

Print Request: Current Document: 11

Time of Request: February 22, 2005 04:54 PM EST

Number of Lines: 135

Job Number: 1862:33016388

Client ID/Project Name:

Research Information:

TX Comptroller of Public Accounts Hearing Decisions and Administrative Rule
elias lorezana

Send to: LORENZANA, ELIAS
TEXAS WORKERS COMPENSATION COMMISSION
7551 METRO CENTER DR. STE 100
AUSTIN, TX 78744

11 of 18 DOCUMENTS

NAME: IN RE: * * *

NUMBER: HEARING NO. 41,142

COURT: COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS

CITE: 2002 *Tex. Tax LEXIS 199*

DATE: September 19, 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: 1992 THROUGH 2000

FRANCHISE 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.

CONTENTION OF PETITIONER:

Petitioner contends that it does not have nexus in Texas.

FINDINGS OF FACT:

The Administrative Hearings Section ("AHS") filed Proposed Findings of Fact. The following Findings represent the ALJ's ruling on those Proposed Findings of Fact:

1. Petitioner requested a redetermination hearing on the franchise tax combined billing self-assessment of Petitioner for the report periods [*2] 1992 through 2000, which resulted in tax assessments.
2. Petitioner is a California corporation engaged in the manufacture and sale of desktop computers, workstations, and servers.

3. Petitioner markets its products directly to major corporations, governmental and educational entities, small businesses, and end users, via an internet web page and a toll-free 800 number.

4. Petitioner offered and provided on-site product warranty and service agreements for its computer hardware products through third-party providers in Texas.

5. On May 1, 1998, the Agency sent Petitioner a Business Tax Questionnaire because Petitioner was doing business in Texas and had not filed any Texas tax reports. Additional information was requested of Petitioner thereafter. On November 29, 2000, the Agency sent Petitioner another letter notifying it that since it made no response to the Agency's request for the 1992 through 2000 franchise tax reports and sales and use tax reports, estimates were made by the Agency of Petitioner's franchise and sales and use tax liability for the periods under examination.

6. Petitioner was examined by the Agency's Business Activity Research Team (BART) Audit Group on [*3] the franchise tax combined billing self-assessment for the examination period 1992 through 2000.

7. Based upon the findings of the Agency's BART Audit Group, Petitioner was determined to have sufficient nexus in Texas for purposes of the Texas franchise tax; therefore, Petitioner was assessed an estimated Texas franchise tax for the examination period.

8. Petitioner's Onsite Service Warranty n1 provides as follows:

...Unless otherwise noted on the sales invoice ("invoice"), actual onsite service will be provided by * * * or another qualified third party ("provider").

EQUIPMENT:

The equipment covered is identified on the invoice. ...

SCHEDULE & SERVICE HOURS:

These terms and conditions are effective for a period of one (1) year, beginning with the date of shipment of the system to the customer. Service will be provided on a "best efforts" basis, typically within eight (8) business hours after receipt of replacement parts by provider, if within 50 miles of the nearest provider service location, or if more distant, typically within sixteen (16) business hours. ...

SERVICE AREA:

The "bill to" address on the invoice will be the location at which on-site service [*4] will be provided unless otherwise noted on the invoice. If the customer relocates, service will be provided to the new location if that location is within the United States and Canada.

SERVICE TO BE PROVIDED:

This onsite service warranty covers onsite removal and replacement of defective parts necessitated by equipment failure, which occurred during normal use. ...

PROVIDER'S RESPONSIBILITIES:

The provider has responsibility for providing telephone technical support and arranging, as appropriate, for providing on-site services without additional charge (except as noted): .

..

n1 This language is from the On-Site Service agreement submitted with the AHS's Proposed Findings of Fact. The agreement has the date 9/24/96 in the bottom right corner.

CONCLUSIONS OF LAW AND DISCUSSION:

Petitioner's contention should be denied.

Petitioner contends that it does not have nexus in Texas. It argues that the mere fact that it may provide for onsite warranty work via a third-party service provider does not establish "substantial nexus" in Texas for assessing tax as required by the U.S. Supreme Court in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992).

Additionally, [*5] Petitioner argues the fact that it may have an internet-generated sale that may require onsite warranty work seems to be a tenuous thread to establish "substantial nexus" with a particular state. It states that it does not do the actual onsite warranty work, and that its contracts disclose and provide for an unrelated service provider to do the work. Additionally, it argues that the onsite warranty repair occurs less than once a year on average, but submitted no evidence to substantiate this assertion.

The AHS takes the position that Petitioner has nexus for the taxable capital component of the franchise tax by contracting in Texas through its on-site service warranty, and by providing technical support services to Texas customers. Further, the AHS argues that a foreign corporation is liable for the franchise tax if it is doing business in Texas, citing Rule 3.546(a). The AHS contends that under Rule 3.546(c)(1) the contracting or performance of a contract in Texas regardless of whether the corporation brings its own employees into Texas, hires local labor, or subcontracts with another is an activity that constitutes doing business in Texas.

Additionally, the AHS takes the position [*6] that Petitioner has sufficient nexus in Texas for purposes of the earned surplus component of the Texas franchise tax because it provides on-site warranties to its customers in Texas and provides technical support services to its Texas customers. It argues that specific activities that constitute doing business in Texas, assuming they are not of a de minimis level by a foreign corporation, include making repairs or providing maintenance (Rule 3.554 (d)(1)) and providing any kind of technical assistance or services (Rule 3.554 (d)(6)).

The applicable statutes and rules are set out below:

Section 101.002(b) provides as follows: (b) Except as otherwise provided by statute, the jurisdiction and authority of the state to determine the subjects and objects of taxation shall extend to the limits of the then-current interpretations of the Texas Constitution and the United States Constitution and laws.

Section 171.001(a) provides that a foreign corporation is liable for franchise tax if it is doing business in Texas either with or without a certificate of authority.

Comptroller's Rule 3.546(b) provides that a "corporation is doing business in this state, for the taxable capital component of [*7] the franchise tax, when it has sufficient contact with this state to be taxed without violating the United States Constitution."

Comptroller's Rule 3.546(c) lists activities that qualify as doing business in Texas for purposes of the taxable capital component of the franchise tax.

(1) contracting: performance of a contract in Texas regardless of whether the corporation brings its own employees into the state, hires local labor, or subcontracts with another;

(2) providing services:

(A) providing any service in Texas, regardless of whether the employees, independent contractors, agents, or other representatives performing the services reside in Texas;

(B) maintaining or repairing property located in Texas whether under warranty or by separate contract; or

* * *

Comptroller Rule 3.554(a) provides that a "corporation is doing business in this state, for the earned surplus component of the franchise tax, when it has sufficient contact with this state to be taxed without violating the United States Constitution."

Comptroller's Rule 3.554(d) lists examples of activities that qualify as doing business in Texas for purposes of the earned surplus component of the franchise tax. [*8] The applicable subsections are listed below:

(1) making repairs or providing maintenance;

* * *

(6) providing any kind of technical assistance or services, including, but not limited to, engineering assistance or services, when one of the purposes thereof is other than the facilitation of the solicitation of orders;

* * *

(20) conducting any activity listed as doing business in sec. 3.546 of this title (relating to Taxable Capital: Nexus), which is not protected by Public Law 86-272

* * *

The primary issue in this hearing is whether Petitioner's operations in Texas result in it being a corporation that is doing business in Texas for purposes of the taxable capital and earned surplus components of the franchise tax.

The ALJ concludes that the onsite warranty repairs performed for Petitioner under the On-Site Service Warranty agreement by third-party service contractors was an activity in Texas that clearly falls within the provisions of Rule 3.546(c)(1) and (2) and Rule 3.554(d)(1), (6), and (20). The ALJ further concludes that the record contains sufficient evidence to show that Claimant had the necessary physical presence in Texas to result in constitutional substantial [*9] nexus under § 101.002 and Rules 3.446 and 3.554.

Further, I find that these activities in Texas were above and beyond the mere mail order solicitation activities of the taxpayer in *Quill*.

RECOMMENDATION:

Based upon the findings of fact, conclusions of law, and discussion contained herein, the ALJ recommends the assessment be upheld.

SIGNED September 19, 2002.

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-three (23) days from the date of this Order, and the total sum of the tax, penalty, and interest amounts is due and payable within twenty (20) days thereafter. If such sum is not paid within such time, an additional penalty of ten percent of the taxes due will accrue, and interest will continue to accrue.

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 September 19, [*10] 2002.

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

115BC8

***** Print Completed *****

Time of Request: February 22, 2005 04:54 PM EST

Print Number: 1862:33016388

Number of Lines: 135

Number of Pages:

Send To: LORENZANA, ELIAS
TEXAS WORKERS COMPENSATION COMMISSION
7551 METRO CENTER DR. STE 100
AUSTIN, TX 78744