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9 of 18 DOCUMENTS

NAME: RE: * * *

NUMBER: HEARING NO. 40,791

COURT: COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS

CITE: 2003 *Tex. Tax LEXIS 3*

DATE: January 15, 2003

PANEL: [*1]

JOE GRECO, Administrative Law Judge

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

* * *, * * *, Representing Petitioner

OPINIONBY: GRECO

TAXPAYER NO.: * * *

AUDIT OFFICE: * * *

AUDIT PERIOD: 04/01/96 THROUGH 12/31/99

LIMITED SALES, EXCISE AND USE TAX/RDT

COMPTROLLER'S DECISION

RELIMINARY DISCUSSION:

Lisa Loughney, who performed the Comptroller's sales and use tax audit of Petitioner, * * *, an auditor assigned to the Comptroller's * * * Audit Office, and David Sommerville, a tax specialist assigned to the Comptroller's Tax Policy Division, testified for the Administrative Hearings Section (AHS). * * *, Petitioner's * * *, testified for Petitioner.

Notice has been taken of the Comptroller's records pertinent to Petitioner or the issues raised in this case. Unless otherwise indicated, Section references are to Title 2 of the Texas Tax Code, and Rule references are to sections of Title 34, Texas Administrative Code.

On July 2, 2002, the Petitioner filed Exceptions to the June 17, 2002 Proposed Comptroller's Decision. The AHS filed its Response on July 17, 2002. The Administrative Law Judge and the Comptroller have considered the Petitioner's Exceptions and the [*2] AHS' Response, and this Comptroller's Decision represents the ruling thereon.

PETITIONER'S CONTENTIONS:

1. "Petitioner's payments to * * *, Inc., in consideration for * * * provision of temporary security personnel, are not subject to sales and use tax under Tex. Tax Code Ann. Section 151.057(2) (Vernon 1992)."

2. Electricity used by Petitioner at * * * is purchased by the City of * * * and therefore is exempt from sales tax under Section 151.309.

FINDINGS OF FACT:

1. Petitioner is a Delaware corporation doing business in Texas, whose business operations include the management and control of * * *, located in and leased from the City of * * *, Texas.

2. Petitioner was audited for sales and use tax compliance for the above-referenced audit period. As a result, on January 5, 2001, the Comptroller issued a Texas Notification of Audit Results to Petitioner assessing an amount of tax, penalty, and interest.

3. Security services purchased from * * * (COMPANY A) are among the sample base record numbers scheduled on audit exams 2 and 3.

4. The electricity purchases involved in Petitioner's second contention are scheduled on audit exam 4. The AHS agrees with Petitioner's second [*3] contention.

5. * * * is the site of * * * home football games, as well as numerous other events, including high school and college football games, concerts, motor sports events, and many smaller events.

6. Petitioner employs its own security personnel to maintain security at * * *, including a supervisor of security, three full-time employees, and 14 to 18 part-time employees.

7. During the audit period there were approximately 1,370 days, of which approximately 500 were non-event days, and 893 were event days. Petitioner provided its own security at * * * on all non-event days and 590 event days.

8. For larger events, on 303 event days during the audit period, Petitioner requested and obtained varying numbers of personnel to assist with security at * * * from COMPANY A (larger events mean events such as football games, concerts, motor sports events, and film shoots).

9. COMPANY A is licensed under the Private Investigators and Private Security Agencies Act. In addition to providing security services to Petitioner and others, COMPANY A also provides other types of assistance, such as ticket takers. However, amounts charged by COMPANY A for ticket takers were not scheduled on exams [*4] 2 and 3.

10. Petitioner's employees normally performed all security operations at * * * and were supplemented by personnel from COMPANY A for larger events.

11. Prior to an event, GK, of Petitioner's Operations Department, contacted one of COMPANY A's supervisors to inform COMPANY A of the type of event, number of COMPANY A staff needed, timing and positioning of COMPANY A staff at the stadium, and any special needs, depending on the event.

12. COMPANY A staff typically arrived at the stadium parking lot in their own vehicles, and, after parking their cars, took the stadium's employee bus to the stadium and reported to a certain room within the stadium. The personnel provided by COMPANY A also included supervisor(s) who were issued a key to the room to which COMPANY A staff reported. COMPANY A personnel are then issued distinctive clothing identifying them as stadium security personnel. No equipment, except for searchlights provided when concerts were held, was provided to COMPANY A personnel. The record indicates that no other supplies or equipment were needed by COMPANY A personnel to provide the security services needed by Petitioner.

13. Generally, supervision of COMPANY A personnel [*5] was handled via "chain of command" (i.e., Petitioner supervised COMPANY A supervisors who, in turn, supervised COMPANY A personnel). However, if during the course of an event, Petitioner's security staff observed a matter or situation that needed immediate attention, then Petitioner's staff would direct COMPANY A personnel to take required action. On at least one occasion, Petitioner's staff immediately removed a COMPANY A staff member from the stadium, during an event, when dissatisfied with his performance.

14. Petitioner's purchases of security services from COMPANY A, to supplement its security staff on 303 event days during the audit period, occurred during each of the 45 months during the audit period except for February 1997, February 1998, June 1999, and July 1999. n1

n1 See Appendix A for a list, by month, of the times COMPANY A's security services were purchased by Petitioner during the audit period.

DISCUSSION AND CONCLUSIONS OF LAW:

Security services are defined as taxable services under the Tax Code. Sections 151.0101(a)(14) and 151.0075. However, Petitioner contends that the security services at issue should be deleted from the audit because they qualify

[*6] for the "temporary help services" exclusion under Section 151.057. Prior to the 1997 amendment to Section 151.057, the statute provided as follows:

A service performed by an employee for his employer in the regular course of business, within the scope of the employee's duties, and for which the employee is paid his regular wages or salary, **or a service performed by a temporary help service for an employer to supplement the employer's existing work force on a temporary basis, when the service is normally performed by the employer's own employees, the employer provides all supplies and equipment necessary, and the help is under the direct or general supervision of the employer to whom the help is furnished, is not taxable under this chapter.** [Emphasis added.]

Effective September 1, 1997, Section 151.057 was amended to provide, in relevant part, as follows:

The following services are not taxable under this chapter:

* * *

2. a service performed by a temporary help service for an employer to supplement the employer's existing work force on a temporary basis, when the service is normally performed by the employer's own employees, the employer provides all supplies and equipment [*7] necessary, and the help is under the direct or general supervision of the employer to whom the help is furnished; or

* * *

As can be seen by the foregoing, the September 1, 1997 amendment to Section 151.057 did not affect a substantive change to the portion of the statute applicable to Petitioner's contention. Therefore, to qualify as "temporary help services," the services at issue must meet the following qualifications:

1. the service is performed to supplement the employer's existing work force on a temporary basis;
2. the service is normally performed by the employer's own employees;
3. the employer provides all supplies and equipment necessary; and
4. the help is under the direct or general supervision of the employer to whom the help is furnished. (*See also* Rule 3.333 listing similar requirements in order for security services to qualify as a temporary help service.)

Because the controversy involves the taxability of services, and because Petitioner is claiming that the services at issue fall under the general exclusion for temporary help services, the AHS bears the initial burden of showing that the services purchased by Petitioner are among the services defined [*8] as taxable under the Tax Code. Once the AHS establishes a prima facie case, then the burden shifts to Petitioner to prove its case by a preponderance of the evidence. Comptroller's Decision No. 31,689 (1996). The facts indicate, and the parties seem to agree, that Petitioner purchased security services. Therefore, the AHS has established its prima facie case. The question then to be resolved is whether the preponderance of the evidence supports Petitioner's contention that the security services purchased from COMPANY A qualify under Section 151.057 as a temporary help service.

The AHS essentially argues, among other things, that, since "security services" Rule 3.333 does not define the term "temporary help service," we must look to Rule 3.356(a)(10), relating to real property services, to determine whether Petitioner qualifies as a "temporary help service." However, a similar claim was addressed and rejected in Comptroller's Decision No. 31,447 (1996), involving real property repairs, which provides, in part, as follows:

However, the [AHS] questions whether TC qualifies as a "temporary help service" under Section 151.057, which additionally requires that the service be performed [*9] by a "temporary help service" in order to be nontaxable. Although this term is not defined by statute, it is defined in Rule 3.356(a), which pertains to real property services, as follows:

(10) Temporary help service - An individual, company, or corporation covered by Industry Group 7363, Group 736, Major Group 73 of the Standard Industrial Classification Manual, 1989, and includes an individual, company, or corporation that supplies

personnel on a temporary basis to supplement a customer's existing work force. In the context of this rule, such temporary personnel must perform a service that is normally performed by the customer's own employees; the customer must provide all supplies and equipment necessary; and the temporary personnel must be under the direct or general supervision of the customer to whom the help is furnished.

Rule 3.356(a)(10).

The SIC Manual classifies Industry Group 7363 as "help supply services." Persons who provide such services are generally described as "establishments primarily engaged in supplying temporary . . . help on a contract or fee basis. The help supplied is always on the payroll of the supplying establishments, but is under the direct or [*10] general supervision of the business to whom the help is furnished." These establishments are commonly identified as employee leasing services, labor pools, manpower pools, office help supply services, temporary help supply services, etc.

The Comptroller has clearly defined the types of services that qualify as "temporary help services" for **real property service** purposes, and TC, as a construction company, does not meet the requirements of this definition. However, the term "temporary help service" has not been defined with regard to **real property repair and remodeling services**, which are the services being performed by the temporary help (TC's employees) herein. *See* Rule 3.357. The fact that "temporary help service" is not defined in Rule 3.357 raises a question as to whether the term should be viewed in a different (perhaps broader) sense than as defined in Rule 3.356. After reviewing Amended TR1270, Microfiche No. 9207T1183E01, I conclude that the Comptroller's Office has interpreted the term "temporary help service" in a broader sense for real property repair and remodeling services. [Emphasis in the original.]

The same rationale would apply to the instant case, since [*11] Rule 3.333, relating to security services, does not contain the restrictive definition of a "temporary help service" found in Rule 3.356. *See, also*, Comptroller's Decision No. 31,665 (1999).

The AHS also argues that the Petitioner's contention should be rejected because COMPANY A's ". . . services were not temporary in nature, but rather continuous and recurring all throughout the audit period," because Petitioner did not have sufficient staff to meet ongoing needs, and because Petitioner did not furnish all the necessary supplies or equipment, or exercise the requisite supervisory control over COMPANY A personnel. n2

n2 The AHS' claims that it is "arguable" that necessary supplies used by COMPANY A security personnel included items other than those referenced in Fact No. 12, such as pens, notepads, mace, batons, radio equipment, identification, pepper gas, and restraining equipment. However, there is no evidence of record to support the AHS' speculation. Note also that the City of * * * police were required to be on hand at events, and would likely be the ones handling any matters that required police action. As to the supervisory issue, the AHS seems to be relying on the fact that COMPANY A supervisors were present at events, and certain contracts between Petitioner and COMPANY A in effect for periods prior to the audit period. The fact that COMPANY A supervisors were part of the staff provided by COMPANY A does not preclude a finding that Petitioner exercised direct or general supervision over all COMPANY A staff. As to the contracts, no fact-findings were made in that regard because neither was in effect during the audit period. Furthermore, neither contract indicated that Petitioner was precluded from exercising direct or general supervision over COMPANY A staff. [*12]

Petitioner ably counters each of the AHS' arguments, except one, which is the assertion that COMPANY A's services were not temporary in nature, because they were continuous and recurring throughout the audit period. Petitioner disagrees, and argues that the AHS is erroneously attempting to ". . . engraft the term 'non-recurring' onto 'temporary.'" However, there is support for the AHS position.

In that regard, Decision No. 32,481 (1996) denied an attempt to qualify under Section 151.057 stating, among other reasons for denial of the contention, ". . . that the issue of temporary help services is not applicable since these services were provided throughout the audit period." (Note that it appears the taxpayer in Hearing No. 32,481 was attempting to qualify under the portion of Section 151.057 that excludes services performed by "employees," rather than the "temporary help services" portion of the statute. However, the dicta does provide insight to how the Comptroller views "temporary" within the context of Section 151.057.

Decision No. 31,665 (1999) addressed the issue of whether repair and remodeling services, provided under three separate contracts for periods of 25 and one-half [*13] months, four years, and four years, respectively, were not taxable because they qualified as "temporary help services" under Section 151.057. In all three instances, the

Comptroller held that "although there is no 'bright-line' test to determine how long is 'temporary,' it appears from a review of the statute, rules, and Comptroller Decisions, that such a period would not be considered temporary." *Also see* Decision No. 35,633 (1998) wherein the Comptroller denied a claim that real property repair and remodeling services, provided under contract for a four-year period, qualified for the Section 151.057 exclusion at issue in the instant hearing, holding, as in Decision No. 31,665, that services provided over such a lengthy period did not qualify as "temporary help services." Additionally, Decision No. 38,706 (2000) includes the following relevant statement: "The [AHS] has clearly established that the janitorial services were not performed by * * * on a temporary [basis]. The services were performed through a twenty-seven month period on a regular basis."

Based on the construction given to "temporary" in the decisions cited above, and the frequency and duration of the security services [*14] purchased by Petitioner from COMPANY A, I am of the opinion the precedent requires concluding that Petitioner does not qualify for relief under Section 151.057. *See* Fact No. 14 and Appendix A.

RECOMMENDATION:

Petitioner's first contention should be denied. Petitioner's second contention should be granted, and the audit should be amended accordingly.

SIGNED January 15, 2003.

JOE GRECO, Administrative Law Judge

APPENDIX A

NUMBER OF EVENTS/DAYS, BY MONTH, THAT COMPANY A SERVICES WERE USED BY PETITIONER

YEAR	MONTH	NUMBER OF EVENTS	
1996	April	8	
	May	4	
	June	8	
	July	1	
	August	6	
	September	5	
	October	13	
	November	11	
	December	7	
	1997	January	1
		February	0
		March	11
April		2	
May		2	
June		2	
July		3	
August		4	
September		5	
October		14	
November		10	
December		6	
1998	January	4	
	February	0	
	March	5	
	April	5	
	May	9	
	June	1	
	July	1	
	August	2	
	September	6	
	October	8	
	November	13	
	December	7	
1999	January	1	
	February	1	
	March	32	
	April	24	
	May	10	

YEAR	MONTH	NUMBER OF EVENTS
	June	0
	July	0
	August	3
	September	15
	October	7
	November	14
	December	6

ORDER OF THE COMPTROLLER

The above decision of the Administrative [*15] 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 January 15, 2003.

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

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