the main suit and remained in the judgment for $97,820.86. The state argued that since the $6,743.70 was included in the earlier judgment it had been transferred out of suspense into general revenue and, therefore, was not recoverable.

The court of civil appeals held that Electro-Science had shown no authority under which it could bring the suit and decided that since the suit was not filed within ninety days from the date on which the taxes were paid under protest the trial court did not have jurisdiction to hear the case. The case would also seem to be sound authority for the position that a suit cannot be instituted to recover any moneys which are not paid under protest at the time of payment.

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34. 533 S.W.2d 892 (Tex. Civ. App.—Austin 1976, no writ).
38. 533 S.W.2d at 895. The court cited as precedent Stetler v. Calvert, 456 S.W.2d 202 (Tex. Civ. App.—Austin 1970, no writ). See Mobile Homes of America, Inc. v. Easy Living, Inc., 527 S.W.2d 847 (Tex. Civ. App.—Fort Worth 1975, no writ) (corporation owing franchise taxes not able to sue to recover funds which might be used to pay the taxes).
B. Miscellaneous Franchise Tax Matters

An opinion of the Texas attorney general has caused a change in a comptroller’s ruling. The prior policy of the comptroller had been to treat the receipts from the sale of oil or gas by a producer to an interstate pipeline company when title and possession passed in Texas as not constituting receipts from Texas business. The ruling, which was issued pursuant to the attorney general opinion, is being applied both prospectively and retroactively by the comptroller. In the opinion the attorney general determined that the comptroller’s prior construction was incorrect. This author notes that it can certainly be argued that the comptroller should not be bound by his prior policy since it was not legally authorized by the statute, as opposed to a situation where the construction was longstanding and the statute was ambiguous. A number of cases have been filed on this question but to date have not been tried.

A number of administrative decisions have been issued regarding the franchise tax. These decisions dealt with the use of the short form, the equity method of accounting, profits from inter-company sales, and various other subjects.

39. TEX. ATT’Y GEN. OP. NO. H-640 (1975). This opinion dealt with the computation of franchise tax for Texas gas producers and the effect of sales from such producers to interstate pipeline companies. Under the facts presented, title to and possession of the products purchased passed to the interstate pipelines within Texas. The attorney general concluded the sales were intrastate sales and “business done in Texas” for purposes of computing the producer-vendor’s franchise taxes both before and after the 1969 amendment to TEX. TAX.-GEN. ANN. art. 12.02 (Vernon 1969).

40. Comptroller’s Business Tax Ruling .013(4)(a) now states: “The sale of oil or gas by a Texas producer to an interstate pipeline company, with delivery and passage of title and possession in Texas, results in receipts from business done in Texas.”


43. Summaries of Comptroller’s Administrative Decisions are published in TEXAS LAWYERS’ WEEKLY DIGEST; TEXAS LEGISLATIVE SERVICE; NEWSLETTER OF THE SECTION OF TAXATION, STATE BAR OF TEXAS; and the TEXAS REGISTER. The summaries of the decisions can be found in STATE & LOCAL TAXES (P-H). Copies of the underlying decisions can also be obtained without charge by contacting the Legal Services Division, P.O. Box 13528, Austin, Texas 78711.

44. Comptroller’s Administrative Decision No. 6994 (1976) decided that once a corporation makes an election to file on the optional short form basis, it can not after the June 15th filing date amend its return and file under a long form. See Comptroller’s Business Tax Ruling .002(2).

45. Since Comptroller’s Franchise Tax Ruling 80-0.06 required a corporation to file its franchise tax returns in conformity with its books, a corporation which made annual adjustments on its books reflecting use of the “equity method” of accounting was required to file its franchise tax report based on the use of this method, thereby including in its surplus the amount which it annually added to its “Investment Subsidies” account. Comptroller’s Administrative Decision Nos. 6961, 7178 (1976). See also Comptroller’s Business Tax Ruling .015(2)(d). Pursuant to these and other similar decisions, suits have been filed contesting this interpretation. See Southwestern Inv. Co. v. Bullock, Civ. No. 250,198, Dist. Ct. of Travis County, 53d Judicial Dist. of Texas, July 20, 1976; Teledyne, Inc. v. Bullock, Civ. No. 245,873, Dist. Ct. of Travis County, 53d Judicial Dist. of Texas, Mar. 31, 1976.

46. Comptroller’s Administrative Decision No. 7184 (1976) held that a corporation must include profits from intercompany sales in its surplus for franchise tax purposes and cannot defer such profits merely because its sales are made to controlled or subsidiary corporations. See Comptroller’s Business Tax Ruling .013(2)(q).

47. In comptroller’s Administrative Decision No. 7422 (1976), it was decided that debentures transferred in consideration for the purchase of property represent taxable debt for franchise tax purposes even though the transaction is a tax free exchange made in accordance with I.R.C. § 351.
III. SALES AND USE TAXES

The distinction between service versus sale was the major controversy in a recent case in the sales and use tax arena. In *Statistical Tabulating Corp. v. Bullock* 48 the keypunching of computer cards was determined to be a service 49 and not subject to the Texas Limited Sales, Excise and Use Tax Act. Statistical Tabulating furnished the cards and imprinted data on them with information furnished by its customers. The crux of the court’s opinion was as follows: “it may not be assumed or implied that the Legislature intended also to tax intangible data as materials furnished by a customer wanting the data transferred to cards suitable for computer calculations or recording. The Legislature made it clear that the tax should fall only on ‘tangible personal property.’” 50

It appears that the court’s concern was from the viewpoint of what the customers were furnishing Statistical Tabulating rather than what Statistical Tabulating was furnishing its customers. Since the Texas Supreme Court has granted a writ of error on this case the comptroller has another opportunity to argue the taxability of the transactions. The supreme court might well differ with the court of civil appeals decision, or at least might clarify the question of the nature of the item being transferred by Statistical Tabulating. 51 The taxation of service related activities has not been looked upon with favor by Texas courts. 52

Comptroller’s Administrative Decision No. 7039 (1976) held that all corporations who compute their franchise tax by using the assessed value of their property for county ad valorem purposes must include all the property which they own on the last day of their fiscal year. See TEX. ATT’Y GEN. OP. NO. S-196 (1956) (regarding first year corporation filing a franchise tax return); Comptroller’s Business Tax Ruling .011(3).

Receipts from service fees and transfer charges on loan contracts are receipts from the rendition of services for franchise tax purposes and are allocable to Texas under TEX. TAX.-GEN. ANN. art. 12.02(1)(b)(ii) (Vernon 1969) from Texas gross receipts for franchise tax purposes since such sales did not qualify for exemption under id. art. 20.04(M) as sales by a licensed practitioner. Comptroller’s Administrative Decision No. 7003 (1976); Comptroller’s Business Tax Ruling .013(3)(f).

Sales of insulin, drugs, and medicines by a manufacturer who purchases these items out-of-state under a resale certificate and sells them in Texas to hospitals, wholesalers, and retailers were held not to be excludable under TEX. TAX.-GEN. ANN. art. 12.02(1)(c) (Vernon 1969) from Texas gross receipts for franchise tax purposes since such sales did not qualify for exemption under id. art. 20.04(M) as sales by a licensed practitioner. Comptroller’s Administrative Decision No. 7003 (1976); Comptroller’s Administrative Decision No. 6087 (1975), the punching of information onto a card for computer use was held to constitute the processing or imprinting of tangible personal property within the meaning of TEX. TAX.-GEN. ANN. art. 20.01(K)(2)(a) (Vernon 1969).

Comptroller’s Sales Tax Ruling .028—Computers, Services and Software. The engraving of trophies has also been held to be processing. Comptroller’s Administrative Decision No. 6833 (1976).

50. See also Calvert v. Julian Gold, Inc. 479 S.W.2d 328 (Tex. Civ. App.—Austin 1972, writ ref’d n.r.e.) (charges for altering women’s dresses were held to be charges for remodeling and excluded from the definition of receipts and sales price); TEX. TAX.-GEN. ANN. arts. 20.01(D)(2)(g), (L)(3)(g) (Vernon 1969). See Ball, *What is a Sale for Sales Tax Purposes?*, 9 VAND. L. REV. 227 (1956).
The comptroller's purchase invoice method of auditing grocery stores was upheld in the refund suit of \textit{Baker v. Bullock}. In auditing grocery stores the comptroller employs an optional reporting method provided for retail grocers. This procedure involves determining the grocer's tax liability by the calculation of a fraction. The fraction consists of the total of the taxpayer's purchases of tax exempt merchandise as the numerator and his total merchandise purchases as the denominator. His gross sales are then multiplied by this fraction and the result is subtracted from gross sales to obtain taxable sales. The current tax rate is applied to the taxable sales to obtain the tax due. The comptroller uses this method of auditing to verify a grocer's reported liability and does not rely on the grocer's cash register tapes. In the \textit{Baker} case the taxpayer did not present any records to substantiate his contentions regarding, among other things, failure to consider mark-up differences and transfers between stores.

The court ruled that the taxpayer must show not only that he overpaid his taxes, but the exact amount of overpayment. The effect of the \textit{Baker} case is to require retail grocers to have evidence other than cash register tapes to refute a comptroller's audit, such as actual records reflecting their mark-up on various items, their beginning and ending purchases, and sales of loss leaders.

Numerous administrative decisions have been issued by the comptroller involving sales and use tax. These decisions cover agreements to pay taxes, \textit{use} of direct permits, and \textit{accrual of interest during redetermination}. Two important administrative decisions involve the storage and use exclusion and the definition of place of business for local sales and use tax purposes.
recent decision held that a purchaser who both purchases and takes delivery of tangible personal property within Texas and who then removes the property from Texas for use solely outside of Texas is subject to sales and use tax. The comptroller’s hearings examiner determined that article 20.01(O) did not exempt such a purchase. To gain exemption the item must be purchased outside of Texas, stored in Texas, and then removed from Texas for use.

In a local tax jurisdiction where the local tax is applied to sales from a retailer’s place of business, a “place of business” is defined by a comptroller’s ruling as not including a warehouse or storage location from which sales are not regularly made. In accordance with this ruling the examiner decided that a warehouse where goods were merely stored and inspected and no orders were taken was not a “place of business.”

The comptroller has also decided that a foreign corporation operating in Texas through a representative, who distributed catalogs, order forms, and price lists to Texas customers, but who did not take orders, was responsible for payment of tax on all its sales to its Texas customers as a “retailer engaged in business in this State” within the meaning of article 20.031(B)(2). The comptroller determined that the representative was creating a demand for the taxpayer’s product and came within the statutory language of “for the purpose of selling” in article 20.031(B)(2). This decision further minimized the amount of contact necessary to make a person subject to taxation by a state. Other decisions in the sales and use tax field involve unjust enrichment, the definition of “sales price,” and general taxability questions.

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58. Comptroller’s Administrative Decision No. 6811 (1976).
59. TEX. TAX.-GEN. ANN. art. 20.01(O) (Vernon 1969) provides:
   Storage and Use Exclusion. ‘Storage’ and ‘Use’ do not include the keeping, retaining or exercising of any right or power over tangible personal property for the purpose of subsequently transporting it outside the State for use thereafter solely outside the State, or for the purpose of being processed, fabricated or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the State, and thereafter used solely outside the State.
60. Id. art. 20.04(G)(3)(b) (1969).
61. Comptroller’s Local Taxes Ruling .004(2).
62. Comptroller’s Administrative Decision No. 6689 (1976). It was further held in this decision that if tangible personal property is sold by salesmen employed at certain sales offices in Texas and delivery of the property is made to customers from storage warehouses, the sales offices are considered as the places of business at which the sales are consummated for local sales and use tax purposes.
63. Comptroller’s Administrative Decision No. 6491 (1975).
65. TX. TAX.-GEN. ANN. art. 20.031(B)(2) (Vernon 1969).
67. If sales tax is collected upon nontaxable transactions, the state can require under the doctrine of unjust enrichment that the person collecting the amounts either remit them to the state or demonstrate that they have been refunded to the persons from whom they were collected. Comptroller’s Administrative Decision No. 6623 (1976); see Comptroller’s General Ruling .003—Unjust Enrichment.
68. Comptroller’s Administrative Decision No. 7406 (1976) (“handling charge” added to sales price of tangible personal property is taxable as part of sales price); Comptroller’s
IV. INHERITANCE TAXES

As was noted in the previous Survey article, the Texas Supreme Court in Citizens National Bank v. Calvert reversed the judgment of the court of civil appeals and ruled that a percentage based on the ratio of the Texas net estate to total net estate should be used to determine the amount of additional inheritance tax due where the decedent’s estate was located partly within and partly without the State of Texas. The comptroller had applied a percentage based on Texas gross estate to total gross estate. The court concluded that the comptroller’s interpretation would be helpful were the statute ambiguous but was inapplicable here because the interpretation was contrary to the words of the statute.

In Carroll v. Bullock the court had to determine whether article 14.01(D), which provides that the basic inheritance tax “shall not apply to residents of those states which have no inheritance tax law,” applies only to a nonresident decedent or a nonresident beneficiary who resides in a state which has an estate tax law but no inheritance tax law. The decedent, a Texas resident, left a will naming the plaintiff, who was her grandson and a New York resident, the sole beneficiary and independent executor. The court determined that the word “resident” refers only to decedents who are residents of states which have no inheritance tax law and does not apply to a nonresident beneficiary.

Administrative Decision No. 6924 (1976) (charge for serving food at private party which was separated from charge for food was taxable as part of “sales price” of food); Comptroller’s Administrative Decision No. 6699 (1976) (when seller or lessor requires purchaser or lessee to pay maintenance charge in connection with sale or lease of equipment, maintenance charge is considered part of sale or lease price for sales and use tax purposes; Comptroller’s Sales Tax Ruling .014); Comptroller’s Administrative Decision No. 6697 (1976) (manufacturer of drill bits was taxable on the entire charge for bits even though material charge was separated from labor charge).

69. Comptroller’s Administrative Decision No. 7389 (1976) (floating clamshell dredge not used to transport persons or property not exempt as vessel under TEX. TAX.-GEN. ANN. art. 20.04(P) (Vernon 1969); Comptroller’s Administrative Decision No. 7299 (1976) (sale of photographs through vending machines on federal enclave subject to sales and use tax); Comptroller’s Administrative Decision No. 7105 (1976) (purchaser subject to tax on purchase price for personal use of aircraft); Comptroller’s Administrative Decision No. 7063 (1976) (contractor improving realty under lump sum contract is consumer, not retailer, of taxable items which he incorporates and such contractor is not entitled to bad debt deduction for such items); Comptroller’s Administrative Decision No. 7054 (1976) (sales through mechanical devices not activated by deposit of money held not exempted by vending machine exemption in TEX. TAX.-GEN. ANN. art. 20.04(U) (Vernon 1969)); Comptroller’s Administrative Decision No. 6938 (1976) (taxable sale rather than repair when headwell of videomachine sent for “repair” and party sending the headwell assured only of receiving in return reconditioned headwell, though not necessarily same unit as one sent, because term “repair” contemplates restoring same unit to original working condition); Comptroller’s Administrative Decision No. 6320 (1976) (“Ruff-coating” of pipe taxable as processing of tangible personal property); Comptroller’s Administrative Decision No. 6262 (1976) (purchases made in anticipation of need for increased facilities to generate power and not to fulfill specific third party contract not exempt under prior contract exemption).


71. 527 S.W.2d 175 (Tex. 1975).

72. The court held that the plain meaning of the language used by the legislature in art. 14.01(D) precludes the method of calculation advanced by the comptroller. See generally Annot., 71 A.L.R. 3d 247 (1976).

73. See, e.g., Humble Oil & Ref. Co. v. Calvert, 414 S.W.2d 172 (Tex. 1967) (administrative construction of ambiguous statute upheld).

74. 530 S.W.2d 135 (Tex. Civ. App.—Austin 1975, no writ).

75. TEX. TAX.-GEN. ANN. art. 14.01(D) (Vernon 1969).

76. Id.

77. See Comptroller’s Inheritance Tax Ruling .068 regarding acquisition of property in Texas by a nonresident.
One noteworthy event that could certainly affect the area of state inheritance tax revenue is the proceeding pending in Houston to determine whether Howard Hughes was domiciled in Texas. If a decision is rendered that Hughes was domiciled in Texas, a significant sum of inheritance taxes will be due the comptroller. The state has filed an appearance in the proceeding for the purpose of determining domicile and protecting its inheritance tax lien.

The comptroller has issued a few administrative decisions regarding inheritance tax during the survey period. The Texas attorney general has determined that the comptroller may require county or probate clerks to file a "county clerk report" in lieu of filing certified copies of the inventory and appraisement, the list of claims, and the last will or, in the absence of a will, proof of heirship, but he may not extend from twenty to forty-five days the time within which the clerk is required to file the report.

The comptroller's office has initiated training seminars on inheritance taxes for its field personnel so that the field offices can offer more comprehensive assistance to persons regarding the filing of inheritance tax returns.

V. MISCELLANEOUS STATE TAX MATTERS

A portion of the Texas admissions tax was declared unconstitutional in ABC Interstate Theatres, Inc. v. Bullock. The trial court entered judgment that section 2 of article 21.01, which imposes a tax on admissions to motion pictures, is unconstitutional. The comptroller has issued several administrative decisions regarding inheritance tax during the survey period. The Texas attorney general has determined that the comptroller may require county or probate clerks to file a "county clerk report" in lieu of filing certified copies of the inventory and appraisement, the list of claims, and the last will or, in the absence of a will, proof of heirship, but he may not extend from twenty to forty-five days the time within which the clerk is required to file the report.

The comptroller's office has initiated training seminars on inheritance taxes for its field personnel so that the field offices can offer more comprehensive assistance to persons regarding the filing of inheritance tax returns.

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78. In re Howard Hughes, Decedent, No. 139,362, Probate Court No. 2 of Harris County, Texas, April 14, 1976.

79. Comptroller's Administrative Decision No. 7140 (1976) (personal representative not authorized by TEX. PROB. CODE ANN. § 37A (Vernon Supp. 1976-77) to disclaim legacy to decedent and his attempt without legal effect for inheritance tax purposes); Comptroller's Administrative Decision No. 6896 (1976) ("succession duty" paid to British Columbia not permissible inheritance tax deduction since it was not federal, state, county or municipal tax or debt due estate); Comptroller's Administrative Decision No. 6245 (1976) (upon simultaneous death of husband and wife, one-half value of proceeds of community property life insurance policy which insured husband's life and made payable to trust held includable in wife's estate); Comptroller's Inheritance Tax Ruling .033.


81. TEX. ATT'Y GEN. OP. Nos. H-804 (1976); see Comptroller's Inheritance Tax Ruling .009. TEX. TAX.-GEN. ANN. art. 1.034 (Vernon 1969) provides: "Notwithstanding the provision of any Article of this Title, the Comptroller may revise any report required by any Article of this Title so as to eliminate any specific information required by the provisions of any Article of this Title.


83. In Chairman's Message, 10 STATE BAR OF TEXAS, NEWSLETTER OF THE SECTION OF TAXATION, No. 1, Oct. 1976, at 2, it is stated:

The new Committee on Liaison with the Comptroller's Office, Charles W. Hall, Chairman, has been established to provide a means whereby the Comptroller's Office and private practitioners can discuss mutual problems that need to be addressed. It is hoped that an arrangement similar to the Liaison Committee with the Internal Revenue Service can be established.

The Committee on Inheritance Taxes, Edward C. Osterberg, Jr., Chairman, has prepared two legislative proposals which will be submitted for inclusion in the State Bar's legislative program, one exempting a non-employee spouse's community interest in qualified pension and profit sharing plans from inheritance tax, and the other dealing with computation of inheritance taxes on non-Texas property.


85. TEX. TAX.-GEN. ANN. art. 21.02(2) (Vernon 1969) provides:
pictures held at a fixed or regularly established motion picture theater, was unconstitutional. This judgment was not appealed, and the comptroller's office is abiding by the trial court's decision. The comptroller is, however, imposing a sales and use tax on rentals of film from distributors to exhibitors. These rentals had been exempted by article 20.04(Z), which provides:

There are exempted from the taxes imposed by this chapter the receipts from the leasing or licensing of motion picture films of any kind to or by motion picture theatres which are subject to admissions taxes as imposed by Chapter 21, Title 122A, Revised Civil Statutes of Texas, 1925, as amended, and to or by licensed television stations.

Since the admissions tax on motion picture theatres has been held unconstitutional and the theatres are no longer subject to it, the comptroller has taken the position that film rentals to or by such theatres are not exempt. Before any admission tax paid pursuant to article 21.02(2) is refunded, the comptroller is auditing to determine the amount of sales tax due and is requiring that the sales tax be paid.

In Horton v. Cook the gross receipts tax on sales of mixed alcoholic beverages was attacked. The plaintiffs contested the fact that mixed alcoholic beverage permittees are taxed at a rate of ten percent on their gross receipts whereas wine and beer retailer permittees are not required to pay a gross receipts tax. Sales by wine and beer permittees are limited to vinous or malt fermented liquor containing no more than fourteen percent alcohol. Mixed beverage permittees are permitted to sell beverages of unlimited alcoholic content. It was argued that there should be no tax differential since both permittees sell beverages containing alcohol. The court found that the classification was properly based on obvious differences between the two classes of businesses. One of these differences was the time and method of recouping the cost of the materials used in sales or rendering of services.

As noted in the previous Survey, the attorney general has determined that article 1.07(1)(f)(ii), which permits the comptroller to issue a notice to a bank or savings and loan institution asserting a claim to a deposit and thereby

There is hereby levied on each admission to entertainments such as motion pictures, operas, plays and like amusements held at a fixed or regularly established motion picture theater, where the admission charged is in excess of One Dollar and Five Cents ($1.05) and not more than One Dollar and Fifteen Cents ($1.15) a tax of one cent (1¢); and where the admission charged is in excess of One Dollar and Fifteen Cents ($1.15) a tax of two cents (2¢) plus one cent (1¢) on each ten cents (10¢) or fractional part thereof in excess of One Dollar and Twenty-five Cents ($1.25).

85. In Calvert v. McLemore, 163 Tex. 562, 358 S.W.2d 551 (1962), TEX. TAX.-GEN. ANN. art. 21.02, § 1 (Vernon 1969) which imposed an admission tax of one cent on each ten cents paid as on admission to entertainments held at places other than at a fixed or regularly established motion picture theater where the admission charged exceeded fifty-one cents, was held unconstitutional.
86. TEX. TAX.-GEN. ANN. art. 20.04(Z) (Vernon 1969) became effective on October 1, 1969.
87. See notes 83-85 supra and accompanying text.
88. Comptroller's Sales Tax Ruling .014.
90. 538 S.W.2d 221 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).
91. TEX. PEN. CODE AUX. LAWS ANN. art. 666-20d (Vernon 1975).
92. 538 S.W.2d at 224.
93. Tracy, supra note 70, at 382 n.131.
freeze the account, is constitutional. The comptroller uses this provision as part of its procedure for the collection of delinquent taxes. In the collection of delinquent sales and use taxes the comptroller has successfully used the seizure and sale provision of article 20.09(H).

Administrative decisions regarding hotel occupancy taxes, limitations problems, and other general matters have also been issued by the comptroller’s office during the survey period.

VI. AD VALOREM TAXES

This survey period has seen the rendition of some important decisions in the area of ad valorem taxes. In *Michelin Tire Corp. v. Wages* the United States Supreme Court allowed a nondiscriminatory Georgia property tax to be imposed on imported goods that were no longer in import transit but were awaiting distribution from a warehouse to dealers. Many of the goods were stored in their “original package.”

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96. TEX. TAX-GEN. ANN. art. 20.09 (H) (Vernon 1969).

97. Comptroller’s Administrative Decision No. 6924 (1976) (“corkage charge” covering only the transportation and storage of a customer’s own liquor to a customer’s room not taxable); Comptroller’s Administrative Decision No. 6909 (1976) (charges for special preparation of room, being charges for readying room for occupancy, are part of consideration for room rental even though separated from flat rental fee for room); see TEX. TAX-GEN. ANN. art. 23.01(b) (Vernon 1969).

98. Comptroller’s Administrative Decision No. 7031 (1976) (claim for refund filed by diesel fuel bonded import user permittee required to be timely under TEX. TAX-GEN. ANN. art. 10.14 (Vernon 1969), and id. art. 1.045 not available to obtain refund if time period elapsed under art. 10.14); Comptroller’s Administrative Decision No. 5878 (1976) (claim for refund for taxes becoming due and payable prior to July 1, 1967, the effective date of TEX. TAX-GEN. ANN. art. 1.045 (Vernon 1969), not timely made when filed more than seven years after Sept. 1, 1965); see Comptroller’s Administrative Decision No. 6360 (1975) regarding limitations for sales and use assessments (TEX. TAX-GEN. ANN. arts. 1.045(A), (B) (Vernon 1969)); TEX. ATT’Y GEN. Op. No. H-811 (1976) holding that taxes levied on public utility are part of its receipts for assessment purposes.

99. *See* Comptroller’s Administrative Decision No. 6640 (1975) (TEX. TAX-GEN. ANN. art. 6.03(D)(3) (Vernon 1969) not applicable to rental vehicles rented for more than 31 days because tax base for status change from rental to lease units “owner’s book value,” not “total consideration”); Comptroller’s Motor Vehicle Tax Ruling 021; City of Jacksonville v. Entex, Inc., 538 S.W.2d 250 (Tex. Civ. App.— Tyler 1976, writ ref’d n.r.e.) (city’s imposition of reimbursement charge for consultant fee under TEX. TAX-GEN. ANN. art. 11.03 (Vernon 1969) unconstitutional).

100. 423 U.S. 276 (1976).

101. In J. HOWELL, PROPERTY TAXES, 21 TEXAS PRACTICE § 66 (Supp. 1976), it is observed: *Michelin Tire Corp. v. Wages* overruled Low v. Austin and other cases holding that inventories were not exempt simply because they were imported from a foreign country. The court observed the specific abuses which led the framers to include the clause in the Constitution, saying that one of the major defects of the Articles of Confederation was that seaboard states were deriving revenue by imposing taxes on imported goods destined for customers in inland states. Nothing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the framers of the Constitution. Imported goods should be treated no differently from the common mass of property in the country insofar as state and local taxation is concerned.

For a discussion of prior import-export cases see HELLERSTEIN, STATE AND LOCAL TAXATION, CASES AND MATERIALS 273-302 (1969). In addition, in 40 FEDERATION OF TAX ADMINISTRATORS,
Following the rationale in *Michelin*, the Texas Supreme Court upheld the imposition of nondiscriminatory ad valorem taxes on personal property stored in unopened containers in warehouses in *City of Farmers Branch v. Matsushita Electric Corp. of America* and *City of Farmers Branch v. American Honda Motor Co.* Petitions for writ of certiorari were filed in the United States Supreme Court contesting the retroactive application of the taxes. Petitioners contended that the Texas court erred in not following the standards established for civil cases regarding prospective application of the United States Supreme Court decisions. The taxes assessed by Farmers Branch had been for the year 1972. The taxes imposed in *Michelin* were for the years 1972 and 1973. A motion for rehearing filed by Michelin raising this point was overruled by the United States Supreme Court. The same result occurred regarding the two Texas cases.

The Texas Supreme Court has again spoken in the area of the purely public charity exemption. In *City of McAllen v. The Evangelical Lutheran Good Samaritan Society*, the court held that the Society's operation of an intermediate nursing home met the requirements for being a purely public charity and was, therefore, exempt under the Texas Constitution and article 7150(7). Patients admitted to the home had to be under the care of a physician. The daily rates charged were based on the level of care required as well as on the classification of the patient as private or welfare. Welfare patients were charged a lesser rate than those who could pay the full cost of their care. More than one-half of the patients were welfare patients. The Society received less than the average daily cost on these patients and had to absorb the remainder of the costs. Approximately ten percent of the patients had a private source of funds but still received supplemental welfare payments which did not cover the entire cost of their care. The nursing home paid the difference for this category of patients. There were no patients who completely failed to contribute to the costs of their care. The home had an open admissions policy but did require each prospective patient to obtain the signature of a "responsible party" as part of the admission agreement. This information was used not only for payment purposes but for notification in the event of the death of the patient.

The contention was made that a public charity had to dispense "absolute" gratuity and that the home's policy of requiring those who could pay to do so

TAX ADMINISTRATORS NEWS, No. 6, June 1976, at 62, see suggested guidelines by the Georgia Commissioner of Revenue for determining whether a state tax violates the Import-Export clause, to wit:

102. 537 S.W.2d 452 (Tex.), cert. denied, 97 S. Ct. 164, 50 L.Ed. 2d 139 (1976).
103. 537 S.W.2d 454 (Tex.), cert. denied, 97 S. Ct. 161, 50 L.Ed. 2d 137 (1976).
105. 530 S.W.2d 806 (Tex. 1975).
106. TEX. CONSTR. art. VIII, § 2(a).
108. In the Preface to J. HOWELL, supra note 101, at 3, it is noted: "The services rendered were similar to those rendered by hospitals. The court followed the leading hospital case rather than the old age home cases."
and the making of supplemental payments for those who could not pay all their costs did not meet the test. The court stated in what was a major holding in the decision:

With the advent of present day social security and welfare programs, the traditional concept of charity, involving the extension of free services to the poor and almsgiving, will be rarely found since wide ranging assistance is available to the poor under such programs. . . . The ultimate consideration then, should be based upon an evaluation of the total operation of the institution engaged in humanitarian activities whose services are rendered at cost or less and which are maintained to care for the physical and mental well-being of the recipients. By that total operation the institution must assume, to a material extent, that which otherwise might become the obligation or duty of the community or the state.109

Furthermore, the court overruled its holding in Hilltop Village, Inc. v. Kerrville Independent School District110 that an institution in order to meet constitutional and statutory requirements for tax exemption had to pledge its property and assets in perpetuity to the relief of persons in financial need and to their assistance in obtaining care, by stating:

We hold the Society's dedication of the McAllen home to charitable purposes and the pledge of the property and assets, upon dissolution, to a non-profit fund, foundation or corporation organized and operated exclusively for charitable and religious purposes does meet the constitutional and statutory requirements of a purely public charity.111

The court determined that the requirement of a signature of a "responsible party"112 did not prevent the Society from being a purely public charity because the evidence reflected that inability to pay was not an obstacle to admission. Thus, it is the opinion of this author that the court did not overrule the requirement for an open admissions policy. Justice Steakley's dissent expresses doubt as to what the current charitable rule is.113

109. 530 S.W.2d at 810. In Hartt, Ad Valorem Taxes and Non-Profit Health-Care Facilities, 39 Tex. B.J. 864, 874 (1976) the City of McAllen case was commented upon as follows: "The potential impact of the city's contentions would have affected almost every health care provider in Texas which claimed a charitable exemption. Because of the common availability of one or more of these programs to most indigent persons in need of health care, few providers today fail to receive at least some form of government reimbursement for such care. The significant [sic] factor, however, is that while these programs pay part of the costs of health care, rarely, if ever, do they pay all of the cost. Appreciating this reality, the court held that the absolute gratuity requirement meant that such charity as was extended, i.e., the portion of the cost not covered by government funds, must be of an 'unconditional nature.' In such cases, the 'ultimate consideration' is whether the institution's 'total operation' materially alleviates what would otherwise be a public burden. See also River Oaks Garden Club v. City of Houston, 370 S.W.2d 851 (Tex. 1963); City of Houston v. Scottish Rite Benevolent Ass'n, 111 Tex. 191, 230 S.W. 978 (1921).

110. 426 S.W.2d 943 (Tex. 1968).

111. 530 S.W.2d at 811.

112. The following notation is made in Hartt, supra note 109, at 874: "A similar factual issue was determined adversely to the institution claiming an exemption in Hilltop Village. Without attempting to distinguish its opinion in Hilltop Village, the Court held that to the extent that it was inconsistent with the instant case, Hilltop Village was overruled." See also Challenge Homes, Inc. v. County of Lubbock, 474 S.W.2d 746 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.).

113. 530 S.W.2d at 812-13 (Steakley, J., dissenting). J. Howell, supra note 101, at 26, observes that this may be a landmark case. San Antonio Conservation Soc'y, Inc. v. City of San
holding in the case has certainly left questions which can only be answered by subsequent litigation. In another area of ad valorem tax exemptions property occupied exclusively by a church's minister of music was held to be exempt in City of Amarillo v. Paramount Terrace Christian Church\(^1\) pursuant to article 7150b,\(^1\) which exempts from taxation any property owned exclusively by a church for the exclusive use as a dwelling place for the ministry of the church. A church camp was determined not to be exempt as "an actual place of religious worship" in Davies v. Meyer.\(^1\) Another case of particular importance was Gragg v. Cayuga Independent School District,\(^1\) which interpreted the agricultural use designation for assessment purposes found in the Texas Constitution.\(^1\) The court determined that the "primary occupation and source of income" language contemplates "gross" rather than "net" income, that the word "primary" does not require a farmer or rancher to receive more than fifty percent of his total gross income from his farming or ranching business, and that only sources of gross income from occupations or business ventures carried on for profit should be compared with gross income from agricultural sources in determining eligibility for the agricultural use designation.\(^1\) Other cases and attorney general opinions during the survey period covered a broad range of subjects, but were not of great importance. This classification included ad valorem tax procedures,\(^1\) payment by check,\(^1\) and other

\(^1\) Antonio, 455 S.W.2d 743 (Tex. 1970), in which the court extended the definition of charity to include more than alms-giving or the relief of poverty and distress, is similarly important.

\(^1\) 530 S.W.2d 323 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.). In McCreless v. City of San Antonio, 454 S.W.2d 393 (Tex. 1970), the residence of a district superintendent was also held exempt.

\(^1\) TEX. TAX. ANN. art. 7150b (Vernon Supp. 1976-77); TEX. CONST. art. VIII, § 2(a).


\(^1\) San Marcos Consol. Ind. School Dist. v. Nance, 495 S.W.2d 335 (Tex. Civ. App.—Austin, writ ref'd n.r.e. per curiam, 502 S.W.2d 694 (Tex. 1974); TEX. CONST. art. VIII, § 1-d. See also Klitgaard v. Gaines, 479 S.W.2d 765 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

\(^1\) See TEX. ATT'Y GEN. OP. NO. H-799 (1976) (explanation of method of assessing irrigated agricultural land); TEX. ATT'Y GEN. OP. NO. H-863 (1976) (comparable sales of lands used for agricultural purposes, if available and truly reflective of agricultural use factors, to be used by tax assessor for valuation purposes).

\(^1\) Watts v. Alto Ind. School Dist., 537 S.W.2d 776 (Tex. Civ. App.—Tyler 1976, no writ) (final judgment not to be rendered at hearing on temporary injunction to restrain certification and approval of tax roll); Crystal City Ind. School Dist. v. Johnson, 535 S.W.2d 730 (Tex. Civ. App.—Tyler 1976, no writ) (Board of Equalization final authority in establishing taxable valuation of property within independent school districts and school trustees without power to usurp this function); Johnson City Ind. School Dist. v. Crider, 535 S.W.2d 725 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (to enjoin collection of tax because of some illegal feature, taxpayer must show how the alleged illegality damaged him and that the damage to him was substantial); Fayetteville Ind. School Dist. v. Crowley, 528 S.W.2d 344 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) (giving notice and opportunity to be heard jurisdictional as to Board of Equalization's right to raise property values); TEX. ATT'Y GEN. OP. NO. H-798 (1976) (amount of maintenance tax leviable by a particular school district).

\(^1\) Dickinson Ind. School Dist. v. McGowan, 533 S.W.2d 127 (Tex. Civ. App.—Houston 1976, no writ) (mailing of check, which was never received, to school district did not
general matters. 122

VII. FEDERAL AND OTHER RELATED TAX MATTERS

Although more related to state than federal taxes, a federal court has decided in United States Steel Corp. v. Multistate Tax Commission123 that the Multistate Tax Compact is a valid interstate agreement that does not require congressional approval. Texas is a member of the Multistate Tax Commission pursuant to article 7359a.124 The plaintiffs in the U.S. Steel case had challenged the constitutionality of the Compact. There have been some recent cases and rulings in the federal tax area that affect Texas. In Revenue Ruling 75-505125 it was decided that one-half of the value of a survivorship annuity receivable under the Texas Judicial Retirement System was includable in the decedent’s gross estate as being paid under a contract within the meaning of section 2039(a) of the Internal Revenue Code.126 Murphy v. United States127 concerned the dischargeability in a bankruptcy proceeding of a 100 percent tax penalty for withholding and F.I.C.A. taxes imposed against a responsible corporate officer under I.R.C. § 6672.128 The United States had not filed a proof of claim for the constitute payment of ad valorem taxes.) See also Muldrow v. Texas Frozen Foods, Inc., 157 Tex. 39, 299 S.W.2d 275 (1957).


126. I.R.C. § 6672.


128. I.R.C. § 6672.
liability in the bankruptcy proceeding. The court held that even though a
claim had not been filed the bankruptcy court could adjudicate discharge-a-
ility of the tax liability and that the section 6672 liability was a nondis-
chargeable tax rather than the dischargeable penalty. Pursuant to a
Revenue Ruling no gain or loss was required to be recognized on the
approximately equal division of the fair market value of community
property pursuant to a divorce settlement agreement that provided for the
transfer of assets to one spouse or the other. The assets received by each
spouse retained their community basis.

The greatest changes in the area of federal estate and gift taxes have
been occasioned by the enactment of the Tax Reform Act of 1976. The
many details of the Act cannot be covered here, but it should be noted that among other things the Act provides for estate and gift tax purposes a
unified credit of $47,000 by 1981, an increase in the maximum estate tax
marital deduction to the greater of $250,000 or one-half of the decedent's
adjusted gross estate, and an unlimited marital deduction for the first
$100,000 of lifetime transfers to a spouse. The unified credit of $47,000
is equivalent to an exemption of $175,625. The effect of this legislation

property incident to a divorce or a property settlement agreement may result in a taxable event.
Jean C. Carrieres, 64 T.C. 959 (1975). See also Rev. Rul. 76-312, 1976-1 R.B. No. 33, at 12 (estate
representatives given option as to date they choose to redeem U.S. Treasury ("flower") bonds
which are eligible for redemption at face value for credit in payment of the federal estate tax);
Rev. Rul. 76-100, 1976-1 C.B. 123 (community property trust and disposition of installment
obligations); Rev. Rul. 76-68, 1976-1 C.B. 216 (surviving spouse's basis for community property
United States Treasury bonds, redeemable at par in payment of federal estate tax, is fair market
value at date of other spouse's death rather than value for federal estate tax purposes). For
discussion of estate tax consequences regarding community property insurance policies where
spouses die in close succession, see McKnight, Family Law, Annual Survey of Texas Law, 30
(1976) (transfer of interest in community property insurance policy by spouse beneficiary).


131. The Hon. Al Ullman, Chairman of the House Committee on Ways and Means, upon
introducing the Conference Report on H.R. 10612, 122 CONG. REC. H10,227 (daily ed. Sept. 16,
1976), said the following:
The major elements in the estate and gift tax package are an increase in the
estate tax threshold—the level at which estates become taxable—from the
current $60,000 to $175,000. This estate tax cut is phased in over a five year
period. In order not to benefit unduly the larger estates, this tax cut takes the form of
a credit in place of the $60,000 exemption; and existing rates, which range from
3 to 77 per cent, are replaced with a rate scheduling ranging from 18 to 70 per cent.

Other estate and gift tax reductions in the bill include an increase in the marital
deduction to permit larger tax-free transfers between husbands and wives.

132. See Ray v. United States, 538 F.2d 1228 (5th Cir. 1976) (treasury bonds purchased with
separate property loan proceeds separate, not community, property); First Nat'l Bank v. United
States, 418 F. Supp. 955 (N.D. Tex. 1976) (when insurance policy taken out on husband's life
payable to wife right to proceeds on wife's death before husband's death not community property
under Texas law and proceeds eventually realized entirely includable in husband's estate); Finley
v. United States, 404 F. Supp. 200 (S.D. Fla. 1975) (when decedent lacked legal capacity to
exercise general testamentary powers of appointment, property forming subject matter of power
not includable in decedent's gross estate for federal estate tax purposes); Smith Estate v.
Commissioner, 66 T.C. 42 (1976) (marital deductions not barred by "equalization clause");
I.R.C. § 2041(a)(2) (property subject to unexercised power of appointment to be included in gross
estate of decedent donee). For contrary holding see Fish v. United States, 432 F.2d 1278 (9th Cir.
1970) (immaterial whether decedent donee had legal capacity to exercise power of appointment,
and inclusion of assets in decedent's gross estate determined by the existence of the power).
will be the subject of much future interpretation and discussion.  

133. See Discussion on Federal Tax Reform Bill, 40 Federation of Tax Administrators, Tax Administrators News, No. 10, Oct. 1976, at 110 (for property of a decedent purchased before Dec. 31, 1976, the carryover basis in the hands of an heir will be its value as of that date, increased by the amount of taxes paid on its transfer; for property purchased after 1976, the carryover basis will be the decedent's basis immediately before his death increased by the taxes paid on the property's transfer; the income tax minimum standard deduction has been changed for single persons and for joint returns). See Tax Law Developments, 15 State Bar of Texas, Real Estate, Probate and Trust Law Section Report, No. 1, Oct. 1976, at 6-9, for discussion of federal cases and rulings prior to new Act, including Lamkin v. United States, 533 F. 2d 303 (5th Cir. 1976) (allocation of depreciation allowance between estate and future trust beneficiaries).