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Texas Panel Revives Training Co.'s Franchise Tax Protest

By **Derek Major**

Law360, New York (October 30, 2017, 11:37 PM EDT) -- A Texas appeals court on Friday revived a training company's protest against having to pay the state's franchise tax, finding the lower court wrongly denied the business a chance to amend its argument against the levy.

The state appeals court reversed a district court decision that sided with the comptroller of Public Accounts of the State of Texas. The panel found the lower court should have allowed OGC Training Inc. to amend its district court case arguing over how much of its business should have been taxed in Texas, rather than Oklahoma, where most of its work is done, and not dismiss the case for bringing up arguments it did not make in its initial tax protest letter.

"The Comptroller has neither asserted nor demonstrated that OGC had a full and fair opportunity to amend its pleadings in the district court," Justice Scott K. Field wrote for the three-judge panel.

Jimmy Martens, one of the lawyers representing OGC, was happy with the ruling and the precedent it sets.

"The court's decision is important because it allows attorneys to amend pleadings as facts develop without losing jurisdiction so long as new grounds are not raised," Martens said.

After being assessed a franchise tax, OGC argued to the lower court that its in-person training sessions are conducted through third-party individual trainers. Two-thirds of the money generated through the classes go to the trainers and one-third goes to OGC itself, the company said.

OGC, which provides comprehensive educational development services to large petroleum companies, is disputing \$42,058 in franchise taxes.

The appellate court also struck down a second decision by the lower court, saying that OGC filed an amended franchise tax report reflecting an additional alleged overpayment of taxes that was not part of the instant protest claim. In its appeal, OGC argued the trial court erred in striking the statement because it was "simply a background fact notifying the Comptroller and the court about the existence of this claim" and OGC was not seeking any relief regarding this overpayment in this proceeding.

The court agreed with OGC, stating, "Although the relevance of OGC's allegations regarding the additional overpayment and the separate administrative proceeding is unclear, we agree that because OGC is not seeking any relief for the injury in this

proceeding, the propriety of the allegations is not a jurisdictional issue.”

The case stems from a 2009 Texas Franchise Tax report. OGCI reported approximately \$35 million in total gross receipts and \$10 million in receipts from services performed in Texas. In the report, OGCI claimed a cost-of-goods-sold (COGS) deduction and calculated an apportionment factor of 30.32 percent. The report was reviewed by comptroller staff, who concluded that OGCI did not qualify for the COGS.

Based on that assertion, the comptroller concluded that OGCI’s live-training sessions were wholly performed in Texas and that no apportionment to account for OGCI’s activities in Oklahoma was necessary. However, OGCI said the in-training session were performed by third-party contractors. The court tossed the suit because OGCI did not broach the third-party subject in its initial protest letter fighting the franchise tax.

Eventually, OGCI conceded the COGS claim but filed an administrative petition for redetermination, saying the comptroller “erroneously sourced a significant amount of OGCI’s receipts to Texas,” that its “services are performed both inside and outside of Texas” and that “[its] Oklahoma corporate office directs the activities of the company’s multi-state training offerings, inclusive of those in Texas, providing support, marketing, and the overall development and creation of the OGCI training materials.”

OGCI is represented by Jimmy Martens, Kelli Todd of Martens Todd Leonard & Ahlrich and Amanda Taylor of Beck Redden LLP.

The case is OGCI Training Inc. v. Glenn Hegar, Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of the State of Texas, case number 03-16-00704-CV, in the Texas Court of Appeals, Third District.

--Editing by Richard McVay and Jill Coffey.

UPDATE: This story has been updated to add counsel information.