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TX Comptroller of Public Accounts Hearing Decisions and Administrative Rule  
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TEXAS WORKERS COMPENSATION COMMISSION  
7551 METRO CENTER DR. STE 100  
AUSTIN, TX 78744

13 of 18 DOCUMENTS

**NAME:** IN RE: \* \* \*

**NUMBER:** HEARING NO. 40,937

**COURT:** COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS

**CITE:** 2002 *Tex. Tax LEXIS 164*

**DATE:** August 21, 2002

**PANEL:** [\*1]

ELIZABETH WILSON DAVIS, Administrative Law Judge

**COUNSEL:** ELIAS V. LORENZANA, JR., Representing Administrative Hearings Section

\* \* \*, Representing Petitioner

**OPINIONBY:** DAVIS

TAXPAYER NO.: \* \* \*

AUDIT OFFICE: \* \* \*

AUDIT PERIOD: 01/01/98 THROUGH 02/29/00

LIMITED SALES, EXCISE AND USE TAX/RDT

**COMPTROLLER'S DECISION**

**PRELIMINARY DISCUSSION:**

At Petitioner's request, the Administrative Law Judge ("ALJ") based this Comptroller's Decision on a review of the parties' written submissions.

The ALJ took official notice of all records of the Comptroller's office that pertain to the Petitioner and the issues involved in the case. Unless otherwise indicated, all Section references are to Title 2, Texas Tax Code Ann. (Vernon 1992). References to Rules are to sections of Title 34, Texas Administrative Code.

The ALJ has referred to all agreements between the parties in the Recommendation at the end of this Decision. The Decision below will discuss only the remaining contested issues.

**CONTENTIONS OF PETITIONER:**

1. Petitioner contends that it should not have to pay tax on purchases because the vendor failed to collect tax on these taxable purchases.
2. Petitioner contends that it should be [\*2] given insolvency relief.

**FINDINGS OF FACT:**

1. Petitioner is in the business of hospitality and accommodations.
2. The Comptroller audited Petitioner for sales and use tax compliance for the period from January 1, 1998, through February 29, 2000. On December 14, 2000, the Comptroller issued the Petitioner a Texas Notice of Tax Due, which

included tax, penalty, and interest through the date of the Notice. Penalty was waived for all periods covered by timely filed reports. The Petitioner timely requested a redetermination hearing.

3. The auditor made adjustments in the audit for additional taxable purchases of capital assets and expense items for which tax was not paid or accrued and remitted.

4. Petitioner submitted no evidence or legal arguments in support of its first contention.

#### **CONCLUSIONS OF LAW AND DISCUSSION:**

Petitioner's first contention should be denied.

Petitioner contends that it should not have to pay tax on its purchases of capital assets and expense items since its vendors did not charge Petitioner tax at the time of purchase.

The Administrative Hearings Section ("AHS") disagrees with Petitioner's contention arguing that sales tax is a transaction tax, [\*3] and both the seller and the purchaser are liable to the state for such tax. *Bullock v. Foley Bros. Dry Goods Corporation*, 802 S.W. 2d 835 (Tex. App.--Austin 1990, writ denied). Additionally, the AHS notes that the Comptroller may proceed against the seller or purchaser or both, until the tax, penalty, and interest have been paid, pursuant to § 151.515.

The position taken by the AHS is correct, and the assessment should be upheld. Additionally, Rule 1.40(2)(B) requires Petitioner to prove, by a preponderance of the evidence, if it contends that an action, or proposed action, of the Administrative Hearings Section is otherwise unwarranted. As the record shows, Petitioner has failed to prove its case with the required specificity. Bare assertions, without any supporting evidence, are not sufficient to overcome the presumption of validity afforded to the Comptroller's assessment. *Baker v. Bullock*, 529 S.W.2d 279 (Tex. Civ. App. -- Austin 1975, writ ref'd n.r.e.) and *State v. Glass*, 723 S.W.2d 325 (Tex. App. -- Austin, 1987, writ ref'd n.r.e.).

Petitioner's second contention should be granted in part.

Petitioner contends that it should be granted insolvency relief by the Comptroller. [\*4]

Section 111.102 provides:

As a part of a redetermination order, the comptroller may settle a claim for a tax, penalty or interest imposed by this title if:

(1) collection of the total amount due would make the taxpayer insolvent and the taxpayer has submitted to the comptroller all financial records, including income tax reports and an inventory of all property owned wherever located; or

(2) the taxpayer is insolvent, is in liquidation, or has ceased to do business and:

(A) the taxpayer has no property that may be seized by the courts of this or another state; or

(B) the value of the taxpayer's property is less than the total amount due and the amount of debts against the property.

The AHS recommended the following insolvency relief in its Post-hearing Response filed April 5, 2002:

1. Petitioner pay the State of Texas the sum certain of \$ 1,000.00 per month until the tax obligation at issue in this hearing is satisfied, and

2. Interest assessed against Petitioner should be waived.

#### **RECOMMENDATION:**

Based upon the findings of fact, conclusions of law, and discussion contained herein, the ALJ recommends the following:

1. The audit be amended based on the agreed audit [\*5] deletions as set out in the Administrative Hearings Section's Position Letter dated August 10, 2001, and its Response dated April 5, 2002.

2. The ALJ recommends that insolvency relief be granted as agreed in the AHS's response filed April 5, 2002, including interest waiver.

3. The insolvency relief provided Petitioner herein is CONTINGENT upon Petitioner timely entering into a formal, written PAYMENT AGREEMENT with the Enforcement Division of the Comptroller's office. Such Payment Agreement will contain the standard terms, conditions, and requirements for Payment Agreements utilized by the Enforcement Division, unless directly in conflict with the insolvency relief provided by this Decision, which shall be controlling. Failure of Petitioner to enter into the Payment Agreement within 30 days after the date of administrative finality of this Decision, or failure of Petitioner to abide by the provisions of the Payment Agreement during the term thereof, shall result in the insolvency relief afforded herein being FORFEITED and VOID; in which event Petitioner's liability, or remaining liability, to the State shall be due and payable as otherwise provided by law.

SIGNED August 21, 2002. [\*6]

**ORDER OF THE COMPTROLLER**

The above decision of the Administrative Law Judge, resulting in Taxpayer's liability as set out in Attachment "A" which is incorporated by reference, is approved and adopted in all respects. This decision becomes final twenty (23) days from the date of this Order, and the total sum of the tax, penalty and interest amounts is due and payable as provided in the Recommendation in the Comptroller's Decision.

If a rehearing is desired, a Motion for Rehearing must be filed with the Administrative Law Judge no later than twenty-three (23) days after the date of this Order, and must state the grounds upon which the motion is based.

RENDERED and ISSUED August 21, 2002.

CAROLE KEETON RYLANDER, Comptroller of Public Accounts of the State of Texas

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