

Texas Comptroller of Public Accounts STAR System

201510698H

SOAH DOCKET NO. 304-15-3967.13
CPA HEARING NO. 111,655

RE: *****

TAXPAYER NO.: *****

AUDIT OFFICE: *****

AUDIT PERIOD: January 1, 2009 THROUGH December 31, 2012

Franchise Tax/RDT

BEFORE THE COMPTROLLER
OF PUBLIC ACCOUNTS
OF THE STATE OF TEXASGLENN HEGAR
Texas Comptroller of Public AccountsMICHAEL WANG
Representing Tax Division

Representing Petitioner

COMPTROLLER'S DECISION

This decision is final on November 12, 2015, unless a motion for rehearing is timely filed. SEE Administrative Procedure Act, Tex. Gov't Code SECTION 2001.142, .144, .146; 34 Tex. Admin. Code SECTION 1.29, .31, .32. A party that files a motion for rehearing must file it with the Deputy Comptroller through the Special Counsel for Tax Hearings at P.O. Box 13528, Austin, Texas 78711-3528 or by facsimile at 512-936-6190. A copy of the motion must be served on the opposing party. The failure to timely file a motion for rehearing may result in adverse legal consequences.

Administrative Law Judge (ALJ) Trevor Moore of the State Office of Administrative Hearings (SOAH) issued a Proposal for Decision (PFD) that includes Findings of Fact and Conclusions of Law. SOAH served the PFD on each party and each party was given an opportunity to file exceptions and replies with SOAH in accordance with SOAH's rules of procedure. The ALJ recommended that the Comptroller adopt the PFD as written.

After review and consideration, IT IS ORDERED that the PFD is adopted as changed pursuant to Texas Government Code SECTION 2003.101(e) and (f).

The result from this Decision is Attachment A. The ALJ's letter to the Comptroller is Attachment B. The PFD as changed is Attachment C. Attachments A, B and C are incorporated by reference.

Attachment A reflects a liability.

SIGNED on this 19th day of October 2015.

GLENN HEGAR
Texas Comptroller of Public Accounts

By: Mike Reissig
Deputy Comptroller

Attachment A, Texas Notification of Hearing Results
Attachment B, ALJ's letter to the Comptroller
Attachment C, Proposal for Decision as changed

SOAH DOCKET NO. 304-15-3967.13
TCPA DOCKET NO. 111,655

Taxpayer No. *****

v.

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS

BEFORE THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

*****'s (Petitioner) franchise tax returns for report years 2009 through 2012 were audited for franchise tax compliance by the Tax Division (Staff) of the Texas Comptroller of Public Accounts (Comptroller). As a result, Petitioner was assessed tax, a 10% late-filed penalty, and accrued interest. Petitioner requested redetermination, contending that it was a staff leasing services company during the audit period and therefore the payments received from Petitioner's clients for wages, payroll taxes, employee benefits, and workers' compensation benefits should be excluded from the calculation of Petitioner's total revenue. Staff contends that Petitioner does not qualify as a staff leasing company under the applicable statutory provisions. In this Proposal for Decision, the Administrative Law Judge (ALJ) finds that no adjustments to the audit assessment are warranted and recommends that Petitioner's contention should be denied.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

Staff referred the case to the State Office of Administrative Hearings (SOAH) for a hearing based on the parties' written submissions and, on June 2, 2015, issued a Notice of Hearing. Petitioner was represented by ***** of COMPANY A. Staff was represented by Assistant General Counsel Michael Wang. The record was ordered closed on August 5, 2015.

There are no issues of notice or jurisdiction. Therefore, those matters are set out in the Findings of Fact and Conclusions of Law without further discussion.

II. REASONS FOR DECISION

A. Evidence Presented

In addition to the pleadings filed while this matter was pending before the Comptroller, Staff submitted the following exhibits:

1. Sixty-Day Letter;
2. Texas Notification of Audit Results;
3. Penalty and Interest Waiver Worksheet;
4. Audit Report; and
5. Audit Plan.

Petitioner submitted the following exhibits, attached to its reply to Staff's position letter:

1. Pool Management/Operations Agreement, COMPANY B; and
2. Pool Management/Operations Agreement, COMPANY C

Each exhibit was admitted without objection.

B. Agreed Adjustments

Staff did not agree to make any adjustments.

C. Material Facts and Issues in Dispute

Petitioner is a swimming pool management company, providing lifeguards, maintenance services, and swimming lessons for pools operated by home owners' associations. In calculating its franchise tax margin for the report years 2009 through 2012, Petitioner excluded amounts its clients paid for lifeguard wages and benefits from the calculation of its total revenue. Staff determined that Petitioner was not allowed to exclude those amounts from its total revenue in calculating its franchise tax margin. The auditor recalculated Petitioner's tax liability and amended the reporting method used by Petitioner from the "EZ" method to the compensation method, as it resulted in the lowest tax liability.

On August 2, 2013, Staff issued a Texas Notification of Exam Results to Petitioner assessing tax, 10% late-filed penalty, and accrued interest. Petitioner timely requested redetermination. Petitioner does not dispute the amendment to the compensation method, but contends that it was eligible to exclude the lifeguard wages and benefit amounts from compensation because it is a staff leasing services company as defined in 34 Texas Administrative Code SECTION 3.587(e)(7). In support of its contention, Petitioner submitted two examples of management contracts between Petitioner and homeowners' associations. The agreements outline the terms of Petitioner's management of the pools, including the provision of lifeguards during the operating season as well as year-round maintenance at the pools. Staff contends that Petitioner's lifeguards did not support or supplement an existing workforce, and therefore

Petitioner did not qualify as a staff leasing company under the applicable statutory definition.

D. Analysis and Recommendations

Franchise tax is imposed on each taxable entity that does business in this state or that is chartered or organized in this state. Tex. Tax Code SECTION 171.001. The taxable margin of a taxable entity is determined by calculating 70% of total revenue from the entity's total business, or by subtracting, at the election of the taxpayer, either the costs of goods sold (COGS) or compensation deductions. Tex. Tax Code SECTION 171.101(a)(1); .1011-.1013.

In calculating its total revenue, a staff leasing services company shall exclude payments received from a client company for wages, payroll taxes on those wages, employee benefits, and workers' compensation benefits for the employees assigned to the client company. 34 Tex. Admin. Code SECTION 3.587(e)(7); SEE ALSO Texas Tax Code SECTION 171.1011(k). A "staff leasing services company" is defined as a business entity that offers staff leasing services, as that term is defined by Texas Labor Code, SECTION 91.001, or a temporary employment service, as that term is defined by Texas Labor Code, SECTION 93.001. 34 Tex. Admin. Code SECTION 3.587(b)(13); Tex. Tax Code SECTION 171.0001(15). Petitioner contends that it qualifies as a temporary employment service under Texas Labor Code SECTION 93.001 and therefore qualifies as a staff leasing services company under Rule 3.587(b)(13).

Section 93.001 of the Texas Labor Code defines a "temporary employment service" as "a person who employs individuals for the purpose of assigning those individuals to the clients of the service to support or supplement the client's workforce in a special work situation, including (A) an employee absence; (B) a temporary skill shortage; (C) a seasonal workload; or (D) a special assignment or project." Considering the requirements of the Texas Labor Code, the first issue to be addressed is whether the lifeguards provided by Petitioner supported or supplemented an existing workforce.

Petitioner is required to show by a preponderance of the evidence that the auditor erred in disallowing the exclusion from total revenue that Petitioner claimed. SEE 34 Tex. Admin. Code SECTION 1.40(2)(B). In support of its contention, Petitioner submitted two swimming pool management agreements it made with homeowners' associations. The agreements do not indicate that the pools were staffed with lifeguards other than those provided by Petitioner, and Petitioner concedes this point in its pleadings. However, Petitioner proposes that to "support" or "supplement" a client's workforce does not require that the client have an existing workforce. In its pleadings, Petitioner cited the root and definition for the word "supplement," concluding that "to supplement" may be used synonymously with "to fill, to complete, or to supply." Petitioner cited the concept of "supplementary angles" in arguing for the proposition that lack of a thing does not mandate that it cannot be supplemented ("the supplement of a zero degree angle is 180"). Petitioner also cited the dictionary definition of "support" and provided several examples of the use of the word that do not require any existing condition: child support, structural support, and the atmosphere's support of life on Earth. Petitioner proposes that, considering the definitions of "supplement" and "support" and the manner in which the words are used in a variety of practical applications, there is no requirement under Texas Labor Code SECTION 93.001 for the clients to have any existing lifeguard staff in place in order for Petitioner's lifeguards to "supplement" or "support" the clients' workforce.

Staff, in response, cited Comptroller Decisions that address the definition of a temporary employment service under Texas Labor Code SECTION 93.001. In Comptroller's Decision No. 44,590 (2005), the ALJ held that, "[t]he most emphasized characteristic of temporary employees is that they supplement an existing work force on a temporary basis." And Comptroller Decision No. 46,776 (2008) found that, "Claimant has not shown that it employed cleaning personnel of its own during the time the . . . agreements were in effect, or that there was an existing work force to supplement." Petitioner contends that the cited precedent addressed sales tax, not franchise tax, and therefore the holdings are not applicable here. The ALJ disagrees. Both the sales tax statutes and the franchise tax statutes reference Texas Labor Code SECTION 93.001 for its definition of a temporary employment service. That definition is independent of the Texas Tax Code and is not applicable to any certain tax type. Likewise, in the cited cases, the consideration of whether or not the definition of a temporary employment service requires an existing workforce is not affected by the tax type. The Comptroller's analysis of Texas Labor Code 93.001 found in Comptroller Decision Nos. 44,590 (2005) and 46,776 (2008) is applicable to this case.

In order to qualify as a temporary employment services under Texas Labor Code SECTION 93.001 the employees provided by Petitioner must support or supplement an existing workforce. The evidence in the record establishes that there was not an existing workforce at the pools that were managed by Petitioner during the audit period. The ALJ concludes that Petitioner did not qualify as a temporary employment service as defined by Texas Labor Code SECTION 93.001, and therefore was not a staff leasing company as defined in 34 Texas Administrative Code SECTION 3.587(b)(13). Petitioner was not allowed to exclude the wages and benefits received from its clients under Texas Administrative Code SECTION 3.587(e)(7), and the contention should be denied.

III. FINDINGS OF FACT

1. ***** (Petitioner) is a swimming pool management company, providing lifeguards, maintenance services, and swimming lessons for pools operated by home owners' associations.
2. In calculating its franchise tax margin for the report years 2009 through 2012, Petitioner excluded amounts its clients paid for lifeguard wages and benefits from the calculation of its total revenue.
3. The Tax Division (Staff) of the Texas Comptroller of Public Accounts (Comptroller) audited Petitioner for franchise tax compliance for report years 2009 through 2012.
4. Staff determined that Petitioner was not allowed to exclude amounts its clients paid for lifeguard wages and benefits from the calculation of its total revenue in calculating its franchise tax margin. The auditor reversed the excluded amounts in recalculating Petitioner's tax liability. The auditor also amended the reporting method used by Petitioner from the "EZ" method to the compensation method, as it resulted in the lowest tax liability.
5. On August 2, 2013, Staff assessed Petitioner tax, a 10% penalty, and accrued interest for the audited report periods.
6. Petitioner timely requested redetermination.
7. Staff referred the case to the State Office of Administrative Hearings

(SOAH) and issued a Notice of Hearing by Written Submission that contained a statement of the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

8. Petitioner submitted two examples of swimming pool management contracts between Petitioner and homeowners' associations.

9. Petitioner's lifeguards did not support or supplement an existing workforce at its clients' pools.

IV. CONCLUSIONS OF LAW

1. The Comptroller has jurisdiction over this matter pursuant to Texas Tax Code ch. 111.

2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code ch. 2003.

3. Staff provided proper and timely notice of the hearing pursuant to Texas Government Code ch. 2001.

4. A staff leasing services company shall exclude from its total revenue payments received from a client company for wages, payroll taxes on those wages, employee benefits, and workers' compensation benefits for the employees assigned to the client company. Tex. Tax Code Section 171.1011(k); 34 Tex. Admin. Code Section 3.587(e)(7).

5. A "staff leasing services company" is defined as "a business entity that offers staff leasing services, as that term is defined by Texas Labor Code, Section 91.001, or a temporary employment service, as that term is defined by Texas Labor Code, SECTION 93.001. Tex. Tax Code Section 171.0001(15); 34 Tex. Admin. Code Section 3.587(b)(13).

6. A "temporary employment service" is defined as "a person who employs individuals for the purpose of assigning those individuals to the clients of the service to support or supplement the client's workforce in a special work situation, including (A) an employee absence; (B) a temporary skill shortage; (C) a seasonal workload; or (D) a special assignment or project." Texas Labor Code SECTION 93.001.

7. Petitioner is required to show by a preponderance of the evidence that the auditor erred in disallowing the exclusion from total revenue claimed by Petitioner. SEE 34 Tex. Admin. Code SECTION 1.40(2)(B).

8. Petitioner failed to establish that it is a staff leasing services company and therefore failed to establish that it is entitled to the exclusion claimed.

9. The audit assessment should be affirmed.

SIGNED August 13, 2015.

TREVOR MOORE
ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ACCESSION NUMBER: 201510698H

SUPERSEDED: N

DOCUMENT TYPE: H

DATE: 10/19/2015

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