

Print Request: Current Document: 15

Time of Request: February 22, 2005 04:57 PM EST

Number of Lines: 103

Job Number: 1862:33016804

Client ID/Project Name:

Research Information:

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

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

15 of 18 DOCUMENTS

NAME: IN RE: * * *

NUMBER: HEARING NO. 41,242

COURT: COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS

CITE: 2002 Tex. Tax LEXIS 55

DATE: June 24, 2002

PANEL: [*1]

JACK M. WILHELM, Administrative Law Judge

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

* * *, Representing Taxpayer

OPINIONBY: WILHELM

TAXPAYER NO.: * * *

AUDIT OFFICE: * * *

AUDIT PERIOD: 01/01/98 through 12/31/00

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.

CONTENTIONS OF PETITIONER:

. Petitioner contends that it should be allowed to transfer certain business loss carryovers from the * * * Corporation to Petitioner for purposes of determining Petitioner's franchise tax liability.

. Petitioner contends that it should be allowed to convert the * * * Corporation into Petitioner, according to TEX. BUS. CORP. ACT § 5.17, n1 and then apply the business loss carryovers [*2] from the * * * Corporation against Petitioner's franchise tax liability.

n1 **Art. 5.17. Conversion**

* * *

B. Any foreign corporation or other entity may adopt a plan of conversion and convert to a domestic corporation if:

- (1) the conversion is permitted by the laws of the state or country in which the foreign corporation is incorporated, if a foreign corporation is converting;
- (2) the conversion is either permitted by the laws under which the other entity is formed or organized or by the constituent documents of the other entity that are not inconsistent with the laws of the state or country in which the other entity is formed or organized, if another entity is converting; and
- (3) the converting entity takes all action that may be required by the laws of the state or country under which it is incorporated, formed, or organized and by its constituent documents to effect the conversion.

C. A plan of conversion shall set forth:

- (1) the name of the converting entity and the converted entity;
- (2) a statement that the converting entity is continuing its existence in the organizational form of the converted entity;
- (3) a statement as to the type of entity that the converted entity is to be and the state or country under the laws of which the converted entity is to be incorporated, formed, or organized;
- (4) the manner and basis of converting the shares or other evidences of ownership of the converting entity into shares or other evidences of ownership or securities of the converted entity, or any combination thereof;
- (5) in an attachment or exhibit, the articles of incorporation of the domestic corporation, if the converted entity is a domestic corporation; and
- (6) in an attachment or exhibit, the articles of incorporation or other organizational documents of the converted entity, if the converted entity is not a domestic corporation.

D. A plan of conversion may set forth such other provisions relating to the conversion not inconsistent with law, including the initial bylaws and officers of the converted entity.

E. After a conversion of a corporation is approved, and at any time before the conversion has become effective, the plan of conversion may be abandoned (subject to any contractual rights) by the converting entity, without shareholder action, in accordance with the procedures set forth in the plan of conversion or, if any such procedures are not set forth in the plan, in the manner determined by the board of directors. If articles of conversion have been filed with the Secretary of State but the conversion has not become effective, the conversion may be abandoned if a statement, executed on behalf of the converting entity by an officer or other duly authorized representative and stating that the plan of conversion has been abandoned in accordance with applicable law, is filed with the Secretary of State prior to the effectiveness of the conversion. If the Secretary of State finds that such statement conforms to law, the Secretary of State shall, when all fees have been paid as required by law:

- (1) endorse on the original and each copy the word "Filed" and the month, day, and year of the filing;
- (2) file the original in his office; and
- (3) issue a certificate of abandonment to the converting entity or its representatives.

F. On the filing of the statement described by Section E of this Article by the Secretary of State, the conversion shall be deemed abandoned and shall not become effective.

[*3]

FINDINGS OF FACT:

1. Petitioner is in the software vending business.

2. On March 10, 1994, * * *, a corporation chartered in the state of * * * (* * * Corporation), obtained a certificate of authority from the Texas Secretary of State. This corporation filed a 1995 initial report, 1996 annual report, 1997 annual report, and a 1997 final report. The Texas Secretary of State records show this corporation's existence as having been terminated on February 28, 1997. n2

n2 The record is unclear whether the * * * Corporation was merged into Petitioner, but such a finding is unnecessary to dispense with this proceeding.

3. On January 31, 1997, * * *, (Petitioner) obtained a Texas corporate charter. An initial 1998 report and annual reports for the years 1999 through 2001 have been filed.

4. Petitioner's 1998, 1999, and 2000 franchise tax returns as originally filed show business loss carryovers.

5. Petitioner filed amended franchise tax returns for 1998, 1999, and 2000, that included additional business loss carryovers for the * * * Corporation. On June 25, 2001, the Comptroller rejected these amended filings. Petitioner timely sought a redetermination.

CONCLUSIONS OF LAW [*4] AND DISCUSSION:

Petitioner's contentions should be denied.

Because Texas requires that each corporation report franchise tax as a separate corporation, the business loss of one corporation cannot be transferred to another corporation, even where a merger is involved. See Rule 3.555(g)(3) n3 and Comptroller Decision Nos. 38,267 (2001), 37,672(1999), 36,277 (1998), and 36,030 (1996).

n3 Rule 3.555(g)(3)

(g) Business losses.

* * *

(3) A corporation may not convey, assign, or transfer a business loss to another entity including, but not limited to, by merger.

Here, * * * Corporation terminated its existence. Sometime thereafter, Petitioner was separately incorporated. These are two separate corporations, and the Comptroller does not allow losses to be transferred between separate corporate entities.

Possibly, the * * * Corporation could have been converted from a Hawaii corporation to a Texas corporation pursuant to TEX. BUS. CORP. ACT § 5.17 to satisfy Petitioner's business objectives and preserve the business losses. However, that was not done. The * * * Corporation's existence was terminated, and separately Petitioner's existence was created by the filing of articles [*5] of incorporation with the Texas Secretary of State. As correctly noted by the AHS, I know of no procedure to undo what the * * * Corporation and Petitioner have done.

RECOMMENDATION:

Based upon the findings of fact, conclusions of law, and discussion contained herein, the ALJ recommends that the rejection of Petitioner's amended franchise tax returns for 1998, 1999, and 2000 be upheld.

SIGNED June 24, 2002.

ORDER OF THE COMPTROLLER

The above decision of the Administrative Law Judge is approved and adopted in all respects. This decision becomes final twenty-three (23) days from the date of this Order.

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 June 24, 2002.

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

115BC8

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

Time of Request: February 22, 2005 04:57 PM EST

Print Number: 1862:33016804

Number of Lines: 103

Number of Pages:

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