THE present survey period\textsuperscript{1} was an active time in the development of Texas tax law. The 68th Legislature enacted many new or revised tax statutes and the Office of the Comptroller of Public Accounts (the comptroller) adopted many changes to the administrative rules interpreting those statutes. In addition, both the comptroller and the courts issued a number of significant decisions in Texas tax controversies. The United States Supreme Court invalidated a portion of the property tax applicable to banks\textsuperscript{2} and the imposition of property taxes upon goods temporarily stored in customs warehouses in Texas before shipment to foreign countries.\textsuperscript{3} These developments, along with several miscellaneous tax matters, are briefly addressed in this Article.

I. LIMITED SALES, EXCISE, AND USE TAX

The Texas appellate courts rendered no decisions in this area during the survey period.\textsuperscript{4} The legislature, however, enacted several changes to this tax. For example, it increased the amount of annual taxable sales neces-

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1. In general, Oct. 15, 1982, to Oct. 15, 1983. In addition, the author has included certain significant developments that occurred shortly before or after that period.

2. American Bank & Trust Co. v. Dallas County, 103 S. Ct. 3369, 77 L. Ed. 2d 1072 (1983); see infra note 166 and accompanying text.

3. Xerox Corp. v. Harris County, 103 S. Ct. 523, 74 L. Ed. 2d 323 (1982); see infra note 169 and accompanying text.

4. Several trial court decisions rendered in sales tax cases are, however, currently on appeal. See, e.g., Bullock v. Citizens Nat'l Bank, 663 S.W.2d 923 (Tex. App.—Austin 1984, no writ) (characterization of sale-leasebacks as mortgages or sales for resale); East Tex. Oxygen Co. v. Bullock, No. 13893 (Tex. App.—Austin, argued Sept. 7, 1983) (whether refillable gas tanks are exempt from sales tax because purchased for resale); Payless Drugs v. State, No. 13770 (Tex. App.—Austin) (sales and use tax collections); American Cotton Growers v. Bullock, No. 335183 (Dist. Ct. of Travis County, 250th Judicial Dist. of Tex., Oct. 21, 1983) (tax exemption for machinery and equipment used to process and pack agricultural products); MBI, Inc. v. Bullock, No. 339348 (Dist. Ct. of Travis County, 53rd Judicial Dist. of Tex., Nov. 7, 1983) (inclusion of freight charges in sales price used to calculate sales tax); Mel Powers Inv. Builders v. Bullock, No. 300843 (Dist. Ct. of Travis County, 126th Judicial Dist. of Tex., Mar. 28, 1983) (tax exemption for aircraft); Shell Pipe Line Corp. v. Bullock, No. 337343 (Dist. Ct. of Travis County, 126th Judicial Dist. of Tex.) (exemptions for common carriers).
sary to qualify for a direct payment permit from $200,000 to $800,000.Existing direct payment permit holders may retain their permits until can-
celled by the comptroller.

The legislature added several statutory exemptions to the sales and use
tax during the survey period. New exemptions include the following:
(a) bins used exclusively as containers to transport fruit or vegetables from
the place of harvest to a processing, packaging, or marketing location;
(b) certain health care supplies that enable the blind to function more in-
dependently; (c) items sold to a nonprofit convention and tourist promo-
tional agency representing at least one Texas city or county; (d) airline in-
flight magazines (now defined as tax exempt newspapers if certain enumer-
ated requirements are met); (e) any item sold, leased, or rented to, or
stored, used, or consumed by, and many items sold, leased or rented by the
tribal councils and tribal businesses of the Alabama-Coushatta and Tigua
Indian Tribes; (f) gold, silver, or numismatic coins or platinum, gold or
silver bullion if the total sales price equals $10,000 or more (such coins and
bullion are also exempt from use tax until subsequent transfer to a differ-
ent owner); and (g) any items sold to a nonprofit corporation formed
pursuant to the Development Corporation Act.

The legislature nar-
rowed the statutory sales and use tax exemption for solar energy devices,
other than a site-built solar energy device, by disallowing an exemption
unless the device meets the rating and certification standards adopted by
the State of Texas. Additionally, the statutory due dates and other pro-
cedural aspects of the sales and use tax were also amended by the
legislature.

The comptroller promulgated a number of sales and use tax administra-
tive rules during the survey period. Rule 3.283 concerns the sales tax
responsibilities of bartering clubs or exchanges and their members. The
barter of a taxable item is a sale even though trade units are accepted by
the seller instead of money. The seller in a barter exchange, which in-
cludes exchanges maintaining show or sales rooms for bartering purposes,
ordinarily must collect and remit tax on the sales price of a taxable item.
Dues and service fees charged to join an exchange and fees for maintain-
ing records on barter transactions are not, however, taxable.

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7. Id. § 1, at 850.
10. Id. ch. 840, § 4, at 4769-70.
11. Id. ch. 859, § 2, at 4869-70.
   conforming provisions were added to reflect a development corporation's exemption from
   franchise tax. Id. § 2, at 1039.
   673 (1983) (to be codified at 34 TEX. ADMIN. CODE § 3.283).
Rule 3.291\textsuperscript{17} was amended to allow contractors a partial credit for tax paid on the purchase price of equipment bought for use on a taxable job but later used on an exempt job. Moreover, contractors improving realty for both exempt and nonexempt entities may purchase equipment tax-free by issuing an exemption certificate. The rule also provides that the issuance of separate materials and labor invoices to a customer will not change a lump-sum contract into a separated contract if the invoices do not amend the original contract.

Rule 3.308\textsuperscript{18} was amended on an emergency basis during the 1982 Christmas selling season and later was adopted formally. The amendment defines computer software to include computer video game cartridges. When computer hardware and software are purchased together, the rule provides that sales tax is not due on the cartridges when the charge for them is separately stated. When charges for labor or services rendered in installing, applying, remodeling, or repairing computer hardware are separately stated they are also not taxable. Buyers of hardware purchased exclusively for resale are not liable for sales tax unless they make a taxable use of the hardware while awaiting resale.

The comptroller issued several sales and use tax hearing decisions during the survey period. Many of the decisions centered on sales and use tax exemptions. In Decision 12,830\textsuperscript{19} the comptroller considered whether temporary retention in Texas of pipe purchased out-of-state was subject to Texas's storage tax. The judge upheld the tax assessment by broadly construing the statutory concept of storage to include even a short retention of property in Texas.\textsuperscript{20}

Decision 12,305\textsuperscript{21} involved the sales tax exemption for purchases and rentals of equipment used to process certain vegetables that the petitioner purchased from other farmers at various stages of the vegetables' growth prior to maturity. Only an original producer is entitled to the exemption.\textsuperscript{22} The term is defined to include "any person who performs or supervises the day-to-day operations necessary for the growth of agricultural products and who is at risk with regard to their success or failure . . . [but not] persons who acquire agricultural products after they have reached maturity."\textsuperscript{23} The judge held that the exemption applied because the petitioner acquired the products before they were fully grown.\textsuperscript{24}


\textsuperscript{19} Tex. Comptroller's Administrative Decision No. 12,830 (1982).

\textsuperscript{20} Id.; see TEX. TAX CODE ANN. § 151.011 (Vernon 1982) (defining storage); cf. Shell Pipe Line Corp. v. Bullock, No. 337343 (Dist. Ct. of Travis County, 126th Judicial Dist. of Tex.) (finding common carrier tax exemption despite for pipe line temporary storage of pipe in Texas).

\textsuperscript{21} Tex. Comptroller's Administrative Decision No. 12,305 (1982).

\textsuperscript{22} TEX. TAX CODE ANN. § 151.316(9) (Vernon 1982).

\textsuperscript{23} Id.

\textsuperscript{24} Tex. Comptroller's Administrative Decision No. 12,305, at 3.
The issue in Decision 12,403 was whether previously taxed equipment later used in the performance of tax-exempt contracts was entitled to tax exemption to the extent of the value of the equipment consumed in the performance of such contracts. The taxpayer argued that the comptroller's administrative rule, which depends upon the sequence of exempt and nonexempt use of the equipment, was unfair. When exempt use was followed by nonexempt use no tax was due on the original purchase and only a proportion of the equipment's value was later taxed when the use changed. By contrast, if the equipment was used first in a nonexempt way tax was due on its full value and any later exempt use did not result in an offsetting credit for tax previously paid. The judge partially invalidated the rule and declared that the taxpayer was entitled to the exemption to the extent the value of the equipment was actually consumed in performing the jobs.

Decision 13,025 considered the exemption of helicopter parts purchased for attachment to and integration into the petitioner's helicopters. The petitioner was a licensed and certified carrier of persons and property providing ferry services to offshore oil rigs and platforms. It acquired some helicopters in an incomplete condition and completed the assembly. Under Texas law, helicopters and repair parts are exempt from taxation. Most of the parts were held exempt as repair or replacement parts, even though of higher quality than the original parts.

Decision 12,761 involved two distinct issues. The first issue was whether sales or use tax was due on amounts received for monthly barge rentals paid to an entity by its parent corporation. The judge rejected the taxpayer's exemption arguments that the rentals constituted occasional sales, the transfer was between joint owners of the transferred property, and the rental charges were transportation fees paid after the sale of the transported goods. The occasional sale exemption, the judge held, is not applicable when monthly rentals are involved. Also, the exemption for transferred property was not available since the taxpayer merely shared joint ownership of stock with its parent. The judge concluded that the final exemption argument failed for lack of a sale or transportation of the goods. The second issue involved the taxation of charges to purchasers of concrete for extra time that the truck and driver had to remain at the job site before being able to pour. The judge concluded that such standby

25. Id. No. 12,403 (1982); see Tex. Tax Code Ann. § 151.311 (Vernon 1982).
27. Tex. Comptroller's Administrative Decision No. 12,403.
31. Id. No. 12,761.
33. See id. § 151.306.
34. See id. § 151.007(7).
time constituted a service, which was part of the sale of the concrete, and
the receipts for such time were taxable. 35

In Decision 12,507 the comptroller considered the exemption of electricity predominantly used to power a computer that exclusively processed seismic data. The taxpayer argued that the electricity was exempt because it was used in the exploration for a material extracted from the earth. 36 If the electricity is used predominantly in an exempt manner, all of the electricity is exempt; otherwise all the electricity used is taxable. 37 The judge determined that the term exploration must be construed broadly and, therefore, geophysical work, of which the petitioner’s computer was an integral and essential part, constituted exploration. Thus, the purchase of electricity predominantly used to operate the computer was exempt.

The principal issue in Decision 13,251 was whether certain charges made by the petitioner to its customers were nontaxable because they represented freight charges incurred after the sale. 38 The key to determining the taxability of the freight charges was whether more than one sale had occurred as to each piece of merchandise. The judge concluded that two sales occurred when the vendors invoiced and expected payment by the petitioner, who in turn billed its clients and looked to them for payment. The freight charges incurred by the petitioner for transporting merchandise to a warehouse, where the goods were held prior to ultimate delivery to the customer, were held to be taxable charges incurred by the petitioner prior to sale to its customers. The decision also contained the following guidelines for future transactions of this kind: (a) if merchandise is shipped directly from the manufacturer/supplier to the ultimate consumer’s place of business or residence, any charge for freight, transportation, or handling is not taxable; (b) if the merchandise is shipped to a public warehouse, freight, transportation, and handling charges are probably taxable; (3) if the merchandise is shipped to petitioner’s warehouse in the ultimate consumer’s name, transportation and handling charges are taxable; and (d) if the merchandise is shipped to petitioner’s warehouse under petitioner’s name, the transportation and handling charges are taxable. 39

35. See id. § 151.007.
37. See Tex. Comptroller of Public Accounts, 34 Tex. Admin. Code § 3.295 (Shepard’s May 1, 1982) (exemption is based on predominant use of the electricity); see also Colonial Cafeteria—Arlington v. Bullock, 587 S.W.2d 211, 214 (Tex. Civ. App.—Beaumont 1979, no writ) (predominant use theory is applied when no other practical way to determine taxable amount of electricity consumed).
39. Tex. Comptroller’s Administrative Decision No. 13,251 (1983); see also id. No. 12,688. The comptroller rendered this decision approximately two months before Decision No. 13,251, which was decided largely on the same basis. In Decision 12,688, however, the petitioner raised the additional argument that it was the agent for its customers in taking delivery of the purchased property from the third-party suppliers. The administrative law judge rejected this argument and concluded that the charges upon which tax was assessed were associated with transportation of the property before title or possession was transferred.
In Decision 12,974 the comptroller held that a taxpayer, engaged in manufacturing prestressed concrete products used primarily in highway and bridge construction by contractors under contract with exempt entities, is not a contractor for purposes of the statutory exemption.\textsuperscript{40} The comptroller also strictly construed another statutory exemption in Decision 13,329.\textsuperscript{41} The petitioner there contended that amounts paid for bins and containers used in the course of harvesting and processing fruits and vegetables, as well as amounts paid for repair parts, were entitled to tax exemption.\textsuperscript{42} The judge concluded that such bins and containers were taxable prospectively on and after January 1, 1983. Thus, the petitioner’s purchase was not taxable because applying the tax retroactively would cause confusion.

Decision 8,984\textsuperscript{43} involved the applicability of an exemption to pipe and equipment purchased by a regulated pipeline company, defined as a common carrier, to construct offshore pipelines wholly outside the State of Texas.\textsuperscript{44} The judge concluded that the petitioner’s pipe and equipment qualified for exemption because the petitioner did not take possession in Texas and the goods were delivered to a carrier for shipment out-of-state. The exemption was not lost merely because the pipe was delivered to another retailer for coating before delivery to the carrier, or because petitioner inspected the pipe prior to delivery. The judge observed, however, that if the pipe coater had delivered the pipe for storage to a third party as agent for the petitioner, sales tax liability would have been triggered.

In Decision 13,106 the comptroller considered whether a hair styling salon’s purchase of shampoo, hair conditioner, and hair spray were tax-exempt purchases for resale or were taxable purchases because their use changed from inventory to supplies when subsequently used on the salon’s customers.\textsuperscript{45} In dismissing the tax deficiency the judge relied, in part, on statements of his own hair stylist with respect to the amount of shampoo, hair conditioners, and hair spray that is likely to be consumed by a barber during a given period of time.

Two of the comptroller’s sales and use tax decisions during the survey period involved refund claims. In Decision 12,550\textsuperscript{46} the taxpayer sought to recover a portion of taxes previously paid for goods purchased to equip its methanol production facilities. The taxpayer argued that to the extent

\textsuperscript{40} Id. No. 12,974 (1983); see TEX. TAX CODE ANN. § 151.311 (Vernon 1982); accord Brazos Concrete Prods., Inc. v. Bullock, 567 S.W.2d 877, 879 (Tex. Civ. App.—Eastland 1978, no writ).


\textsuperscript{42} TEX. TAX CODE ANN. § 151.316 (Vernon 1982). This issue has largely been obviated for future transactions by the recent enactment of § 151.333. See Act of June 19, 1983, ch. 913, § 1, 1983 Tex. Gen. Laws 5052, 5052.

\textsuperscript{43} Tex. Comptroller’s Administrative Decision No. 8,984 (1983).

\textsuperscript{44} TEX. TAX CODE ANN. § 151.330(a)(2) (Vernon 1982).

\textsuperscript{45} Tex. Comptroller’s Administrative Decision No. 13,106 (1983); see TEX. TAX CODE ANN. § 151.154 (Vernon 1982).

\textsuperscript{46} Tex. Comptroller’s Administrative Decision No. 12,550 (1982).
the equipment was used to produce methanol it was a tax-exempt solar energy device. The judge determined that the exemption was unavailable on a proportionate basis. On an all-or-nothing basis the taxpayer was not entitled to the exemption because the equipment was not used for more than half the time as a solar energy device.

The refund claim in Decision 12,380 turned on whether the petitioner's purchase of certain printing equipment in a bankruptcy sale was exempt from sales tax as an occasional sale. The judge held that the supremacy clause of the Constitution does not bar the imposition of a state sales tax in a bankruptcy sale, and concluded that neither of the potentially applicable forms of an occasional sale governed this transaction. Substantially similar ownership of the equipment did not exist both before and after the sale since the petitioner did not acquire all, or substantially all, of the equipment used by the seller in a unified business activity. The judge, however, left open the question of whether the requisite ownership would be present if the petitioner had purchased substantially all of the bankrupt's unified business activity and the petitioner also owned eighty percent of the stock of the bankrupt, as it did in this case. The other form of an occasional sale was also found inapplicable because the bankrupt's assets were not sold in a single sale to a single buyer. The petitioner's purchase of the equipment, therefore, was held taxable.

The comptroller considered the fraud penalty for erroneously reporting taxable sales in two decisions during the period. In Decision 13,216 the taxpayer argued that the tax auditor improperly sampled the taxpayer's sales for purposes of projecting the tax deficiency. Since substantial discrepancies existed in some records and other records were unavailable, the judge upheld the tax deficiency based on a projection method. The taxpayer was also subjected to a twenty-five percent penalty for fraud. Decision 12,912 was essentially a factual determination regarding the correct amount of the petitioner's taxable sales as reconstructed by the Sales Tax Division. Of more importance, however, was the division's assertion that the petitioner committed fraud by intentionally underreporting the true amount of his taxable sales and was, therefore, liable for the twenty-five percent penalty. The division had the burden of proof on the issue and the judge, by analogy to federal income tax law, concluded that the burden must be discharged with clear, convincing, and substantial evi-

47. TEX. TAX CODE ANN. § 151.325 (Vernon 1982).
49. TEX. TAX CODE ANN. § 151.304 (Vernon 1982).
50. Id. § 151.304(b)(3).
51. Id. § 151.304(b)(2); Tex. Comptroller of Public Accounts, 34 TEX. ADMIN. CODE § 3.316(d)(4) (Shepard's May 1, 1982).
52. Tex. Comptroller's Administrative Decision No. 13,216 (1983); see TEX. TAX CODE ANN. § 111.0042 (Vernon 1982); Tex. Comptroller of Public Accounts, 34 TEX. ADMIN. CODE § 3.282 (Shepard's May 1, 1982).
53. See TEX. TAX CODE ANN. § 151.502 (Vernon 1982).
55. TEX. TAX CODE ANN. § 151.502 (Vernon 1982).
idence that the taxpayer intended to evade a tax he believed he owed the state. The judge concluded that the division did not sustain its burden of showing the petitioner's scienter and, therefore, dismissed the penalty.

The comptroller issued a number of other sales and use tax decisions covering a wide range of topics during the survey period. The issue in Decision 11,674\footnote{56. Tex. Comptroller's Administrative Decision No. 11,674 (1982).} was whether or not the petitioner was engaged in business and, therefore, a retailer in Texas cities where it maintained no offices. As a retailer the petitioner would be required to collect the local use tax on any of its sales made outside of Texas but delivered to customers in those Texas cities.\footnote{57. TEX. TAX CODE ANN. §§ 151.103, .107 (Vernon 1982).} Because the Sales Tax Division failed to show that the petitioner's salesmen traveled to the subject cities, the judge held that the petitioner had no such tax collection duty.

Decision 12,822\footnote{58. Tex. Comptroller's Administrative Decision No. 12,822 (1983).} concerned the question of whether the petitioner was the legal successor to another's sales tax liability due to the purchase of the business or inventory from another taxpayer.\footnote{59. See TEX. TAX CODE ANN. § 151.613 (Vernon 1982).} The petitioner purchased certain capital assets from the taxpayer, not including the name, goodwill, legal rights to the business location, or the major portion of the inventory. The judge concluded that the petitioner did not buy the business, but warned, in a dictum, that one can purchase a business even though one immediately changes the location and/or the name. Since the petitioner purchased approximately twenty percent of the inventory, the judge concluded that the purchase was not of the stock of goods. The judge reserved decision, however, on whether all of the inventory or just a majority of it must be purchased to impose successor liability for sales tax on the purchaser of a stock of goods.

Decision 10,317\footnote{60. Tex. Comptroller's Administrative Decision No. 10,317 (1982).} involved the question of whether sales of hot oil and vacuum units constituted the sale of a motor vehicle subject to the motor vehicle sales tax\footnote{61. TEX. TAX CODE ANN. § 152.021 (Vernon 1982).} rather than the sale of an attachment to a motor vehicle subject to the general sales tax. If the motor vehicle sales tax applied, the petitioner, as a seller, had no duty to collect that tax.\footnote{62. Id. § 152.041-.044.} The judge concluded that the cab and chassis purchased by a customer and provided to the petitioner was a motor vehicle; therefore, the hot oil or vacuum unit sold and installed by the petitioner was an attachment or accessory to that motor vehicle. Thus, the petitioner's sales charge was subject to the general sales tax, which the seller was obligated to collect.

Decision 13,519\footnote{63. Tex. Comptroller's Administrative Decision No. 13,519 (1983).} concerned the base for computing the use tax due on the purchase of an aircraft. The judge held the proper use tax base to be the sales price paid since the petitioner apparently intended to use the aircraft itself. The taxpayer listed the aircraft as a fixed asset on its records,
took a depreciation deduction for federal income tax purposes, and con-
stantly used the aircraft for business and personal purposes for a year
before demonstrating the aircraft to a potential customer.\footnote{See Tex. Tax Code Ann. §§ 151.101, .154(a) (Vernon 1982).}

In Decision 11,964\footnote{Tex. Comptroller's Administrative Decision No. 11,964 (1983).} the petitioner purchased certain items that it sub-
sequently donated to a tax-exempt entity. Sales tax was neither charged by
the seller nor paid by the petitioner at the time the items were purchased.
The judge concluded that the applicable statute\footnote{Tex. Tax Code Ann. § 151.155 (Vernon 1982).} must be construed to
authorize the purchase of any item tax free as long as the item is donated
to one of the tax-exempt entities named in the statute and the purchaser
makes no intervening beneficial use of the item.

Decisions 13,303\footnote{Tex. Comptroller's Administrative Decision No. 13,303 (1982).} and 13,317\footnote{Id No. 13,317.} were consolidated and considered
whether the proper taxable sales price was that shown on the petitioner's
internal records or the higher amount shown on an invoice given to the
petitioner's customers. The petitioner made carpet sales to customers who
were quoted a single lump sum price that included material, tax, and in-
stallation labor. The materials portion of the lump sum figure included the
petitioner's profit. When labor costs increased, the petitioner decreased its
profit component, thus reducing the amount used to determine sales tax.
The judge concluded that, as a result of a special statutory provision,\footnote{Tex. Tax Code Ann. § 111.016 (Vernon 1982).} the
amount shown as tax on the initial customer invoice was the full amount
owed to the comptroller, even though the true tax liability was less in the
case where the materials charge was reduced by reason of increased non-
taxable labor charges.

Decisions 13,998\footnote{Tex. Comptroller's Administrative Decision No. 13,998 (1983).} and 13,998-A\footnote{Id No. 13,998-A.} involved a tax protester who con-
tended that the United States Constitution prohibited the State of Texas
from accepting anything but gold or silver coins as payment of his sales tax
liability.\footnote{Taxpayer urged that there had been a violation of U.S. Const. art. 1, § 10, cl. 1.} The judge concluded that all United States coin and currency
was constitutionally legal tender, which the comptroller could lawfully re-
ceive in satisfaction of the petitioner's sales tax liability. Since United
States gold and silver coins also qualify as legal tender, the judge stated
that the comptroller could accept, at face value, as many of such coins as
the taxpayer would like to pay.

\section*{II. Franchise Taxes}

The Texas appellate courts decided no franchise tax cases during the
survey period.\footnote{One trial court, however, heard a significant case. In Central Power & Light v. Bullock, No. 333,772 (Dist. Ct. of Travis County, 250th Judicial District Court of Tex., Dec. 30, 1983) the issue was whether pre-1971 federal investment tax credits and certain other}
repeal of the use of the short form for filing franchise tax reports and the elimination of the requirement that a corporation file a signed copy of its federal income tax return with its franchise tax report for the period ending the year before that in which the franchise tax is due.\textsuperscript{74}

During the survey period the comptroller issued several new or amended franchise tax rules. Three rules concerned foreign corporations doing business in Texas. The comptroller amended rule 3.394, concerning cash security deposits, to provide that after June 15 of each year, the comptroller will automatically refund the $500 security deposit made by a foreign corporation if the corporation has been in good standing for the three previous reporting years.\textsuperscript{75} The corporation need not apply for the refund. The comptroller adopted new rule 3.406\textsuperscript{76} simultaneously with the repeal of its predecessor. The new rule details specific activities that the comptroller deems sufficient to subject a foreign corporation to the franchise tax.\textsuperscript{77} The comptroller amended rule 3.395\textsuperscript{78} to specify that a foreign corporation must only provide a statement of county assessed property values for accounting years ending prior to January 1, 1980. The change reflects the elimination of the county assessed value base of the franchise tax in 1981 legislation.

The comptroller adopted rule 3.397\textsuperscript{79} concerning requests for franchise tax reports and other information, simultaneously with the repeal of its predecessor. As amended, rule 3.397 eliminates the small fee previously charged for certificates of good standing and most other public franchise tax information. Rule 3.398\textsuperscript{80} was amended by adding a provision to inform taxpayers that liens against corporations failing to file a franchise tax report will be released only upon the payment of all tax, penalty, and interest due. The lien is assessed in the amount of the minimum franchise tax.

\textsuperscript{74} 1971 federal tax credits should be included in the taxpayer's taxable surplus in calculating its franchise tax. The taxpayer contended that these credits should be excluded because it was required to ratably flow the credits through to its ratepayers and was, thereby, indebted to them. The state contended that the credits were properly taxable as just another operating expense that the taxpayer was allowed to recover from its customers. The trial court issued no decision during the survey period.


\textsuperscript{77} Among some of the activities listed are: providing any service in Texas that is in the ordinary business of the company; maintaining inventory in the state; maintaining agents in the state to promote sales; dealing in real estate; transporting passengers or freight between points within the state; or acting as a general partner in a general or limited partnership doing business in Texas.


Rule 3.399,81 adopted simultaneously with the repeal of its predecessor, concerns franchise tax exemptions. The new rule specifies procedures for contesting the denial or revocation of franchise tax exemptions. Rule 3.399 revises the definitions of religious worship and educational purpose corporations to conform with those used in the administration of the state sales tax. Also, national and state banks are expressly exempted from payment of the franchise tax. Finally, the new rule establishes the requirements of a dissolution clause for all eleemosynary, religious, and educational corporations.

The comptroller adopted a new rule 3.402,82 concerning limitations on collections and refunds, simultaneously with the repeal of its predecessor. The new rule notifies taxpayers of the change in the statute of limitations for assessing delinquent franchise taxes from seven to four years. The rule sets out the conditions under which interest accrues on amounts erroneously paid to the comptroller, and outlines the proper procedure for making protest payments. In addition, the new rule provides for interest payable at the rate of ten percent per year on amounts erroneously paid to the comptroller for tax periods beginning on or after January 1, 1982.

Administrative law judges rendered a number of significant decisions concerning the franchise tax during the survey period. Decision 12,30783 considered whether receipts from business done in Texas included advertising and preprint revenues received from out-of-state customers by a newspaper printed and published in Texas, but circulated both within and outside the state. The amount of total Texas receipts is used in the statutory formula to determine the portion of a corporation’s capital subject to state franchise tax.84 The judge first determined that the sale of advertising is the performance of a service rather than the sale of an intangible. If the sales were considered intangibles, the receipts would be tested under the location of the payor standard, which treats out-of-state customer sales as non-Texas receipts for purposes of determining the petitioner’s franchise tax liability. Since the services were performed entirely within Texas, the judge concluded that the petitioner’s franchise tax liability was properly calculated based upon those services.

A taxpayer must be doing business in Texas to trigger state franchise tax liability.85 The petitioner in Decision 10,87886 asserted that it was not doing business in Texas because it was merely a holding company incorporated out-of-state that only received dividends and interest on its investments in its subsidiary corporations. The judge observed that the standard for doing business for franchise tax purposes differs from, and

84. TEX. TAX CODE ANN. §§ 171.103-.106 (Vernon 1982).
85. Id. § 171.001.
arguably is much broader than, the similar requirement for a certificate of authority under the Texas Business Corporation Act. The judge concluded that the holding company was doing business in Texas in a franchise tax sense because the corporation engaged in the continuous pursuit of its business and had not entered Texas to conduct a single, isolated, or casual transaction. The petitioner was, therefore, liable for the franchise tax.

Decision 12,903 considered whether intercompany charges that the petitioner received from its subsidiaries were dividends rather than receipts from services performed within Texas for the purpose of allocating the petitioner's taxable capital. If the payments were dividends they would only be Texas receipts when made by a Texas payor subsidiary corporation, whereas if the payments were receipts for services performed within Texas for those subsidiaries they would be receipts from Texas business. The judge concluded that, without evidence that the charges were for services rendered to its subsidiaries, the charges were considered informal dividends and not receipts from business done in Texas for allocation purposes, except for dividends received from the petitioner's Texas subsidiary.

Decision 11,786 involved two issues. The first was whether certain amounts credited by the petitioner to a bad debt reserve were proper reductions of the petitioner's taxable capital. The judge ruled that the reserve accounts in question should be considered a legitimate reduction of the petitioner's taxable capital because no distinction is made between different types of bad debt accounts. The second issue involved the petitioner's allocation of loan servicing receipts between Texas and other states on the same geographical basis used to distribute payroll. The judge concluded that the taxpayer must follow the cost method, under which a service is deemed performed wherever the costs are incurred, so long as the performance site is immaterial to the payor of the service fee. Payroll alone is not as representative an indicator of where services are performed as is a method taking all costs incurred in performance into consideration. The judge thus required the petitioner to use the cost method in the future.

Decision 11,628 involved several issues. The first issue was whether

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89. See Tex. Tax Code Ann. § 171.103 (Vernon 1982). Since only one of the several subsidiaries was domiciled in Texas, only its payments to the petitioner would be Texas receipts if the payments were dividends.
92. The judge further observed that the petitioner could use additional factors, such as payroll and property, for purposes of allocating its taxable capital in future reporting periods provided the petitioner requests and the comptroller grants permission to do so in accordance with Tex. Tax Code Ann. § 171.108(2) (Vernon 1982).
the rental payments received by the petitioner from its subsidiaries for a
certain type of offshore drilling barge should be considered rents from
property situated in this state and, therefore, receipts from business done
in Texas for franchise tax allocation purposes. The judge interpreted the
word “situated” to mean within Texas borders and not in transit, and con-
cluded that the drilling rig vessel, operating in Texas waters for several
months at a time, was not in transit and, therefore, was within Texas’s tax
jurisdiction. Thus, only receipts from rental of the rig when it operated in
Texas waters were Texas receipts. Another issue involved amounts ac-
crued by the petitioner for payment in the following year to its employees
as management incentive payments. The judge concluded that the pay-
ments, because of their discretionary nature, did not represent fixed, actual
liabilities of the petitioner and, thus, did not reduce the petitioner’s taxable
surplus. The final question in the decision was whether revenue from the
sale of an offshore drilling rig still under construction must be recognized
in the year received or over the term of the financing lease. The judge
held that federal income tax rules and generally accepted accounting prin-
ciples have no bearing on franchise tax treatment of income received over
a multi-year period. The entire amount of cash must, therefore, be shown
as part of taxable surplus in the year received.

At issue in Decision 12,737 was whether management fees received
from subsidiaries for administrative work and management advice should
be considered part of business receipts for purposes of allocating the peti-
tioner’s taxable capital. The judge concluded that the payments for serv-
ices performed by the petitioner through its own employees or third-party
suppliers were compensation that must be considered gross receipts from
services performed within Texas. The fact that the petitioner neither in-
cluded a markup nor intended to make a profit did not destroy the busi-
ness character of the receipts.

Decision 13,652 involved a title-holding corporation, exempt from fed-
eral income tax under section 501(c)(2) of the Internal Revenue Code, that contended that it was also exempt from franchise tax. The judge
noted that the legislature had amended the applicable exemption statute
specifically to add certain federally exempt entities, and did not include
section 501(c)(2) entities. The judge concluded, therefore, that the legisla-
ture intentionally rejected a franchise tax exemption for such corporat-
sions, and found the petitioner ineligible for the franchise tax exemption.

95. See generally id. § 171.101 (outlining formula for determining a corporation’s taxa-
table capital).
Decision 12,092 involved a corporation's purported debt owed to its sole shareholder/president. If the loan was a true debt it would reduce taxable capital subject to franchise tax, but if the payment was a capital contribution taxable capital would increase upon the corporation's receipt of the cash without any corresponding liability. Based on the petitioner's documents, its federal income tax return, and its failure to accrue interest on the alleged loan, the judge concluded that the amount involved was additional paid-in capital for franchise tax purposes.

In Decision 12,677 an accrual method taxpayer contended that its year-end adjusting entries should be considered part of its books and records for determining its taxable capital. The judge characterized the issue as whether the petitioner was entitled to report its financial condition on the cash basis of accounting, giving effect to the adjusting entries made at year end, and disregard the records maintained throughout the year on the accrual basis. The judge rejected the taxpayer's contention and held that the unadjusted books were the proper books and records to use for determining franchise tax liability.

Decision 10,659 involved two principal issues. The first was when losses on long-term construction contracts and expected recoveries on claims filed with respect to those contracts should be recognized. The losses would reduce taxable capital, and any recovery would partially offset those losses. The judge permitted the petitioner to use the percentage-of-completion method rather than the completed contract method of accounting to determine when to recognize the losses and expected recoveries from the contract. The taxable capital, therefore, fluctuates yearly depending upon the amount recognized. In another part of the decision, however, the judge held that the elimination of the possibility of profit on future, uncommitted sales orders was not a proper reduction of the taxpayer's taxable capital for franchise tax purposes because the exact amount of loss was unknown.

Decision 9,831 involved two major issues among several raised at the hearing. The first issue concerned whether certain reserves maintained by the petitioner were properly treated as debts. The judge determined that the reserves constituted debt and thereby reduced surplus. The judge then considered whether advance receipts from future sales or services properly resulted in a net increase in the taxpayer's surplus. The surplus did not increase, the judge concluded, prior to the time the services were...

103. See Tex. Comptroller of Public Accounts, 34 Tex. Admin. Code § 3.405(a) (Shepard's May 1, 1982).
performed or the property was delivered since the amount by which the taxpayer's total debts were increased offset the amount by which its total assets were increased.

Decision 12,318\textsuperscript{110} was a very significant administrative decision issued during the survey period. The first issue involved whether a parent's charges to its subsidiaries for various services were reimbursements or proceeds from the resale of those services to the subsidiaries when paid to the parent as agent for its subsidiaries. If the payments were considered reimbursements, they would not be business receipts for the purpose of allocating taxable capital, whereas proceeds from resales of services would be considered to be business receipts for the same purpose.\textsuperscript{111} Despite the absence of a formal agency agreement between the parties, an agency relationship existed when goods or services passed from the supplier through one corporation to its subsidiary, and the parent received the same amount the supplier would have received directly. While the judge determined that several items met this test, thus qualifying as reimbursements, items such as legal retainer fees and long distance telephone services could only be apportioned on an estimated basis to each subsidiary and, therefore, were not eligible as reimbursements. Moreover, the judge deemed these payments to be business receipts even though the parent had no direct profit motive in charging a portion of its costs to its subsidiaries. The judge observed that the petitioner's acquisition of services rather than separate acquisitions by each subsidiary enhanced the overall economic benefit of the group; this indirect profit motive thus supported the view that the receipts were business receipts.

The second issue in Decision 12,318 was whether dividends received from a business trust, of which the petitioner owned 9.8\% of the stock, constituted receipts from business done in Texas.\textsuperscript{112} Because the dividends were receipts from an intangible asset the location-of-payor test applied, and the judge had to determine the legal or commercial domicile of the payor trust. If the trust was domiciled in Texas the dividends would be receipts from Texas business.\textsuperscript{113} The judge rejected the petitioner's argument that the trust should be considered legally domiciled in the state under whose laws the trust was formed and in which the declaration of trust was recorded. The judge also rejected the petitioner's contention, based on the applicable non-Texas law, that the act of recording the trust was analogous to a corporation's acquiring legal domicile by virtue of a state-issued charter or certificate of incorporation, which recognized the corporation as a creature of that state. The trust was created, according to the judge, by the private act of signing the declaration of trust agreement and the act of recording the agreement was more like filing a limited partnership agreement, which only provides notice. Furthermore, the trust

\textsuperscript{110} Tex. Comptroller's Administrative Decision No. 12,318 (1983).
\textsuperscript{111} \textit{Tex. Tax Code Ann.} §§ 171.103, .105 (Vernon 1982).
\textsuperscript{112} \textit{See id.} § 171.103.
\textsuperscript{113} \textit{See} Humble Oil & Ref. Co. v. Calvert, 414 S.W.2d 172, 180 (Tex. 1967).
was not recognized as a trust entity under Texas law and, therefore, was
treated as an unincorporated association. The judge noted the absence of
case law giving the test for determining the legal domicile of an unincorpor-
ated association, but concluded that courts would probably apply the
same test as that used for partnerships, which states that the legal domicile
is the location of the principal place of business. Since the trust's principal
place of business was Texas the judge found the trust to be domiciled in
Texas, and the petitioner's receipts from the trust were, accordingly, re-
ceipts from business done in Texas.

The next issue in Decision 12,318 was whether interest paid by third
party borrowers on loans, with respect to which the petitioner and others
had entered into loan participation agreements, should be treated as re-
ceipts from Texas business based upon the legal domicile of a theoretical
partnership between the petitioner and the other loan participants. The
judge rejected the position of the Business Tax Division that the loan par-
ticipation agreements constituted partnerships and, therefore, concluded
that the location of the borrower is used for determining whether or not the
interest payments are receipts from business done in Texas for franchise
tax allocation purposes. Another significant issue in Decision 12,318 was
whether the taxpayer could use the equity method of valuing its ownership
interest in certain corporations and a joint venture. The judge held, based
upon Bullock v. Enserch Corporation,\footnote{114} that any investment in a corpora-
tion, whether or not a subsidiary, must be computed at cost in calculating
taxable capital. The rule, however, did not apply to the petitioner's invest-
ment in a joint venture, which could be valued using the equity method.

The decision also addressed the issue of whether the petitioner could
reduce its taxable capital on loan losses recognized at the time of foreclo-
sure. The loss was the difference between the amount owed by a borrower
and the amount realized from the sale of the property securing the loan.
The judge permitted the reduction because the amount in question repre-
sented a bad debt that was certain at foreclosure. Since the law allows a
reserve for bad debts estimated to occur in the future as a reduction of
taxable capital,\footnote{115} the judge concluded that a reduction claimed at the time
that the loss is firmly established should be recognized. The judge also
ruled on whether the petitioner's lease receipts from sale-leaseback trans-
actions should be treated as lease payments rather than loan payments for
franchise tax purposes. The judge concluded that the payments were prop-
erly characterized as lease payments subject to the location of payor test.

The last significant issue in Decision 12,318 was whether income the
petitioner realized from purchasing its own convertible debentures at a dis-
count should be considered a business receipt for franchise tax allocation
purposes.\footnote{116} The judge concluded that the increase in the petitioner's taxa-

\footnote{114. 583 S.W.2d 950, 952 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).
115. See Huey & Philp Hardware Co. v. Shepperd, 151 Tex. 462, 251 S.W.2d 515, 520
(1952).
116. The judge observed that the Internal Revenue Service considers the differential to}
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be taxable income, and generally accepted accounting principles require such amount to be treated as income, thus increasing the petitioner's retained earnings. Decision No. 12,318 at 3.

118. Id. No. 13,676.
121. 639 S.W.2d 302 (Tex. 1982).
against a county hospital district and a hospital seeking a declaratory judgment that a tax exemption certificate issued by the commission was void. The plaintiff contended that taxpaying residents of the hospital district would pay higher taxes as a result of the construction of a new hospital. The trial court granted the defendants’ motion for summary judgment on the grounds that the plaintiffs lacked standing and had not exhausted their administrative remedies. The court of appeals affirmed the judgment on the sole ground that the taxpayers lacked standing. The supreme court’s per curiam opinion reversed the court of appeals and remanded the cause to the trial court on the basis that the court of appeals had improperly placed the burden of proof as to the standing issue on the nonmoving taxpayers.

Welker v. State involved delinquent state employment contributions, including interest and penalties, owed by a company acquired by Welker. The state claimed that Welker had successor liability. The applicable statute provides that the state has made a prima facie case if its petition is accompanied by an affidavit from the Texas Employment Commission setting forth the amount due. If the state establishes a prima facie case, the defendant must file a counter-affidavit denying the state’s claims. While the failure to file such a counter-affidavit generally bars the defendant from challenging the accuracy or justness of the amount claimed in the state’s affidavit, the court of appeals held, by analogy to the operation of civil rule 185, that the defendant is not precluded from raising other defenses to his alleged liability. Thus, the defendant’s failure to file the counter-affidavit in this case did not bar him from proving that the amount alleged as due was inaccurate, and the court of appeals reversed the trial court judgment and remanded the case for a new trial. Consequently, the state must prove by a preponderance of the evidence that the defendant owed the alleged amount of employment contributions and the defendant has the opportunity to prove affirmatively that he was not an employer and, therefore, not liable under the statute.

In Houston Lighting & Power Co. v. Dickinson Independent School District the taxpayer sued to avoid assessment of ad valorem taxes on grounds of excessiveness and discrimination. The court of appeals held
that the school district had substantially complied with the statutory requirements for tax levies and strict compliance was not required to uphold the levy.\textsuperscript{133} The court also upheld the trial court’s findings that the taxpayer had not made an unconditional tender of tax due and, therefore, had not satisfied its tax obligation for the year at issue.\textsuperscript{134} The court also found that the taxpayer had failed to prove that the taxing authority’s valuation, found by the trial court to reflect fair market value, was grossly excessive; that substantial injury resulted thereby; and that the taxpayer’s valuation reflected the market value of properties within the district.\textsuperscript{135}

In \textit{Coffee v. City of Alvin}\textsuperscript{136} property owners sued to enjoin collection of allegedly excessive ad valorem taxes, and the taxing authority counterclaimed to collect the delinquent taxes. The court of appeals held that the owner’s testimony was of no probative value with respect to valuation of the subject property because the testimony was based on approximation and was unsupported by relevant facts.\textsuperscript{137} Thus, although an owner of property may give his opinion as to the property’s value, the opinion must be more than mere conjecture.

The legislature enacted several statutes during the survey period that affect state tax procedures. The Tax Code now contains section 156.204, regarding the hotel occupancy tax.\textsuperscript{138} Section 156.204 specifically requires that the purchaser of a hotel withhold an amount of the purchase price sufficient to pay the hotel occupancy tax due until the seller provides proof that the tax has been paid or is not due. A purchaser failing to withhold this amount is liable for the amount required to be withheld up to the purchase price. The statute further provides a procedure whereby the hotel purchaser may request a no tax due certificate, or a statement specifying the amount required to be paid before the issuance of such a certificate, and contemplates an audit of the hotel’s former owner prior to the issuance of a statement or certificate.\textsuperscript{139} The statute of limitations with respect to the comptroller’s assessment of tax against the purchaser is four years from the later of the date of sale or the date of determination against the former owner.\textsuperscript{140} Moreover, at any time within three years after a deficiency determination against the purchaser has become due and payable, the comptroller may sue to collect the delinquent amounts together with penalties and interest.\textsuperscript{141}

The legislature clarified that the general provision for ten percent interest on all delinquent taxes also applies to delinquent motor vehicle sales and use taxes.\textsuperscript{142} A forfeiture penalty is assessed for failure to file a report

\textsuperscript{133.  Id. at 306.}
\textsuperscript{134.  Id. at 308.}
\textsuperscript{135.  Id. at 309-10.}
\textsuperscript{136.  641 S.W.2d 597 (Tex. App.—Houston [14th Dist.] 1982, writ ref’d n.r.e.).}
\textsuperscript{137.  Id. at 601.}
\textsuperscript{139.  Id.}
\textsuperscript{140.  Id.}
\textsuperscript{141.  Id.}
or pay the motor fuel tax when due.\textsuperscript{143} The legislature imposed a similar forfeiture penalty with respect to the motor vehicle sales tax, the tobacco products and cigar tax, the cement production tax, miscellaneous gross receipts tax, miscellaneous occupation taxes, the gas production tax, the oil production tax, the sulphur production tax, and the inheritance tax;\textsuperscript{144} and provided similar penalties for assessments due with respect to public utilities.\textsuperscript{145}

The legislature established certain limitations on the collection and refunds of state taxes and the filing and release of state tax liens.\textsuperscript{146} First, the comptroller and a taxpayer may now agree on extending the period for filing a refund claim in the same manner as previously provided for extending the period for assessment and collection of the tax. Second, a pending administrative proceeding before the comptroller regarding the same period and the type of tax is not considered in determining the expiration date for filing a refund claim. A taxpayer cannot file a refund claim for the same transaction, type of tax, or time period as a refund claim previously filed with the comptroller. Third, the comptroller is now authorized to pay the customary fee to a county clerk for filing and indexing a release of tax lien notice and to collect the amount paid from the taxpayer against whom the lien was filed. Fourth, the legislation provides that the protest payment required prior to filing suit for a refund must be made before the later of the expiration of the statute of limitations for filing a refund claim or six months after a jeopardy or deficiency determination becomes final.

Under new legislation, the general interest rate on judgments and the period for which judgments earn interest do not apply to judgments earning interest under title 2 of the Tax Code.\textsuperscript{147} Moreover, the state is entitled to interest at the rate of ten percent a year on judgments it wins in tax cases. The interest begins on the day the judgment is signed and ends on the day the judgment is satisfied.\textsuperscript{148}

The requirement that a taxpayer consent before a sample audit can be performed by the comptroller's auditors has been repealed.\textsuperscript{149} Under prior law consent was not required if the taxpayer's records were inadequate or insufficient.\textsuperscript{150} New legislation now provides that, in addition to other remedies provided by law or by city ordinance for the collection of the city hotel occupancy tax, the city attorney or his designee may sue persons re-

\begin{flushright}
\textsuperscript{143} Id. \textsection 2, at 450-51.
\textsuperscript{144} Id. \textsection\textsection 3-13, at 451-56.
\textsuperscript{145} Id. \textsection 14, at 456-57.
\textsuperscript{146} Id. ch. 94, at 458.
\textsuperscript{148} Id. \textsection 2, at 519.
\textsuperscript{150} Tex. Tax Code Ann. \textsection 111.0042 (Vernon 1982).
\end{flushright}
required to collect the city hotel occupancy tax to enjoin the operation of a hotel in the city until payment is made or the report is filed. The legislature amended the Property Tax Code by changing the due date for the filing of annual tax reports. Collectors for taxing units must now submit reports accounting for collected and delinquent property taxes within sixty days after the close of the unit's fiscal year.

The legislature also made several changes to the due dates for oil and gas production taxes, motor fuel taxes, gross receipt taxes, and the reports and estimated payments in connection with those taxes. The time and manner that motor vehicle tax collections and tax receipts must be sent by county tax assessor-collectors to the comptroller were also amended.

The comptroller changed several of the administrative rules governing tax procedure. During the survey period the comptroller significantly amended rules 1.1 to 1.42. In general, the new procedures require a taxpayer to submit documented and detailed formal objections to a deficiency determination at a very early stage in the administrative redetermination proceeding.

The comptroller formally adopted new rule 3.6 concerning subpoenas of third-party record keepers, after the rule's initial adoption on an emergency basis. The rule allows the comptroller to subpoena a taxpayer's records from any person in possession of them. The new rule fixes the reimbursement rates payable to third-party record keepers who comply with subpoenas, and provides a procedure for requesting payment. Under this rule, the comptroller will reimburse record keepers for time actually spent in locating, retrieving, copying, and compiling requested records. No reimbursement, however, is made for managerial or legal work expended in determining whether to comply with a subpoena.

The comptroller adopted rule 3.55 which authorizes the payment of interest at ten percent per year on tax erroneously paid for reporting periods after January 1, 1982. The interest appends automatically to amounts refunded and need not be requested. Interest begins to accrue sixty days after either the payment date or the due date of the tax report, whichever is later. Interest stops when credit is allowed by the comptroller or within ten days prior to issuance of the refund warrant.

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152. Id. ch. 1027, § 1, at 5461, 5462.
154. Id. ch. 280, at 1360.
158. The rate of reimbursement is $6.00 per hour.
IV. INHERITANCE TAX

The Texas courts decided no inheritance tax cases during the survey period. The legislature, however, made several important changes to the administration, collection, and enforcement of the inheritance tax, the due dates for filing certain returns and paying taxes, and the liability of certain persons.\textsuperscript{160} First, the due dates for state inheritance tax returns and payments are coordinated with the due dates for federal generation-skipping transfer taxes. Previously, coordination was limited to the federal estate tax return and tax. Second, a Texas tax return need not be filed if no federal estate or generation-skipping transfer tax return must be filed. Third, the state no longer holds an automatic tax lien as of the date of death, thus eliminating the need for a no tax due certificate from the personal representative of the estate. Fourth, the statute provides that any personal representative of a decedent's estate who transfers any of the decedent's property without paying the inheritance tax, penalty, and interest is personally liable for such amount to the extent of the property's value.

The comptroller issued only two inheritance tax administrative decisions during the survey period. Decision 12,818\textsuperscript{161} involved a taxpayer claiming a deduction on the inheritance tax return for property received from a prior decedent whose estate paid another state's estate tax. The deduction for such property is allowed if an inheritance tax has been paid.\textsuperscript{162} The decision concluded that payment of an estate tax on the property is deemed to be payment of an inheritance tax for purposes of the statute. The taxpayer, therefore, was entitled to the deduction for the property.

The issue in Decision 12,819\textsuperscript{163} was whether the valuation of a land transfer made in contemplation of death should be reduced by the amount of federal gift tax paid on the transfer prior to the decedent's death.\textsuperscript{164} The gift of the property was made in contemplation of death; therefore, the estate corpus subject to inheritance tax included the property transferred. The fact that the donees had agreed to pay the gift tax on the original transfer did not reduce the market value of the subject property. The judge thus refused to allow reduction of the property's value by the federal gift tax paid.

\textsuperscript{161} Tex. Comptroller's Administrative Decision No. 12,818 (1982).
\textsuperscript{162} See TEX. TAX CODE ANN. § 211.051(b) (Vernon 1982). This provision in the Tax Code refers to a death tax, which is specifically defined in § 211.001(2) to include an estate tax, rather than an inheritance tax. The predecessor statute, Act of Sept. 1, 1959, ch. 1, art. 14.10, 1959 Tex. Gen. Laws 187, 327, repealed by Act of Sept. 1, 1981, ch. 862, § 6, 1981 Tex. Gen. Laws 3291, 3294, which was at issue in Decision 12,818 did not expressly define an inheritance tax to include an estate tax.
\textsuperscript{163} Tex. Comptroller's Administrative Decision No. 12,819 (1982).
V. PROPERTY TAX

The survey period was a bountiful time for developments in Texas property taxation. The United States Supreme Court issued two significant decisions in the property tax area. In American Bank & Trust Co. v. Dallas County the Court struck down the Texas property tax on bank shares. Several Dallas-area taxing subdivisions levied property taxes on the value of banks' shares of stock. In determining that value, the taxing authorities included the value of United States obligations held by the banks. The banks contended that the property tax violated federal law, which generally exempts federal obligations from state and local taxes. The Court agreed, holding that the plain meaning of the federal exemption statute forbade any form of taxation and, therefore, the property tax could not stand.

In Xerox Corp. v. County of Harris the Supreme Court considered the validity of imposing personal property taxes on copying machines assembled in Mexico from United States manufactured parts, shipped to and temporarily stored in a customs bonded warehouse in Houston prior to sale, and finally shipped to Xerox affiliates in Latin America. None of the copiers were sold to customers for domestic use. Instead, the products were under the continuous control and supervision of the United States Customs Service from the time of entry into the warehouse until clearance at the port of shipment. Xerox prevailed in the trial court on the grounds that the taxes violated the import-export clause and the commerce clause of the United States Constitution. The Houston court of civil appeals reversed, holding that neither constitutional provision had been violated, and the Texas Supreme Court denied Xerox's application for a writ of error. The United States Supreme Court, over Mr. Justice Powell's lone dissent, reversed the Texas appellate decision and held that the taxes were an impermissible violation of Congress's comprehensive regulation of customs duties. Accordingly, the Supreme Court found it unnecessary to consider whether the taxes would have been permitted under the import-export or commerce clauses.

The issue in Hays Consolidated Independent School District v. Valero Transmission Co. was whether the taxpayer had properly challenged the taxing authority's valuation of the taxpayer's property. The court of ap-

166. 103 S. Ct. 3369, 77 L. Ed. 2d 1072 (1983).
168. 103 S. Ct. at 3380, 77 L. Ed. 2d at 1085.
169. 103 S. Ct. 523, 74 L. Ed. 2d 323 (1982).
170. U.S. Const. art. 1, § 10, cl. 2.
171. Id. § 8, cl. 3.
172. 619 S.W.2d 402, 404 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).
173. Id. at 407. For discussion of the case at the appellate court level, see Stark, Taxation, Annual Survey of Texas Law, 36 Sw. L.J. 571, 588-89 (1982).
174. 103 S. Ct. at 528, 74 L. Ed. 2d at 331.
175. 645 S.W.2d 542 (Tex. App.—Austin 1982, writ ref'd n.r.e.).
peals reversed the trial court and found that the taxpayer had not shown that the assessment was excessive, as required by the applicable statute. The court stated that the taxpayer had a greater burden to carry in this case because it had delayed its attack on the assessment until after the board of equalization had approved the tax rolls and begun collection.

In Highland Church of Christ v. Powell the taxpayer argued that the part of a building in which it conducted a radio and television ministry was exempt from property taxation. The court of appeals held that the portion of the building used for the radio and television ministry was properly exempted from property taxation because it was exclusively used for religious worship within the meaning of the applicable statute. The church, however, was denied an exemption for certain years because it had failed to file for the exemption.

Missouri Pacific Railroad v. Midland Independent School District was another case regarding the proper valuation of the taxpayer's property for taxing purposes. The railroad asserted, and the court of appeals agreed, that the taxing authorities' use of comparable sales to establish market value was illegal, arbitrary, and fundamentally wrong. The court stated that the taxing units should have used the cost and income approaches in determining value, as authorized by the Texas Supreme Court.

Querner Truck Lines v. State was an action brought by a taxpayer to enjoin the sale of its property after seizure for delinquent taxes. The supreme court, on direct appeal of the district court's denial of the injunction, upheld the statute under which a taxpayer who renders his personal property with the county tax assessor is assured that it will be assessed at the value listed on the tax rolls or that he will have ten days' notice to appear before the board of equalization to contest any increase. The supreme court's holding was based upon its earlier decision in a companion case, Shaw v. Phillips Crane & Rigging of San Antonio, Inc.

A suit for delinquent ad valorem taxes in Manges v. Freer Independent

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177. 645 S.W.2d at 547 n.1.
178. 644 S.W.2d 177 (Tex. App.—Eastland 1982, writ ref'd n.r.e.).
180. 644 S.W.2d at 181. The relevant exemption statute is Tex. Tax Code Ann. § 11.20 (Vernon 1982).
181. 644 S.W.2d at 182.
182. 647 S.W.2d 62 (Tex. App.—El Paso 1983, writ ref'd n.r.e.).
183. Id. at 64-65.
184. Id. The Texas Supreme court authorized the cost/income valuation in Polk County v. Tenneco, Inc., 554 S.W.2d 918, 923 (Tex. 1977), and Missouri-Kansas-Texas R.R. v. City of Dallas, 623 S.W.2d 296, 300 (Tex. 1981).
185. 652 S.W.2d 367 (Tex. 1983).
School District resulted in several holdings by the court of appeals. First, the independent school district involved was held to lack constitutional authority to levy ad valorem taxes because of the manner in which the school district was formed. Moreover, this constitutional deficiency could not be cured by a legislative enactment. Next, the court held that the school district was not entitled to collect attorneys' fees in this litigation. Furthermore, the court held that a bulk lien upon multiple properties of multiple defendants is a violation of the Texas Constitution and the applicable property tax statute. Accordingly, the court set aside as void the foreclosure sought by the taxing authorities.

The legislature made a number of technical and relatively minor changes to the Property Tax Code during the survey period. The comptroller repealed rules 3.231 to 3.256 relating to state ad valorem taxes, because a constitutional amendment repealed state ad valorem taxes. The Board of Tax Assessor Examiners also adopted a comprehensive set of administrative rules during the survey period to conform to the statutory amendments made by the legislature.

The attorney general issued several significant opinions relating to the property tax during the survey period, including the following: (a) no additional fifteen percent penalty is available if a county attorney collects delinquent property tax; (b) the chief appraiser must give homestead designation to a residence for up to twenty acres of land; (c) state park...
land concessions are not exempt from property taxation; \(^{200}\) (d) the statutory limitation on property valuation increases for reappraisals between 1982 and 1983 violates the constitutional requirement for equal and uniform property taxation; \(^{201}\) (e) property owned by a nonprofit corporation that provides employment training and assistance to ex-offenders is not tax-exempt because the organization is not assisting handicapped persons (interpreted to refer to persons with physical or mental impairments that place such individuals at a disadvantage in economic competition); \(^{202}\) (f) the property tax exemption accorded to nursery products is constitutional inasmuch as Texas courts would construe tax-exempt farm products to include such items; \(^{203}\) (g) a home owned by a church and used by a needy family is not tax-exempt under any tax provisions; \(^{204}\) and (h) an appraisal district must impose penalty and interest on a taxing unit’s late payment of taxes to the district. \(^{205}\)

VI. MISCELLANEOUS

In \textit{Superior Oil Co. v. City of Port Arthur} \(^{206}\) the city annexed an oil company’s offshore drilling platform and leasehold. The oil company claimed that the annexation was a taking without due process in violation of the fourteenth amendment of the United States Constitution. \(^{207}\) In addition to several procedural holdings, the court expressly held that the annexation of the oil company’s property and the resultant tax assessed upon it violated constitutional due process. \(^{208}\) The court stated that:

Port Arthur’s annexation was nothing more than a land grab, motivated solely by a lust for tax revenue and having no relation to the traditional purposes of municipal government and its legitimate powers. . . . The disparity between the tax imposed and the benefits received was clearly so flagrant and palpable as to amount to an arbitrary taking of property without compensation. \(^{209}\)

The district court, therefore, declared the annexation ordinance unconstitutional and ordered the annexation set aside. \(^{210}\)

\textit{State v. Allstate Insurance Co.} \(^{211}\) was an action to recover an alleged overpayment of taxes levied upon gross insurance premiums received on policies covering property or risks located in Texas during the preceding

\(^{201}\) \textit{Id.} No. JM-43; \textit{see} TEX. CONST. art. VIII, § 1 (amended 1978).
\(^{205}\) \textit{Id.} No. JM-74 (1983); \textit{see} TEX. TAX CODE ANN. § 6.06(e) (Vernon 1982).
\(^{206}\) 553 F. Supp. 511 (E.D. Tex. 1982).
\(^{207}\) U.S. CONST. amend. XIV.
\(^{208}\) 553 F. Supp. at 518.
\(^{209}\) \textit{Id.}
\(^{210}\) \textit{Id.}
\(^{211}\) 654 S.W.2d 45 (Tex. App.—Austin 1983, writ ref’d n.r.e.).
The court of appeals held that the insurance carrier paid the tax under duress. Specifically, the carrier feared that the state Board of Insurance and the Commissioner of Insurance might terminate the company's right to do business in Texas if it did not conform to the interpretation assigned to the tax statutes by the board and the commissioner and submit the overpayment.

In *Christian Jew Foundation v. State* the court of appeals extensively analyzed the federal and state constitutional and statutory requirements for tax exemption of a church. The tax at issue was the employer's contribution to the unemployment compensation fund administered by the Texas Employment Commission. The court held that the foundation, which propagated its belief generally through written publications and radio broadcasts and was not formally affiliated with a specified sect or denomination, was nevertheless a church eligible for exemption from contributing to the unemployment compensation fund for services performed by its employees.

*United States v. Texas* considered the applicability of the gallonage tax on alcoholic beverages purchased by military bases from nonresident sellers. The Fifth Circuit held that the federal government exercises exclusive jurisdiction over federal enclaves under the supremacy clause and Texas, therefore, was not allowed to prohibit purchases directly from nonresident sellers. Accordingly, the military purchasers were not subject to the gallonage tax. A few additional miscellaneous tax cases were decided or appealed during the survey period, and a variety of miscellaneous tax legislation was enacted.

The legislature made a very important change to motor vehicle sales and use taxes. Those taxes no longer apply to the retail sale of a motor vehicle that is not used in Texas prior to being transported out of state. In addition:

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213. 645 S.W.2d at 47.
214. 653 S.W.2d 607 (Tex. App.—Austin 1983, no writ).
217. 695 F.2d 136 (5th Cir. 1983).
220. 695 F.2d at 141.
221. *Id.*
222. See Dorchester Gas Producing Co. v. Bullock, No. 13672 (Tex. App.—Texarkana, Nov. 15, 1983) (not yet reported) (involving whether the taxpayer was a producer of hydrocarbons subject to gas production tax); Lone Star Gas Co. v. Bullock, No. 282075 (Dist. Ct. of Travis County, 361st Judicial Dist. of Tex., Dec. 7, 1982) (concerning the Texas gross receipts tax on gas utilities). Among the more important legislative changes were the following: (1) no longer will a state warrant (payment) be issued to anyone owing delinquent state taxes until such taxes are paid. Act of May 10, 1983, ch. 100, § 1, 1983 Tex. Gen. Laws 499; and (2) the occupation taxes on brokers and factors, quotation services, pistol dealers, ship brokers, and billiard table owners or operators were repealed. Act of Aug. 29, 1983, ch. 840, § 1, 1983 Tex. Gen. Laws 4769.
tion, the comptroller adopted or proposed several miscellaneous changes to his administrative rules during the survey period. Most of these were technical in nature. The comptroller revised rule 3.14,224 which provided an exemption from the gas occupation tax for certain royalty interests, and rule 3.33,225 concerning the taxability of tank bottoms under the crude oil production tax.226 To alleviate the otherwise accelerated reporting required by a combination of certain statutes applicable to the sulfur production tax,227 the comptroller adopted rule 3.42 on an emergency basis.228 The comptroller initially adopted new rule 3.54,229 concerning the gross receipts tax applicable to telegraph business within Texas, but later proposed it for repeal because clarifying legislation made this rule unnecessary.230 The comptroller also adopted rule 3.56,231 concerning telephone company business within Texas to clearly identify business within Texas that is subject to the gross receipts tax on telephone companies.232 For example, receipts from the lease or rental of telephone equipment located in Texas and from access charges for connecting this type of equipment to communication lines are taxable unless either the sender or receiver of a communication is outside Texas.

New rule 3.113 authorizes interest to be paid on refunds of cigarette tax at the rate of ten percent per year if the tax is erroneously paid to the comptroller.233 Refunds for reporting periods prior to January 1, 1982, wil
not accrue interest. After January 1, 1982, interest begins to accrue on the later of either sixty days after the date of payment or sixty days after the due date of the tax report. Interest stops when credit is allowed by the comptroller or within ten days before the date the refund warrant is issued. Credits taken on the taxpayer's return do not accrue interest and no tax or interest will be refunded to a person who has collected the tax from another until the amount collected is first refunded to the party from whom it was collected. 234

The comptroller amended rules 3.161 to 3.164, 235 regarding the hotel occupancy tax, 236 to clarify certain terms in connection with the complete revision of the rules relating to this tax. The comptroller repealed rule 3.171, 237 concerning special purpose liquefied gas propelled motor vehicles to conform with the repeal of the related statute. 238 The comptroller also repealed rule 3.177 relating to certain certificates of deposit deposited in lieu of cash or surety bonds as security for certain fuel tax permits. 239 Rule 3.181, 240 concerning cargo tank calibration, no longer requires that taxpayers obtain the comptroller's permission before using meters to measure the volume of liquid placed in, or removed from, a vehicle cargo tank. The comptroller proposed rule 3.485 for amendment to reflect the legislative change to the motor vehicle tax on manufactured housing, 241 and adopted the bingo tax rules, rules 3.541 242 and 3.544 to 3.553, 243 on an emergency basis to provide detailed guidance to taxpayers in light of recent legislative changes to the bingo taxes. 244

During the survey period the Texas Attorney General issued one important miscellaneous tax opinion, stating that the hotel occupancy tax applies to state employees traveling on state business. 245 Finally, the comptroller is

236. TEX. TAX CODE ANN. § 156.051 (Vernon 1982).
239. Tex. Comptroller of Public Accounts, 7 Tex. Reg. 4521 (1982), 8 Tex. Reg. 731 (1983), adopted, 8 Tex. Reg. 1495 (1983) (repealing 34 TEX. ADMIN. CODE § 3.177). Prior to its repeal the rule required that a person who desired to assign a certificate of deposit to the comptroller in lieu of a cash or surety bond as security for a gasoline or diesel fuel permit must submit the certificate of deposit, as well as the assignment, to the comptroller. The repeal of the rule will allow the submission of only the assignment with respect to a certificate of deposit held by a broker or savings and loan association.
243. Id. at 3345, 3469 (amending on an emergency basis 34 TEX. ADMIN. CODE §§ 3.543-553).
now required to publish the maximum credit against the gasoline tax allowable for the first sale or use of gasoline and alcohol mixture blended from products produced in a state allowing a reciprocal credit for Texas produced products.246