1975

Taxation

J. David Tracy

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
J. David Tracy, Taxation, 29 Sw L.J. 326 (1975)
https://scholar.smu.edu/smulr/vol29/iss1/15

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
TAXATION

by

J. David Tracy*

I. INHERITANCE TAX

Although there was a dearth of activity in the area of the Texas inheritance tax, 1 Findley v. Calvert 2 was a case of first impression in construing the “contemplation of death” provision. 3 In Findley the decedent had conveyed his community property interest in certain real estate to his wife some seven months prior to his death. The real estate interest transferred was valued at $15,375.00, while the decedent's gross estate was valued at $248,367.94. Presumably, the valuation of the gross estate did not include the gift of real property. This gift was found to be in contemplation of death, and thus includable in the decedent's gross estate, both by the hearings division of the comptroller's office, 4 and by the district court in a non-jury trial. The affirmance by the court of civil appeals, unfortunately, was a decision lacking in clarity. Apparently, this gift satisfied the statutory presumption be-

---

1. In one case the hearings division of the comptroller's office had to construe a signature card signed by the decedent and the decedent's sister, which provided, in part: "To provide for the contingency arising from the death of any joint depositor, each such joint depositor does hereby appoint each one of the other joint depositors to collect all or any part of such joint deposit; and all payment made by said bank as herein authorized shall be binding on all persons concerned ...." 8 STATE BAR OF TEXAS, NEWSLETTER OF SECTION OF TAXATION, No. 1, Oct. 1974, at 6. The hearings examiner held that a joint tenancy with right of survivorship account was not created because the words "payable to the survivor" or words of a similar import were not included on the signature card. See Forehand v. Light, 452 S.W.2d 709 (Tex. 1970). Thus, these funds passed by intestacy, rather than by right of survivorship, to the decedent's sister and were taxed accordingly. 8 STATE BAR OF TEXAS, NEWSLETTER OF SECTION OF TAXATION, No. 1, Oct. 1974, at 6. This decision reiterates the principal that state substantive law will determine a decedent's ownership rights and the state tax laws will then determine the tax effects of those ownership rights. A comparable rule is followed in federal tax matters. See generally 10 J. MERTENS, LAW OF FEDERAL INCOME TAXATION §§ 61.01-.09 (1970); Scharf, State Law in the Tax Court—Controlling Precedents, 26 TAX LAW. 293 (1973).


3. On the date of decedent's death, the statute provided in part:

Any transfer made by a grantor . . . by deed . . . shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . . . if such transfer is made within two (2) years prior to the death of the grantor . . . . of a material part of his estate, or if the transfer made within such period is in the nature of a final distribution of property and without adequate valuable consideration.

Ch. 1, § 1, [1959] Tex. Laws, 3d Spec. Sess. 324. The statute was subsequently amended, but the only change was to increase the period of presumption to three years. Tex. Tax.-Gen. Ann. art. 14.01(B) (Supp. 1974-75).

cause it was both within the proper time limit and was also a "material" part of the decedent's estate. Since the estate did not present sufficient evidence to overcome this presumption, the gift was conclusively presumed to be in contemplation of death and, thus, includable in the decedent's gross estate for the purposes of Texas inheritance tax.

The court did not delineate any boundaries for the definition of a "material" part of a decedent's estate. Based upon the court's reliance on some early cases from other jurisdictions, however, it seems that the $15,375.00 gift was "material" because it was a "large sum of money." Equating the definition of a "material" part of the decedent's estate to mean a "large sum of money" does nothing more than to require one to commence the fruitless inquiry of "how big is big?" Although the test laid down by the court for determining materiality is, at best, vague, the most disturbing portion of the opinion is where the court states in dicta:

Appellant [Executrix of the estate] has based her case on the erroneous assumption that a transfer is not taxable even though made in contemplation of death unless the transfer is of a material part of the estate. Thus we also agree with the conclusion of the Attorney General: 'Materiality is a factor which causes the presumption of taxability to arise. It is not, per se, definitive of the state of mind of the donor, nor the sine qua non of taxability.'

For a gift to be deemed in contemplation of death, it must be made within three years of the decedent's death, and must be either: (1) a material part of the estate, or (2) in the nature of a final distribution of assets. Thus,
even if the gift is made within the three-year statutory period, it must still meet one of the tests set forth above before it will be presumed in contemplation of death. If the gift meets the necessary criteria, the estate can still overcome this presumption by presenting sufficient evidence to show "life motives" for the transfer.\(^{10}\)

If the quote attributed to the attorney general\(^{11}\) is considered by itself, the two-prong test view of the contemplation of death provision is buttressed, since the fact that the gift is material does not necessarily mean that it is in contemplation of death. The estate still has the opportunity to prove otherwise. Viewing the quote attributed to the attorney general in the context of the court's opinion, however, leads to the necessary inference that a gift can be in contemplation of death, even though it is not a material part of the estate, nor in the nature of a final distribution of assets.\(^{12}\) It is submitted that this construction of the statute is erroneous, and since these statements were made in dicta, they should be treated accordingly.\(^{13}\)
II. Franchise Taxes

Amid little other activity in this area, the allocation formula used to determine the amount of franchise taxes for an interstate corporation was in the limelight during the past year. Under article 12.02, a corporation doing business in Texas determines its franchise taxes on the basis of a formula using the corporation's total gross business receipts from both within and without the state of Texas. In Calvert v. Electro-Science Investors, Inc. the court construed that portion of the statute which defines "total gross receipts of the corporation from its entire business" to include, inter alia,

14. In one case the hearings division of the comptroller's office was asked to determine whether a credit union's subsidiary corporation was exempt from the franchise tax. See State Bar of Texas, Newsletter of the Section of Taxation, No. 1, Oct. 1974, at 5. It seemed that the subsidiary corporation performed services similar to those performed by a bank trust department, and for this reason argued that it should be exempt from the franchise tax. In holding that the subsidiary corporation was not exempt, the hearings examiner noted that an exemption for state banks was not derived from Tex. Tax.-Gen. Ann. art. 12.03 (1969), but rather is derived from Tex. Rev. Civ. Stat. Ann. art 342-908 (1973) of the Texas Banking Code, which provides in part: "[State banks and private banks shall be subjected to only such taxes . . . as could lawfully be imposed upon such state banks or private banks were they operating as national banks." Since the subsidiary corporation was not organized under the Texas Banking Code and did not prove that it was a national or private bank, it was not exempt.

One additional case, Hoover v. Barker, 507 S.W.2d 299 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.), peripherally touched upon the franchise tax statute in holding that a creditor of a corporation, which debtor corporation could not defend or prosecute a lawsuit due to the forfeiture of its right to do business for failure to pay franchise taxes, could sue the assignee who had purchased all of the corporation's assets, and had assumed its liabilities. Thus, the assignee's plea in abatement based on the forfeiture of the assignor corporation's right to do business was overruled. Cf. Acme Color Art Printing Co. v. Brown, 488 S.W.2d 507 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.), reviewed in Tracy, Taxation, Annual Survey of Texas Law, 28 Sw. L.J. 340, 343-44 (1974).

15. For an introduction into the use of allocation formulas, see generally W. Beaman, Paying Taxes to Other States 15.1-8 (1963).

16. Tex. Tax.-Gen. Ann. art. 12.02(1)(a) (1969) provides that a corporation calculates the Texas franchise tax by multiplying its taxable capital by the percentage "which the gross receipts from its business done in Texas bear to the total gross receipts of the corporation from its entire business." The allocation formula can be expressed as follows:

\[
\text{Franchise Tax} = \frac{\text{Texas Gross Receipts}}{\text{Entire Gross Receipts}} \times \text{Rate of Tax}
\]

\[
\text{Taxable Capital} \times \frac{\text{Texas Gross Receipts}}{\text{Entire Gross Receipts}} \times \text{Rate of Tax}
\]

The term "taxable capital" includes the corporation's stated capital, surplus, and undivided profits. Tex. Tax.-Gen. Ann. art. 12.01(1)(a) (i) (1969). Stated capital is basically the par value or actual consideration for a corporation's stock, Comptroller's ruling No. 80-0.08, P-H State & Local Taxes ¶ 15,721 (1966), while surplus and undivided profits includes all surplus items which are defined in Tex. Bus. Corp. Act Ann. art. 1.02(12) (1956) as "the excess of the net assets of a corporation over its stated capital." Comptroller's Ruling No. 80-0.09, P-H State & Local Taxes ¶ 15,723 (1966). For the purposes of the allocation formula, taxable capital includes the corporation's stated capital, surplus and undivided profits wherever located. Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939).

17. If the allocation formula of Tex. Tax.-Gen. Ann. art. 12.02(1) (1969) does not fairly represent the extent of the taxpayer's business done in Texas, it may petition the comptroller to take other factors into consideration. See Comptroller's Ruling No. 80-0.17, P-H State & Local Taxes ¶ 15,744 (1966); Lane, Recent Changes in Texas Franchise Tax Law, 5 State Bar of Texas, Newsletter of the Section of Taxation, No. 2, July 1972, at 6-8. The Texas allocation is criticized in 5 Hous. L. Rev. 132 (1967).

The comptroller argued that the phrase “net gain” in article 12.02(1)(d) referred only to gain, so that entire gross receipts would include only the gain from these assets, with no reduction for any losses. Losses would, however, reduce taxable capital, since they would be a reduction of surplus. On the other hand, the taxpayer argued that the phrase “net gain” means the netting of gains and losses during the course of the year. Accordingly, losses from the investment type assets would reduce not only the amount of entire gross receipts, but, also, would necessarily reduce the amount of taxable capital.

Quite logically, the court accepted the taxpayer’s construction of the applicable statutory language. However, the decision is quite interesting, for it would appear that the taxpayer would pay more franchise taxes by the court’s decision (i.e., the taxpayer’s own argument) than by adhering to the comptroller’s view of the statute. This follows from the holding that the entire gross receipts includes only net gain as opposed to gross gain from the designated assets.

It is axiomatic that a fractional ratio decreases as the denominator of the fraction increases, if all other variables in the equation remain constant. Assuming that the taxable capital, Texas gross receipts, and rate of tax components of the equation will all remain constant, the comptroller’s use of gross receipts from investment assets will cause the denominator of the fraction to be larger than by using the taxpayer’s argument of including only net receipts as an addition to the denominator. Thus, mathematically, the comptroller’s argument (by increasing the denominator of the fraction in the allocation formula) decreases the fraction, so that less taxable capital is available on which to calculate the rate of tax. The rationale for this very unique situation may arise from the assumption by the comptroller, the taxpayer, and the court that since only net gains were included in the denominator of the fraction, it must necessarily follow that only net gains were also used in determining Texas gross receipts, i.e., the numerator of the fraction. Naturally, decreasing the numerator (which would follow the taxpayer’s argument) also decreases the fraction and, consequently, the taxable capital which is subject to the franchise tax. It is submitted, however, that if this...
were the court's implication, it was in error. The court construed article 12.02(1)(d) defining "total gross receipts of the corporation from its entire business" and not article 12.02(1)(b) defining "gross receipts from its business done in Texas." The added definition concerning the sale of capital and investment assets is not found in article 12.02(1)(b). Further, in construing the predecessor statute to article 12.02, the courts have held that "gross receipts" means gross and not net receipts.\(^2\)

The only other franchise tax decision, \textit{Texas Pipe Line Co. v. Calvert},\(^2\)\(^3\) presented a unique decision of statutory construction. Article 12.20 provides an additional franchise tax for those corporations filing franchise tax returns "for the preceding fiscal year as shown in the report . . . filed . . . between January 1 and May 1, 1971 (or the initial or first year report required to be filed . . . )"\(^2\)\(^4\) The legislature in drafting the statute apparently overlooked the 1969 amendment to article 12.08 which changed the period during which a corporation must file a franchise tax return from "between January 1st and May 1st" to "between January 1st and June 15th."\(^2\)\(^5\) In response to the comptroller's argument that the additional franchise tax was applicable to all "regular" corporations and that the legislative intent was to tax these corporations, the court stated:

Article 12.20 is clear and unambiguous and leaves no room for construction. Its plain terms apply only to those corporations required to file a franchise tax report between January 1 and May 1, 1971, and thus does not apply to those corporations which were not required to file the report until June 15, 1971. In addition, appellants were not required to pay a franchise tax 'for the preceding fiscal year' but were required to pay a franchise tax under Article 12.01 as described above.\(^2\)\(^6\)

Under the court's construction of the statute only corporations filing an initial or first year franchise tax report between January 1 and May 1, 1971, would be subject to the additional franchise tax. Since all other corporations would be required to file their return between January 1 and June 15, 1971, they would not be members of the class of corporations subject to article 12.20.

\(^{22}\)\(^{23}\)\(^{24}\)\(^{25}\)\(^{26}\)
It might well be that even the "regular" corporations which paid the additional franchise tax might be entitled to a refund.\(^{27}\)

Since the Texas Supreme Court has agreed to hear arguments in the *Texas Pipe Line* case, the state has another opportunity to plead its case. Contrary to the view of the court of civil appeals, it is the author's opinion that the Texas Supreme Court might hold article 12.20 applicable to all "regular" corporations for several reasons.\(^{28}\) First, the manifest legislative intent was to include all corporations within the parameters of article 12.20. The use of "May 1" instead of "June 15" in defining the period during which tax reports, for corporations subject to the additional tax, are filed was mere inadvertence. Secondly, article 12.20 must be construed in light of all provisions in chapter 12 of title 122A affecting franchise taxes. One such provision is article 12.08 requiring corporations to make a report and pay franchise taxes between January 1 and June 15 of each year. The legislature changed "May 1" to read "June 15" in 1969; consequently, the court may judicially read "May 1" in article 12.20 to read "June 15." Finally, the taxpayer was required to file a franchise tax report between January 1 and May 1. The mere fact that the report was not delinquent until June 15 does not obviate the responsibility of the corporation to file the return during this period. Thus, the taxpayer was a member of the class of corporations subject to the additional franchise tax.*

### III. SALES AND USE TAXES

#### A. *Limited Sales, Excise and Use Tax Act*\(^{29}\)

Unless an exemption is available,\(^{30}\) the Texas sales tax is imposed upon

---

\(^{27}\) *TEX. TAX.-GEN. ANN.* art. 1.11A(2) (1969) provides in part: "When the Comptroller determines that any . . . corporation has through mistake of law or fact overpaid the amount due the State . . . for franchise taxes . . . the Comptroller may refund such overpayment . . . from funds appropriated for such purpose." (Emphasis added.) The comptroller is precluded from making such refunds so long as a suit regarding the taxes is pending. Thus, the refund can be made during the course of administrative proceedings following payment of the tax and protest, or even after a suit concerning the taxes is dismissed. *TEX. ATT'Y GEN. OP. NO. M-996 (1971).*

\(^{28}\) This is especially true in light of the statement by one commentator that the refund of the additional franchise taxes might cause such a depletion in state funds that a special session of the legislature would be needed to make additional appropriations. *Lane,* supra note 16, at 5-6.

\(^{29}\) Editor's Note: Since this Article went to press, the Texas Supreme Court reversed the judgment of the court of civil appeals. 517 S.W.2d 777 (Tex. 1974).

\(^{30}\) A general introduction into the field of state sales taxes can be found in *J. DUE, STATE SALES TAX ADMINISTRATION* (1963); *D. MORGAN, RETAIL SALES TAX* (1964). Additionally, the comptroller in response to questions propounded to him has provided some enlightening responses to the application of the use tax to out-of-state sellers. *P-H STATE & LOCAL TAXES* ¶ 23,054 (1974).

* One of the exemptions is the occasional sale of taxable items. *TEX. TAX.-GEN. ANN.* art. 20.04(I) (1969). An "occasional sale" includes, *inter alia,* the "sale of the entire operating assets of a business." *TEX. TAX.-GEN. ANN.* art. 20.01(F)(2) (1969). The hearings division of the comptroller's office recently construed this provision in a case where all of the assets of an automobile dealership were sold except for accounts receivable. *STATE BAR OF TEXAS, NEWSLETTER OF THE SECTION OF TAXATION,* No. 1, Oct. 1974, at 5. The hearings examiner held that this qualified as an occasional sale because the sales tax was intended to be levied upon tangible personal property. Accounts receivable, being intangible property, were not intended to be included within the definition of "operating assets of a business." It is interesting to note in the two cases concerning the bulk sale of a business that it is unclear from the opinions whether the seller had accounts receivable on its books and, if so, whether the buyer purchased them.
the retail sale of all tangible personal property.\textsuperscript{31} The retailer is required to collect from the consumer and remit to the comptroller the appropriate tax. If a retailer becomes delinquent in remitting the sales tax or applies for a new sales tax permit after January 1, 1974, he must provide the comptroller with a bond or other security to guarantee payment of the tax.\textsuperscript{32}

A government contractor recently came under scrutiny in \textit{Calvert v. Day & Zimmerman, Inc.}\textsuperscript{33} The taxpayer in this case assembled and packaged on a military base ammunition solely for the Government on a “cost plus award fee” basis. The purchase order used by the taxpayer clearly specified that the sale was between the taxpayer and the vendor of the goods and not between the vendor and the United States. As a practical matter, however, title to the goods passed to the United States upon receipt and inspection by the taxpayer, unless a government purchasing agent refused to accept the goods. In finding the taxpayer liable for sales taxes upon the goods that it purchased, the court based its decision upon a finding that the taxpayer was an independent contractor, as opposed to an agent for the United States Government. Naturally, if the taxpayer were an agent for the United States, no sales taxes would be due.\textsuperscript{34} However, it would seem that the characterization

\footnotesize{Calvert v. Marathon Oil Co., 389 S.W.2d 153 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.); Calvert v. H.E. Butt Grocery Co., 388 S.W.2d 727 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.). The purchaser would, however, be liable for any sales taxes due and owing by the seller. TEX. TAX.-GEN. ANN. art. 20.09(I) (1969); Comptroller's Ruling No. 95-0.45, 1 CCH TEX. STATE TAX REP. \textit{\|$\|$} 63-030a (1969); see also 6 STATE BAR OF TEXAS, NEWSPAPER OF THE SECTION OF TAXATION, No. 2, April 1973, at 10-11, \S\ 7.

31. Recently, TEX. ATT'Y GEN. OP. NO. H-303 (1974) held that the sale of state owned marl, sand, gravel, and shell by the Parks and Wildlife Department, as authorized by TEX. REV. CIV. STAT. ANN. art. 4053(d) (1966), is subject to the Limited Sales, Excise and Use Tax Act. It should be noted here that the exemption for governmental agencies provided by TEX. TAX.-GEN. ANN. art. 20.04(H) (1969) applies only when the sale is "to" and not "by" the agency. Comptroller's Ruling No. 95-0.35, 1 CCH TEX. STATE TAX REP. \textit{\|$\|$} 60-236 (1972).

Another attorney general opinion, TEX. ATT'Y GEN. OP. NO. H-247 (1974), concerned the determination of whether service gratuities, i.e., "tips," constituted a portion of the sales price for the taxable sale of food by a restaurant. In this unusual opinion the attorney general held that service gratuities, even if collected by the employer, are not taxable unless the employer receives some benefit from them, e.g., the gratuities are credited against the employer's payment of minimum wages. The opinion concludes that the definition of "sales price" in TEX. TAX.-GEN. ANN. art. 20.04(L)(2)(a) (1969) to include any "services which are a part of the sale" requires the inclusion of the gratuities when credited against the minimum wage because, in the attorney general's view, "the employer derives a very definite benefit" therefrom. In the author's opinion, the reasoning of the attorney general is faulty because the customer pays the same price for his food whether or not he is gracious enough to tip the waitress. The fact that the gratuity may or may not give some benefit to the employer is irrelevant for the purposes of computing the sales tax upon tangible personal property. There is certainly no attempt to deduct the "labor cost" of the waitress from the sales price of the food sold.

32. TEX. TAX.-GEN. ANN. art. 20.021(N) (Supp. 1974-75); Comptroller's Ruling No. 95-0.46, P-H STATE & LOCAL TAXES \textit{\|$\|$} 21,584 (1974). The attorney general has held that the comptroller may, but is not required to, accept a bond written by a surety not authorized to engage in business in Texas. TEX. ATT'Y GEN. OP. NO. H-378 (1974). Additionally, both governmental agencies and private individuals selling taxable items on government property must furnish the required bond. TEX. ATT'Y GEN. OP. NO. H-424 (1974).


34. Governmental agencies are exempt from the sales tax. TEX. TAX.-GEN. ANN. art. 20.04(H) (1969); Comptroller's Ruling No. 95-0.35, 1 CCH TEX. STATE TAX REP. \textit{\|$\|$} 60-236 (1972).}
of taxpayer as an independent contractor does not provide a satisfactory rationale for the court's decision. If the taxpayer were a "lump sum contractor," i.e., completing work on a flat fee basis for both materials and labor, it would be required to pay sales taxes on the materials which it purchased. However, the lump sum contractor provisions apply only when personal property is incorporated into realty, which, apparently, is not the case here. Additionally, it would seem that several arguments are available to the taxpayer in its appeal to the Texas Supreme Court to deny taxability. First, the materials purchased by the taxpayer are used in the process of manufacturing other items of tangible personal property. Second, due to the "cost plus" nature of the taxpayer's contract with the government, the items of personal property are being purchased for the purpose of resale and are, thus, exempt. In the author’s opinion, the supreme court might well use one of these arguments to find the sales tax inapplicable to the taxpayer. The effect of such a decision would be that no sales tax would be due, since the taxpayer's gross receipts from sales to the United States Government would be exempt.

Richardson Construction Co. v. Calvert presented a case of first impression construing article 20.04(V), which provides, inter alia, for an exemption for receipts from the "lease or rental of . . . an interest in tangible personal property to a partner, co-owner or other person who before or after such a [lease or rental] owns a joint or undivided interest (with the seller) in such tangible personal property . . . ." In Richardson a partnership leased certain tangible personal property to a corporation which was under common control with the partnership. The court quite reasonably held that article 20.04(V) did not provide an exemption for this lease transaction because


36. Tex. Tax.-Gen. Ann. arts. 20.01(U), 20.04(E) (1969); see Comptroller's Ruling No. 95-0.16, P-H State & Local Taxes ¶ 21,530 (1973). However, a taxable use of the property would be a break in the "train of progression" toward ultimate resale, so that sales taxes on such property would then be due. See 8 State Bar of Texas, Newsletter of the Section of Taxation, No. 1, Oct. 1974, at 5-6.

37. Tex. Tax.-Gen. Ann. art. 20.04(O) (1969); see Comptroller's Ruling No. 95-0.05, P-H State & Local Taxes ¶ 21,508 (1974). It is interesting to note that the comptroller is attempting to collect the tax from the purchaser, i.e., the taxpayer, rather than the seller, which may indicate that the comptroller's theory of recovery is predicated upon the use tax, rather than the sales tax. The use tax, which is the complement of the sales tax, provides that the taxes imposed "on the storage, use and other consumption in this state of taxable items purchased, leased or rented from any retailer for storage, use or other consumption in this state . . . shall be at the same rates prescribed on the sales price "or in the case of leases or rentals on said lease or rental prices.” Tex. Tax.-Gen. Ann. art. 20.03 (1969). The use tax is collected by every retailer engaged in business in the State of Texas, i.e., any retailer who has "any representative, agent, salesman, canvasser or solicitor operating in this State under the authority of the retailer . . . for the purpose of selling, delivering, or the taking of orders for any taxable items.” Tex. Tax.-Gen. Ann. art. 20.031(B)(2) (1969).

38. See authorities cited in note 34 supra. If one of the exemptions described in notes 36 and 37 supra is applicable, the comptroller would also be prevented from asserting any use taxes against the taxpayer. Tex. Tax.-Gen. Ann. art. 20.04(A) (1969).

* Editor's Note: Since this Article went to press, the Texas Supreme Court reversed the judgment of the court of civil appeals. 519 S.W.2d 107 (Tex. 1975).


the corporation and the partnership did not jointly own the property which was the subject matter of the lease. It is hard to imagine any different result under these facts.

B. Local Sales and Use Tax Act

Under the Local Sales and Use Tax Act, cities may impose a one percent tax on all items taxable under the Limited Sales, Excise and Use Tax Act. The comptroller administers the Act and collects all receipts for the benefit of the adopting cities.

One case of interest was presented in a recent attorney general opinion concerning the availability of receipts under the Act to a defectively incorporated town. It seems that the town of Angus was purportedly incorporated in 1972 with the governing body of the town adopting the Local Act. On July 23, 1973, the district court of Navarro County declared the incorporation “illegal, void, and of no effect.” Based upon this judgment, the attorney general held that the incorporation of the town of Angus was void ab initio, so that Angus never had the authority to adopt the Local Act. Thus, the “purported” town having neither de jure nor de facto status was not entitled to receive the sales taxes collected on its behalf by the comptroller. A necessary corollary to the attorney general’s opinion is that those persons paying the additional sales tax to the town of Angus are entitled to a refund under article 20.10. As a practical matter, however, these funds will probably revert to the state, for few, if any, taxpayers will make the required refund claims, and those that do will doubtless be unable to meet the specificity requirement for such claims.

C. Motor Vehicle Retail Sales and Use Tax

A sales tax is imposed upon the retail sale, rental, or lease of a motor

---

41. Additional requirements for the joint ownership exemption are set out in Comptroller’s Ruling No. 95-0.50, P-H STATE & LOCAL TAXES ¶ 21,592 (1974).

42. The attorney general recently held that a “sale” of state owned marl, sand, gravel and shell by the Parks and Wildlife Department occurs within the jurisdiction of the city where these items are severed from the real estate for the purposes of the Local Act. TEX. ATT’Y GEN. OP. NO. H-303 (1974).

43. In fact, the comptroller is the sole agent for the collection of these taxes. Thus, if a city collects the taxes, in any manner, it must turn the tax receipts over to the comptroller for its own benefit. TEX. ATT’Y GEN. OP. NO. H-274 (1974).


46. TEX. TAX.-GEN. ANN. art. 20.10 (1969).

47. Id. art. 20.10(C) provides: “Every claim shall be in writing and shall state the specific grounds upon which the claim is founded.” Apparently, under the facts presented, a taxpayer would not be entitled to a refund unless he could produce cash register receipts evidencing payment of the tax in this situation.

48. A vehicle is held for rental if its exclusive use is to be given to another for a consideration and for a period of time exceeding 31 days. TEX. TAX.-GEN. ANN. art. 6.03(E) (Supp. 1974-75). See Comptroller’s Ruling No. 40-0.14, P-H STATE & LOCAL TAXES ¶ 21,700 (1973). When a vehicle is purchased for rental, no vehicle sales tax is due; rather, a tax is levied upon the gross rental receipts and must be collected by the owner from the renter. TEX. TAX.-GEN. ANN. art. 6.01(1) (Supp. 1974-75).

49. A vehicle is held for lease if its exclusive use is to be given to another for a consideration and for a period of time exceeding 31 days. TEX. TAX.-GEN. ANN. art.
vehicle in this state. When title to the motor vehicle is changed, an affidavit signed by both the seller and purchaser must be presented to the county tax assessor-collector setting forth the consideration paid for the vehicle. As a practical matter, the statute is self-regulating in the sense that the assessor-collector is dependent upon these affidavits in collecting the bulk of the taxes due under the Act.

A recent attorney general opinion provides an interesting insight into an exemption from the motor vehicle sales tax for certain transactions on the basis of a "no sale" theory. The facts underlying the opinion involved a husband and wife who formed a partnership to engage in the trucking business. They purchased trucks in the partnership name, paid a motor vehicle sales tax, and two days later decided to incorporate the business. The partnership was liquidated with the couple transferring partnership property, including the trucks, to the new corporation in exchange for all of its stock. Although there is no statutory exemption for such transfers, the attorney general quite reasonably held that no motor vehicle sales tax is due on such transfers, since they are merely the adoption of a new form of business without a change in ownership, so long as the only consideration given in the exchange is stock in the newly created corporation. This decision would not

49. Some recent attorney general opinions concerning the motor vehicle sales tax include TEX. ATT'y GEN. Op. No. H-381 (1974) (a motor vehicle sales tax is due on the use of a vehicle owned by a car dealer for his personal use, or that of his family or employees); TEX. ATT'y GEN. Op. No. H-380 (1974) (a motor vehicle sales tax is due on the conversion of a vehicle from rental to personal use or from rental to lease use, but in this latter circumstance, the comptroller's regulations setting forth the only method to determine "book value" of the vehicle for the purposes of determining the tax is invalid); TEX. ATT'y GEN. Op. No. H-380 (1974) (a motor vehicle sales tax cannot be imposed on the rental of a vehicle to a federal employee acting on government business and within the scope of his employment).

50. The attorney general considered, in several opinions, the affidavit required by TEX. TAX.-GEN. ANN. art. 6.05 (1969) to be furnished the county tax assessor-collector. See generally Comptroller's Ruling No. 40-0.17, P-H STATE & LOCAL TAXES ¶ 21,706 (1973). These opinions included TEX. ATT'y GEN. Op. No. H-293 (1974) (tax assessor-collector has no authority to require parties to a prior sale to pay taxes due but unpaid on those sales, as he can only deny registration of vehicles if the sales taxes are not paid; however, tax assessor-collector should notify comptroller of this fact so that appropriate action can be taken); TEX. ATT'y GEN. Op. No. H-174 (1973) (the tax assessor-collector has no authority to refuse an affidavit on grounds that it may be false, but should report his suspicions to the comptroller or district attorney for appropriate action); and TEX. ATT'y GEN. Op. No. H-173 (1973) (tax assessor-collector can refuse affidavit where corporation is a party to the transaction and an authorized officer of the corporation does not sign the required affidavit).


52. The "no sale" theory has also found fruition in TEX. ATT'y GEN. Op. No. S-22 (1953) (a corporate merger where no consideration was involved due to joint ownership of corporations); TEX. ATT'y GEN. Op. No. O-6871 (1945) (a corporate dissolution where vehicle distributed to shareholder represents a portion of the shareholder's interests in the corporate assets); Comptroller's Ruling No. 40-0.16, P-H STATE & LOCAL TAXES ¶ 21,704 (1973) (creation of a subsidiary corporation by "spinning-off" assets of the parent corporation). See also 6 STATE BAR OF TEXAS NEWSLETTER OF THE SECTION OF TAXATION, No. 2, April 1973, at 9-10, ¶ 4 (merger of Texas and California corporations).
be noteworthy but for the fact that the comptroller in his regulations, and an earlier attorney general opinion, reached a contrary result. Although the opinion does not specifically so state, presumably these contrary views are now overruled.

IV. Ad Valorem Taxes

There was the usual flurry of decisions relating to ad valorem taxes, most of which are not of general interest. Included in this category were those cases discussing the Legislative Property Tax Committee, exemption from ad valorem taxation of property owned by charities or municipalities, and what constitutes land held for "agri-

53. Comptroller's Ruling No. 40-0.16, P-H STATE & LOCAL TAXES ¶ 21,704 (1973) provides, inter alia, that a motor vehicle sales tax is due:

1. In transactions involving the transfer of motor vehicles to or from corporations except [as described in note 52 supra]...
2. In an instance where a corporation is in the formative stage of its organization, any and all vehicles contributed by stockholders are subject to the Motor Vehicle Sales Tax and the tax base will be the value of the stock issued in exchange for the motor vehicle.
3. When two or more individuals or corporations enter into a partnership or Joint Venture and transfer title to motor vehicles into the assumed name of the new enterprise.

See also TEX. ATTY GEN. OP. NO. C-764 (1966).

54. TEX. ATTY GEN. OP. NO. V-36 (1947).


56. TEX. ATTY GEN. OP. NO. H-317 (1974) (Legislative Property Tax Committee (LPTC) can require production of appraisal data from tax assessor-collector or private appraisal firms); TEX. ATTY GEN. OP. NO. H-258 (1974) (financial information relating to asset values gathered by LPTC during study of market values of property is public information subject to disclosure under TEX. REV. CIV. STAT. ANN. art. 6252-17a (Supp. 1974-75), the Open Records Act).

57. TEX. ATTY GEN. OP. NO. H-399 (1974) (dwelling furnished for minister of music may qualify for tax exempt status, provided other requirements of TEX. REV. CIV. STAT. ANN. arts. 7150(1) (1971), and 7150b (Supp. 1974-75) are met); TEX. ATTY GEN. OP. NO. H-342 (1974) (hospital will not lose its property tax exemption when a portion of its premises are used by a blood bank, if: (a) the blood bank's operation is incidental to that of the hospital, or (b) the blood bank is also a public charity, no landlord-tenant relationship is created between the hospital and the blood bank, and no rent is charged by the hospital); TEX. ATTY GEN. OP. NO. H-316 (1974) (property conveyed to Gulf Coast Waste Disposal Authority, a municipal corporation, for the purpose of constructing facilities to treat industrial waste from five corporations is not exempt from ad valorem taxes when the conveyance is so burdened with restrictions and built in reversionary interests that it does not exclusively belong to the municipal corporation); TEX. ATTY GEN. OP. NO. H-315 (1974) (TEX. REV. CIV. STAT. ANN. art. 7150, § 28 (Supp. 1974-75) exempting property held by non-profit corporations for use in medical center developments is constitutional); TEX. ATTY GEN. OP. NO. H-230 (1974) (under authority of City of Amarillo v. Amarillo Lodge No. 731, A.F. & A.M., 488 S.W.2d 69 (Tex. 1972), San Benito Elks Lodge is held not to be exempt).

58. TEX. ATTY GEN. OP. NO. H-364 (1974) (TEX. REV. CIV. STAT. ANN. art. 7329a (Supp. 1974-75) postponing foreclosure for delinquent taxes on homesteads of persons over age 65 is constitutional); TEX. ATTY GEN. OP. NO. H-309 (1974) (when political subdivision of state has approved additional exemption for those persons over age 65, the homowner can obtain the benefit of this exemption even though he does not claim it during the statutory exemption period); TEX. ATTY GEN. OP. NO. H-162 (1973) (the additional exemption for persons over age 65 is based upon the assessed value of the homestead, cannot be varied during year in which it is established, can be changed or modified prospectively, and is unlimited as to maximum amount, except to extent needed.
culture use" and, thus, subject to special tax assessments, the procedure used for assessing certain properties, and procedural aspects of ad valorem tax collection.

A. Taxable Situs of Property

In Nacogdoches Independent School Dist. v. McKinney the Texas Supreme Court was presented with the question of determining the taxable situs of certain equipment used in McKinney's construction business. From the facts, it was clear that McKinney's road building equipment was never physically located within the jurisdiction of the Nacogdoches School District; the equipment was maintained at various "field offices" from whence it was

to protect the pledged security for debt. See also Kahn v. Shevin, 516 U.S. 351 (1974) (Florida statutes providing property tax exemption for "widows," but not for "widowers" does not violate the equal protection clause).

59. San Marcos Consol. Ind. School Dist. v. Nance, 502 S.W.2d 694 (Tex. 1974) (secondary and incidental lease of land for deer hunting does not deprive owner of special tax assessment when property is otherwise devoted exclusively to "agriculture use").

60. Tex. Att'y Gen. Op. No. H-370 (1974) (if personal property has become so annexed to realty that it is a fixture, then it is to be taxed as a part of the realty and cannot be taxed as personal property); Tex. Att'y Gen. Op. No. H-281 (1974) (taxation of flight equipment on interstate air carriers based on miles traveled within Texas as compared to miles traveled within and without Texas satisfies the commerce clause requirements of the United States Constitution, but may not meet the uniform and equal requirements of the Texas Constitution because the formula does not tax idle "bridge time" while the craft is stationary and, thus, 100% of value of the plane would not be taxed by all taxing jurisdictions combined; whereas, solely intra-state carriers are taxed at 100% of their value). See also Kosydar v. National Cash Register Co., 417 U.S. 62 (1974) (Machines specially built for foreign customers, stored in warehouse for future shipment, for which export license had not been issued and for which purchaser had not yet paid were not "exports," as they had not yet entered "upon an actual movement into the stream of export." Thus, the State of Ohio could assess ad valorem taxes against this property.).


62. Two additional "situs" cases during the survey period were Houston v. Southern Pac. Transp. Co., 504 S.W.2d 554 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.) (incorporated town cannot assess ad valorem taxes against rolling stock of a railroad, as statutory situs is fixed in counties only), and City of Bryan v. Texas Serv., Inc., 499 S.W.2d 750 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.) (rent cars permanently stationed at locations outside city acquire domicile for tax purposes at these locations, so that city in which company offices are located has no taxing power over the vehicles).

63. 504 S.W.2d 832 (Tex. 1974).
deployed to job sites; rarely did the equipment go from job to job without first returning to the field office for checking and repair; and when not in use, the equipment was stored at the various field offices. On the basis of these facts, the supreme court reversed the court of civil appeals and held that McKinney's road building equipment had obtained a tax situs outside the Nacogdoches Independent School District and, thus, the district was without jurisdiction to levy a tax on this equipment. Although the supreme court's decision in McKinney is correct, a slight shift in the facts could cause the common law rule of mobilia sequuntur personam (personalty is taxable at the domicile of its owner, regardless of its actual location) to apply. Thus, if the road building equipment is constantly moved from place to place on different job sites and never acquires an actual situs at any such locations, the equipment would be taxable at the domicile of the owner of the property. In this latter circumstance, the jurisdictions in which the personalty was located would be unable to assess any ad valorem taxes against the property.

B. Taxpayer Remedies

Many times a taxpayer will feel aggrieved by a plan of taxation instituted by a taxing authority and will seek, in some manner, to rectify what he considers to be an unfair system of taxation. Swamp Irish, Inc. v. Snow was concerned with just such a situation and shows graphically the taxpayer's problems in these types of suits. In Swamp Irish the taxpayer pleaded, in broad terms, that certain personalty was not included in the tax rolls. Thus, the tax rate necessary to raise a given amount of revenue was higher than if the omitted property had been included, thereby causing the taxpayer to pay more in ad valorem taxes than he would otherwise be required to pay. The decision is not noteworthy for its specific holding that the taxpayer failed to have the necessary pleadings to withstand a motion for summary judgment by the defendant taxing authority, but rather is very instructive in detailing the availability of the remedy of mandamus and injunctive relief.

The taxpayer had sought mandamus and injunctive relief to require the inclusion on the tax rolls of certain omitted personalty. This relief is available to the taxpayer only if suit is filed prior to the tax plan's being put into effect, and even then the taxpayer must not only allege and prove that certain classes of personal property were omitted from the tax rolls and that such omission resulted in substan-

---

64. The court also affirmed the court of civil appeals decision that on similar facts, McKinney's partnerships were separate legal entities having their domiciles in Waco and Saner so that the Nacogdoches School District was without jurisdiction to tax the property of these businesses. Id. at 834.
66. A relatively unimportant recent decision was Florence v. Asherton Ind. School Dist., 509 S.W.2d 676 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.), which held that certain actions of the Board of Equalization (which was a replacement Board some of whose members had been fired by the Trustees of the School Board), were not absolutely void so as to be subject to collateral attack.
tial injury to him in dollars, but he must also allege and prove that such omission was the result of a deliberate, arbitrary and fundamentally erroneous scheme adopted and imposed by the tax officials of the taxing agency to permit the excluded classes of property to escape their fair share of the tax burden. . . .

If the taxpayer does not commence suit until after the institution of the tax plan, as was the case in Swamp Irish, his remedies are severely limited. He must prove that the taxes levied upon his property are excessive, and after this showing, he will only be entitled to recover the excess amount of taxes.

C. Delinquent Tax Suits

An important decision was rendered by the Dallas court of civil appeals in Collum v. Anderson. It appeared that in a suit to foreclose delinquent taxes, personal service was not had upon Anderson, the owner of the real estate. Rather, Anderson was cited by publication in accordance with Texas Rule of Civil Procedure 117a, § 3. After a default judgment was entered by the trial court in favor of the state in the foreclosure proceedings, Collum purchased this property at a tax sale. The trial court in Collum set aside the foreclosure judgment and awarded Collum the purchase price of the property at the foreclosure sale, which had been tendered into court by Anderson. Since the action by Anderson was in the nature of a bill of review, the court of civil appeals held that in order to set aside the judgment in the tax foreclosure suit and the tax sale to Collum, Anderson had to plead and prove a meritorious defense. The court held that Anderson's plea that payment of the delinquent taxes would have been made if he had been personally served was not a meritorious defense. Thus, the case was remanded for a new trial.

In its remand the court of civil appeals suggested that possible meritorious defenses could include the fact that the asserted taxes were not levied properly, the land was not subject to tax, or the taxes were not delinquent. In the author's opinion, all of these considerations merely skirt the crux of the controversy, i.e., whether service by publication on a landowner in a tax delinquency suit is valid when, apparently, he could have been personally served. It is submitted that if Anderson was the record owner of the prop-

68. Id. at 692. For a discussion of the requirements for injunctive relief on the theory that the taxpayer's property has been assessed at a higher percentage of true market value than other classes of property on the tax rolls, see Lancaster Ind. School Dist. v. Pinson, 510 S.W.2d 380 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). Cf. Johnson, Use of Injunctions in State Tax Cases, in 6 State Bar of Texas, Newsletter of the Section of Taxation, No. 2, April 1973, at 1, discussing injunction suits brought by the state.
72. The court alluded to the proper service argument in discussing possible meritorious defenses by the following language: If a tax judgment is obtained without proper service the property owner may be deprived not only of his right to appear and defend the suit but
V. Procedures and Miscellaneous Taxes

A. Hearings Division of Comptroller's Office

A recent attorney general opinion discussed the effect of both the Open

also may be deprived of his statutory right of redemption. If the Ander-
sons are able to plead and prove that without any fault or negligence on
their part they were deprived of their statutory right of redemption by
judgment taken against them without notice, together with any other cir-
cumstances, such as gross inadequacy of price, . . . and they tender into
court the amount required for such redemption, they might possibly be en-
titled to equitable relief permitting them to exercise their right of redemption
beyond the two year period allowed by the statute.

502 S.W.2d at 602.

1974. There were several decisions concerning various taxes, which are not of general
interest. Included in this category are Robinson v. Hill, 507 S.W.2d 521 (Tex. 1974)
fees imposed on bailbondsmen are regulatory in nature and are thus license fees as op-
oposed to being occupation taxes illegally imposed without statutory authorization); Cal-
vert v. Zanes-Ewalt Warehouse, Inc., 502 S.W.2d 689 (Tex. 1974) (statute providing for
the imposition of a tax on "first sale" of cigarettes and defining "first sale" to include
the loss or theft of cigarettes within this state is within the legislative taxing power and
does not offend the constitutional requirements of reasonableness and due process); Big
Country Club, Inc. v. Humphreys, 511 S.W.2d 315 (Tex. Civ. App.—Beaumont 1974,
write ref'd n.r.e.) (after assertion by taxing authority that additional liquor taxes are due,
private club has burden to show that formula used by state to calculate additional taxes
is unreasonable, excessive, capricious, or arbitrary. Merely introducing all records of
the club will not meet this burden); Barnett v. Texas Employment Comm'n, 510 S.W.2d
361 (Tex. Civ. App.—Austin 1974, write ref'd n.r.e.) (claims adjusters found to be inde-
pendent contractors due to lack of control over their work product by the "employers,"
thus exempting the employer from contributing unemployment taxes based on their com-
penation); Morrow v. State, 509 S.W.2d 726 (Tex. Civ. App.—Austin 1974, no writ)
in a plea of privilege proceeding, defendants' argument that they were not "employers"
subject to unemployment taxes goes to the merits of the suit and is irrelevant for the
purposes of venue); Texas Vending Comm'n v. Headquarters Corp., 505 S.W.2d 402
(Tex. Civ. App.—Austin 1974, write ref'd n.r.e.) (The legislature delegated to the Texas
Vending Commission the right to refuse to issue or renew vending licenses under Tex.
TAX.—GEN. ANN. art. 13.17, § 20(3) (1969) on the basis of a discretionary standard re-
lating to "the general welfare, health, peace, and safety of the people." Upon a trial
de novo of the commission's order, the court would be deciding matters of discretion dele-
gated to the commission by the legislature in contravention of Tex. CONST. art. II, §
1, and thus due to the nonseverability clause in § 25 of the Act relating to trials de
novo, the entire Act, except for the definition section, is void.); Space Precision Machin-
ing Co. v. Texas, 503 S.W.2d 289 (Tex. Civ. App.—Austin 1973, write ref'd n.r.e.) (em-
ployer cannot receive lower contribution rate under Texas Unemployment Contribution
Act available after first four consecutive calendar quarters, when corporation was an
"employer" as defined in the Act, but had not been making contributions under the
Act); Lumbermen's Underwriters v. State Bd. of Ins., 502 S.W.2d 217 (Tex. Civ. App.—
Austin 1973, write ref'd n.r.e.) (a classical reciprocal insurance exchange whereby sub-
scribers mutually insure each other's property, the organization is non-profit, and sub-
scribers have a contingent liability for losses, is exempt from the gross premiums of Tex.
REV. CIV. STAT. ANN. art. 7064 (1960)); Cannon Ball Truck Stop, Inc. v. Mobil Oil
Corp., 501 S.W.2d 927 (Tex. Civ. App.—Houston [14th Dist.] 1973, write ref'd n.r.e.)
when a supplier pays state diesel fuel tax which it has failed to collect from a non-
bonded dealer, the supplier is subrogated to the rights of the state and its cause of
action against the dealer accrues on the date the tax is paid to the state); Tex. ATT'Y GEN.
Op. No. H-323 (1974) (a taxpayer is entitled to a refund of gas production taxes if the
Federal Power Commission establishes a rate lower than the contract price and re-

73 *

74 *

75 *
Meetings Act\(^6\) and the Open Records Act\(^7\) on the disclosure of information gathered during administrative proceedings held by the hearings division of the comptroller's office. The purpose of these hearings is to afford the taxpayer an opportunity to make an adjustment in a proposed tax deficiency\(^8\) or to request a refund or credit of a tax\(^9\) without the necessity of commencing litigation. It has been the policy of the comptroller's office to publish condensed statements of these hearings reflecting the basic facts and a statement of the decision. It is not possible from a review of these rulings to ascertain the identity of the taxpayer.

The Open Records Act makes public the information gathered by governmental agencies in furtherance of their official business. An exception is provided in section 3(a)(1) of the Act for "information deemed confidential by law, either Constitutional, statutory or by judicial decision . . . ."\(^{10}\) Since article 1.031(1) expressly requires the comptroller not to disseminate specific information about a taxpayer,\(^{11}\) the attorney general held that section requires him to make a refund of the amount overcharged, even though he is permitted to satisfy this obligation in a manner otherwise than by making a cash payment, e.g., a gas exploration agreement with the customer; Tex. Att'y Gen. Op. No. H-224 (1974) (15% of the Mixed Drink Beverage Clearance fund established from the 10% gross receipts tax on the sale of mixed beverages is owned by the cities and counties where the tax originated and the comptroller must refund these amounts to appropriate recipient); Tex. Att'y Gen. Op. No. H-209 (1974) (City of Temple may not use revenue collected from the hotel occupancy tax to contract for operation of the Temple Cultural Activities Center for the general culture enrichment of the populace, as such funds can be used only for the statutory purposes, including the development of programs which directly relate to the attraction of conventions and visitors to the city); Tex. Att'y Gen. Op. No. H-176 (1973) (the term "market value" as used in Tex. Tax.-Gen. Ann. art. 3.02(1) (1969) in computing the natural gas tax allows a deduction from taxable receipts of payments made by the purchaser for the purpose of reimbursing the producer for taxes. The allowable deduction is for increases in the natural gas tax subsequent to the execution of the contract, but not for taxes in existence at the time the contract is signed); Tex. Att'y Gen. Op. No. H-172 (1973) (a "final determination" by the Federal Power Commission of the rate on natural gas for the purpose of determining whether any refund or credit is due the producer for natural gas taxes which it paid on the basis of temporary rates occurs when the producer, the Federal Power Commission, and the purchaser have agreed on the exact amount to be refunded); Tex. Att'y Gen. Op. No. H-149 (1973) (the state is liable for federal airway use taxes imposed on the transportation of state employees on state owned aircraft and for any interest due on unpaid taxes); Tex. Att'y Gen. Op. No. H-124 (1973) (in determining the tax on shareholders of a bank under Tex. Rev. Civ. Stat. Ann. art. 7166 (1960), real estate held by a subsidiary corporation or by a trustee, which could legally have been held in the bank's name, cannot be deducted from the value of the stock). See also Pittsburg v. ALCO Parking Corp., 417 U.S. 369 (1974) (a 20% tax on the gross receipts from commercial parking facilities is not an unconstituted taking of property in violation of the due process clause, when the tax puts some enterprises out of business, prevents others from making a profit, and the taxing authority itself competes with private business by operating parking facilities); and Alexander v. Texaco, Inc., 482 F.2d 1248 (5th Cir. 1973) (a deed executed prior to the enactment of the Occupation Tax on Oil was construed as not shifting the burden of that tax from the producer to the purchaser).

77. Id. at 6252-17a.
3(a)(1) excepts the results of proceedings in the hearings division and the comptroller may not divulge this information. However, there is no such prohibition on making public the names of those taxpayers who have petitioned for a redetermination of tax or have filed a claim for refund.

In like manner, the attorney general held that the proceedings in the hearings division were not "meetings" within the meaning of the Open Meetings Act and, thus, need not be open to the public. Although there is no exemption available in the Open Meetings Act, as in the Open Records Act, for confidential information protected by statute, the comptroller could not meet the requirements of article 1.031(1) if the hearings were open to the public. In the author's opinion, the attorney general has reached the correct result under both the Open Records Act and the Open Meetings Act.

B. Tax Liens

In State v. Gilbreth the State of Texas sought to recover delinquent admissions taxes from the operator of a nightclub and also the landlord who owned the property where the club was located. At the conclusion of the state's evidence, the landlord moved for a summary judgment on the grounds that the state had neither pleaded nor proved that notice of the tax lien on the landlord's property had been filed in the county where the land was located, as required by article 1.07, in effect prior to 1970. Both the trial court and court of civil appeals upheld the landlord's motion, thus disallowing a foreclosure of the tax lien against his property and dismissing him from the suit. The decision makes clear that not only must the required notice be filed in order to validly foreclose the state's lien, but also article 1.07 applies to all tax liens created in title 122A, Taxation—General, whether they specifically refer to article 1.07 or not.

A similar result was reached by the court in United States Fidelity & Guar-
In that case a surety paid motor fuel taxes due by a distributor, thereby becoming subrogated to the rights of the state with respect to these taxes. It appeared that the distributor, Daniel B. Smith, d/b/a Forest-Dallas Oil Company, operated his business on property owned by Ernest Duane Smith, Jr., an unrelated party. Since the state never filed a notice claiming a lien on the property of Ernest Duane Smith, Jr., for taxes owed by Daniel B. Smith, no lien was perfected, so that United States Fidelity & Guaranty could not foreclose the lien it had received by subrogation. Having “stepped into the shoes” of the state, United States Fidelity & Guaranty obtained only the rights possessed by the state. The obvious moral for sureties and similarly situated persons is to verify that all actions prerequisite to the establishment of a valid state tax lien have been complied with prior to the payment of the delinquent taxes.

The Gilbreth and Smith cases are important only for the purposes of testing these decisions against the provisions of article 1.07, as effective January 1, 1970. The main change in the statute relevant to this inquiry is article 1.07(1)(b), which provides in part: “As to the person liable for such taxes the lien shall attach to all of his property as of the date the tax is due and payable.” It would seem that subsequent to the amendment, the Smith and Gilbreth cases would have been decided differently, since filing of the notice is no longer a prerequisite to creation of the lien. This conclusion is buttressed by the new article 1.07(1)(c) which would seem to show that the purpose of filing the notice is only to cut off persons acquiring a bona fide interest in the taxpayer’s property.

C. Federal Taxes

Although it is not the purpose of the Survey to present an extended discussion of federal tax cases, certain of these cases are of general interest, being uniquely intertwined with the community property system or Texas law in general. During the past Survey year, there were no noteworthy federal tax cases meeting this criterion, although there were several decisions concerning the taxable aspects of divorce settlements, availability of the exclusion under section 911(a) of the Internal Revenue Code for foreign source

86. 512 S.W.2d 342 (Tex. Civ. App.—Eastland 1974, writ ref’d n.r.e.).
88. See text accompanying note 85 supra.
89. TEX. TAX.-GEN. ANN. art. 1.07(1)(c) (1969) provides:
No lien provided for by Title 122A shall be effective as against any bona fide mortgagee, holder of a deed of trust, purchaser or judgment creditor or any other person who for a bona fide consideration has acquired a lien, title or other right or interest in any real estate or personal property of the taxpayer prior to the filing, recording and indexing of such lien in the county where real estate is situated, and for personal property, in the county of the residence of the taxpayer at the time that said tax became due and payable or in the county in which said taxpayer filed his report.
income based on foreign community property law\textsuperscript{91} or laws of United States community property states,\textsuperscript{92} effect of community property laws on the "innocent spouse" rule,\textsuperscript{93} estate tax ramifications of the widow's election,\textsuperscript{94} estate taxation in general,\textsuperscript{95} and other miscellaneous matters.\textsuperscript{96}

\textsuperscript{92} Edward R. Fink, 60 T.C. 867 (1973).
\textsuperscript{93} Mary Lou Galliher, 62 T.C. 760 (1974); Jennie Allen, 61 T.C. 125 (1973).
\textsuperscript{94} Estate of Isabelle M. Sparling, 60 T.C. 330 (1973); Estate of Mose Sumner, 59 T.C. 837 (1973).
THE PLACEMENT OFFICE
Southern Methodist University
School of Law

AN INVITATION TO EMPLOYERS

The School of Law of Southern Methodist University invites attorneys, firms, corporations, banking institutions, government agencies and other prospective employers to use the Law School Placement Office to make contact with its students and graduates.

PROCEDURE FOR INTERVIEWS

Employers who wish to Interview at the School of Law during the coming year should telephone or write the Placement Office as far in advance as possible, giving preferred and alternate dates. The telephone number is Area Code 214, 692-2622. The Placement Office will reserve conference rooms at the School, will supply resumes if the students have prepared them, and will arrange for overnight accommodations for the interviewer, if desired.

Interviews may be scheduled Mondays through Fridays during the academic year, except during examination periods. Many representatives visit the School during the autumn interview period. Therefore the reservation of autumn interview dates should be arranged some months in advance.

Many members of the June graduating class will have accepted employment by January 1st.

EMPLOYERS ARE ENCOURAGED TO SEND DESCRIPTIONS OF THEIR FIRMS AND ANY OTHER PERTINENT INFORMATION FOR STUDENTS TO READ PRIOR TO THE INTERVIEWS; our experience indicates that such descriptions can sometimes materially increase the student response for particular openings. A file of firm resumes and job descriptions is maintained for student reference throughout the year.

PROCEDURE AND PLACEMENT NOTICES

Employers who do not plan to send representatives to the School but who wish to hire new associates are invited to mail or telephone their job descriptions for posting on the placement bulletin board. Information about interested and qualified candidates will be furnished by mail, and the candidates will be invited to communicate directly with the employer.

The Placement Office will not reveal a student's or a graduate's rank in class or law school average without the consent of the student or graduate having first been obtained.

Many members of the June graduating class will have accepted employment by January 1st.

EMPLOYERS ARE ENCOURAGED TO SEND DESCRIPTIONS OF THEIR FIRMS AND ANY OTHER PERTINENT INFORMATION FOR STUDENTS TO READ PRIOR TO THE INTERVIEWS; our experience indicates that such descriptions can sometimes materially increase the student response for particular openings. A file of firm resumes and job descriptions is maintained for student reference throughout the year.

FURTHER INQUIRY

The Law School Placement Office invites inquiries and suggestions relative to placement. Please address correspondence to:

Placement Office
SMU School of Law
126 Storey Hall
Dallas, Texas 75275