

NAME: RE: * * *

NUMBER: HEARING NO. 43,986

COURT: COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS

CITE: 2004 Tex. Tax LEXIS 181

DATE: September 17, 2004

PANEL: [*1]

ROY G. SCUDDAY, Administrative Law Judge

COUNSEL: ELIAS V. LORENZANA, JR., Representing Tax Division

* * *, Representing Petitioner

OPINIONBY: SCUDDAY

TAXPAYER NO.: * * *
AUDIT OFFICE: * * *
AUDIT PERIOD: May 1, 1999 THROUGH November 30, 2002

SALES AND USE TAX/RDT

COMPTROLLER'S DECISION

PRELIMINARY DISCUSSION:

This case was heard at an oral hearing on April 8, 2004. * * * * *, Petitioner, was represented at the hearing by its attorney * * * * *, who presented the testimony of * * * * *, owner, * * * * *, and * * * * *, pool builder. The Tax Division was represented by Assistant General Counsel **Elias V. Lorenzana, Jr.**, who presented the testimony of Tiffany Davis from the * * * * * Audit Office.

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. Notice has been taken of all Comptroller's records pertinent to Petitioner and the issues raised in this case.

On June 9, 2004, the Tax Division filed Exceptions to the May 25, 2004 Proposed Comptroller's Decision. Petitioner Division filed its Response to these Exceptions on June 24, 2004. The ALJ and the Comptroller [*2] have considered the Tax Division's Exceptions and the Petitioner's Response, and this Comptroller's Decision represents the ruling thereon.

AGREEMENT OF THE PARTIES:

In its Position Letter dated October 14, 2003, the Tax Division agreed to waive penalty.

PETITIONER'S CONTENTIONS:

1. Petitioner contends that its acid-wash services are nontaxable residential real property repairs.
2. Petitioner contends that it has not received equal treatment by the Comptroller.

FINDINGS OF FACT:

1. * * * * * (Petitioner) provides swimming pool and spa cleaning and maintenance services to residential customers.

2. Petitioner was the subject of a sales and use tax audit for the period of May 1, 1999, through November 30, 2002. On June 16, 2003, a Texas Notification of Audit Results was issued to Petitioner showing an amount due that included tax, penalty, and interest through the date of the notice. Petitioner's timely-filed request for redetermination resulted in this proceeding.

3. In addition to its routine cleaning and maintenance services, Petitioner also provides an acid wash service in which it uses an acid solution to clean an interior surface of a pool to restore [*3] the pool's plaster. This service is provided to both repair dead pools, i.e., non-operational black or green pools, as well as to remove stained plaster to restore pools. The service is performed by draining the pool, and then stripping a layer of plaster by brushing it with an acid solution to expose fresh plaster. Petitioner described this process on its invoices as either "acid-wash" or "drain and clean," the terms being used interchangeably to describe the same process. The lump-sum price charged depended on the size of the pool. The auditor scheduled these charges as taxable real property services.

4. Petitioner's acid-wash process is used as a substitute for repainting the plaster, is not a routine cleaning or maintenance service, is substantially more expensive than a routine cleaning or maintenance service, and is only used as a last resort.

5. The auditor did not schedule purchases made by Petitioner because its records showed that sales tax had been paid on them.

6. A competitor of Petitioner was audited by the Comptroller, in which audit acid-washing services were not scheduled as taxable services.

CONCLUSIONS OF LAW AND DISCUSSION:

Petitioner's first contention [*4] should be granted.

Petitioner contends that the acid-wash services it provides are nontaxable real property repairs or restoration of residential property, not taxable real property services.

Section 151.0048(a)(4) includes in the definition of taxable "real property services" "building or grounds cleaning, janitorial, or custodial services." Rule 3.356(a)(7) includes in the definition of "residential or nonresidential building or grounds cleaning, janitorial, or custodial services" "pool cleaning and maintenance." The rule further provides that the "term does not include activities such as painting; wallpapering; or performing significant repairs." Rule 3.357(a)(12) defines "repair" as mending or bringing back "real property that was broken, damaged, or defective as near as possible to its original working order." Rule 3.357(a)(14) defines "restoration" as an "activity that is performed to bring back real property that is still operational and functional but that has faded, declined, or deteriorated, as near as possible to its original condition."

The Tax Division's position is that the acid-wash service is pool cleaning and maintenance service under Rule 3.356, not a repair or restoration [*5] service under Rule 3.357. In support it cites two Tax Policy Letters, Star Access Nos. 9011L1059A05 and 200202798L, stating that the acid wash of a swimming pool is a taxable real property service.

The evidence presented at the hearing established that the term "acid wash" is used to describe different services in the industry, from the draining and acid brushing application to the plaster provided by the Petitioner to a procedure where acid is added to the water without draining the pool. Neither of the letters cited by the Tax Division describe the actual process being termed acid wash, and would still apply to a routine cleaning or maintenance service. The evidence in this case demonstrates that Petitioner's process is used as a substitute for repainting the plaster, is not a routine cleaning or maintenance service, is substantially more expensive than a routine cleaning or maintenance service, and is only used as a last resort (Finding of Fact No. 4).

Based on the evidence, the acid wash service provided by Petitioner is not "pool cleaning and maintenance" as defined by Rule 3.356, but rather repair or restoration of real property as defined by Rule 3.357. Accordingly, because [*6] Petitioner only provides the service to residential customers, it is not subject to sales tax, and the "acid wash" and "drain and clean" transactions should be deleted from the audit.

Based on the recommendation concerning the first contention, Petitioner's second contention is moot.

RECOMMENDATION:

The "acid wash" and "drain and clean" transactions should be deleted from the audit, taxable purchases on which sales tax was not paid should be scheduled, penalty should be waived, and the amended audit liability should then be upheld in its entirety.

SIGNED September 17, 2004.

HEARING NO. 43,986

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 [*7] 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 17, 2004.

CAROLE KEETON STRAYHORN, Texas Comptroller

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Time of Request: February 22, 2005 04:50 PM EST

Print Number: 1862:33015700

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